
MINISTERIAL RESPONSIBILITY AND THE *FINANCIAL ADMINISTRATION ACT*: THE CONSTITUTIONAL OBLIGATION TO ACCOUNT FOR GOVERNMENT SPENDING

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1 Introduction

It has been argued that the dominance of the political executive is a central, if not the defining, feature of the constitutional order that Canada inherited from the United Kingdom.¹ While today's Cabinet may not merit Bagehot's characterization of its 19th century British model as the "efficient secret" of the Constitution, it remains true that Cabinet is the "connecting link" between the legislature and the executive.² This principle of Canada's inherited Constitution is in constant tension with another principle derived from that same tradition, namely the

requirement that the executive cannot spend public money without the prior authorization of Parliament. That said, even in Bagehot's time "the Cabinet was in relatively firm control of the entire political system" and Bagehot's praise of its role in government may have "somewhat underestimated how far it had already captured the legislative initiative from parliament."³ The danger that Cabinet may use its control over the legislature to usurp parliamentary control of the law-making—and by implication the spending—power underlies the third principle of Westminster government, ministerial responsibility, a principle that contains under the Canadian Constitution both political or conventional, and legal elements.

It is essential that the concept of ministerial responsibility be seen in this context. While often regarded as the defining feature of the Westminster model, it is, in fact, only intelligible with reference to the more fundamental principles of parliamentary sovereignty and rule of law. Ministerial responsibility is commonly regarded as a form of accountability. Any meaningful concept of accountability requires the existence of someone with the authority to hold the Minister to account. Parliamentary sovereignty requires that the executive be accountable to the legislature; rule of law holds the executive accountable before the courts. The separation of powers implicit in this model is, of course, imperfectly realized in the Westminster model, especially in the age of party politics. However, although Canada is often said to have a Westminster system of responsible government, that system is significantly different from its counterpart in the United Kingdom. In other words, while it is true to say that the separation of powers is not fully realized under the Canadian Constitution, it is equally true to say that the Westminster model of responsible government is not fully realized either.

Canada differs from the United Kingdom in having a written Constitution in which the supremacy of law has been explicit since 1982.⁴

In this regard, at least, Canada is closer to the United States.⁵ Judges can, and have, prevented governments from changing the law. As Justice Bora Laskin noted 30 years ago:

The question of the constitutionality of legislation has in this country always been a justiciable question.⁶

In exercising this power, the Canadian courts are clearly much closer to their American counterparts than they are to any court in the United Kingdom. By combining Westminster representative government with a written Constitution, Canada has from the beginning shared features of the constitutions of the United Kingdom and the United States. In addition to the role of the courts under the Canadian Constitution, our hybrid Constitution also includes a legal source for ministerial responsibility.

2 Ministerial Responsibility in Canada

The Canadian courts have occasionally endorsed the view that there is a straightforward separation of powers in the Canadian Constitution. For example, in *Fraser v. Public Service Staff Relations Board* the Supreme Court of Canada outlined the functions of the three branches of Government as follows:

There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.⁷

However, in other cases the Supreme Court has acknowledged that the role of the executive is somewhat more complex than the foregoing passage would suggest. While the Courts have recognized the inherent

ambiguity of the word “government,” it is clear in the following passage from *Reference Re Canada Assistance Plan* that the term is being used to refer to something that is controlled by a victorious political party.

Once a government is in place, democratic principles dictate that the bulk of the Governor General’s powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet. So the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms “government”, “Cabinet” and “executive.” . . . The government has the power to introduce legislation in Parliament. In practice, the bulk of the new legislation is initiated by the government.⁸

More recently, in *Wells v. Newfoundland*, the Court was even more explicit on the nature of the actual relationship between the executive and the legislature:

The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and de facto controls the legislature.⁹

As the last two passages make clear, the Court is aware that the doctrine of separation of powers finds special application within the Canadian context. Indeed, insofar as the idea of separation of powers applies in Canada, it is in the role of the courts vis-à-vis the legislature and the executive rather than in the relation between the executive, understood to include the Cabinet, and the legislature, which includes ministers. The line between the legislature and the executive separates the dual roles of individual Cabinet ministers. The obligation to respect the separation of powers is an essential part of the idea of ministerial responsibility. As executive actors, ministers are subject to the

constitutionally protected supervisory jurisdiction of the superior courts and, as legislators, they are subject to the authority of the courts to rule on the constitutionality of legislation. Put more concisely, both as lawmakers and as executive actors, ministers are subject not only to the democratically expressed will of Parliament, but also to the rule of law.

Ministers, of course, are more than just lawmakers and executive actors. They are also partisan political actors, members of the party that won the election. The advent of party politics with its demands for loyalty to the interests of the party has long been recognized as posing a particular threat to countries governed under the Westminster model. For example, in his Reith Lectures in 1951, Lord Radcliffe commented on the effect of party discipline upon the role of Bagehot's "connecting link" in the English Constitution. He noted:

The executive and lawmaking power are to all intents and purposes the same, because both powers have fallen into the same hands, those of the ruling political party.¹⁰

Almost 30 years later, Lord Scarman went even further when he expressed the same concern in somewhat more dramatic terms:

We have achieved the total union of executive and legislative power which Blackstone foresaw would be productive of tyranny . . . The judges will maintain the rule of law, but cannot prevent government from changing the law, whatever the nature of the change.¹¹

Both Lords Radcliffe and Scarman were addressing the consequences of party solidarity within a constitutional order in which Parliament is sovereign but the sovereign is effectively controlled by the executive, that is to say, within the United Kingdom. In that context "maintain(ing) the rule of law" means ensuring that laws are applied in accordance with the principles of the rule of law; it does not mean challenging the

constitutionality of the laws themselves. The situation in Canada is quite different.

The conventional elements of ministerial responsibility—namely, the political costs borne by ministers for the failings of their departments—have been the subject of a great deal of debate in recent years and they will not be the subject of the present study. Since ministerial responsibility is typically thought of as a political convention, it may sound odd even to speak of its legal aspects. Indeed, its legal elements have not received much attention. One of the few places in which the legal basis of ministerial responsibility is clearly recognized is in *Responsibility in the Constitution*, a document issued by the Privy Council Office and originally written as a submission to the Lambert Commission in 1977. According to this account:

Ministers exercise power constitutionally because the law requires it and Parliament and their colleagues in the ministry hold them responsible for their actions under the law . . . this legal individual responsibility of ministers reflects the theory and law of the constitution and remains a practical force because of the conventional responsibility of ministers to the House of Commons and the statutory basis on which ministers are charged with the administration of the public service.¹²

For a fuller account of “the legal basis of ministerial responsibility,” readers are referred to A. V. Dicey’s account of ministerial responsibility in his *Introduction to the Law of the Constitution*. According to Dicey:

Ministerial responsibility means two utterly different things. It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons.

This is a matter depending on the conventions of the Constitution with which the law has no direct concern.

It means, when used in its strict sense, the legal responsibility of every Minister for every act of the Crown in which he takes part.¹³

What is most striking about Dicey's account is the fact that he was dividing individual ministerial responsibility into two distinct types, namely, the conventional and the legal. The authors of *Responsibility in Government* were drawing the more common distinction between individual and collective ministerial responsibility, characterizing the former as legal and the latter as conventional. Under the former, ministers are responsible for the actions of their departments while under the latter ministers are responsible for the policies of their government.¹⁴

Collective ministerial responsibility is actually different from either of the two forms identified by Dicey. Like Dicey's forms, it is also a form of individual responsibility insofar as it requires that ministers who are unable to support the policies of their government must resign. Those who choose to remain in power will justifiably be burdened with the implication that they supported the government. Like Dicey's first form of responsibility, this third form is also correctly regarded by the authors of *Responsibility in Government* as largely political in nature, insofar as there is no legal obligation upon a Minister to resign from Cabinet in either case. It is Dicey's second form of responsibility, what he calls the "strict sense," that the Privy Council Office recognized as "the legal and ancient" foundation of the concept of ministerial responsibility in the Canadian Constitution.¹⁵

This means that individual ministers are legally, not just conventionally, responsible for every act of their departments in which they play a part. Clearly, this does not mean that they are personally liable, in a civil or criminal sense, for every act of wrongdoing committed by a member

of their departments during their term in office. There is a distinction between personal wrongdoing and maladministration. That said, the point of holding ministers legally as well as politically responsible for the actions of their departments is to draw attention to the fact that the Minister is responsible under the Constitution for ensuring that the business of the Department is conducted in accordance with the rule of law. This is more than a matter of politics or convention. The line between law and convention is, of course, not a precise one. As Geoffrey Wilson notes regarding the Constitution of the United Kingdom, law and convention

are not like bordering territories. Not only do law and convention often overlap and intertwine, the line between them is often arbitrary and changing.¹⁶

The line between law and convention is often drawn by referring to the courts. Rules and practices that are enforceable by the courts have legal content; those which cannot be so enforced do not. Eugene Forsey, who characterized the law as the “skeleton” and conventions as the “sinews and nerves” of the Canadian Constitution noted with regard to the difference:

The law of the Constitution is interpreted and enforced by the courts: breach of the law carries legal penalties. The conventions are rarely even mentioned by the courts. Breach of the conventions carries no legal penalties. The sanctions are purely political.¹⁷

It is a matter of some importance, therefore, whether ministerial responsibility is placed within the legal or the conventional part of the Canadian constitutional order. Forsey maintained that, since “there is not one syllable” in the Constitution referring to ministers or the Cabinet, ministerial responsibility belonged within the domain of convention.¹⁸

Others, like Dicey, have argued, however, that the legal component of ministerial responsibility, even in the United Kingdom, is actually its defining feature. In an essay on the difference between the pre-modern and the modern concepts of ministerial responsibility, George Burton Adams characterized the modern form as follows:

Ministerial responsibility, operated by what we call party government, is the method of coercion applied in such a constitution to the actual, not to the theoretical, executive. It has for its object not merely to compel the executive to regard the fundamental law of the state, which is a principle now so thoroughly established that it is never likely to be questioned, but also to carry out in the details of government the policy which Parliament decides upon.¹⁹

Adams's account of ministerial responsibility is important in the present context because it draws attention to the two essential legal components in the idea, namely the constitutional and the legislative. Furthermore, unlike Forsey who defined the legal in terms of penalties, Adams recognized that the primary purpose of legal responsibility is "to compel the Executive" to obey the law.

The threat of penalties is only one form of compulsion, and the penalties themselves are, by definition, imposed only after the fact. Applications for judicial review of executive action, constitutional questions before the courts, and the prospect of being held civilly liable for damages are also ways in which the law, or the threat of its use, can be understood to compel the executive.²⁰ Compulsion presupposes the legal authority to compel. In other words, the law and those who are empowered to articulate it provide both the foundation for all executive action as well as the basis for external oversight of that action. The executive is bound by the Constitution in all administrations while particular administrations are also bound by the will of the legislature, insofar as that will finds expression in constitutionally acceptable legislation. That the will of the

legislature changes from Parliament to Parliament is, of course, a commonplace, but the underlying principle remains the same. Even if the political executive exercises *de facto* control over the legislature, the principle of parliamentary sovereignty within the bounds of the Constitution requires that any change to the legal basis of executive action must be subject to the public scrutiny of parliamentary debate. The executive cannot act in defiance of the law. Along with a great deal else, this fact means that the executive cannot spend public money except in accordance with the law.

