Volume IV

# Examining the Key Questions

October, 1996

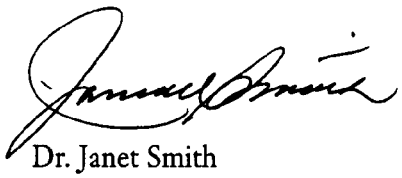
# Table of Contents

# Foreword

The mandate given to the Task Force required us to deal with accountability and authority issues. The mandate's further requirement for us to look at an integrated approach to citizens' needs led us into the areas of territoriality and partnerships. Soon, a series of concerns began to take the form of practical questions such as:

- What accountability framework would need to be put in place to enable citizen-centred service to thrive?
- What are citizens' current views about government service and how do they compare with other sectors?
- How do public servants perceive their roles and what are their values concerning service to citizens?
- What are the recent and current government or service-renewal initiatives going on in government here and abroad? What can we learn from their experience?
- What have we learned about making government renewal and service improvements stick?

Of course, the answers to these questions are not easy, and some of our enquiries resulted in more fruitful exploration than others. A comment of one of my Task Force colleagues comes to mind: "Students of public management have been searching for resolution of some of these issues for thousands of years. How could we expect to find the Holly Grail, the final answer?" I, for one, believe that, as society, technology and nations continuously evolve, the search for improvement will continue. Further, our energies are better spent developing a continuous learning culture than on searching for the big answer. There will always be room for improvement. We hope, however, that in some small ways, we have contributed to the flow of learning.



Dr. Janet Smith
Chair, Task Force on Service Delivery

# 1

# Ministerial Accountability

Roger Tassé, O.C., Q.C.
Malcolm Rowe, Q.C.

Table of Contents

## INTRODUCTION

### Purpose of the Study

- This study was commissioned by the Task Force to report on the implications for Ministerial accountability of the various types of service delivery that the Task Force is considering.

- In carrying out this study, we have sought to be mindful of the Task Force's overall work and the goals toward which that work is directed.

- Among those goals is:

  (i) placing the focus on clients, to improve the quality and efficiency of service delivery;

  (ii) a smaller public service to carry out core government functions; and

  (iii) reform of the federation.

- Reform of the federation should be seen particularly in the context of the Prime Minister's October 24 speech, in which he stated:

  *That's why we are making changes ... to make our federation more flexible and to forge effective cooperation among governments.*

  *All levels of government must find the means to bring decision-making closer to citizens. This desire by the people for greater decentralization is a challenge that our federal and provincial governments must address.*

  *This reality is made more urgent because of government budgetary constraints. We must see whether services are being provided at the right government level. We must assess whether some services would not be better delivered by the private sector.*

## Scope of the Work

- This study looks at Ministerial accountability in the context of the five types of service delivery being considered by the Task Force:

  (i) officials from more than one federal department;

  (ii) federal and provincial/municipal officials;

  (iii) federal officials and the private sector;

  (iv) provincial officials; and,

  (v) the private sector (either not-for-profit or commercial enterprises).

- The study does not focus on types of service delivery other than the five that the Task Force is considering. In particular, the study addresses only briefly accountability in the context of special operating agencies.

## Organization of the Report

- This report deals with these matters in the following sequence:

  (i) accountability of Ministers;

  (ii) statutory authorities;

  (iii) The Alberta **Government Organization Act**;

  (iv) financial and personnel matters;

  (v) major issues regarding accountability;

  (vi) accountability and other reforms; and,

  (vi) recommendations;

- This is intended to set out the facts and analysis in a way that makes clear the choices open to the government and the implications of each choice. There are often several means to achieve a given end. What is most important is clarity as to goals.

## ACCOUNTABILITY OF MINISTERS

Some Important Canadian Comments

*In the last analysis, the ultimate safeguard lies in the political process itself- in the accountability of ministers, both individually and collectively, to Parliament and through it to the public. The growth and increasing complexity of government, which have generated new problems of the management of the public services, may well create new problems in accountability to the public and their elected representatives. Such, indeed, has been the experience of other parliamentary systems, resulting in a growing resort, in recent years, to new methods for the scrutiny of administrative action.* (Royal Commission on Government Organization: Glassco Commission, 1962).

