



**HOUSE OF COMMONS
CANADA**

**CHAPTER 2, "THE GOVERNOR IN COUNCIL
APPOINTMENT PROCESS," OF THE 2009 STATUS
REPORT OF THE AUDITOR GENERAL OF
CANADA**

**Report of the Standing Committee on
Public Accounts**

**Hon. Shawn Murphy, MP
Chair**

MARCH 2010

40th PARLIAMENT, 3rd SESSION



Published under the authority of the Speaker of the House of Commons

SPEAKER'S PERMISSION

Reproduction of the proceedings of the House of Commons and its Committees, in whole or in part and in any medium, is hereby permitted provided that the reproduction is accurate and is not presented as official. This permission does not extend to reproduction, distribution or use for commercial purpose of financial gain. Reproduction or use outside this permission or without authorization may be treated as copyright infringement in accordance with the *Copyright Act*. Authorization may be obtained on written application to the Office of the Speaker of the House of Commons.

Reproduction in accordance with this permission does not constitute publication under the authority of the House of Commons. The absolute privilege that applies to the proceedings of the House of Commons does not extend to these permitted reproductions. Where a reproduction includes briefs to a Standing Committee of the House of Commons, authorization for reproduction may be required from the authors in accordance with the *Copyright Act*.

Nothing in this permission abrogates or derogates from the privileges, powers, immunities and rights of the House of Commons and its Committees. For greater certainty, this permission does not affect the prohibition against impeaching or questioning the proceedings of the House of Commons in courts or otherwise. The House of Commons retains the right and privilege to find users in contempt of Parliament if a reproduction or use is not in accordance with this permission.

Additional copies may be obtained from: Publishing and Depository Services
Public Works and Government Services Canada
Ottawa, Ontario K1A 0S5
Telephone: 613-941-5995 or 1-800-635-7943
Fax: 613-954-5779 or 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
<http://publications.gc.ca>

Also available on the Parliament of Canada Web Site
at the following address: <http://www.parl.gc.ca>

**CHAPTER 2, "THE GOVERNOR IN COUNCIL
APPOINTMENT PROCESS," OF THE 2009 STATUS
REPORT OF THE AUDITOR GENERAL OF
CANADA**

**Report of the Standing Committee on
Public Accounts**

**Hon. Shawn Murphy, MP
Chair**

MARCH 2010

40th PARLIAMENT, 3rd SESSION

STANDING COMMITTEE ON PUBLIC ACCOUNTS

40th PARLIAMENT, 3rd SESSION

CHAIR

Hon. Shawn Murphy

VICE-CHAIRS

David Christopherson

Daryl Kramp

MEMBERS

Josée Beaudin

Earl Dreeshen

Derek Lee

Bev Shipley

Hon. Stéphane Dion

Meili Faille

Andrew Saxton

Terence Young

CLERK OF THE COMMITTEE

Joann Garbig

LIBRARY OF PARLIAMENT

Parliamentary Information and Research Service

Maria Edwards

Alex Smith

STANDING COMMITTEE ON PUBLIC ACCOUNTS

40th PARLIAMENT, 2nd SESSION

CHAIR

Hon. Shawn Murphy

VICE-CHAIRS

David Christopherson

Daryl Kramp

MEMBERS

Bonnie Crombie

Andrew Saxton

Meili Faille

Bev Shipley

Derek Lee

John Weston

Pascal-Pierre Paillé

Terence Young

CLERK OF THE COMMITTEE

Joann Garbig

LIBRARY OF PARLIAMENT

Parliamentary Information and Research Service

Andrew Kitching

Alex Smith

THE STANDING COMMITTEE ON PUBLIC ACCOUNTS

has the honour to present its

SECOND REPORT

Pursuant to its mandate under Standing Order 108(3)(g), the Committee has studied Chapter 2, “The Governor in Council Appointment Process,” of the 2009 Status Report of the Auditor General of Canada and has agreed to report the following:

INTRODUCTION

The government fills vacancies for positions on a wide array of federal tribunals and agencies through the Governor in Council (GIC) appointment process. Appointees perform work that is essential to the the proper functioning of government, ranging from quasi-judicial decision making, to management of Crown corporations. The Governor in Council (Cabinet and the Governor General acting in a legal capacity) appoints candidates on the recommendation of the responsible minister, and with the assistance of the Senior Personnel and Special Projects Secretariat in the Privy Council Office (PCO). There are approximately 400 full-time and 1,000 part-time GIC appointees spread over 43 Crown corporations and 52 other entities.