3 The Constitutional Basis of Ministerial Responsibility

In a recent defence of the virtues of the English Constitution, Adam Tomkins contrasted the English Constitution with the Canadian.²¹ Defending the English “historical” model of public law against court enforced “principled” alternatives, he used the Supreme Court of Canada’s judgment in the *Quebec Secession Reference* as an example of a bad principled judgment reflective of legal rather than political constitutionalism. In his criticism of the decision, he claimed that the Court picked the principles of federalism, democracy, constitutionalism and rule of law, and respect for minorities out of thin air.²² The problem with this reading of the *Secession Reference*, and of the Canadian Constitution, is that it ignores the clear fact that the Court picked the principles out of the text of the Constitution itself, a document the courts have long held must be interpreted with reference to historical development. Lord Sankey’s justly famous characterization of the Canadian Constitution as a “living tree” was intended to capture the idea of a constitution as a balance between principle and change.²³ In the *Quebec Secession Reference*, the Supreme Court was simply following in the footsteps of a well-established tradition of constitutional jurisprudence.

Approval by the House of Commons of all expenditures of public money is required by the *Constitution Act, 1867*.²⁴ This is not a matter of

constitutional convention, nor is it a principle plucked out of thin air, it is a legal requirement. It would be a breach of section 53 of the *Constitution Act, 1867*, for Cabinet to authorize the spending of public money without approval from the House of Commons. Section 53 provides:

Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

According to the Supreme Court, “Section 53 is a constitutional imperative that is enforceable by the courts.”²⁵ While section 53 clearly has the effect of preventing money bills from originating in the Senate, it equally clearly gives expression to the role of the House of Commons in approving all spending of public money.²⁶ The wording reflects the principle of parliamentary control over the spending of public money derived from the *English Bill of Rights*.²⁷ Justice Major characterized section 53 as codifying “the principle of no taxation without representation,” the same principle that underlies the English *Bill of Rights*.²⁸ Justice Major continued:

The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for taxation.

While *Eurig Estate* dealt with the second part of section 53—namely, the imposing of a tax—it is readily apparent that, if that part of the section is enforceable by the courts, the opening section must be as well. In other words, the opening words of section 53, “Bills for appropriating any part of the public revenue” is also “a constitutional imperative that is enforceable in the courts.” If these words are read in the same fashion as the second phrase, then it is clear that the House of Commons cannot “incidentally” delegate the spending power. All delegation of the authority to spend public money must be explicit.

The section immediately following deals with the role of the political executive in the appropriation of public revenue. Section 54 reads:

It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any purpose that has not been first recommended to that House by Message of the Governor General in the session in which such Vote, Resolution, Address, or Bill is proposed.

In practice, of course, “Message of the Governor General” means a Bill originating in Cabinet. Like the cases concerning the meaning of section 53, cases dealing with section 54 have been concerned with taxation.²⁹ For example, in *Reference re: Agricultural Products Marketing Act, 1970 (Canada)* Justice Laskin found that levies authorized by the Act were not taxes and as a result were not subject to sections 53 and 54. While Laskin’s finding on the issue of taxation was endorsed by the entire Court, the Court split on the question of whether these sections could ground an application for judicial review. The majority sided with Justice Pigeon who held that Parliament could indirectly amend sections 53 and 54 by clearly delegating taxation powers to the executive. Dissenting on this issue, Justice Laskin held that Canadian courts were not bound by British precedents that went to the relation between the Constitution and the courts.³⁰ While the Court held in *Eurig Estate* that section 54 was not engaged on the facts of the case, it is clear that the same reasoning that makes section 53 justiciable would also apply to section 54. One of the consequences of the patriation of the Constitution in 1982 is that the courts have sided with Laskin over Pigeon. This does not mean that the federal government could not amend sections 53 and 54 under the authority of section 44 of the *Constitution Act, 1982*, merely that they would have to do so explicitly and in public.

In the cases dealing with section 54, a distinction has been drawn between appropriating and imposing taxes, and section 54 has been held

to have the effect of restricting the role of the House to approving or disapproving appropriations from the public revenue to requests that originate in the executive branch. The passage quoted earlier from *Reference Re Canada Assistance Plan* concludes:

By virtue of s. 54 of *the Constitution Act, 1867*, a money bill, including an amendment to a money bill, can only be introduced by means of the initiative of the government.³¹

Taken together the effects of sections 53 and 54 are that governments must publicly request funds from the House of Commons, the true guardians of the public purse, for publicly identified purposes and, once authorized, those funds must be spent for the purposes for which they were requested.³²

It is by virtue of the House's constitutional authority to approve all appropriations that it also has the authority to take steps to ensure that the money is actually spent for purposes that have been approved. Indeed, without the surveillance power of the House, the requirement for approval would collapse into a mere formality. Section 53 of the *Constitution Act, 1867*, is the constitutional basis of ministerial responsibility for the expenditure of public money, a legal foundation that provides the House of Commons with the authority to place legal limits upon executive spending. In other words, the House has the constitutional authority to enact legislation with the purpose of ensuring the compliance of the executive and to monitor and, if necessary, to enforce compliance. This is not to suggest that the courts should play an increased role in supervising the exercise of the spending power by the House of Commons, merely to make clear that there is a constitutional basis for their performing such a role, a basis that is, if necessary, enforceable in the courts. The primary purpose of the foregoing argument is to show that the courts have recognized the constitutional basis in law, not convention, for the House to exercise its supervisory authority over

executive spending. It goes without saying that without the authority to spend the executive would be impotent.

4 The Statutory Basis of Financial Accountability

Since 1951, the *Financial Administration Act* (FAA) has been the primary statutory instrument by means of which the House of Commons endeavours to ensure that public money is only spent for purposes that have received its approval.³³ The wording of section 26 of the Act clearly gives expression to the principle of no taxation without representation:

Subject to the *Constitution Acts, 1867 to 1982*, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament.

Since the Act in its present form applies to all money in the Consolidated Revenue Fund, no government expenditure lies outside its scope. Furthermore, the Act applies to “any person” in receipt of public funds, whether those funds have been disbursed by the Government or have been received on behalf of the Government. Given this language, it is readily apparent that the scope of the statute extends well beyond spending by government officials to include all spending and acquiring of public money. As a legal instrument, the Act should be understood as one of the means whereby the House of Commons fulfills its constitutional obligation to hold the executive accountable for the spending of public money. Understood in this way, the Act is intended to impose certain legal obligations upon the political executive, obligations that constitute the statutory legal component of ministerial responsibility.

The *Financial Administration Act* replaced the *Consolidated Revenue and Audit Act*, a statute that had its origins in the pre-Confederation *Audit Act* of 1855. Significant amendments were made to the *Financial Administration Act* in 1967, following the report of the Glassco Commission (1962) and again in 1984 following upon the Lambert Report (1979).³⁴ More

recently amendments were made to the Act in 2003, changes that took effect on April 1 of this year.³⁵ While clearly motivated by the need for parliamentary oversight of government spending, these amendments have reflected a pattern described by Norman Ward in 1962 as “a steady accumulation of power in executive hands, with parliamentary assent.”³⁶ Ward, who regarded the Financial Administration Act as “admirably lucid” and a “good” statute, noted:

(by) its clear separation of functions, and their allocation to specific officers, the *Financial Administration Act* not merely made statutory a system of financial control which was unique in the Commonwealth, but also greatly facilitated parliamentary surveillance of it.³⁷

Hodgetts et al. agreed with this assessment of the Act, commenting with regard to the powers of Treasury Board that the term “‘clarify’ perhaps best describes the effects of the 1951 Act.”³⁸ However, Ward also noted that the Act

altered none of the basic principles of parliamentary control of finance in Canada, but reaffirmed them, clarifying and enlarging several important concepts and definitions . . .³⁹

In the end, Ward’s judgment of the statute may be summarized in terms of the tension between the claim that the Act “carried still further the process of centralizing the executive control of finance” and the claim that it “greatly facilitated parliamentary surveillance” of the executive. It can be said that, in enacting the *Financial Administration Act* and its various amendments, Parliament has placed a great deal of the responsibility for conducting surveillance of the executive in the hands of the executive itself.⁴⁰

At first glance, the most striking feature of the *Financial Administration Act* may well be its scope. This is clearly evident in the number of different types of official financial transactions to which it applies. As

already noted, the purpose of the Act is to keep track of public money. Public money may be expended on the services of individuals who are employees working under collective agreements, “managers” who are not members of unions, individuals whose terms of appointment vary from fixed term to “at pleasure,” individuals working for Crown corporations and other quasi governmental organizations, as well as those working under a wide variety of contractual arrangements. The only common feature of all of these arrangements is the fact that in every case the individual is in receipt of public money, whether in the form of a salary or on the basis of invoices for services rendered. In addition, every individual with the authority to spend public money is subject to the Act. Finally, every individual who in the course of providing a service for the Government is in receipt of money intended for the Consolidated Revenue Fund is also covered by the Act.

The distinctions between money received for services rendered, money received in the course of rendering services, and the spending of public money are important because each type of transaction attracts a different form of attention, a form dependent to a large degree upon the context in which the transaction took place. While it may be possible to characterize any number of transactions as inappropriate, only some of them will attract legal attention and the remedies available will likely depend more on the context than on the nature of the transaction itself. Rather than focusing on the nature of the various financial exchanges covered by the Act, it will be easier to look at the different categories of individuals engaged in such transactions.

The Act applies to government departments, other government agencies, Crown corporations, and to any parties engaged in financial transactions with such departments, agencies and corporations. Under the current, recently amended, version there are seven schedules appended to the statute that list the various government departments

and agencies to which the Act applies, an increase of three from the earlier versions.⁴¹ The seven schedules are headed Departments (Schedule I), Divisions or Branches (Schedule I.1), Departmental Corporations (Schedule II), Crown Corporations (Schedule III, Part I & Part II), Portions of the Core Public Administration (Schedule IV) and Separate Agencies (Schedule V). The “core public administration” is defined as Schedules I and IV while the “public service” includes Schedules I, IV and V, as well as “any other portion of the federal public administration that may be designated by the Governor in Council for the purpose of this paragraph.”⁴² The differences between the “core public administration,” the “public service,” and the “federal public administration” are significant insofar as they are subject to different parts of the Act.⁴³ Similarly, departmental corporations and Crown corporations are not part of the public service and are not subject to those parts of the Act that apply thereto.

The Act clearly applies in very different ways to departments, agencies and corporations, many of which are also subject to numerous other pieces of legislation. For example, the difference between members of the public service, the “core public administration,” and those others to whom the Act also applies is evident in the application of sections 11-13 in Part I and sections 76-82 in Part IX. Under the heading “Human Resources Management,” the former sections set out the responsibilities of Treasury Board and its delegates, most importantly deputy heads, with regard to the overall responsibility of managing the core public administration.⁴⁴ For example, section 11.1(1)(f) grants Treasury Board the discretion to supervise deputy heads by establishing policies and issuing directives respecting any powers granted to deputy heads under the Act and by setting out the ways in which deputy heads are required to report to Treasury Board regarding the exercise of their assigned powers.

