

## **WHAT HAS BEEN DONE**

The Commission's mandate directs it to make recommendations that take into account the initiatives announced by the Government of Canada on February 10, 2004. The Government has, since that date, tabled several documents and introduced a number of policies designed to strengthen responsibility and accountability mechanisms in government. Some of these measures deal squarely with issues that the Commission has been asked to review, and it is not possible to make recommendations in these areas without first reviewing these initiatives.

Nothing would please me more than to write only one simple sentence for this second Report: "The Government has done everything that needs to be done, and there is nothing more to add." Although the recently tabled reports are generally desirable, along with the measures introduced both to strengthen responsibility and accountability and to improve management practices, more still needs to be done. The reforms do not go far enough in restoring accountability and in rebalancing the relationship between Parliament and the Government.

## Government Initiatives

On February 10, 2004, the day the Government announced its decision to establish this Commission of Inquiry, it also unveiled a series of measures in response to the Auditor General's Report examining the Government's sponsorship and advertising activities.<sup>1</sup> Two months earlier, it had decided to eliminate the Sponsorship Program and to disband Communication Canada, the agency that had been designated in 2002 to administer the program.<sup>2</sup> In addition to the measures announced on February 10, the Government took steps shortly after the House resumed its sittings to activate the Public Accounts Committee of the House of Commons and to enable it to begin work as quickly as possible in reviewing the Auditor General's Report. It also appointed a Special Counsel for financial recovery and provided him with a mandate "to pursue all possible avenues, including civil litigation, to recover funds that were improperly received."<sup>3</sup>

## Changes to Crown Corporations

At the same time, the Government, led by the President of the Treasury Board, announced a review of the governance of Crown Corporations. This review was designed to strengthen the audit committees, to examine the possible extension of the access to information legislation to all of them, to take stock of the current accountability framework, and to ensure the consistent application of the *Financial Administration Act* provisions to all Crown Corporations.<sup>4</sup>

The Treasury Board tabled the report on Crown Corporations on February 17, 2005.<sup>5</sup> It contained 31 "measures," or recommendations, dealing with a host of issues ranging from access to information legislation to broad governance issues. The Government proposed to introduce legislation to ensure a split in the positions of the Chief Executive Officer (CEO) and the Chair of the Board for Crown Corporations; to review the appointment of public servants to the

boards of Crown Corporations so as to restrict or eliminate their participation; and to take steps to require that the CEO be the sole representative of management to the Board of Directors. It also announced the Government's intention to amend the relevant legislation to allow the appointment of the Auditor General of Canada as the external or joint auditor for all Crown Corporations and to provide its office with the authority to conduct special examinations in all Crown Corporations. With respect to the appointment process, the report says:

The Government will obtain references on all candidates for appointment as director or chair. In the case of CEOs, the Board's nominating committee will be required to do the same for any candidate it submits to the Government for appointment. In addition, the government will continue to conduct background checks and ensure that candidates are not in a conflict of interest, prior to making any appointment . . . [and will] work closely with parliamentary committees to ensure a workable appointment review process that will not unduly delay necessary appointments.<sup>6</sup>

The report reveals the Government's intentions, in the interest of greater transparency, to ensure that its Main Estimates document will clearly outline the funds allocated to each Crown Corporation receiving parliamentary appropriations. It urges the Government to extend, by Order in Council, the *Access to Information Act* to 10 of the 18 Crown Corporations that have, until now, been outside the ambit of the Act. It recommends that the Act not be extended to seven other Crown Corporations until the Government has introduced mechanisms to protect commercially sensitive information, and that the Canada Pension Plan Investment Board remain excluded "at this time" because of its federal-provincial structure.<sup>7</sup> It also calls on the Government to propose an amendment to the legislation to protect journalistic sources.

The report was generally well received by the media and by other interested parties. Members of the Commission's Advisory Committee have indicated their general support for the report's findings. Accordingly, the Commission does not propose to challenge in any fundamental fashion the findings and measures presented in the report. That said, there are two issues that merit further reflection: the appointment of members of the Board of Directors and the appointment of the CEO. These issues will be dealt with later in this Report.