In its March 2009 *Status Report*, the Office of the Auditor General (OAG) examined the process for GIC appointments to Crown corporations, small entities, and the Immigration and Refugee Board (IRB).¹ The OAG assessed the extent to which the appointment process is timely, transparent, and competency-based, and whether appointees receive appropriate orientation and training. In addition, the *Status Report* examined the progress made in implementing recommendations from a series of earlier audits, including 2000 and 2005 reports on Crown corporation governance, a 2003 audit of the Office of Privacy Commissioner, a 2006 audit of the Office of the Correctional Investigator, and a 1997 audit of the IRB.

The timely appointment of individuals to vacancies in these entities is essential, if the entities are to provide the services they were given the mandate to perform. The Public Accounts Committee, concerned that a lack of timely appointments could reduce the effectiveness of Canada's Crown corporations, tribunals and agencies, held a meeting on the audit on 11 June 2009.² The OAG was represented by Richard Flageole, Assistant Auditor General; and Anne Marie Smith, Principal. The PCO was represented by Kevin Lynch, Clerk of the Privy Council and Secretary to the Cabinet; Yvan Roy,

¹ Auditor General of Canada, March 2009 *Status Report*, "Chapter 2 – Governor in Council Appointments Process," http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_02_e_32289.html.

² House of Commons Standing Committee on Public Accounts, 40th Parliament, 2nd Session, Meeting 27.

Deputy Secretary to the Cabinet and Counsel to the Clerk of the Privy Council, Legislation and House Planning and Machinery of Government; and Patricia J. Hassard, Deputy Secretary to the Cabinet, Senior Personnel and Public Service Renewal. The IRB was represented by Brian Goodman, Chairperson; and Sylvia Cox-Duquette, Senior General Counsel.

MANDATE OF THE AUDITOR GENERAL

In response to the *Status Report*, the PCO stated that aspects of the report went beyond the OAG's mandate and encroached on the exercise of discretion by ministers and the Governor in Council. The PCO declined to respond to OAG recommendations on clarifying expectations related to the Boards of crown corporations; ensuring timely appointments to the board; and ensuring timely communications regarding the appointment and reappointment process.³ The PCO stated:

As these recommendations are directed toward the exercise of Governor in Council discretion, it would be inappropriate for the Privy Council Office to respond to each recommendation. However, PCO will continue to support the Government in the administration of the policies and processes the Government establishes for Governor in Council appointments.⁴

In the *Status Report* the OAG stated that it was satisfied that its findings fell entirely within its mandate, and that its audit focused on the mechanics of the appointment process and suggested opportunities for improvement:

We did not conduct examination work in ministers' offices or in the Prime Minister's Office (PMO), but we did consider the relationship and communications between ministers, PMO, and PCO. We did not audit the actual appointment decisions that are made by the Governor in Council, but rather the process that leads to the decision.⁵

The Committee, concerned over the PCO's response to the *Status Report* and its possible implications for future audits, asked both the OAG and the PCO to explain the jurisdictional issue in greater detail. In addition, the Committee contacted Office of the

³ Chapter 2, para 2.125 to 2.127.

⁴ *Ibid*, para 2.127.

⁵ *Ibid*, About the Audit.

Law Clerk and Parliamentary Counsel of the House of Commons, and requested that the Law Clerk provide a legal opinion on whether the OAG had exceeded its mandate.

The Committee received correspondence from the Auditor General in which she maintained that her powers under section 7 of the *Auditor General Act* were broad, and therefore permitted her to make the recommendations contained in the Status Report.⁶ The Auditor General pointed out that her office had carried out a number of previous audits in the same subject areas, without objection, and that the OAG did not audit any appointment decisions made by the GIC.