Part IX of the Act is entitled Civil Liability and Offences. This Part of the Act has been subject to only minor amendments since the statute was first enacted. The definitions of civil liability and of the offences created under this section are expressed in the most general of terms, clearly indicating that they are in addition to, rather than separate from, the disciplinary measures established on the basis of the earlier sections. Since anyone from a Minister to a clerk within the public service, or from the director of a Crown corporation to someone working under a contract with a subsidiary of such a corporation, is subject to Part IX but only the clerk would be subject to the disciplinary measures set out under the authority of sections 11.1(1)(f) and 12(1)(c) the procedures that would be followed in the case of a clerk who had violated the Act would be very different than those that would be followed in the case of a director of a Crown corporation.⁴⁵ Given the scope of Part IX and the varied problems that are likely to arise in its enforcement, it will be helpful to consider the issue of liability under the Act in terms of the different groups to whom it applies. These comprise three different categories of individuals or corporate entities who could be in receipt of public money, those subject to sections 11-13 of the Act, the directors, officers and employees of Crown corporations, whether parent or subsidiary, and all those who provide services to the Government or its agencies on a contractual basis. In what follows, it will be important to bear in mind the distinction between those parts of the Act that apply to all of the above and those that apply only to one or two of the categories. Before proceeding, it will be useful to examine briefly some of the general concerns that the Act is intended to address as an instrument of policy. These concerns can best be defined in terms of the familiar concepts of “responsibility,” “accountability” and “liability.”

5 Responsibility, Accountability, Liability

In a well-known paper, written almost 20 years ago, Gerald Caiden noted that, although these terms—responsibility, accountability, liability—

are often used interchangeably, they should be differentiated and treated as a complex set of related concepts, rather than as synonyms. Although the literature on these concepts has expanded dramatically in the intervening years, Caiden's advice is still well worth heeding. He briefly defined the three terms as follows:

- To be responsible is to have the authority to act, power to control, freedom to decide, the ability to distinguish (as between right and wrong) and to behave rationally and reliably and with consistency and trustworthiness in exercising internal judgment;
- To be accountable is to answer for one's responsibilities, to report, to explain, to give reasons, to respond, to assume obligations, to render reckoning and to submit to an outside or external judgment;
- To be liable is to assume the duty of making good, to restore, to compensate, to recompense for wrongdoing or poor judgment.⁴⁶

From a legal perspective it might appear as if the third of these concepts, liability, has the greatest legal content but any such assumption would be misleading. Indeed, to characterize one of these concepts as legal would be to miss the point of Caiden's advice that the concepts should be distinguished but not separated.

In the case of public officials, or anyone dealing with public monies, responsibility will flow from a legal delegation of authority. An individual will be responsible for performing a legally delegated set of duties or responsibilities whose scope will be set out in a statute, regulation or job description. The same individual will be legally required to account for the performance of those duties to someone with the legal authority to demand such an account. Finally, the individual may be held liable—administratively, civilly or criminally—not only for the failure to perform the delegated duties, but also for the failure to account for his or her performance or non-performance. From a legal perspective, liability will not be “assumed,” as Caiden would have it, but imposed

by a body with the jurisdiction to do so. It doesn't follow from the fact that one has taken responsibility for something that one has any legal liability at all. Legal liability is not up to the individual to assume, it is always something imposed on someone after the requisite procedures have been followed. Liability, whether criminal, civil or administrative, is the outcome of a process, not its beginning point.

Although the distinction between the failure to meet one's responsibilities and the failure to account for those responsibilities is central to the *Financial Administration Act*, the statute is more precisely concerned with ensuring that individuals account for the performance of responsibilities assigned elsewhere. Those responsibilities will usually be defined in the statute establishing the government department or the Crown corporation, or in the various regulations, job descriptions, guidelines and codes enacted thereunder. Like all such "umbrella" legislation, the *Financial Administration Act* must be made to apply to a very diverse group of actors. There is, however, a single underlying burden placed upon all of those individuals, the obligation to account. The scope of the burden to account to Parliament is further emphasised in section 76(1)(c), which refers to "any person" who "has received any public money applicable to any purpose." That said, the discretion to spend and the structure of accountability clearly vary from individual to individual. Nonetheless, the clear purpose of the Act is, wherever possible, to hold all of those charged with responsibility for public funds to a common standard of accountability to Parliament.

"Accountability" has become one of the most overused words in the literature on public administration. Richard Mulgan noted in a recent article:

That "accountability" is a complex and chameleon-like term is now a commonplace of the public administration literature. A word which a few decades ago was used only rarely and with relatively restricted meaning (and which, interestingly, has no obvious

equivalent in other European languages) now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic “governance” (itself another conceptual newcomer). In the process, the concept of “accountability” has lost some of its former straightforwardness and has come to require constant clarification and increasingly complex categorization.⁴⁷

Caiden’s admonition that it should be distinguished from the related concepts of responsibility and liability clearly has not had the effect of reining in the abuses of the term. In addition to the growth in the scope of the term, there has also been, as Mulgan notes, a dramatic expansion in the number of types of accountability. For example, in an often-cited paper written after the explosion of the space shuttle Challenger, Barbara Romzek and Melvin Dubnik distinguished between bureaucratic, legal, professional and political accountability on the basis of the relationship between the person(s) held accountable and the person(s) to whom accountability was owed.⁴⁸ In a similar vein, writing in the field of health policy, Emanuel and Linda Ezekiel distinguished between professional, economic, and political accountability.⁴⁹ However, in spite of the frequency with which such distinctions are drawn, it isn’t always clear why they are necessary. Indeed, in many cases, the implication of these efforts at categorization is that there are fundamentally different types of accountability, rather than different contexts within which one might be held accountable. Yet, surely this latter understanding of accountability is closer to what is actually the case.

To be accountable is to be in a relationship to someone with the authority to demand or, more significantly, to require an account. The essential element in an accountability relationship is not the obligation to account, it is the existence of someone with the authority to require an account. The authority to require an account will often include the

authority to impose a sanction for the failure to account. This authority may rest directly with the person authorized to require an account or it may depend upon the engagement of some other source of legal authority such as a court. The authority to require an account will be limited by the grant of that authority.⁵⁰ In any case, the authority to require an account may be coupled with the authority to sanction, or to initiate a sanction, for the failure to meet the requirement.

Just as it is possible to speak of the responsibility to provide an account, it is also possible to speak of the responsibility to require an account. Indeed, accountability is best understood as the correlation of two responsibilities, the responsibility to provide an account when required, and the responsibility to require an account. Either, both or neither of these responsibilities might have been met in a particular case. It follows from this analysis that the accountability relationship should also be understood in such a way that liability might fall on both parties to the relationship. The failure to require an account, when possessed with the responsibility to do so, would attract liability in precisely the same sense as the failure to provide one when required to do so. Those charged with the responsibility of requiring an account should be held to the same standard as those charged with the responsibility of providing one.

On the basis of the foregoing analysis, accountability may be understood as an additional responsibility for which one may be held liable. An individual assigned a set of responsibilities will also be assigned the responsibility to account. To take a relatively simple example, the requirement that a public official keep a record of transactions may also be an assignment of the responsibility to account. The record is kept not only for the purpose of keeping track of the transactions within the Department but also to serve as an accounting of those transactions to another party with the authority to require access to the records. Among the duties assigned to this other party will be the responsibility

to require an account. While the responsibility to provide an account, like the responsibility to require an account, may be the primary or sole duty of an official, it is much more likely within any bureaucratic structure that these responsibilities will be only part of the official duties of an individual. Indeed, a pure accountability relationship between two individuals would be impossible since coupling the sole duty to require an account with the sole duty to provide one would leave both parties to the relationship with nothing to account for. An office, like that of the Auditor General, for example, clearly can be created with the responsibility to require an account from one body (the executive) and the responsibility to provide that account to another body (Parliament).

While the forms in which an account is to be given will vary depending upon the nature of the request or demand, in each case the same basic elements are present. The authority to require an account will be exercised by setting a variety of requirements, ranging from statutes and regulations through guidelines and policy directives to more informal arrangements, such as regular staff meetings. At the highest level, the *Financial Administration Act* may be understood as an exercise of Parliament's constitutional authority to require an account from the executive. Parliamentarians, in particular those with the greatest degree of control over the legislature, will be held politically accountable by the electorate for their failure to call the executive to account. In addition, sanctions for the failure to account may range from an informal reprimand to loss of one's position and, in the most extreme cases, civil and criminal liability. The *Financial Administration Act* is one of the ways in which Parliament imposes the responsibility to account on the executive, although, as noted earlier, the primary emphasis in the Act is on the relations between Cabinet and those departments, corporations and agencies that are answerable to Cabinet. Furthermore, as noted earlier, the tension between the interests of Parliament and those of Cabinet is ever present, a potential limitation on the effectiveness of the Act insofar as the responsibility for its enforcement rests with the executive.

As noted at the outset, the doctrine of ministerial responsibility contains both political and legal elements. It is important to recognize both of these. The subjection of the executive branch of Government, up to and including the political executive, to law is one of the most important principles of the Canadian legal order. Whether the instrument of legal ordering is Parliament, through the enactment of such legislation as the *Financial Administration Act*, or the Courts, through the exercise of the power of judicial review, the underlying principle is the same: all executive action must be undertaken in accordance with the law. According to the Supreme Court, the first principle of the rule of law, “a fundamental postulate of our constitutional structure,” is that “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.”⁵¹ There are legal boundaries to the responsibilities of any public official that derive from the principle of the rule of law, boundaries that are legally, not just politically, enforceable. Minimally, rule of law means that no official, no matter how high ranking, can possess absolute discretion.⁵² All discretion is bounded by law. It is presupposed in law that for all occupants of public offices, from the lowest to the highest, there are limits to what the occupant is legally permitted to do while in office. These limits are likely to be far more precisely spelled out in the job descriptions of those who occupy offices in the lower parts of the hierarchy than they will be in the case of those at the highest level, where rules and regulations are likely to be replaced by the delegation of a discretion that may be interpreted in terms of notions of privilege and convention.