### Proposed Reforms to the *Financial Administration Act*

The Government also committed to produce a report, by September 30, 2004, on the proposed changes to the *Financial Administration Act*, and a second report on ways to improve the clarity and understanding of the respective responsibilities and accountabilities of Ministers and public servants and of the interface between them.<sup>8</sup> It tabled both reports on October 25, 2005.

The first report, on the *Financial Administration Act*, focuses on non-compliance, mismanagement, disciplinary and administrative sanctions, criminal sanctions, the recovery of lost funds, and fostering better compliance with management rules.<sup>9</sup> The review concludes that the legislative and administrative frameworks available to deal with mismanagement are sound. The problem lies with the "accumulation of rules and policies."<sup>10</sup> The review calls for "consistency" in dealing with mismanagement and argues that accountability in this area "must start at the top."<sup>11</sup> That is the only way, the Government insists, that a shift in values and culture can take place. Thus, the Government takes the position that if there is something lacking in this area, it is not the existing legislative and administrative frameworks but, rather, leadership at the top, a willingness to make tough management decisions, and an ability to "communicate effectively in order to enhance confidence in the Government's compliance framework."<sup>12</sup>

## Clarifying Responsibilities and Accountability

The second report of the Treasury Board to Parliament, entitled *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials*, focuses on the doctrine and practice of ministerial responsibility and the workings of Parliament.<sup>13</sup> It states that, since December 2003, a number of measures have been introduced to strengthen accountability, including a shift to clarifying better management expectations and measures to enhance financial management.

The report explains the doctrine of ministerial responsibility. It defines key concepts underpinning the doctrine, notably *responsibility*, *accountability* and *answerability*. It is worth repeating here the definitions of these terms because they constitute the Government's thinking, which has direct relevance to this Report:

- *Responsibility*, in addition to referring to the constitutional relationship between ministers and the House under responsible government, also refers to the sphere in which a public office holder (elected or unelected) can act, which is defined by the specific authority given to that office holder by law or delegation.
- *Accountability* is the means of explaining and enforcing responsibility. It involves rendering an account of how responsibilities have been carried out; taking corrective action and fixing any problems that have been identified; and, depending on the circumstances, accepting personal consequences if the matter is attributable to the office holder's own action or inaction.
- *Answerability* refers to a duty to inform and explain. It is narrower in scope than accountability in that it entails neither the responsibility to take action nor the personal consequences associated with accountability.<sup>14</sup>

The Government's report also deals with the role of Parliament in assigning responsibility and in holding the Government to account. It

observes that while the Prime Minister is responsible for organizing the Cabinet, Parliament plays an important role in the assignment of ministerial responsibility through departmental acts. In addition, it notes that Parliament approved the *Financial Administration Act*, a basic document that guides the work of public servants and provides the cornerstone of the legal framework for financial management.

The report reaffirms the Government's long-standing view on ministerial responsibility. It is worth quoting at some length the Government's position:

A Minister's accountability to Parliament for his or her department means that all actions of the department—whether pertaining to policy or administration, whether taken by the Minister personally or by unelected officials under the Minister's authority or under authorities vested in those officials directly by statute are considered to be those of the Minister responsible. If Parliament has questions or concerns, the Minister must address them, providing whatever information and explanations are necessary and appropriate. (This means that accountability always includes answerability.) If something has gone wrong, the Minister must undertake before Parliament to see that it is corrected. And, depending on the circumstances, if the problem could have been avoided had the Minister acted differently, the Minister may be required to accept personal consequences.<sup>15</sup>

The doctrine does not require that Ministers be aware of everything that takes place in their department. It goes on to state, however, that “while responsibilities can, and indeed often must, be delegated, accountability cannot,” and that “accountability and blame are different.”<sup>16</sup>

The report states that “public servants as such have no constitutional identity independent of their Minister.”<sup>17</sup> Thus, public servants, including

Deputy Ministers, always appear before parliamentary committees on behalf of their Ministers. Deputy Ministers, the report makes clear, are each accountable to their own Minister, and, ultimately, to the Prime Minister through the Clerk of the Privy Council, who is also Secretary to the Cabinet. Even though Parliament has enacted statutory obligations for Deputy Ministers in certain areas, that duty alone does not give rise to an accountability relationship between Deputy Ministers and Parliament. The report explains that Parliament establishes many statutory obligations, but that does not give Parliament the authority to oversee compliance or to enforce the law.