The Law Clerk of the House of Commons produced a legal opinion consistent with the Auditor General's assessment, believing that an examination of the GIC appointment process was not an intrusion upon the government's prerogative power to make appointments. The Law Clerk stated as follows:

It seems to me fairly clear that GIC appointments, as a matter of process, fall within the AG's mandate to review from time to time and to report to Parliament, if necessary. The legal fact that the GIC appointment power is done at the exclusive discretion of the Governor in Council does not mean, in my view, that the exercise of this discretion cannot be reviewed, either by the House itself or by the AG on its behalf. It's all part of the House's constitutional function of holding the Government to account.⁷

The PCO responded to the Committee's request for clarification by asserting that the OAG's observations with regards to vacancy rates for GIC appointments deal with ministerial discretion and are outside the scope of the audit.⁸ The PCO stated that the OAG's comments on the IRB's accumulated backlog, for example "could be interpreted as moving from the mechanics of appointments to the decision to appoint."⁹

⁶ Letter from Sheila Fraser, Auditor General of Canada to the Hon. Shawn Murphy, MP, Chair, Standing Committee on Public Accounts, dated 2 June 2009.

⁷ Letter from Rob Walsh, Law Clerk and Parliamentary Counsel, to the Hon. Shawn Murphy, MP, Chair, Standing Committee on Public Accounts, 4 June 2009.

⁸ Letter from Kevin Lynch, Clerk of the Privy Council to the Hon. Shawn Murphy, MP, Chair, Standing Committee on Public Accounts, 11 June 2009.

⁹ Ibid.

The Committee recognizes that the GIC retains broad discretionary authority to appoint any person it sees fit to a position. Moreover, the Law Clerk noted that “identifying the line between ministerial discretion and a statutory mandate, in this case the line between the Crown’s prerogative powers to make appointments and the AG’s mandate under the *Auditor General Act*, can sometimes be difficult to do as a legal matter.”¹⁰ The Committee also appreciates that during the course of the audit, the PCO provided access to all necessary information and documents, and cooperated fully with the OAG. Finally, the Committee notes that an entity being audited is under no obligation to respond to the OAG’s recommendations at all, regardless of whether the OAG has exceeded its mandate.

Nonetheless, the Committee also believes that there are compelling reasons why a response by the PCO should have been provided. Under the *Auditor General Act*, the legal mandate of the OAG is broad. The OAG does not comment on government policy by convention. There is no express legal provision within the OAG’s enabling legislation that prevents it from making recommendations on any matter it considers to be material to its mandate.

Given its broad mandate, many of the OAG’s recommendations do not seem unreasonable. For example, the question of whether the GIC makes appointments to the IRB in a timely manner has repercussions on the ability of the IRB to do its job. The oversight function performed by the OAG and the Committee would suffer if one of the chief causes of the backlog of refugee claims – timely appointments to the IRB - were not open to scrutiny.

The Auditor General of Canada provides critical oversight of Canada’s government, and responses to OAG reports are essential if the government is to be held accountable for its actions. Federal government departments and agencies should only refuse to

¹⁰ Letter from Rob Walsh, Law Clerk and Parliamentary Counsel, to the Hon. Shawn Murphy, MP, Chair, Standing Committee on Public Accounts, 27 November 2009.

respond to OAG recommendations on jurisdictional grounds where the OAG has exceeded its mandate.

ACTION PLAN AND PROGRESS REPORT

GIC appointments are used to staff many of Canada's most prominent tribunals, agencies and crown corporations. While the Committee recognises that the PCO has many competing priorities for its time, the Committee believes that devoting sufficient attention to management of the GIC appointment process is crucial to the proper functioning of government. The Committee shares the OAG's concern that many of the weaknesses identified in the *Status Report* are not new, and have been the subject of previous audits. For example, issues related to the IRB were raised as far back as 1997.

The OAG made several recommendations to improve the GIC appointment process in Crown corporations, small federal entities, and the IRB. The OAG recommended that:

- the PCO complete its project to determine the optimal complement of appointees for each Crown corporation;
- the government clarify its expectation regarding the level of Crown corporation board involvement in director and CEO search and selection;
- the government ensure that timely appointments are made to Crown corporations, small federal entities and the Immigration and Refugee Board of Canada; and
- the government ensure that appointees receive appropriate and timely communication of GIC appointment and reappointment processes and decisions.