Discretion is the authority to make decisions in particular cases without seeking authorization from someone with greater authority; it is an essential feature of all executive decision-making. The application of rules to particular cases inevitably requires an element of judgment that resists codification. In *Results for Canadians: A Management Framework for*

the Government of Canada, a “modern management agenda” published by the Treasury Board, it is noted that the delivery of government programs and services requires that “decision-making authority [be] located at the right level to achieve results.”⁵³ “Real decision-making authority at the front line” is a synonym for the exercise of discretion by the individual dealing with specific cases and may be understood as the most recent version of what became the slogan of the Glassco Commission, “Let the managers manage.” The fact that a decision-maker does not have to seek authorization to make a particular decision or rule, does not mean that the decision-maker is not accountable for the decision or rule that is made. In other words, discretion does not imply freedom from the obligation to account. In *Results for Canadians* it is clearly recognized that

[e]xtending decision making to the front line must be accompanied by a framework to ensure due diligence in the management of public funds. The framework must start with clear accountabilities so that managers at all levels understand them and support the accountability of their organizations, through ministers, to Cabinet and Parliament.⁵⁴

As argued above, the common element in all forms of accountability is the obligation to explain or to justify one’s actions to someone else who has the authority to demand an account—the obligation to provide an account, along with the correlative duty placed upon another party to require an account. Ideally each office-holder would know the limits of his or her authority and would operate within those boundaries. From a practical point of view, there are innumerable reasons why individual office-holders fail to respect those boundaries, reasons ranging from the praiseworthy to the truly malevolent. Furthermore, since each office only exists in terms of its relations with other offices, the legal limits of one office can only be defined in terms of these relations. For example, many office-holders are required to take direction from other

office-holders who are in a position to exercise authority over them.⁵⁵ This authority can take many forms ranging from the ordering of the performance of a specified task to a role in recommending a promotion. Although these forms of authority can be separated for the purposes of analysis, in practice they are not so easily taken apart. The individual office-holder who orders that a cheque be issued is the same individual who will be involved in the next performance review. It may be very difficult in practice for someone in a subordinate position to challenge what a person in authority characterizes as a legitimate exercise of discretion. In addition, since accountability for the exercise of discretion is typically owed to someone higher up, it is all but impossible for a subordinate to hold a senior official accountable.⁵⁶

The exercise of discretion can, of course, be challenged in the courts. From the standpoint of administrative law, interest in the exercise of delegated discretion has focused on specific exercises of statutory authority that have a direct impact upon the interests of individuals, for example, property and civil rights. The reasons for this focus are obvious. The law regarding discretion has evolved as a result of applications for judicial review brought by individuals who believe their rights have been adversely affected by those with “real decision-making authority.” In their supervisory role, the courts have imposed procedural and substantive limitations on the exercise of discretion in individual cases. Within modern bureaucratic states, however, the domain of discretion has been extended well beyond the authority to make decisions in individual cases to encompass the authority to make the rules that will be applied in those cases. Some grants of statutory authority must now be understood to include not only the power of decision-making but also the power of rule-making.

Regulations (or secondary legislation) and guidelines (also known as soft law) are forms of executive law-making. The authority of the executive to make rules has long been recognized as a potential source for abuses of power. One of the most important reasons follows from

the fact that the introduction of an intermediate step between law-making and its implementation complicates the problem of accountability. The executive branch of Government is empowered by statute to make rules, which are not brought before Parliament, and to oversee the application of those rules to individual cases by means of administrative tribunals, which are not courts. In other words, the modern administrative state has evolved in such a way that the executive sets many of the rules that govern decision-making, as well as controlling the tribunals that serve as the overseers of the application of those rules. This development is further complicated under the Westminster system of ministerial responsibility because, as noted above, the Cabinet, a partisan body, effectively controls the executive branch.

From the perspective of administrative efficiency, every rule cannot be subject to the rigours of parliamentary debate nor can every decision be the subject of an application for judicial review. That said, the fact that the executive branch controls not only the decision-making process but also the rule-making process and the appointment of the officials who will interpret and apply those rules further increases not only opportunities for the actual abuse of power, but also occasions for public suspicion that power is being abused. Since administrative structures now routinely include policy-making, rule-making, decision-making and appellate functions, the idea of the executive branch of Government as the neutral administrator and implementer of policies that have survived the rigours of parliamentary debate is more than a little misleading. Indeed, the growth of the power of the executive has made the problem of accountability even more acute. One possible response to this would be to place an increased emphasis upon the responsibility to require an account, a responsibility that should be seen as a necessary part of any accountability system.

The *Financial Administration Act* actually serves two political masters, namely, Parliament and the Governor in Council. The Act is not only an instrument for parliamentary surveillance of executive spending, it

also provides the framework within which those in receipt of public money must account to Cabinet. As a committee of the Privy Council, Treasury Board is a statutory body with responsibilities to Parliament that are assigned under the Act. As noted above, this structure has the effect of making legal what might otherwise be matters of convention. That said, most of the duties assigned to Treasury Board are set out using the permissive “may” rather than the mandatory “shall.” It can be argued, however, that the discretion goes to the means rather than the ends. In other words, the statute places upon Cabinet, Treasury Board and deputy heads, and, by extension, all others in receipt of public money, the legal obligation of ensuring that public money is actually spent in the pursuit of programs that have received the approval of Parliament, while leaving to the executive the choice of means whereby this goal is to be pursued and accountability is to be achieved.

Although the two purposes of the Act, ensuring accountability to Parliament as well as to the Privy Council, are not incompatible with one another they can be at odds in very important ways, ways that may well affect the exercise of discretionary power. The function of parliamentary surveillance of executive spending is performed primarily, if not exclusively, by the opposition parties in the House. Cabinet surveillance of executive spending, on the other hand, is performed by members of the party holding the reins of power. It is here that the built-in potential for conflict between the two purposes served by the Act is most evident. While Parliament has other means of keeping track of public money, most significantly, the Public Accounts Committee and the Auditor General these bodies perform their functions outside the day-to-day operations of the public service.⁵⁷ The *Financial Administration Act* applies more directly to the inner structure of the public service insofar as it creates Treasury Board and the Department of Finance and defines many of the most important duties of deputy ministers and their delegates at the highest levels of Government.

Treasury Board also possesses managerial authority over the public service. For these and other reasons, perhaps more than any other piece of legislation, the Act addresses the point at which the partisan interests of the political executive meet the traditional administrative neutrality of the public service.⁵⁸

As the present Inquiry makes abundantly clear, a distinction must be drawn between different meanings that might attach to a phrase such as “partisan interests.” The importance of drawing this distinction is evident from the following exchange between Mr. Cournoyer, Associate Legal Council for the Commission, and the Honourable Stéphane Dion during the latter’s testimony before the Commission:

Mr. Cournoyer: Now I’ll ask you, Minister, to go to page 39 of the same volume. It’s page 18 of Mr. Massé’s report. At the top of page 18 we read the paragraph that follows Communication Initiative in Quebec, the following paragraph: “The ministers recommend that the organization of the Liberal Party of Canada in Quebec be substantially strengthened. This entails hiring organizers, finding candidates, identifying ridings that could provide winners at the next federal election and using the most modern political techniques to reach whoever we target.”

My question is the following, Minister. Isn’t it surprising that considerations that can be associated with *partisan politics rather than public administration* are included in a document prepared by ministers for the Cabinet?

Mr. Dion: Yes, it’s surprising. I can tell you that I’ve never seen anything like it in my nine years in politics. That was probably the first document I read from the government. Perhaps it didn’t strike me as odd at the time, but now, looking back, *I’m astonished that public servants would engage in these types of reflections, which pertain to partisan politics.*⁵⁹ [Emphasis added]

The use of the phrase “partisan politics” in this exchange is of interest because it threatens to mask the fact that Cabinet is a partisan body. Collective ministerial responsibility is a partisan principle insofar as it requires ministers to support the policy initiatives of the Government in which they serve. It was the discussion of the election of Liberal Party members, that is, the discussion of matters pertaining to the Liberal Party that was problematic. A discussion of how best to implement Liberal policies, that is to say, the ideological commitments of the Liberal Party, through control of the public administration, a discussion that might also be described as partisan, would not only be appropriate in Cabinet, it would be expected. The political executive is governed by partisan interests because its purposes are to implement, insofar as is politically possible and legally permissible, the platform of the Liberal Party, a platform on the basis of which the electorate granted the party control of the executive branch. As noted earlier, it has long been recognized that in a Westminster democracy in which political parties, rather than individuals, have become the key players, the political executive, a partisan body, is effectively in control of both the legislature and the administration during its term in office. Thus, although the *Financial Administration Act* is one of the legal limitations placed by Parliament upon the political executive, one of the more remarkable features of the Act is the degree to which it places the responsibility for ensuring executive compliance with parliamentary purposes upon the executive itself.

6 Recent Statements on Responsibility and Accountability

The Privy Council Office and Treasury Board both function at the point where the need to separate partisan interests from legislative and executive authority is most pronounced. It is instructive, therefore, to examine recent statements on accountability from both of these offices. In 2004, the Privy Council Office released a document entitled *Governing*

*Responsibly: A Guide for Ministers and Ministers of State.*⁶⁰ The document begins appropriately enough with a section on ministerial responsibility and accountability. As expected, ministers are said to be responsible and accountable in two ways, individually and collectively. Readers of the document are referred to *Responsibility in the Constitution* for further details. Under the heading of “Individual Ministerial Responsibility,” reference is made to the enabling statutes that grant ministers their powers and establish their duties, and reference is made to the “‘unwritten’ conventions or precedents governing the ways in which Ministers fulfill their responsibilities.”⁶¹ There is no reference in this section to the legal basis of ministerial responsibility, in the sense that the law limits the ways in which ministers exercise their powers and perform their duties. A reader of the passage would be excused for assuming that the only consequences to which ministers might be subject are matters of convention rather than law.

The section on individual responsibility is followed by a much longer one on collective responsibility in which the central theme is “cabinet solidarity.” Throughout this section, the importance of consultation, coordination, and consistency in Cabinet initiatives is emphasised on the ground that Cabinet solidarity is a “key ‘unwritten’ constitutional convention.” This convention

is further reinforced by the Privy Councillor’s oath requiring Ministers to declare their opinion as decisions are being made, and to strictly uphold the confidentiality of Cabinet decision making.⁶²

The emphasis upon solidarity and confidentiality creates the impression that loyalty is the defining feature of ministerial responsibility. This impression is strengthened in the following section, “Ministerial Accountability and Answerability” where attention is drawn to the Prime Minister’s

prerogative to evaluate the consequences (of the minister's performance before Parliament) and to reaffirm support for that Minister or to ask for his or her resignation.⁶³

As in the other sections, there is no reference to the possibility that ministerial responsibility could include a legal obligation that would override the Minister's obligations to Cabinet or to the Prime Minister.

More recently, in a report to Parliament entitled *Review of the Responsibilities[sic] and Accountabilities of Ministers and Senior Officials*, the Treasury Board Secretariat characterized the political responsibility of ministers as follows:

Political responsibility is also not the means of determining civil or criminal liability for unlawful conduct—that is the justice system. The sanctions associated with ministerial responsibility are political, ranging from public embarrassment of a minister and consequent loss of political stature at one end of the spectrum to the potential fall of a government at the other.⁶⁴

Although this characterization of the assignment of legal liability is accurate, what is missing is any recognition of the legal foundation of ministerial responsibility itself. The essential difference between law as a source of sanctions for unlawful conduct and law as the source of authority for whose exercise one may be held accountable, even if one has not technically broken the law, lies at the very core of ministerial responsibility.