The Government insists that there are many means to hold Ministers accountable. It points to Parliament's control of the public purse, its exclusive right to authorize both taxation and government spending, and the ability to audit the books and to review proposed legislation. It underlines the importance of Question Period, describing it as, arguably, Parliament's "most powerful instrument of accountability."<sup>18</sup> The report also refers to the role of parliamentary committees and the Office of the Auditor General in holding Ministers to account.

The report addresses a number of issues relating to the machinery of government. It describes the Privy Council Office as "the prime minister's department" and states that the Clerk of the Privy Council, in addition "to being the Secretary to the Cabinet and head of the public service, is the prime minister's deputy minister."<sup>19</sup>

The Government outlines the various ways Ministers can influence their departments by quoting a respected former Clerk, Gordon Osbaldeston:

[S]etting the "general direction" for priorities, both policy and administrative, and the "specific direction" in the department for key priorities; reviewing and signing Cabinet documents, submissions to the Treasury Board, and changes to regulations that

give effect to the direction they have given; approving public announcements and correspondence; following up with departmental officials, through the deputy minister, on specific issues identified by citizens, parliamentarians, and other ministers; and communicating with other government players on all matters of importance affecting the department, Parliament, the public, and Cabinet.<sup>20</sup>

The report maintains that the lines of communication between Ministers and their departments must be “clear and consistent,” and adds:

As a general practice, communications between the minister and his or her office, and departmental officials should be conducted through the deputy minister’s office. Although circumstances will arise in which this is not practical or in which other approaches are appropriate, it will always be important for ministers and deputy ministers to ensure that appropriate controls are in place so that they receive the information they need to fulfil their respective responsibilities.<sup>21</sup>

The role of exempt staff, the Government argues, is to provide strategic and partisan advice to the Minister. Exempt staff members, however, are not part of the executive and are labelled “exempt” precisely because they are exempt from the *Financial Administration Act* and the *Public Service Employment Act*. As a result, exempt staff members have “no authority to give direction to public servants.”<sup>22</sup>

The operating context has grown considerably over the past 50 years. The Government of Canada now spends about \$200 billion annually, has 200 departments and agencies, and employs 450,000 people delivering over 1,600 programs and services. The Government document points to “horizontality,” or the involvement of multiple departments and agencies in a policy or program, and the complexity surrounding policy-making and departmental operations as new challenges for accountability.<sup>23</sup>



The report reviews in some detail the role of the Treasury Board in the accountability regime. It points out that, under the *Financial Administration Act*, the Treasury Board has authority “over all matters relating to administrative policy, financial management, expenditure plans, programs of departments, personnel management, and other matters relating to the prudent and effective use of public resources.”<sup>24</sup> Treasury Board performs this role on the basis of its authority to approve management policies, allocate financial resources through the Estimates, hold departments to account for the way they allocate resources, oversee the performance of a department and act as the principal employer of the public service.

The Treasury Board and its Secretariat have a duty to “ensure that expectations of accountability, legality, and propriety are clear.”<sup>25</sup> Although Secretariat staff members do not become involved in the day-to-day management of departments, the Board can reduce the delegated authorities to departments, place restrictions on financial allotments, and even intervene directly in the management of the department.

## New Management Reforms

The President of the Treasury Board tabled a document entitled *Management in the Government of Canada: A Commitment to Continuous Improvement* on October 25, 2005, unveiling a series of management reforms.<sup>26</sup> The measures are designed to improve management practices and strengthen accountability. The previous day he had announced a \$35 million per year investment in “new learning” for a number of public servants, including specialists in the fields of finance, audit and procurement.<sup>27</sup>

The management reform document commits the Government, beginning in the fall of 2006, to report annually to Parliament on the state of “government-wide management.”<sup>28</sup> It also commits to consulting parliamentarians to strengthen performance information. It declares

that “ministers will attend more parliamentary committee meetings” to account for management performance.<sup>29</sup> It reports that Ministers and their exempt staff will receive a thorough briefing on the requirements of ministerial accountability upon taking office. The Government will revise guidelines to make clear the appropriate roles and responsibilities of political staff and provide detailed briefings to senior exempt staff to ensure that they are aware of “their roles and responsibilities and the boundaries with the non-partisan Public Service.”<sup>30</sup>

