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IN BRIEF

Parliamentary Involvement in Foreign Policy

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PARLIAMENTARY INVOLVEMENT IN FOREIGN POLICY

1 INTRODUCTION

Historically, Parliament's role in the conduct of foreign affairs has been limited, for the most part, to reviewing executive powers exercised in pursuance of foreign policy. This is largely a function of Canada's constitutional structure inherited from Great Britain, by which the conduct of foreign affairs falls within the exercise of the "royal prerogative" by Cabinet.

During periods of crisis or conflict, these constitutional constraints on Parliament have become the subject of debate. In 1999, during the conflict in Yugoslavia over Kosovo, the government provided for debates in the House of Commons on the issue of Canada's deployment of forces. It did not, however, seek a parliamentary resolution supporting Canadian participation in the NATO military action against Yugoslavia. More recently, the government permitted a "take-note" debate in the House of Commons, on 10 April 2006, on Canada's participation in the multinational mission in Afghanistan long after Canadian forces had been committed to the operation.

Those who defend this traditional approach to parliamentary involvement in foreign policy point to the efficiency of such an arrangement, which permits the government to deal with international developments more quickly and decisively than if Parliament had to pre-approve actions by Canada on the international stage. Firstly, Parliament is often not in session, while Cabinet can be convened much more easily and continues to exist even during a dissolution or prorogation of Parliament. Furthermore, the executive is, in any event, accountable to Parliament for its actions and decisions; and Parliament must approve any changes to Canadian law.

Those who advocate reform claim that the status quo gives the executive too much power, and that the checks currently available to Parliament are inadequate because they often come into play only after Canada has committed itself, legally, politically or even militarily. They also point to the practices of other countries, and even past Canadian practices, which provide a greater role for legislators in key decisions, such as treaty commitments and military action.

2 CURRENT PRACTICE IN CANADA

2.1 THE ROYAL PREROGATIVE AND EXECUTIVE POWER OVER FOREIGN AFFAIRS

The conduct of foreign affairs (receiving and sending diplomatic representatives, conducting international negotiations, concluding and approving treaties and other international agreements, and even declaring war) has traditionally rested with the Crown, and is exercised under what is known as the royal prerogative. The same is true for the related issue of deployment of Canada's military forces, both within Canada and around the world. The Queen (represented by Cabinet) is the commander-in-chief of all Canadian armed forces.[1] The various powers that remain under the royal

prerogative, including the power to conduct foreign affairs, are now exercised by Cabinet.

The royal prerogative once constituted the central source of executive authority in Great Britain, and enabled the Crown to exercise considerable executive powers as well as legislative and judicial powers in respect of the colonies. Successive Parliaments, aided by court judgments, in England and in Canada, however, have gradually removed or modified these prerogatives. In Canada, there are now only a handful of areas in which the prerogative remains meaningful, including: foreign affairs and treaty-making; immunities and privileges; powers relating to the armed forces; the emergency prerogative; and some powers relating to the legislature, such as dissolution or prorogation. Even some of these powers are subject to limits as a result of various statutes enacted by Parliament and through judicial intervention.

While provincial cabinets exercise some prerogative powers, only the federal Cabinet can conduct foreign affairs, by virtue of a power devolved upon it following the United Kingdom's enactment of the *Statute of Westminster* in 1931 that confirmed powers over external affairs originally outlined in the 1926 *Balfour Declaration*. Prior to this, the federal government's role, prescribed in section 132 of the *Constitution Act, 1867*, was restricted to implementing U.K. treaties negotiated on behalf of Canada. That section is no longer operative.

Canadian courts have had occasion to consider the scope of the prerogative power over foreign affairs. In a recent case, the Supreme Court of Canada likened the exercise of the royal prerogative over foreign affairs to a "constitutional responsibility," but held that it was nonetheless subject to a narrow scope of review by the courts to ensure the exercise was consistent with the Constitution. [2]

The Court considered whether the Prime Minister's refusal to request the repatriation of a Canadian citizen detained by U.S. authorities in Guantanamo Bay could be reviewed by a court, and what an appropriate remedy should be where the executive violates a constitutional right in exercising a royal prerogative. The applicant seeking repatriation had argued that his rights under the *Canadian Charter of Rights and Freedoms* were violated when Canadian officials interviewed him while in custody in Guantanamo and shared the information obtained from him with his U.S. prosecutors. He argued that an appropriate Charter remedy was to order the Prime Minister to request his repatriation. The lower courts agreed.