*This principle of ministerial responsibility means that Parliament can assure itself that power is being exercised lawfully. Ministers are called upon to answer in Parliament for the actions of their subordinates and are held personally responsible for the activities carried out under their authority. This is fundamental to responsible government; if ministers are to meet the demands of responsibility to Parliament, they must be able to apeak with confidence about the actions of their subordinates.* (Royal Commission on Financial Management and Accountability: Lambert Commission, 1979).

*The individual responsibility of the minister requires that he or she be personally responsible for the activities carried out under his or her authority ... Parliament has insisted that ministers be directly accountable to it by being part of it. Ministers are, therefore, assailable on a daily basis for their actions, and those of their officials ...*

*The direct responsibility of ministers to Parliament on a day-to-day basis is the essential strength of our system. Its vitality depends on the ability of ministers to answer for actions carried out under their authority.* (Responsibility in the Constitution: Privy Council Office, 1993).

## Accountability and the Organization of Government

- Ministerial accountability as we think of it today arose in Britain in the nineteenth century.

- Before then, those who were responsible for decision making in the British government often were not Ministers. They were members of such institutions as the Board of Trade.

- They did not sit in Parliament. That was not considered necessary to exercise the kind of authority now exercised by Ministers. Instead, they were appointed by the Crown to carry out the functions of state. These office holders often accounted directly to Parliament through its committees.

- By the mid-nineteenth century, the establishment of public service institutions under the direct control of Ministers gave rise to a fundamental shift in accountability. This change in the organization of government gave rise to Ministerial accountability as we know it today.

- When Parliament conferred authority on office holders not under the direction of a Minister, then Ministers could not be held accountable for the actions of the office holders. Rather, it was the office holders who were accountable to Parliament. When Parliament conferred authority on a Minister, it was the Minister who was then accountable to Parliament.

- For example, in 1847 a new Poor Law Board was established headed by a Minister. Before this, the Board had operated more or less independently, under authority conferred by Parliament. Under the new arrangement, the Minister had authority over administration of the Poor Law and could therefore be held accountable for this.

- The principle here is clear. Ministerial accountability follows from Ministerial authority. In Britain in the nineteenth century, as Ministerial authority increased, so did Ministerial accountability. Today, in Britain and New Zealand, we see the principle operating in reverse. As Ministerial authority decreases, so does Ministerial accountability.

- In Britain, this came about with the establishment of Executive Agencies to serve as quasi-independent operational adjuncts to departments. While operating under authority delegated to them by Ministers, the Chief Executive Officers of these Agencies, once they have signed their annual contracts to deliver specified services, have direction of their Agencies and Ministers do not.

- The authors of the Next Steps report (that recommended the creation of Executive Agencies) had advocated a change, by law if necessary, such that Ministers would no longer be accountable for everything done in their names; they argued that "old style Ministerial accountability should go". (D. Woodhouse, Ministers and Parliament: Accountability in Theory and Practice, Clarendon Press, Oxford, 1994, p.235).

- The Thatcher government accepted the changes to the organization of government; since 1988, about 100 Executive Agencies have been formed. (Executive Agencies are akin to Crown corporations, in that the Minister has no role to play in their day-to-day operations).