In *Management in the Government of Canada*, a discussion paper released by the President of the Treasury Board in October 2005, it is noted that:

The deputy minister is accountable to the minister and to the Treasury Board specifically for ensuring:

- resources are organized to deliver departmental objectives, under the minister, in the most economical, efficient, and effective way;
- effective systems of external control;
- compliance with financial policies and procedures;
- staffing and human resources planning and management;
- stewardship and safeguarding public funds; and,
- sound management of resources related to horizontal initiatives.⁶⁵

The report sets out as one of the objectives of the Government's policy of "continuous improvement" the following commitment:

In 2006, the *Financial Administration Act* and Treasury Board policies will reinforce accountability relationships of deputy ministers to ministers and the Treasury Board.⁶⁶

Between these two statements the accountability of deputy ministers is addressed further in the following statement:

Deputy Ministers are not accountable to Parliament, as this would undermine the political accountabilities of ministers and would undermine the non-partisan nature of the public service. In supporting their respective minister's accountability, deputy ministers are answerable to parliamentary committees in the sense that they have a duty to inform and explain, as for example when appearing before them. Only ministers are accountable to Parliament.⁶⁷

Finally, the different accountabilities of deputy ministers are set out in more detail in another document issued by the Privy Council Office, *Guidance for Deputy Ministers*.⁶⁸ Under the heading "Multiple Accountabilities," it is noted:

Deputy Ministers are required to manage a complex set of multiple accountabilities which arise out of the various powers, authorities and responsibilities attached to the position . . . The Deputy is accountable to his or her Minister in relation to both individual and collective responsibilities . . . Deputy Ministers are also accountable to the Prime Minister, through the Clerk of the Privy Council . . . Deputy Ministers also have accountabilities to the Public Service Commission and the Treasury Board . . . ⁶⁹

When taken together, the preceding passages provide a relatively clear portrait of the balancing act that is the role of the Deputy Minister.

On the basis of the foregoing two things are readily apparent:

- deputy ministers are accountable to their ministers, to Treasury Board, to the Prime Minister and to the Public Service Commission;
- deputy ministers are not accountable to Parliament.

A number of things, however, are not clear.

6.1

Deputy Ministers' Direct Accountability

Deputy ministers are not accountable to their ministers, Treasury Board, the Prime Minister and the Public Service Commission for the same things. One cannot be accountable in the abstract; one must be accountable for something. Typically one is held accountable for the performance of a delegated task, duty or responsibility. Furthermore, one is held accountable by someone with the authority to require or demand an account, usually, but not necessarily, the one who delegated the task. Accountability is by its very nature a vertical relationship, a relationship in which one individual, or body, exercises authority over another individual, or body, by requiring an account. Deputy ministers

are assigned different responsibilities by their ministers and by Treasury Board. They are accountable to their ministers and to Treasury Board, respectively, for carrying out these responsibilities.

6.2

Deputy Ministers' Indirect Accountability

Since ministers and Treasury Board are both accountable to Parliament, deputy ministers are indirectly accountable to Parliament. The responsibility of deputy ministers to Treasury Board is in law an indirect responsibility to Parliament since the responsibilities of the deputy ministers are delegated under a grant of authority from Parliament. Thus, although it is true to say that deputy ministers are not politically accountable to Parliament; deputy ministers are accountable to Parliament through Treasury Board for the compliance of their department with the terms of the *Financial Administration Act* and other relevant legislation. This follows from the fact that deputy ministers are accountable to the ministers and to Treasury Board for different things.

6.3

Conflict Resulting from Deputy Ministers' Accountabilities

The different accountabilities of Deputy Ministers present numerous opportunities for conflict. On the basis of the brief sketch of the responsibilities of deputy ministers, it makes sense to ask what happens when these responsibilities conflict. Since deputy ministers are accountable to their ministers, the Clerk of the Privy Council, the Public Service Commission, and Treasury Board for different things, it is necessary to ask whether there is a hierarchy among these responsibilities. In the case of a conflict, is it possible to say which responsibility takes priority?

Even a quick glance at the responsibilities assigned to deputy ministers in the list quoted above will reveal the existence of the different sources

of the responsibilities. Responsibilities for “delivering departmental objectives,” “human resources planning and management,” and “safeguarding of public funds” clearly intersect in a number of important ways, but only the first of these is a responsibility assigned by the Minister. The latter two responsibilities have different sources that clearly cannot be overridden or ignored in the pursuit of “departmental objectives.” Furthermore, the source of the responsibility creates a different relationship between the Deputy Minister and the portion of the public service for which he or she is responsible. These different relationships engage different aspects of public sector values, values grounded in the neutral, or non-partisan, nature of public service.

Departmental objectives are policies flowing from government commitments, objectives that require a non-partisan, or neutral, public service for their implementation. Non-partisan in this sense means that the public service cannot frustrate the objectives of an elected Government by taking sides against it. This means nothing more than the fact that the public service cannot have an ideological agenda of its own, an agenda that might be at odds with that of the governing party. While the Supreme Court took the opportunity to address other aspects of the idea of public service in *Fraser v. Canada (Public Service Staff Relations Board)*, this concept of neutrality was at the heart of the case.⁷⁰

The responsibilities for human resources management and the safeguarding of public funds, however, are not assigned to deputy ministers by their ministers; they are delegated to deputy ministers by Treasury Board under an authority assigned to Treasury Board by Parliament. These responsibilities have their origins in the *Financial Administration Act* and other legislation, not in ministerial directives. Meeting these responsibilities also requires a neutral, or non-partisan, executive, but these terms now have a different sense, a sense that captures the differences between the relationships. Public servants are non-partisan in this second sense because they are required to be loyal to

the institutions of Government rather than to the party in power. This second sense of neutrality is partially captured by the phrase “speaking truth to power,” but it would find fuller expression in the idea of reminding those in power of the existence of the law.⁷¹

There is, finally, a third sense of public sector neutrality that is captured in the merit principle, a principle that is intended to prevent members of the public service from being rewarded for their service to the party in power. By removing this motive from members of the public service, the merit principle is intended to free these individuals from the need to curry favour with individuals in power, while simultaneously eliminating the possibility for those in power to use the promise of reward. Like the first two senses of neutrality, this third sense also requires drawing a distinction between the partisan objectives of the party in power and the reasons why the successful public servant may be rewarded for enabling the Government to pursue those objectives effectively.

Although it is important to recognize that the public service is required to be non-partisan in all of these senses, it is even more important not to confuse them. The loyal public servant cannot express partisan opposition to the policies of the Government in power on ideological grounds but is obliged to express opposition to government initiatives that would require breaking the law. The public servant must also be assured that decisions made in compliance with these requirements will have no impact upon opportunities for advancement. The delicate balance between these three senses of non-partisanship can be captured in the single idea that the loyal public servant is required to carry out the directives of the Government of the day within the limits of the law. While a Deputy Minister should not be concerned with advancement, no figure in the Canadian Government bears the burden of maintaining the balance between the first two senses of neutrality more directly than the Deputy Minister. Indeed, the two senses of neutrality are directly related to the two sources of the authority of the

Deputy Minister, each of which engages the occupant of this role with ministers and their departments in very different ways.

On the surface, it appears that deputy ministers must serve several masters insofar as their “multiple accountabilities” are not all owed to the same official. This surface appearance is, however, misleading because these multiple accountabilities are all grounded in responsibilities assigned by two sources, namely, the political executive and Parliament. The fact that Treasury Board is a committee of the Privy Council, which means for all practical purposes the Cabinet, does not alter the fact that the responsibilities in the *Financial Administration Act* are assigned by Parliament, not by Cabinet or by individual ministers. Powers delegated to Treasury Board by the Privy Council and then further delegated to deputy ministers retain their character as statutory powers granted by Parliament. It is in the tension between Parliament and Cabinet that conflicts between the various responsibilities assigned to deputy ministers will inevitably arise.

Parliament and Cabinet function in a complex relationship whose primary, if not defining, purpose is adversarial. Conflicts are an integral part of the system. One of the best expressions of this feature of parliamentary democracy was provided by Chief Justice Duff of the Supreme Court in the Alberta Legislation case:

Under the constitution established by the British North America Act, legislative power for Canada is vested in one Parliament . . . Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body . . . The [Act] contemplates a parliament working under the influence of public opinion and discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism

and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.⁷²

This inherent conflict between the political executive and the legislature finds expression at every level of the public service in the tension between the constitutional and statutory structures of offices and the partisan goals of those who exercise control over them during their term in power.

One of the most important ways in which the exercise of power is controlled between elections is through the legal structure of offices. While it is true that any administration may change the structure of the public service there are certain statutory obligations placed upon public officials that can only be altered with the approval of Parliament. Furthermore, the Constitution stipulates that any changes to the public service that require the expenditure of public money receive approval from the House of Commons. In addition to establishing the administrative framework within which the executive is required to meet its constitutional obligation to account to the House of Commons, the *Financial Administration Act* places statutory duties upon Treasury Board and deputy ministers.

As already noted, deputy ministers are accountable for two different sets of responsibilities that are delegated from two different sources. They are accountable for the performance of those responsibilities to their sources. There are inescapable tensions between these responsibilities, tensions that have their roots in the structure of the

Government. It is a matter of the utmost importance that the nature of these responsibilities be defined as clearly as possible. One way of doing this is to ensure that vocabulary appropriate to one set of responsibilities is not imported into discussions of the others. For example, ministers are authorized by Parliament to spend money in the pursuit of policies that are approved by Parliament. Deputy ministers are, therefore, accountable to their ministers for ensuring that these policies are efficiently and effectively implemented by the public servants within their departments. This form of accountability lends itself to the language of initiatives, goals and performance indicators, terminology that has been increasingly borrowed from the domain of private sector management. To this extent, at least, there is some overlap between private and public sector human resource management. However, deputy ministers are not accountable to their ministers for matters pertaining to human resource management; they are accountable to Treasury Board for the performance of duties assigned to them under the *Financial Administration Act*. Furthermore, these responsibilities must be pursued within the legal framework of employer-employee relations, a framework that is set out in numerous statutes and collective agreements. While the language of goals, initiative and performance indicators overlaps with ideas of training, evaluation and promotion, for example, the laws and regulations governing employer-employee relations that must be followed do not originate with the Minister. Finally, the separation of accountabilities is further complicated by the fact that deputy ministers are also accountable for ensuring that their departments meet the legal requirements regarding the expenditure of public money that are set out in the Act.

That these three different accountabilities, which can be labelled political, managerial, and legal are interwoven in practice goes without saying. However, they are also capable of being pulled apart, not only for the purpose of analysis, but also for the purpose of defining the precise

nature of the responsibilities involved. It is only when the responsibilities are precisely defined that it becomes clear why the legal responsibilities must be kept separate from the others. This problem is evident in the following passage from the discussion paper issued by the President of Treasury Board:

a broad compliance framework is needed to reinforce public-sector values, reward performance excellence, and prescribe clear consequences for underperformance and non-compliance. Many consequences and sanctions for individuals are already in place: to foster excellence, there are performance pay, promotions, and recognition awards; for non-compliance, written warnings, suspensions, demotions, terminations, and in rare cases criminal sanctions. However, managers are not always properly supported to employ these tools; when they do so, it is not always done in a uniform manner and the outcomes of their actions are not always transparent or widely reported. This has led to a perception that there are no consequences, for misconduct or mismanagement.⁷³

One implication of the foregoing is that performance, misconduct and criminal behaviour are parts of a continuum rather than distinct categories. The notion that the failure to win a promotion, the receipt of a written warning and a criminal prosecution are three steps along the same path seriously misrepresents the actual difference between measures of excellence, the failure to follow directives and guidelines, and the concept of criminal behaviour. It is justifiably taken for granted that all public servants will obey the law; it cannot be taken for granted that all public servants will perform to the same standard of excellence. Performance rewards and promotions are not given for obeying the law, nor are they awarded for accomplishing government objectives without breaking the law. Although it is true that there is a range of sanctions available for punishing wrongdoing these sanctions can only be imposed after a finding of guilt. They have no positive counterpart and are by

nature retroactive. By blurring the difference between performance of the job, misconduct and criminal behaviour, a “compliance framework” sends the message that breaking the law is simply a bad performance or another form of misconduct.