The Supreme Court of Canada held that the decision to request the repatriation was an exercise of the royal prerogative over foreign affairs. It confirmed that such exercise could be reviewed to ensure it was undertaken in a manner that conformed with the Constitution. It confirmed that the applicant's Charter rights had been violated. However, the Court declined to order the Prime Minister to request the applicant's repatriation, and left it to the executive to determine the most appropriate remedy in light of its constitutional responsibility to make decisions affecting foreign affairs.

2.2 TREATY-MAKING AND TREATY IMPLEMENTATION

Despite the fact that the executive branch of government has a primary role in foreign policy, Parliament continues to play a valuable role. For example, although the executive is responsible for negotiating, concluding and ratifying treaties, Parliament has had an ad hoc involvement in the ratification process for the past 80 years. Between 1926 and 1966 the executive submitted important treaties to Parliament for approval before ratification. The tabling of treaties in Parliament *following* ratification was also relatively common until 1999.

In January 2008, the federal government announced a policy[3] to enhance parliamentary involvement in the ratification process. As a result, all treaties between Canada and other states or entities are now tabled in the House of Commons before ratification. The Clerk of the House of Commons distributes the full text of the agreement accompanied by a memorandum explaining the primary issues at stake, including primary obligations, national interests, federal–provincial/territorial considerations, implementation issues, a description of any intended reservations or declarations, and a description of consultations undertaken. The House of Commons then has 21 sitting days to consider the treaty before the executive takes action to bring the treaty into effect through ratification or other preliminary measures, such as introducing legislation. The House has the power to debate the treaty and to pass a motion recommending action, including ratification.

However, such a vote has no legal force. Passing treaties through the House of Commons remains a courtesy on the part of the executive, which retains full authority to decide whether to ratify the treaty after the parliamentary review. The policy states clearly that in exceptional cases the executive may have to ratify treaties before they can be tabled in Parliament. To do this, the executive will seek approval from the prime minister for an exemption and inform the House of Commons of the treaty as soon as possible upon ratification.

Perhaps the most crucial role for Parliament in the treaty-making process is in the implementation of treaties. Despite the executive's authority over negotiation, signature and ratification, treaties have no domestic effect and cannot be enforced until they are incorporated into domestic law. This requirement flows from a domestic constitutional norm that maintains a fundamental separation of powers between the executive and the legislative branches of government.

The practical effect of this constitutional arrangement is that the executive is competent to conclude treaties that bind Canada as a matter of international law in the international context. From a domestic legal perspective, however, these treaties do not, on their own, modify existing domestic law or have any legal effect domestically. If it were otherwise, the executive could circumvent the constitutional principle that the executive cannot make domestic law.

Treaties can be incorporated into domestic law in two ways. In some cases it is abundantly clear that domestic legislation must be put in place in order to implement the terms of an international treaty. If so, an implementation bill is drafted and tabled in Parliament. However, many treaties, particularly international human rights

conventions and foreign investment promotion and protection agreements, do not necessarily require specific legislation for implementation. In such cases, government officials will conduct a review of existing legislation to determine whether any amendments or new legislation are needed to comply with the treaty. If none are needed, ratification can proceed without specific implementing legislation; however, where provincial or territorial legislation is implicated, the executive will not ratify the treaty until all Canadian jurisdictions have indicated that they support ratification.

One complication for implementation arising out of Canada's constitutional arrangement is that the federal government does not enjoy exclusive authority for treaty implementation. This authority is shared with the provinces. Both levels of government are competent to implement treaties, when the subject matter falls within their respective areas of legislative jurisdiction, pursuant to sections 91 and 92 of the *Constitution Act, 1867*. No discrete "treaty implementation" power is assigned to either level. While the federal executive may ratify treaties for all of Canada, if the subject matter of the treaty touches on any of the legislative powers listed in section 92 of the *Constitution Act*, *1867*, provincial legislative approval is required to implement the treaty and give it effect domestically.[4]

The difficulties created by this arrangement are typically overcome by the various federal–provincial mechanisms that have evolved under the unique nature of Canadian federalism. Arrangements for consultation and cooperation with provinces prior to concluding treaties are typically put in place to avoid the difficulties of implementing treaties that touch on provincial jurisdiction. The other means available to the federal executive, when faced with uncertainty over whether provincial cooperation can be secured, is to negotiate so-called "federal state" clauses which commit a federal state to perform only those commitments coming within its sphere of legislative competence. Additionally, a federal state may negotiate a "best efforts" clause by which it undertakes to secure provincial adherence to a treaty.