In response to the first recommendation the PCO stated that they "agreed". As previously noted, in response to the remaining recommendations, the PCO stated that since the recommendations are directed toward the exercise of GIC discretion, it would be inappropriate for the PCO to respond.

The OAG further recommended that the IRB and the government determine an appropriate complement of members to deal with the inventory of unprocessed refugee claims and unresolved immigration appeals on a timely basis. The IRB responded that they would continue to work with Citizenship and Immigration Canada to determine an appropriate complement of members.

In order to demonstrate a commitment to the implementation of OAG recommendations that have been agreed to, the Committee expects government agencies to prepare an action plan that details what actions the agency will take in response to each OAG recommendation. The action plan should specify timelines for the completion of the actions, and identify responsible individuals who will ensure the actions are undertaken in a prompt and effective manner.

When responding to the *Status Report*, the PCO stated they would support the Government in the administration of the policies for Governor in Council appointments. In addition, the PCO said they would continue to provide guidance on the roles and responsibilities of stakeholders in the appointment process, and in particular, on vacancy management and appropriate communication of GIC appointment and reappointment processes and decisions.

The Clerk of the PCO, in his testimony before the Committee, offered a six point plan which responds to the spirit and intent of the recommendations made in the *Status Report*.¹¹ The six point plan focussed on providing guidance to Ministers and departments; improving vacancy management; enhancing management of reappointments; improving transparency; improving the selection process, and providing better training for GIC appointees. When he appeared before the Committee, the Clerk also provided an annex (the Annex) to his opening remarks, which responded to the individual recommendations made by the OAG.

¹¹ Meeting 27, 15:40.

It is apparent that notwithstanding the responses provided in the *Status Report*, the PCO has been taking steps to address the concerns raised by the OAG. The Committee believes that this six point plan, along with the Annex, could serve as the basis for a more formal action plan that would add transparency and predictability to the appointment process. The Committee recommends:

RECOMMENDATION 1

That the PCO provide the Public Accounts Committee with an action plan to implement the six point plan they have agreed to, as well as the Auditor General's recommendations contained in her March 2009 Status Report, Chapter 2, by 31 March 2010.

RECOMMENDATION 2

That the PCO provide the Public Accounts Committee with an interim status report on its progress in implementing the action plan by 30 September 2010.

RECOMMENDATION 3

That the IRB provide the Public Accounts Committee with an action plan on how it intends to determine an appropriate complement of IRB members by 31 March 2010.

OBSERVATIONS AND RECOMMENDATIONS

A) Appointments to Crown Corporations

The *Status Report* examined the appointment or reappointment process for chairs and directors of Crown corporations, and found that the government had implemented some of the measures in the 2005 Governance Framework related to appointments. On the positive side, the *Status Report* found that the recruitment and selection of chairs and CEOs has become more transparent, and that the orientation and training for appointees was functioning well.

While the PCO has made progress, several issues remained unresolved, the first of which was vacancy levels. The OAG noted that high vacancy levels can affect board decision making, and impinge on corporate management and governance. The OAG reported that although the situation has improved since its 2005 audit, the fact that 22 % of board positions in Crown corporations were either vacant or were occupied by incumbents with expired terms indicated an ongoing problem. The OAG cited as an example the International Development Research Centre, which did not have a majority of Canadian governors for almost a year, as is required by its enabling legislation.

The *Status Report* noted that the government had not fully resolved issues related to the staggering of appointments so that all appointments to the entity do not become due at once. The OAG reported that best corporate governance practices favoured a board composed of new and veteran directors, and that replacement of a large proportion of directors may lead to loss of stability and continuity.

The OAG found that there was a lack of clarity for the level of involvement by the board in the director and CEO search and selection process. The extent to which board input was provided varied widely, and only 11 out of 41 Crown corporations considered that their input was taken into account during the appointment process. The OAG noted the Public Service Pension Investment Board model, in which a committee led by an independent chairperson that is separate from the board submits names of individuals with the competencies to fill gaps in the board profile, and legislation requires the minister to appoint from this list.