The document has a great deal to say about the relationship between Deputy Ministers and Ministers. It calls for “regular accountability sessions” between them on management matters and commits to an amendment to the *Financial Administration Act* to provide greater explicit authority to the Deputy Minister for management responsibilities, including signing the accounts of the organization and the signing of new management agreements between Deputy Ministers and their Ministers, based on a department’s plans and priorities.<sup>31</sup>

The Treasury Board document also unveils steps to strengthen management control systems. The Government intends to designate a senior executive in each department and agency as the Chief Audit Executive and to initiate steps to recruit and train individuals for these new positions on a priority basis. It is also taking steps to protect the integrity of internal audit committees by making them more independent of management. The Government clarifies this commitment by stating:

Within three years of the effective date of the policy, all audit committees will have a majority of members coming from outside the Public Service, with the remainder coming from outside the department in question - with the exception of the Deputy Minister, who may chair the audit committee or be an ex-officio member.<sup>32</sup>

It also establishes a direct link to the Minister by adding:

It is expected that the Minister will meet annually, in camera, with the Internal Audit Committee for assurance regarding risk management, control, and audit systems. It is also expected that the Deputy Minister will routinely be briefed by the Audit Committee on its assurance findings.<sup>33</sup>

The reforms of the internal audit process come on the heels of other attempts to strengthen financial management. In 2004 the Office of the Comptroller General established a model to put a Chief Financial Officer (CFO) in every department. This official will have a mandate to review and approve new spending proposals for all initiatives involving large financial commitments.

The document endorses the Treasury Board's Management Accountability Framework (MAF), which was introduced in 2003. The MAF calls on departments to demonstrate satisfactory performance by employing some 40 indicators and 150 measures of management practice.

The Treasury Board document also unveils plans to deal more effectively with wrongdoing and unsatisfactory performance and to strengthen transparency. On wrongdoing, it proposes to establish a quick-action investigation team to ensure prompt investigation and disciplinary actions. It proposes to introduce enhanced training, the publication of disciplinary guides, and a more rigorous process to prevent re-employment or contracting with individuals terminated by the public service. It announces its intention to publish, by the end of 2006, the aggregate number of cases of serious wrongdoing, along with the responses to them. With respect to unsatisfactory performance, it announces that it will strengthen the link between compensation and tangible results through management performance agreements. The new *Public Service Labour Relations Act*<sup>34</sup>

gives more weight to the Deputy Minister's opinion in cases of unsatisfactory performance, and promises that Treasury Board policies will clarify still further its expectations for compliance.

On increasing transparency, the Government notes that the *Access to Information Act* was extended to 10 additional Crown Corporations in 2005. Starting in the spring of 2006, information will be made available on grants and contributions above \$25,000. The Government also announces its intentions to define, in collaboration with the private sector, a code of fair contract practices or "an integrity pact between government and those with whom it contracts."<sup>35</sup> Finally, the Government reports that the Office of the Registrar of Lobbyists will, in future, operate as a "stand-alone entity" within Industry Canada, and that other avenues will be explored to enhance its independence.<sup>36</sup>

## Assessing the Reforms

The reform measures that the Government has introduced in recent years are encouraging. The new internal audit approach and the establishment of Chief Financial Officers in the various departments should strengthen financial management practices. Unfortunately, they could also add more red tape to government and have but limited impact on the political and administrative culture. For example, the hiring of 400 new internal auditors does not by itself ensure that government officials, at both the political and the bureaucratic levels, will be more willing to take responsibility. However, new measures to brief Ministers and their exempt staff on their roles and responsibilities are desirable, and it would be beneficial to have Ministers attend more parliamentary committee meetings.