2.3 A Meaningful Role for Parliament

Meaningful opportunities exist for parliamentarians to participate in foreign policy through the parliamentary review process. Ministers must report annually to Parliament with respect to official international development assistance. Since the government is directly accountable to Parliament, ministers responsible for foreign policy, as well as their officials, can also be called upon to address important issues relating to treaties. Those issues include their implications for Canada, Canada's capacity to fulfil its international obligations, and whether the treaties are consistent with broader public policy. Parliament's foreign affairs committees have wide mandates to inquire into all aspects of foreign policy and to examine legislation referred to them, as well as the expenditure estimates of departments and agencies implementing foreign policy.

This is not an insignificant role, and various parliamentary committees have used these opportunities to expound on Canada's foreign policy and provide input to the executive in respect of treaty and other foreign policy initiatives. Moreover, any changes to Canadian law that may be necessary to implement Canada's treaty commitments must be approved by Parliament in legislation. Of course, these

opportunities exist only where Parliament is called upon to implement treaties through specific legislation. Finally, Parliament can ultimately grant funds and confidence to the government, or withhold them.

Those who advocate a more enhanced role for Parliament in key foreign policy decisions – such as whether to participate in foreign conflicts (either as peacekeeper or as belligerent) or incur new treaty obligations – point out, with justification, that Parliament's role in such matters was at one time quite significant.

The high point of Parliament's role in foreign policy decision-making seems to have occurred during the governments of William Lyon Mackenzie King (1921–1926; 1926–1930; and 1935–1948). During these years, as Canada forged its own foreign policy independent of Great Britain, Prime Minister King placed considerable emphasis on Parliament as the primary forum for debating and deciding on Canada's external relations.

On the issue of overseas military involvement, King declared:

> It is for Parliament to decide whether or not we should participate in wars in different parts of the world, and it is neither right nor proper for any individual nor for any groups of individuals to take any step which in any way might limit the rights of Parliament in a matter which is of such great concern to all the people of our country.[5]

Moreover, when the time came, King put this principle into effect: before officially declaring war on Germany in September 1939, King sought and obtained a joint resolution of Parliament in favour of Canadian entry into the war, even though this was not a legal requirement.

2.4 National Security

Parliament also has an enhanced role to play when foreign policy involves national security issues. Direct and specific roles for Parliament in respect of national emergencies are set out in legislation. Part VI of the *Emergencies Act*, for example, requires parliamentary confirmation of any declaration of emergency by the Governor in Council, including a war emergency, an international emergency, a public welfare emergency or a public order emergency. The Act also requires the establishment of a parliamentary review committee (a special joint committee of Parliament) to review Cabinet's exercise of any emergency powers.

Other statutes concerned with national security and other emergencies require parliamentary oversight, including the *Anti-Terrorism Act, 2001*, which required that a comprehensive review of the operation of the Act be undertaken by the Senate, the House of Commons, or both, within three years of the Act receiving Royal Assent.

3 THE SITUATION IN OTHER COUNTRIES

3.1 TREATY-MAKING

Most other major industrialized democracies seem to provide for greater involvement by their national legislatures in the approval of treaties than does Canada. For example, several countries – France, Germany, Denmark, Italy and the United States – have constitutional requirements for legislative approval of at least certain categories of international agreements prior to ratification. However, it should be noted that in these countries, unlike Canada, ratified treaties generally become part of national law without the need for further implementing legislation.

Other countries that share constitutional traditions with Canada have also sought to entrench a role for Parliament in scrutinizing proposed treaty commitments.

In the United Kingdom, a convention established in the 1920s, known as the Ponsonby rule, required that international agreements be placed before both houses of Parliament prior to ratification. Conventions of this type are rules of practice which are recognized as politically, rather than legally, binding on governments. However, this particular convention was given statutory footing in 2010 following a larger movement towards constitutional reform. Part 2 of the *Constitutional Reform and Governance Act 2010* now ensures that the government places most treaties before both houses of Parliament 21 days prior to ratification, accompanied by an explanatory memorandum outlining the treaty provisions and reasons for seeking ratification. If either house votes against ratification, the government must then provide a statement justifying its position. The House of Commons can ultimately block ratification indefinitely in this way. Although treaties must be tabled in Parliament, there is no obligation for a treaty to proceed to a vote or to be sent to committee for scrutiny.

In 1996, Australia also implemented changes to its treaty-making process which require:

- the tabling of treaties in Parliament at least 15 sitting days before binding action is taken by the executive;
- the preparation and tabling in Parliament of a “National Interest Analysis” for each treaty, which includes information on the foreseeable impact of the obligations to be incurred under the treaty; and
- the establishment of a Joint Standing Committee on Treaties to review and report on proposed treaty actions.