- However, the government did not accept that this entailed important changes in Ministerial accountability. This led to some tortured explanations in the House of Commons (Woodhouse, pp. 235-236):

  *I would say the formal arrangements of accountability are unaffected and there is no question of change being needed. [emphasis added]*

  *[While the principle of Ministerial accountability would remain] the mechanics would change.* [emphasis added]

  *[W]hen it is plain that a particular public servant is himself clearly responsible within the framework of operational issues it may well be better to focus an initial question, write a letter to that man asking about the individual case than it would be to go through the minister.*

- An enlightening comment was made by Sir Robin Butler, former head of the British public service, when he said (Woodhouse, p. 236),

*I think that the structure of accountability remains; its operation will be changed ...* [emphasis added]

- This seems to acknowledge that while the ***form*** of Ministerial accountability remains, with respect to Executive Agencies the ***substance*** has changed. It is clear that Ministers remain accountable for policies that Executive Agencies implement; the degree to which they remain accountable for the implementation of those policies is not.

- In New Zealand, the government has been more forthright in acknowledging that when organization and authority change, so does accountability. "State-owned enterprises" more or less correspond to Executive Agencies in Britain. However, their independence is more clearly established.

- The State-Owned Enterprises Act of 1986 even contains a Part on "Accountability" which defines the relationship to the "shareholding Minister". The "responsible Minister for a state-owned enterprise" conveys information from the Board of Directors of the state-owned enterprise to the House of Representatives regarding the operation of the enterprise.

- In addition, the State Sector Act of 1988 in Part II ("Chief Executives") provides the Chief Executive Officer of a department with considerable independence in administration from the Minister. Ministers are expected to concentrate on broad policy directions and leave administration to the Chief Executives.

- All of this contrasts with the prevailing model in Canada. The ordinary Canadian statute (as described further below) confers all authority on a Minister for his or her department. The Minister can and often gives direction not only on policy, but also on aspects of departmental operations that are of concern to the Minister. Thus, Canadian Ministers are accountable to Parliament for all aspects of their departments' work.

What Is It and Why Is It Important

- Accountability can be described in many ways. The classic statements refer to three components:

  (i) Parliament confers authority;

  (ii) this gives rise to a corresponding responsibility to account for the exercise of that authority; and,

  (iii) there are sanctions for failure to properly exercise or oversee the exercise of that authority.

- Accountability of Ministers is a vital part of the apparatus of responsible government in a Parliamentary democracy.

- Every four years (or so), the electorate chooses a government. That is the ultimate form of accountability.

- Between elections, the rough and tumble of Question Periods, the probing of the media and the expectations of the public all revolve around Ministerial accountability. It is a central element of our governmental and political system.

## STATUTORY AUTHORITIES

The Basic Legal Rules

- Ministers exercise authorities conferred by statute. Statutes reflect the principle of Ministerial accountability for the exercise of these authorities. The simplest, most common arrangement is to confer all authority on Minister.

- Discretionary (i.e. decision-making) authority conferred by statute on a Minister can only be exercised by the Minister or an appropriate official in the Minister's department. No delegation is needed for this. It is exercisable by the Minister's departmental officials pursuant to common law (the decisions of the courts in the Carltona and Harrison cases) and s.24(2) of the *Interpretation Act*.

- However, for others (federal public servants outside the Minister's department, provincial public servants or persons in the private sector) to exercise the authority conferred by Parliament on the Minister requires express provision in statute.

- Some statutes provide for this; most do not. This constitutes a fundamental impediment to the exercise of discretionary powers by other than the Minister's departmental officials

- This could be remedied in one of two general ways:

  (i) including provision for this in departmental statutes; or

  (ii) passage of a new statute providing for these matters generally (an example is the Alberta *Government Organization Act* discussed below.

- The foregoing relates to discretionary (i.e. decision-making) authority; it does not relate to the carrying out of operations that do not involve decision-making, such as providing information to the public or running a ferry service.

- Operational actions can be carried out by people other than the Minister's officials without provision for this in statute. The Minister and his or her officials can contract or enter memoranda of understanding for the provision of these services.

- Thus to recap, where decision-making authority is to be exercised by someone other than the Minister's departmental officials, special provision must be made in statute. However, less strict rules apply to operational actions, so that statutory provision for them to be carried out by other than Minister's officials is not necessary.