The difference between performing a job and obeying the law is more readily apparent in the private sector because there is a clear institutional distinction between one’s employer and the legal system. Within the private sector, the relationship between a corporation, for example, and the legal system is complex, but the fundamental difference between the two is never in doubt. In the public sector, this difference is not as clear because one’s employer is also responsible for administering the legal system. The Government is not only a service provider, but is also a regulator. Furthermore, while it is possible to have debates over the merits of public versus private service delivery, debates over public versus private law-making would spell the end of law. Indeed, it is of the very essence of modern democratic lawmaking and governance that the laws find their origin in the will of the people and that Government be conducted in the name of the people. These functions cannot be meaningfully privatized. Law-making and regulation are boundary-setting activities that do not fit comfortably with concepts of management derived from the entrepreneurial ideals of pushing the boundaries in the pursuit of profit. The distinction between service provision, which may be quite broadly defined, and regulation, which may be narrowly defined in terms of the statutory authority to impose sanctions, reflects the difference between the state as an employer and the state as a prosecutor. Since the prosecutorial function has no meaningful counterpart in private sector employers, it is important to maintain the distinction when dealing with the Government as an employer. Private sector employers may evaluate and discipline their employees; they cannot prosecute them without the assistance of the state.

Concepts such as discipline and misconduct are ambiguous insofar as they appear to straddle the line between two senses of obedience, namely, the following of orders or directions, on the one hand, and acting in accordance with the law, on the other. It is appropriate to combine such concepts as performance indicators and excellence with the first idea of obedience but it would be completely inappropriate to combine them with the second. Once again, obeying the law is a precondition of performance, not a measure of it. The legal structure of a public office finds its origins in the Constitution and in the various statutes enacted in accordance with it. Rule of law means that the office defines the powers of its occupant insofar as those powers derive from and are traceable to a source in law, a source external to the office-holder. Whatever authority an office-holder exercises is delegated from elsewhere and the office-holder is always accountable to that source for the exercise of the delegated authority. Performance while in office, on the contrary, is a measure of the individual's ability to successfully meet the demands of the office while operating within its legal boundaries. Among the measures of performance might be included the capacity to assume responsibility for completing assigned tasks and exercising delegated authority.

There are, therefore, two quite distinct ways in which an office-holder may fail while in office. The office-holder may prove to be incapable of meeting the demands of the office for a wide range of reasons, reasons that are the subject matter of human resource management. The successful manager places the right people in the right offices and coordinates their activities in such a way that the objectives of the department are effectively and efficiently met. Individuals who fail to meet the demands of their offices may receive poor performance evaluations, be demoted or even be terminated. While there is a burden placed upon the employer to ensure that these actions are undertaken in accordance with the various legal requirements governing employer-

employee relations, none of this involves infractions of regulations or breaking the law on the part of the employee. These latter actions belong to an entirely different category and engage a different part of the legal system.

This categorical difference is also elided into a “continuum” in Treasury Board’s Report to Parliament, *The Financial Administration Act: Responding to Non-Compliance*. In response to the question “What is mismanagement?” is the following:

Mismanagement could conceivably cover a range of actions from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies. In some cases, it could involve criminal behaviour such as theft, fraud, breach of trust, and conspiracy.⁷⁴

The idea that a “simple mistake” belongs to the same “range of actions” as “theft” or “fraud” seriously misrepresents not only the difference between laws and policies, but also the difference between such fundamentally distinct categories as incompetence and criminality. Individuals who are unable to follow directions or to perform the tasks that are assigned to them are not criminals; they are either unqualified or incompetent. Individuals who achieve the goals set out for them through fraud or breach of trust are criminals whether they are competent or not.

In Treasury Board’s Report to Parliament, the following passage addresses the problem of “good management” in the public sector:

“Good management” is not just the application of a series of rules and legal instruments, and “mismanagement” cannot simply be defined as a failure to apply management rules. There is no single instrument to guide public service managers: the rules and principles

by which they must operate are scattered in a variety of statutes, regulations authorized by those statutes, and, as described above, numerous policies and directives applicable to the internal administration of government.

Good public sector management requires sound judgment that is well grounded in ethics, values and principles and *a desire to uphold the rule of law and pursue the public interest*. Rules, whether regulations, policies, guidelines, or directives should be understood and respected. *Respect for the rules does not preclude changing them to enhance program delivery or creating new ones that respect fundamental values.*⁷⁵ [Emphasis added]

The word “rules” in the foregoing passage elides an essential difference between laws and regulations, on the one hand, and guidelines, policies, and directives, on the other. Upholding the rule of law and pursuing the public interest are the foundations upon which the project of public sector management rests. They are not the objects of public sector managerial judgment; they are the defining features of the difference between public sector management and private sector management.

Although both the public and private sector are subject to law, the attitude towards laws will almost certainly not be the same in both settings. Within the private sector it is not uncommon to find an antagonism towards regulators based upon the assumption that red tape and bureaucracy stand in the way of entrepreneurship and the making of profits. As the President of Treasury Board notes:

While it shares many . . . management challenges with the private sector, a different approach is needed in the public sector. Although conscious of the need for efficiency and value for money, the government is not driven by the profit motive.⁷⁶

The significance of this is difficult to overstate. Moreover, it isn't just that the Government isn't "driven by the profit motive." The simple, and inescapable, fact that the public sector includes the role of regulator prevents the wholesale transplantation of the ethos of private sector management into the public service. The same point has been made with reference to the legal basis of public administration by Ronald Moe and Robert Gilmour:

*The distinguishing characteristic of governmental management, contrasted to private management, is that the actions of government officials must have their basis in public law, not in the pecuniary interests of private entrepreneurs or in the fiduciary concerns of corporate managers.*⁷⁷ [Emphasis in original]

In support of their view of the cultural difference between the public and the private sector Moe and Gilmour cite numerous examples of private sector CEOs being

brought in to "reinvent" or "re-engineer" this program or that agency along private sector lines (and being) shocked to find that they must meticulously obey laws and regulations and are answerable to Congress for their actions.⁷⁸

The authors of the above statements were addressing the problem of introducing private sector management techniques into the public sector in the United States, but the principle is exactly the same in Canada.

This connection between the legal and the political lies at the very heart of a system of democratic government under the rule of law. The legal and the political are necessarily linked because it is only if the executive branch has met its constitutional obligation to inform Parliament of its activities that Parliament, and the people, will have the opportunity to hold the Government which controls the executive politically responsible. Political responsibility does not so much include acting in

accordance with the law as it presupposes that the Government has met its legal obligations, both constitutional and statutory. For this reason the concept of legal responsibility cannot simply be subsumed under the general heading of ministerial responsibility if this latter term is understood in an exclusively political sense. This is why it is accurate to say the Deputy Minister is not politically accountable to Parliament and inaccurate to say that the Deputy Minister is not legally accountable to Parliament.

It has been said that “[t]he main body of the law, which most public servants follow as a matter of normal practice, is an instrument for controlling their behaviour but not for holding them accountable.”⁷⁹ From this perspective, “legal accountability . . . is confined to that part of the law which lays down enforcement procedures.” The distinction between control and enforcement is an important one when looking at the *Financial Administration Act* because the primary purpose of the Act is to control and enforce accountability. In other words, the Act is intended, as an instrument of control, to make accountability “a matter of normal practice” for those dealing with public money while it is also intended, as an instrument of enforcement, to hold people accountable either for their abuse of their responsibilities or for their failure to account. Within the literature on regulatory policy, a distinction is drawn between two models of control and enforcement, “compliance systems” and “deterrence systems.” While the ultimate objective of each system is the same, namely, ensuring that individuals subject to rules actually follow the rules, the means of achieving this overall objective differ, and, indeed, the objectives of the systems themselves are often said to differ.⁸⁰ The important difference in the *Financial Administration Act* between those sections dealing with “Human Resource Management” and those dealing with “Liability” might be best understood as representing compliance and deterrence models of enforcement, respectively. For example, the system of human resource management in sections 11-13

is primarily concerned with ensuring compliance, while Part IX of the Act is more obviously directed at the objective of deterrence.

Albert J. Reiss has drawn the distinction between these two forms of “law enforcement” in the following terms:

The principal objective of a compliance law enforcement system is to secure conformity with law by means of ensuring compliance or by taking action to prevent potential law violations without the necessity to detect, process, and penalize violators. The principal objective of deterrent law enforcement systems is to secure conformity with law by detecting violations of law, determining who is responsible for their violation, and penalizing violators to deter violations in the future, either by those who are punished or by those who might do so were violators not punished.⁸¹

Reiss, like many authors dealing with regulatory policy, was addressing the problem of government regulation of non-governmental actors. The last 20 years, however, have seen an explosive growth of the problem of what is known as “regulation within government.” The “reinventing government” movement, widely identified with the work of David Osborne and Ted Gaebler,⁸² has had the seemingly paradoxical effect of significantly increasing the number of regulatory structures within government itself.⁸³ One of the most important reasons for this has been the growth of a variety of organizations that cross the supposed divide between the public and the private sector. Although it is still possible to draw distinctions between public and private actors at each end of the spectrum, the area in the middle has become increasingly blurred by the creation of a number of bodies that are not easily categorized as public or private. Matters are further confused by the fact that the terms “private” and “public” are often little more than code words for “profit” and “not for profit,” respectively.

Compliance and deterrence models of regulation can, with the appropriate adjustments, be applied to the regulation of government actors, private actors, and to those organizations and agencies that lie somewhere in between. The problem of regulating government actors, “regulation inside government,” has been addressed by Christopher Hood and others who raise the provocative notion of the existence of a “regulatory state within the state.” According to Hood et al., regulation inside Government

is conceived as the range of ways in which the activities of public bureaucracies are subject to influence from other public agencies that come between the orthodox constitutional checking mechanisms . . . [the courts and the members of the legislature], operate at arm’s length from the direct line of command and are endowed with some sort of authority over their charges.⁸⁴

The authors see the emergence of the need for such regulation as a result of the loss of what Hecl and Wildavsky famously called the “village life” of the senior civil service.⁸⁵ In their discussion of this older culture of “mutuality,” the authors note that in the United Kingdom “there was traditionally no statute for the public service, which for the most part was regulated under the Crown’s prerogative power.”⁸⁶ Viewed from this perspective the *Financial Administration Act*, like its predecessors, may be seen as an Act whereby the legislature meets its constitutional obligation to oversee the spending of public money by granting to the Crown the authority to exercise the power of regulation exercised in the United Kingdom without the aid of a statute.⁸⁷ This authority is no longer a matter of prerogative on the part of the Crown; it is an obligation imposed upon the Crown by the legislature.