In 2010, the European Parliament acquired significant powers in relation to treaties negotiated by the European Union (EU). This resulted from amendments to the principal EU and European Community treaties brought about with the entering into force in December 2009 of the *European Union Reform Treaty*, also known as the Lisbon Treaty. The Lisbon Treaty created two consolidated treaties: the *Treaty on European Union* and the *Treaty on the Functioning of the European Union* (TFEU). The European Parliament has an effective veto power over any international agreements concluded by the European Commission on subjects over which the EU

has exclusive legislative competence in relation to EU member states, as prescribed in Article 3 of the TFEU (customs union and common commercial policy, for example).

Under Title V of Part Five of the TFEU, particularly Article 218, the consent of the European Parliament is required for most international agreements negotiated by the Commission. For other agreements, the European Parliament's opinion must be obtained.

3.2 PARTICIPATION IN CONFLICTS

In many countries that do not have a Westminster-style parliamentary system, the legislature has a formal, legal role in declaring war. This is the case, for example, under the U.S. Constitution. However, the issuance of declarations of war seems to have fallen into disuse for many states since the end of World War II.

In order to reassert some control over foreign military involvement in an age of undeclared wars, the U.S. Congress passed the *War Powers Act* in 1973. Under this law, Congress must pass an affirmative resolution approving U.S. military action abroad, either initially or within 60 to 90 days. This does not apply where the United States is attacked or is the subject of a declaration of war.

Germany is another example of a country with strong parliamentary war powers. The German parliament (Bundestag) must approve all decisions to engage German armed forces in military missions.

In the United Kingdom, the government's 2007 Green Paper *The Governance of Britain* set out proposals for reform of the royal prerogative with respect to the deployment of armed forces abroad. The paper proposed that the government should seek the approval of the House of Commons for significant non-routine deployments of the armed forces into conflict, to the greatest extent possible, without prejudicing the government's ability to act to protect national security, or undermining operational security or effectiveness. The 2008 White Paper *The Governance of Britain – Constitutional Renewal* and the Joint Committee on the Draft Constitution Renewal Bill called for this change to be implemented by way of a detailed resolution, rather than legislation. However, the change has yet to be implemented.

4 CANADIAN PARLIAMENTARY ACTION: SOME EXAMPLES OF PROPOSALS FOR REFORM

Calls for a more active role for Parliament in foreign affairs have come from a number of sources. Several private members' initiatives have sought to give Parliament a more explicit role in approving key acts of foreign policy.

With respect to requiring prior parliamentary approval of external military involvement, a private member's bill, Bill C-295 (1st Session, 35th Parliament), proposed by Mr. Strahl (Fraser Valley), was defeated in June 1995, as were later resolutions proposed by Mr. Mills (Red Deer) and Mr. Duceppe (Laurier-Ste-Marie).

A private member's bill came into force in June 2007 requiring the government to: report periodically on Canada's climate change plans; amend, repeal or promulgate regulations to ensure Canada met the Kyoto Protocol greenhouse gas emissions reductions targets; and prepare periodic reports on Canada's progress in meeting those targets. The legislation, the *Kyoto Protocol Implementation Act* (KPIA), became the focus of a 2012 court challenge[6] to the government's decision to withdraw from the Kyoto Protocol. It was argued that the KPIA prevented Cabinet from withdrawing from the Kyoto Protocol, because the legislation had imposed limits on Cabinet's exercise of the royal prerogative in respect of treaties, in this case the Kyoto Protocol. The court rejected the challenge, maintaining that the KPIA imposed no substantive obligation, only a procedural obligation on Cabinet to provide periodic reports on its climate change plans. There were no express or implied provisions that had the effect of limiting Cabinet's prerogative with respect to this particular international agreement, including its prerogative power to withdraw from the agreement.

The Standing Senate Committee on Foreign Affairs, in its April 2000 report *The New NATO and the Evolution of Peacekeeping: Implications for Canada*, recommended that Parliament should have a greater role in reviewing new international agreements and in approving Canadian participation in external conflict situations.

The Standing Senate Committee on Human Rights, in its December 2001 report *Promises to Keep: Implementing Canada's Human Rights Obligations* and its April 2007 report *Children: The Silenced Citizens*, similarly called for an enhanced role for Parliament with respect to Canada's international human rights obligations.

NOTES

1. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), s. 15.
2. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3.
3. Government of Canada, "Policy on Tabling of Treaties in Parliament," January 2008.
4. *Attorney General for Canada v. Attorney General for Ontario (Labour Conventions)*, [1937] A.C. 326.
5. House of Commons, *Debates*, 2nd Session, 14th Parliament, 1 February 1923.
6. *Turp v. Canada (Attorney General)*, 2012 FC 893.

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