The Commission supports new accountability mechanisms within government, such as the Management Accountability Framework, and hopes the approach will succeed. However, similar approaches were introduced in the past with great fanfare, only to disappear from the

government agenda a few years later. Let us remember, for example, the Increased Ministerial Authority and Accountability regime introduced in the 1980s, intended to strengthen both management practices and accountability.<sup>37</sup>

One might question why the Treasury Board needs to announce that a regular accountability session between Deputy Ministers and Ministers will be held to discuss management matters and to review progress by the department against established priorities. Surely individual Ministers and Deputy Ministers are expected to cooperate in this way without direction from a central agency.

The Commission takes issue with the Government's position that "Parliament creates many statutory obligations . . . but this does not give Parliament the authority to oversee compliance or to enforce the law."<sup>38</sup> That Parliament does not have a role in the execution of the day-to-day administration of the Government is not in dispute. But to claim that Parliament does not have the authority to satisfy itself that the Government has complied with Parliament's intentions as expressed in its laws contradicts basic constitutional principles. It also contradicts the current practices of the Parliament of Canada.

The Standing Joint Committee for the Scrutiny of Regulations, established pursuant to the *Statutory Instruments Act* of 1971, provides an excellent example of a parliamentary committee that functions in a non-partisan manner.<sup>39</sup> It oversees and enforces compliance with the law in this important area of subordinate legislation. Its members come from both the Senate and the House of Commons: one of its joint chairs comes from the Senate, and the other is normally selected from the official Opposition in the House of Commons. Its mandate, renewed at the beginning of each session, is to "oversee the Government regulatory process."<sup>40</sup> The criteria it uses in its review include determining whether a statutory instrument or regulation "is not authorized by the terms of

the enabling legislation or has not complied with any condition set forth in the legislation,” or is not in conformity with the *Canadian Charter of Rights and Freedoms*, or the *Canadian Bill of Rights*, or “has not complied with the *Statutory Instruments Act*, with respect to transmission, registration or publication.”<sup>41</sup> Taken together, the statutory and sessional references of the Committee afford it a broad jurisdiction to inquire into and report on most aspects of the federal regulatory process. The Committee reviews and scrutinizes regulations and statutory instruments on the basis of legality and procedural aspects, rather than the merits or policy they reflect.

The Committee has the power of general disallowance of a statutory instrument or regulation. This process, which the Government and the House agreed to in 1986, allows the Committee to recommend the revocation of a statutory instrument for failing to meet the criteria established for the Committee’s review of regulations. The Government committed itself to be bound by any such report from the Committee, and if the House has not debated and rejected such a report it is deemed to be adopted on the fifteenth day after it first appears on the *Order Paper*.<sup>42</sup> Two statutory instruments have been revoked through this procedure since 1986.

In this important area of subordinate legislation, Parliament, through the Committee, has the power not only to oversee compliance but also to enforce the law. The Standing Joint Committee for the Scrutiny of Regulations clearly, as its mandate and actions state, has a powerful role in overseeing and enforcing compliance with the laws passed by Parliament.

The audit and review of compliance with appropriate authorities, including statutes and limitations (sometimes referred to as “regularity”), is carried out by the Auditor General and the Public Accounts Committee. Compliance auditing ensures that the Government collects and spends only those amounts of money which have been authorized

by Parliament, and for purposes approved by Parliament. Without assurance of compliance to laws, rules and regulations, there is no certainty that the Government's use of funds meets the basic standards for parliamentary control of the public purse, let alone the more demanding standards of propriety, economy and efficiency.

Government accountability to Parliament for financial management begins with a compliance audit by the Auditor General. The reports of the Auditor General may form the starting point for investigations by the Public Accounts Committee. Accordingly, much of what the Public Accounts Committee does is a matter of overseeing compliance with statutes, rules and regulations. The Auditor General's audit of the Sponsorship Program was a compliance audit into the regularity of expenditures. Its main finding was that the administration of the Sponsorship initiatives had not conformed with statutory and other rules. Indeed, the administration of the Program had broken "every rule in the book."<sup>43</sup>

In brief, the Government's claim that Parliament has no authority to oversee compliance with the law fails to respect constitutional principles, the law governing the role of the Auditor General, the practices of the Public Accounts Committee, the practices and mandate of the Standing Joint Committee for the Scrutiny of Regulations, and principles established through many centuries of evolution of parliamentary control of the public purse.