7 Conclusion

Although the *Financial Administration Act* is not an example of what Hood means by regulation inside Government, it addresses the same problem insofar as it creates the framework within which the executive is given the statutory authority to regulate its own financial affairs. That said, Treasury Board and deputy ministers are charged under the Act with tasks very much like those that might be defined as intra-government regulation. However, as with all grants of statutory authority, this one brings with it the obligation to account for the exercise of that authority. This obligation is framed in terms of the more “orthodox constitutional checking mechanisms.” The Act is a statutory instrument whose purpose, pursued under constitutional authority, is to subject the executive branch to the control of the legislature with regard to its financial affairs. In pursuit of this goal, the Act includes both compliance and deterrence systems of control. Indeed, one of the more striking features of the *Financial Administration Act* is the difference between the penalties set out in section 80 (deterrence) and the wording of guidelines and policy documents that deal with discipline and misconduct (compliance).

As noted earlier, the *Financial Administration Act* applies to three broad groups of individuals. Roughly speaking, these groups may be defined as members of the public administration, officers and employees of Crown corporations, and all of those working for the Government on a variety of contracts for services. Part IX of the Act sets out penalties for violations of the Act, as well as for various forms of corruption, offences similar to those found in the *Criminal Code*.⁸⁸ Section 80 applies to anyone, whether public servant or not, who is involved in any financial transaction involving public money. The scope of the section is of particular importance when one looks at section 80(e), for example, the only offence that does not have a direct counterpart in the *Criminal Code*. The section reads:

- (80) Every officer or person acting in any office or employment connected with the collection, management or disbursement of public money who . . .
- (e) having knowledge or information of the contravention of this Act or the regulations or any revenue law of Canada by any person, or of fraud committed by any person against Her Majesty, under this Act or the regulations or any revenue law of Canada, fails to report, in writing, that knowledge or information to a superior officer, . . . is guilty of an indictable offence and liable on conviction to a fine not exceeding five thousand dollars and to imprisonment for a term not exceeding five years.

This section has the effect of making it a serious offence for anyone not to inform on anyone else when the first party has knowledge or information regarding wrongdoing under the Act. The sanctions prescribed under this section of the Act are obviously dramatically at odds with the types of penalties that would be attached to disciplinary offences. While section 80 applies to individuals in all of these groups, other sections of the Act are far more restricted in their application, applying only to members of the public service or to Crown corporations. However, as the presence of section 80 indicates, the basic principles remain the same in each case. If the primary purpose of the Act is to ensure compliance with requirements for accountability, then the emphasis in the Act, as well as in any regulations, directives or guidelines issued under the authority of the Act, should be on defining and implementing both the duty to account and the duty to require an account. As argued earlier, the latter obligation is at least as important as the former. Since the scope of the Act is such that it covers every possible financial transaction involving public money, what is necessary is to ensure that all those in receipt of such money are made aware that it carries with it the legally enforceable obligation to account for it.

Given the remark by Norman Ward cited earlier regarding the “lucidity” of the Act, the following comment from the testimony before the Commission by the Honourable Ralph Goodale is particularly interesting. Replying to a question by Mr. Fournier, regarding possible violations of the Act, Mr. Goodale stated:

There were ultimately some disciplinary proceedings launched but I have to tell you, Mr. Fournier, that I was pretty frustrated with the *Financial Administration Act*. It details responsibilities that officials are supposed to exercise and it describes a range of penalties that may effectively be available if those duties and responsibilities are not properly discharged.

But the processes of accessing the disciplinary measures under the *Financial Administration Act* are almost impenetrable. So I, quite frankly, don't think that that provision of that piece of legislation is as effective as it should be.⁸⁹

In its recent report, *The Financial Administration Act: Responding to Non-Compliance*, the Treasury Board Secretariat would appear to agree with both Mr. Ward and Mr. Goodale. In the concluding section of the report it is noted that:

The principles behind the legislative and administrative frameworks are sound. The difficulty arises from the accumulation of rules and policies, etc. This complexity contributes to confusion and errors.⁹⁰

Since the recommendations from this report were incorporated into *Management in the Government of Canada*, it is not surprising to find in the next paragraph a definition of “mismanagement” that places errors and mistakes on a continuum with theft and fraud. It is of the very nature of theft and fraud that they are intentional while it is of the essence of errors and mistakes that they are not. This difference is reflected in the

Act by the separation of sections dealing with Human Resource Management from those dealing with criminal and civil liability.

In 2003, the sections of the FAA dealing with Human Resources Management were significantly amended by the *Public Service Modernization Act*, changes which came into effect on April 1, 2005. Under the newly amended Act the relevant authority of Treasury Board is set out in sections 11.1(1)(f) and 11.1(1)(h):

- (f) establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads in the core public administration and the reporting by those deputy heads in respect of the exercise of those powers;
- (h) establish policies or issue directives respecting the disclosure by persons employed in the public service of information concerning wrongdoing in the public service and the protection from reprisal of persons who disclose such information in accordance with those policies or directives;

Section 12(1) of the Act sets out the powers assigned to deputy heads, the most important of which for present purposes is to be found in section 12(1)(c):

- (c) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties;

Section 12.2(1) authorizes the deputy head to delegate “any of the powers or functions in relation to human resource management” while section 12.2(2) authorizes anyone to whom such powers and functions have been delegated to delegate them “to any other person.” In principle, at least, the power to “establish standards of discipline and set penalties” could be delegated to anyone, as could the power to enforce those standards and impose penalties.

Following the coming into force of the amendments to the Act in April of this year, Treasury Board exercised its discretion under section 11.1(1)(f) by issuing *Guidelines for Discipline*, to replace guidelines that had been issued by Treasury Board under section 11(2)(f) of the preceding version of the Act. Under the heading “Purpose” in the new Guidelines it is pointed out that:

The nature of discipline is corrective, rather than punitive, and its purpose is to motivate employees to accept those rules and standards of conduct which are desirable or necessary to achieve the goals and objectives of the organization.⁹¹

This marks a subtle, but significant, change from the wording of the earlier version which read:

The purpose of corrective disciplinary action is to motivate employees to accept those rules and standards of conduct which are desirable or necessary to achieve the goals and objectives of the organization.⁹²

Both versions of the statement of purpose clearly regard disciplinary proceedings as according more with the compliance than the deterrence model. However, the change from “corrective disciplinary action” to “the nature of discipline is corrective, rather than punitive” is a subtle but significant shift in emphasis. The reference to “the goals and objectives of the organization” in both versions of the Guidelines is important because the organization in question is one charged with implementing public initiatives with public money. The pursuit of these goals and objectives is constrained not only by the limits imposed by the statutory grant of the authority to spend but also by the constitutional obligation to account for such spending. In this context the phrase “motiv[at]ing employees to accept . . . rules and standards of conduct” tends to obscure the fact that the offices they hold are themselves defined by rules. As part of the definition of the office, these rules are intended

to limit the behaviour of the occupant. Ensuring that the occupants of offices comply with these rules is part of the content of ministerial responsibility.

On the basis of the foregoing, it is possible to conclude that the legal content of ministerial responsibility in Canada extends beyond the fact that ministers are required to obey the law and to exercise their authority in compliance with statutes to include the constitutional obligation to administer their departments, whether personally, collectively, or through delegated authority, in accordance with the requirements of sections 53 and 54 of the *Constitution Act, 1867*. While government policy documents refer to the legal basis of ministerial responsibility, this foundation is often obscured by references to its conventional or political content. It would be going too far to suggest that the conventional and political can be neatly separated from the legal in each and every case. Nonetheless, it is possible to argue that even the most broadly defined grant of discretion still includes the non-discretionary obligation to account. The obligation to account is grounded in the Constitution. The obligation to require an account is also grounded in the Constitution.

It is true that the law can be used to compel executive accountability as well as to protect those public servants who challenge the truth of the Government's account. However, court orders, applications for judicial review, and criminal prosecutions are neither the most effective nor the most efficient means of holding the executive to account, although all must be available for use in those cases where there are grounds to believe that the executive has breached its legal obligations. The goal of ensuring accountability is best pursued through clearly written statutes, regulations and guidelines that set out the legal basis of the obligations of public servants because it is the legal foundation of their authority that distinguishes them from actors in the private sector.

Endnotes

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- ¹ The relationship is captured in the well-known phrase from the Preamble to the *Constitution Act, 1867*, where it is stated that Canada is to have “a constitution similar in principle to that of the United Kingdom.”
- ² Walter Bagehot, *The English Constitution*, p. 11.
- ³ Brian Harrison, *The Transformation of British Politics, 1860-1995*, p. 44.
- ⁴ By clearly stating that “the Constitution of Canada is the supreme law of Canada,” section 52 of the *Constitution Act, 1982*, made explicit the consequence of having a written constitution, a consequence that had been implicit since 1867.
- ⁵ It is a matter of some significance that in its first Charter decision, *Law Society of Upper Canada v. Skapinker*, [1984] 1 SCR 357, the Supreme Court cited *Marbury v. Madison* (1803), 5 U.S. (1 Cranch), the well-known United States Supreme Court judgment in which it was argued that judicial review of legislation was a consequence of a written constitution.
- ⁶ *Thorson v. Attorney General of Canada*, [1975] 1 SCR 138 at 151.
- ⁷ [1985] 2 SCR 455 at para. 39.
- ⁸ [1991] 2 SCR 525 at 547.
- ⁹ [1999] 3 SCR 199 at para. 54, Major J., for the Court.
- ¹⁰ Quoted in Sir Stephen Sedley, “The Constitution in the Twenty-First Century,” in Rt Hon Lord Nolan and Sir Stephen Sedley, *The Making and Remaking of the British Constitution*, p. 82.
- ¹¹ Sedley, “The Constitution,” pp. 83-84.
- ¹² *Responsibility in the Constitution*, http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=constitution/ch01_e.htm.
- ¹³ A. V. Dicey, *Introduction to the Law of the Constitution*, p. 325.
- ¹⁴ The Government of Canada clearly recognizes that “ministerial responsibility in Canada, within the British Parliamentary system, is based on ministers’ individual and collective responsibility to Parliament.” Mr. Sylvain Lussier, Oral Submission of the Attorney General of Canada, June 17, 2005, p. 25664, lines 16-18.
- ¹⁵ *Responsibility in the Constitution*.
- ¹⁶ In Nolan and Sedley, *The Making and Remaking of the British Constitution*, p. 106.
- ¹⁷ Eugene A. Forsey, “The Courts and the Conventions of the Constitution,” p. 12.
- ¹⁸ *Ibid.*
- ¹⁹ Adams argued that the earlier form of ministerial responsibility held the monarch to account through the ministers as a means of subjecting the Crown to the rule of law. The later, modern form subjected the ministers and the Crown to the new sovereign, the Parliament. George Burton Adams, *Magna Carta and the Responsible Ministry*, p. 760.
- ²⁰ The Government Legal Services Branch in the United Kingdom publishes “A Guide to Judicial Review for UK Government Administrators,” entitled *The Judge over Your Shoulder*. The purpose of the guide is “to give administrators at all levels an introduction to the present state of the law and to highlight the principles of good administration which the courts will expect us to apply.”
- ²¹ Adam Tomkins, *Public Law*, pp. 33-34.