Finally, many chairs and CEOs of Crown corporations criticized the lack of communication in the appointment process, describing it as a “black box.” The *Status Report* found that appointment and reappointment decisions need to be appropriately communicated to incumbents and candidates to allow them to manage their personal and professional affairs, and that late notification showed a lack of respect for the appointees. The corporations themselves required the information to manage operational priorities. The *Status Report* noted that the Ontario Public Appointments

Secretariat requires that provincial appointees receive three to six months' notice of reappointment decisions. If it is not provided, the Secretariat will require a reappointment for a period equal to that notice period.

Challenges remain in reforming the appointment process for Crown corporations. In the Committee's view, there are tangible steps the government could take to improve the process. The Committee recommends:

RECOMMENDATION 4

That the government consider developing a policy that would govern notice of reappointment decisions, including fixed deadlines for communicating notice or reappointment to incumbent directors and officers.

B) Appointments to Small Federal Entities

The *Status Report* examined GIC appointments to 52 small federal entities and found a relatively low vacancy rate. The OAG noted that the selection process for appointments to tribunals was rigorous, clear, and competency-based, and concluded that orientation and training are functioning well.

The OAG also found that:

- the timeliness of appointments and reappointments had become a significant issue;
- performance was not consistently considered in reappointment decisions; and
- there was no standard for communication of appointment and reappointment, and some of the appointees were only informed of reappointment decisions after their terms had expired.

The issues regarding vacancies, performance standards and communications on appointments mirror problems that the OAG identified in the overall management of GIC

appointments. The Committee reiterates the need for an action plan to address these issues.

C) Appointments to the Immigration and Refugee Board

The IRB appointment process has been the subject of past OAG audits, and the problems associated with high vacancy rates on the board are not new. In a 1997 report, the OAG raised questions about the high turnover among IRB members, and stated that delays in making appointments resulted in a high number of vacant positions.¹² While the OAG noted improvements in the turnover rate and the number of vacant positions in a 2001 follow-up report, the OAG remained concerned that the IRB may not have the necessary complement of staff needed to process refugee claims in a timely manner.

The *Status Report* noted that a number of changes have been made to the selection process for IRB members over the past decade, and that the IRB now has a well-defined process in place to recommend Board members to the government. Merit based criteria are used to make appointment recommendations to the Minister. The *Status Report* said that extensive training is provided to new board members, and all members are made aware of the standards of behaviour and conflict of interest guidelines that apply to their positions. The Committee is encouraged by the progress the government has made on these fronts.

While some progress has been made, the Committee is troubled over the high vacancy rate and turnover of Board members. The OAG found a 23% vacancy at the IRB as of September 2008, while in his testimony before the Committee, the Chairman of the IRB stated that in the 2008-09 fiscal year, the member vacancy rate averaged over 27%. The Chairman of the IRB told the Committee that the board is funded for a complement of 164 members. At the time of the hearing, the IRB had a total of 137 members,

¹² Auditor General of Canada, December 1997 Report, Chapter 25—Citizenship and Immigration Canada and Immigration and Refugee Board—The Processing of Refugee Claims.

making a shortfall of 27 members. In addition, the IRB has 17 members whose terms are due to end in 2009-10.

The shortfall in IRB members is the result not only of an insufficiency of new appointments, but also a lack of reappointments of existing members. The OAG found that only 42% of members recommended for reappointment by the IRB for an additional term were reappointed by the GIC. The OAG stated that equilibrium between new appointments and reappointments was essential to ensure consistency and continuity in operations. The Chair of the IRB also seemed to signal the need for balance when he told the Committee that it takes up to a year for a new member to become fully productive.¹³

The high vacancy and turnover rates have contributed to an extremely high inventory of unprocessed refugee claims and immigration appeals. Officials from the OAG, when they appeared before the Committee, noted that the IRB's 2009-10 Report on Plans and Priorities indicates that the refugee protection division expects to begin the fiscal year with a pending inventory of approximately 65,000 cases, and may receive an additional 50,000 new refugee claims this year. Given the rate at which decisions are made, the Committee was told that the pending inventory could reach 90,000 by the end of this fiscal year.