It is against this backdrop of the Government's recent initiatives and proposed reforms that the Commission will now consider the suggestions that have been made to it for strengthening responsibility and accountability within government. It will then recommend ways for both politicians and public servants to accept responsibility for their decisions and their activities.

## Endnotes to Chapter 2

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- <sup>1</sup> Canada, President of the Treasury Board, Minister of Public Works and Government Services Canada, and Minister of Intergovernmental Affairs, News Release: Government of Canada Announces Independent Inquiry and Other Corrective Measures in Response to the Auditor General's Report on Sponsorship and Advertising, 10 February 2004.
  - <sup>2</sup> Canada, Office of the Prime Minister, News Release: Sponsorship Program Terminated and Communication Canada Disbanded, 13 December 2003.
  - <sup>3</sup> Treasury Board and others, News Release, 10 February 2004.
  - <sup>4</sup> *Ibid.*
  - <sup>5</sup> Canada, Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations - Report to Parliament* (2005).
  - <sup>6</sup> *Ibid.*, p. 48.
  - <sup>7</sup> *Ibid.*, p. 37.
  - <sup>8</sup> Treasury Board and others, News Release, 10 February 2004.
  - <sup>9</sup> Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: The Financial Administration Act: Responding to Non-compliance - Report to Parliament* (2005).
  - <sup>10</sup> *Ibid.*, p. 49.
  - <sup>11</sup> *Ibid.*
  - <sup>12</sup> *Ibid.*, p. 50.
  - <sup>13</sup> Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials - Report to Parliament* (2005).
  - <sup>14</sup> *Ibid.*, p. 5.
  - <sup>15</sup> *Ibid.*, p. 11.
  - <sup>16</sup> *Ibid.*, p. 12.
  - <sup>17</sup> *Ibid.*, p. 13.
  - <sup>18</sup> *Ibid.*, p. 15.
  - <sup>19</sup> *Ibid.*, p. 21.
  - <sup>20</sup> *Ibid.*, pp. 21-22.
  - <sup>21</sup> *Ibid.*, p. 22.
  - <sup>22</sup> *Ibid.*, p. 23.
  - <sup>23</sup> *Ibid.*, pp. 25-26.
  - <sup>24</sup> *Ibid.*, p. 28.
  - <sup>25</sup> *Ibid.*, p. 30.
  - <sup>26</sup> Canada, President of the Treasury Board, *Management in the Government of Canada: A Commitment to Continuous Improvement* (October 2005).



- <sup>27</sup> Canada, President of the Treasury Board and Minister Responsible for the Canadian Wheat Board, Media Release: Government of Canada Invests in the Public Service, 24 October 2005.
- <sup>28</sup> Canada, President of the Treasury Board, *Management in the Government of Canada: A Commitment to Continuous Improvement*, (October 2005), p. 7.
- <sup>29</sup> *Ibid.*, p. 8.
- <sup>30</sup> *Ibid.*, p. 9.
- <sup>31</sup> *Ibid.*, p. 10.
- <sup>32</sup> *Ibid.*, pp. 11-12.
- <sup>33</sup> *Ibid.*, p. 12.
- <sup>34</sup> SC 2003, c. 22.
- <sup>35</sup> Canada, President of the Treasury Board, *Management in the Government of Canada: A Commitment to Continuous Improvement* (October 2005), p. 20.
- <sup>36</sup> *Ibid.*, p. 21.
- <sup>37</sup> See, for example, Donald J. Savoie, *Thatcher, Reagan, Mulroney: In Search of a New Bureaucracy* (Pittsburgh: University of Pittsburgh Press, 1994), pp. 180-181 and 269-270.
- <sup>38</sup> Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians: Review of the Responsibilities and Accountabilities of Ministers and Senior Officials-Report to Parliament (2005)*, p. 14.
- <sup>39</sup> RSC 1985, c. S-22, s. 19.
- <sup>40</sup> A detailed description of this Committee can be found in Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice* (Montreal/Toronto: Chenelière/McGraw-Hill, 2000), pp. 687-696.
- <sup>41</sup> *Ibid.*, pp. 690-91.
- <sup>42</sup> RSC 1985, c. S-22, s. 19.1(5).
- <sup>43</sup> The Auditor General used this expression in a press conference.