- ²² *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 247-48.
- ²³ *Edwards v. Attorney General for Canada*, [1929] All ER Rep. 571 at 577.
- ²⁴ *Constitution Act, 1867* (UK) 30 & 31 Vict., c. 3.
- ²⁵ *Eurig Estate (Re)*, [1998] 2 SCR 565 at para. 34. Major J. Justice Major's interpretation of section 53 has been upheld by unanimous courts in two subsequent judgments. See *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para. 19, Gonthier J.; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 SCR 470 at para. 71, Iacobucci J.
- ²⁶ The idea that section 53 merely operates to restrict rather than to require has been rejected by the courts.
- ²⁷ "That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." *Bill of Rights of 1689* (Eng.), 1 William & Mary sections 2, c. 2.
- ²⁸ Section 53 is not the constitutional version of the provision from the *English Bill of Rights*. While it has been argued that the *English Bill of Rights* entered the Canadian Constitution through the wording of the Preamble, the courts have not uniformly endorsed this idea.
- ²⁹ *Reference re: Agricultural Products Marketing Act, 1970 (Canada)*, [1978] 2 SCR at 1229.
- ³⁰ *Reference re: Agricultural Products Marketing Act, 1970 (Canada)*, [1978] 2 SCR at 1227.
- ³¹ [1991] 2 SCR 525 at 547.
- ³² In practice, compliance with this principle takes different forms. For a recent discussion see Joan Small, "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle." It is important to bear in mind that this paper was written before the Court's decision in *Re Eurig Estate*.
- ³³ *Financial Administration Act*, RSC 1985, c. F—11.
- ³⁴ Royal Commission on Government Organisations, *Final Report* (Glassco Report); Royal Commission on Financial Management and Accountability, *Final Report* (Lambert Report).
- ³⁵ *Public Service Modernization Act*, 2003 c. 22.
- ³⁶ Ward, Norman, *The Public Purse: A Study in Canadian Democracy*, p. 282.
- ³⁷ Ward, *Public Purse*, pp. 212-13.
- ³⁸ The authors were commenting on testimony by R. B. Bryce before the Public Accounts Committee. Bryce had commented that the act would "increase" or "clarify" the powers of Treasury Board. In the context, the authors' choice of the term "clarify" is clearly intended to support their view that the powers of Treasury Board had already been substantially increased by developments that took place before the passing of the Act. Hodgetts et al., *The Biography of an Institution*, p. 226.
- ³⁹ Ward, *Public Purse*, pp. 211-12.
- ⁴⁰ This problem is not unique to Canada. As Vernon Bogdanor has noted with regard to the Government of the United Kingdom "the doctrine of centralized government (has been) espoused by every administration since the (Second World) war." Vernon Bogdanor, *Politics and the Constitution: Essays on British Government*, p. 43.
- ⁴¹ Both earlier versions of the Act had four schedules, although their names differed. In the 1951 version, Schedules A to D were headed Departments, Department (Corporation), Agency Corporations, and Proprietary Corporations, respectively. The 1984 Act included Schedules I to III with two parts to Schedule III. These were headed Departments, Departmental Corporations, Crown Corporations (Part I) and Crown Corporations (Part II).

- ⁴² The “core public administration” comprises the executive branch of government in the narrowest, some might say truest, sense of the term. According to Lord Nolan, for example, the narrow definition of the Crown “holds that the executive is simply the Crown, represented by practical purposes by ministers of the Crown, and their servants, the civil service.” *The Making and Renaking of the British Constitution*, p. 34.
- ⁴³ The *Public Service Modernization Act* replaced the expressions “public service of Canada” and “Public Service” by the expressions “federal public administration” and “public service,” respectively. These changes “are to be considered as terminology changes only and are not to be held to operate as new law.” *Public Service Modernization Act*, 2003 c. 22, s. 226.
- ⁴⁴ Substantial amendments to this part of the Act took effect on April 1, 2005. The significance of these amendments will be considered later in this paper.
- ⁴⁵ This fact also creates the possibility of multiple proceedings being initiated against the same individual. For a discussion of this problem in a different, although in many ways formally similar, context see: Caroline Murdoch and Joan Brockman, “Who’s on First? Disciplinary Proceedings by Self-Regulating Professions and other Agencies for ‘Criminal’ Behaviour.”
- ⁴⁶ Gerald E. Caiden, “The Problem of Ensuring the Public Accountability of Public Officials,” in *Public Service Accountability: A Comparative Perspective*, p. 25.
- ⁴⁷ Richard Mulgan, “‘Accountability’: An Ever-Expanding Concept,” p. 555.
- ⁴⁸ Barbara S. Romzek and Melvin J. Dubnick, “Accountability in the Public Sector: Lessons from the Challenger Tragedy.”
- ⁴⁹ Ezekiel J. Emanuel and Linda L. Emanuel, “What Is Accountability in Health Care?”
- ⁵⁰ In *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, which involved an attempt by the Auditor General to gain access to documents protected under the claim of Cabinet confidentiality, the Supreme Court refused to expand the statutory powers of the Auditor General beyond those that were explicitly granted in the *Auditor General Act*. Writing for Court, Chief Justice Dickson noted that “[t]he appropriateness of an enlarged mandate for the Auditor General is for Parliament, not the courts, to decide,” p. 109.
- ⁵¹ *Roncarelli v. Duplessis*, [1959] SCR 121 at 142; *Reference re Manitoba Language Rights*, [1985] 1 SCR, 721 at 748; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] SCC 49 at para. 57.
- ⁵² Justice Rand’s oft-quoted remark that “in public regulation of this sort there is no such thing as absolute or untrammelled ‘discretion’” was made in reference to the actions of then Premier and Attorney General of Quebec, Maurice Duplessis. *Roncarelli v. Duplessis*, [1959] SCR 121 at 140.
- ⁵³ *Results for Canadians A Management Framework for the Government of Canada*.
- ⁵⁴ *Results for Canadians: A Management Framework for the Government of Canada*, p. 16.
- ⁵⁵ Although it is common to note that the Nuremberg principle, following orders is never a defence to legal liability, applies to this relationship, in practice it is often difficult for an employee to distinguish between a superior’s legitimate exercise of discretion and an illegal act. In other words, one must not only know the legal boundaries of one’s own office, one must be aware of the boundaries of the offices of those with authority over one. This reservation does not apply, of course, to the types of egregious violations that were the subject of the original Nuremberg trials.
- ⁵⁶ This is, of course, the domain of the whistle-blower, a subject that lies outside the present study.
- ⁵⁷ Under s. 64 the Public Accounts submitted each year to the House of Commons must “include the opinion of the Auditor General.”
- ⁵⁸ I use the word “ideological” here to draw attention to the seemingly obvious, but sometimes overlooked in our post-ideological age, fact that political parties in Canada are ideologically diverse and that their platforms and policy agendas reflect ideological differences.

- ⁵⁹ Commission of Inquiry into the Sponsorship Program and Advertising Activities, Transcripts vol. 62 (January 25, 2005), pp. 10881-10882.
- ⁶⁰ *Governing Responsibly: A Guide for Ministers and Ministers of State*.
- ⁶¹ *Governing Responsibly*, pp. 1-2.
- ⁶² *Governing Responsibly*, p. 2.
- ⁶³ *Governing Responsibly*, p. 3.
- ⁶⁴ *Review of the Responsibilities and Accountabilities of Ministers and Senior Officials*, p. 4.
- ⁶⁵ *Management in the Government of Canada: A Commitment to Continuous Improvement*, p. 9.
- ⁶⁶ *Management in the Government of Canada*, p. 9.
- ⁶⁷ *Management in the Government of Canada*, pp. 9-10.
- ⁶⁸ *Guidance for Deputy Ministers*,
http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=gdm-gsm/gdm-gsm_doc_e.htm.
- ⁶⁹ *Guidance for Deputy Ministers*.
- ⁷⁰ "A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the government." *Fraser v. Canada (Public Service Staff Relations Board)*, at para. 43.
- ⁷¹ "As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time." *Fraser*, at para. 41.
- ⁷² *Reference re: Alberta Legislation*, [1938] SCR 100.
- ⁷³ *Management in the Government of Canada*, p. 7.
- ⁷⁴ *The Financial Administration Act: Responding to Non-Compliance*, p. 9.
- ⁷⁵ *The Financial Administration Act: Responding to Non-Compliance*, p. 9.
- ⁷⁶ *Management in the Government of Canada*, p. 3.
- ⁷⁷ Ronald C. Moe and Robert S. Gilmour, "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law," p. 138.
- ⁷⁸ Moe and Gilmore, "Rediscovering Principles of Public Administration."
- ⁷⁹ Mulgan, "Accountability," p. 564.
- ⁸⁰ For example, a compliance model may be directed towards reducing systemic sources of problems without seeking to assign liability to any particular individual, while a deterrence system may be more concerned with identifying and blaming named individuals. It could be argued that a Commission of Inquiry, such as the present one, fits the compliance model while the civil and criminal actions against individuals alleged to have engaged in wrongdoing fit the deterrence model.
- ⁸¹ Reiss, *Enforcing Regulation*, p. 25.
- ⁸² David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*.
- ⁸³ To cite one example, Kieran Walshe, in "The Rise of Regulation in the NHS," has shown that during a time of government cutbacks the number of regulatory bodies in the National Health Service in the United Kingdom actually increased dramatically.
- ⁸⁴ Christopher Hood et al., *Regulation inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*, p. 8.

- ⁸⁵ Hood et al., *Regulation inside Government*, 71. The phrase has also been applied to the Canadian civil service. For a recent example, see Donald J. Savoie, *Breaking the Bargain: Public Servants, Ministers, and Parliament*, pp. 207-208.
- ⁸⁶ Hood et al., *Regulation inside Government*, p. 72.
- ⁸⁷ In a memorandum submitted to the Standing Committee on Public Administration of the UK Parliament in January 1999, N.D. Lewis drew attention to the need in the United Kingdom for a statute similar to the *Administrative Procedure Act* in the United States. While the American statute is much broader in scope than the *Financial Administration Act*, it is concerned with the problem of accountability. <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpublicadm/209/209m113>
- ⁸⁸ *Criminal Code*, RSC 1985, c. C—46, ss. 119-22.
- ⁸⁹ It is reasonable to assume that by “that provision” Mr. Goodale was referring to section 11(2)(f) of the Act, as it was worded prior to April 1, 2005, because Part IX of the Act, entitled “Civil Liability and Offences,” has nothing to do with matters of discipline. Commission of Inquiry into the Sponsorship Program and Advertising Activities, Transcripts vol. 128 (May 27, 2005), pp. 24116-24117 (OE).
- ⁹⁰ *The Financial Administration Act: Responding to Non-compliance*, p. 49.
- ⁹¹ *Guidelines for Discipline*, Effective April 1, 2005.
- ⁹² *Guidelines for Discipline*, Archived Version.

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