The OAG commented that the government needed to ensure the IRB was staffed in a timely manner with the required number of decision makers in order to clear its inventory of unresolved cases. The *Status Report* notes that a person making a refugee claim can count on staying in Canada for at least two years,¹⁴ and the OAG outlined some of the enormous costs the backlog causes:

From the time claimants arrive in Canada, and for as long as they remain and their claim is making its way through the process, they qualify for many of the benefits granted to Canadians and landed immigrants, such as social assistance, legal aid, education, and health care. Lengthy delays

¹³ Meeting 27, 15:50.

¹⁴ Chapter 2, para. 2.108.

in rendering decisions on unsupported claims therefore have significant cost implications for all levels of government.¹⁵

The high inventory of unprocessed claims imposes costs beyond the purely economic expenses borne by governments across Canada. The IRB makes decisions that have vast ramifications for the refugee claimants appearing before it. In some cases, the IRB's decision may be a matter of life and death. Refugee claimants live in a constant state of anxiety while waiting to know whether Canada will accept their claim. For refugees separated from their family members, the wait can be particularly agonizing. There are compelling economic and humanitarian reasons for ensuring that the IRB is adequately staffed. The Committee recommends:

RECOMMENDATION 5

That the government ensure the IRB is staffed with the necessary number of decision makers needed to process refugee claims and immigration matters in a timely manner.

PUBLIC APPOINTMENTS COMMISSION

The 2006 *Federal Accountability Act* provided for the establishment of the Public Appointments Commission, which is empowered to oversee, monitor, and review the selection process for GIC appointments. In May 2006, the government announced the nomination of a chair, and appointed three other members to the Commission. The House of Commons Standing Committee on Government Operations and Estimates reviewed the chair's nomination, but declined to approve it. The three appointed members subsequently resigned from the Commission.

The Public Appointments Commission Secretariat was established within the Prime Minister's Office to provide advice and support on the development of the Commission and, once it is established, to provide it with policy and operational support. A staff of two was assigned to the Secretariat in 2007, and it is currently developing the draft Code of Practice for the Commission.

¹⁵ *Ibid*, para. 2.109.

In the *Status Report*, the OAG noted that several other jurisdictions have public appointment bodies with codes of practice, guiding principles, or appointment guidelines that govern the appointment process, including the United Kingdom, British Columbia, and Ontario. The Committee believes that such bodies could have a positive impact on the GIC appointments process. The Committee recommends:

RECOMMENDATION 6

That the Public Appointments Commission be implemented in accordance with the *Federal Accountability Act*.

CONCLUSION

The Committee recognises that the government is working towards a transparent and competency-based appointment process, and has made progress in matters such as orientation and training. However in the Committee's view, the effectiveness of Canada's Crown corporations, tribunals and agencies is being hampered by the inability of the GIC to make appointments in a timely manner. These agencies perform services that are indispensable to the proper functioning of Canada's government, and need to be adequately staffed. The lack of GIC appointments is particularly serious in the case of the IRB. Refugee claimants live in limbo during the long and anxious period before their status is determined, and the costs of social services for these claimants is borne by the Canadian taxpayer. It is the Committee's hope that the government will take concrete steps towards addressing the issues identified in the *Status Report*, and will remain committed to improving the appointment process.

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<u>40th Parliament, 2nd Session</u>		
Immigration and Refugee Board of Canada	2009/06/11	27
Sylvia Cox-Duquette, Senior General Counsel		
Brian Goodman, Chairperson		
Office of the Auditor General of Canada		
Richard Flageole, Assistant Auditor General		
Anne Marie Smith, Principal		
Privy Council Office		
Patricia J. Hassard, Deputy Secretary to the Cabinet Senior Personnel and Public Service Renewal		
Kevin G. Lynch, Clerk of the Privy Council and Secretary to the Cabinet		
Yvan Roy, Deputy Secretary to the Cabinet and Counsel to the Clerk of the Privy Council Legislation and House Planning and Machinery of Government		

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings (40th Parliament, 3rd Session: [Meeting No 2](#); 40th Parliament, 2nd Session [Meetings Nos. 27, 37, 40 and 45](#)) is tabled.

Respectfully submitted,

Hon. Shawn Murphy, MP

Chair