## The Typical Model

- As the Minister's departmental officials are under the "management and direction" of the Minister (through the Deputy Minister) and exercise authority on his or her behalf, the Minister can properly be called upon to account to Parliament not only for his or her own actions, but for the actions of his/her departmental officials, as well.

- The following is a typical set of provisions taken from the *Employment and Immigration Department and Commission Act*:

S.3(1) There is hereby established a department of the Government of Canada called the Department of Employment and Immigration over which the Minister of Employment and Immigration appointed by commission under the Great Seal Shall preside.

S.3(2) The Minister holds office during pleasure and has management and direction of the Department.

S.5 The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) the development and utilization of labour market resources in Canada;

(b) employment services;

(c) unemployment insurance; and

(d) immigration. [emphasis added]

Statutory Authorities That Allow Flexibility

- Where the government wishes to enter into an arrangement for delivery of a program that,

(i) involves decision-making and not merely operations, and

(ii) where this program is to be delivered by anyone other than the responsible Minister's departmental officials,

then this must be provided for in statute.

- There are three main types of statutory provision to provide for this:

  (i) delegation;

  (ii) designation; and,

  (iii) federal-provincial agreement.

- Delegation involves a federal Minister conferring on someone (often another federal or provincial Minister) an authority conferred on the Minister by Parliament. This authority may or may not limit to whom the Minister may make a delegation may be made. The delegation can be subject to conditions to tailor the arrangement to meet the circumstances.

- An example of delegations within the federal government are those made by the Minister of Public Works and Government Services to other Ministers for procurement pursuant to S.7 of the *Department of Supply and Services Act*.

  > For such periods and under such terms and conditions as he deems suitable, the Minister may delegate any of his powers, duties or functions under this Act to an appropriate Minister within the meaning of the Financial Administration Act.

- Designation is akin to delegation. Some statutes authorize a Minister to designate persons (either named individuals or classes of persons) to exercise a package of authorities conferred by the statute on the holders of a given office. An example of this is S.5.01 of the *Department of Agriculture and Agri-Foods Act*:

  > The Minister may designate any person to be an inspector for the purpose of providing the inspection services that the Minister considers necessary for the enforcement of any Act in respect of which the Minister has any powers, duties or functions.

- Another example is the designation of provincial wildlife officers in Ontario as federal fisheries officers for the purposes of inland fisheries under the *Fisheries Act*. These provincial officials exercise the same package of authorities exercised by DFO fisheries officers, e.g. search and seizure.

- Federal-provincial agreements for the "carrying out of [federal] programs" by provincial governments allows for significant tailoring of arrangements. S.6 of the *Department of Communications Act* provides for this:

  > The Minister may, with the approval of the Governor in Council, enter into agreements with the government of any province or any agency thereof respecting the carrying out of programs for which the Minister is responsible.

- An example of such agreements are those made by Environment Canada which provincial governments to carry out federal environmental programs.

- Bill C-96, the new *Department of Human Resources Development Act*, contains two exceptionally broad provisions: S20 provides for federal-provincial and federal-private sector agreements, and S.21 provides for delegation of authority to other than federal officials.

  > S.20 For the purpose of facilitating the formulation, coordination and implementation of any program or policy related to the powers, duties and functions referred to in section 6 [powers, duties and functions of the Minister], the Minister may enter into agreements with a province or group of provinces, agencies of provinces or financial institutions and such other persons or bodies as the Minister considers appropriate. [emphasis added]
  >
  > S.21 The Minister may authorize the Minister of Labour, the [Canada Employment Insurance] Commission or *any other person or body or member of a class of persons or bodies* to exercise any power or perform any duty or function of the Minister. [emphasis added]

- Finally, S.4.2 (m) of the *Aeronautics Act* provides for a federal-private sector arrangement for a special purpose.

  > [The Minister may] ... enter into arrangements with any person or organization with respect to the provision of [aviation weather services] in such form and manner and in such places as the Minister considers necessary.

- With some creativity, delegation, designation and federal-provincial agreements can be used as substitutes for one another. In highly tailored arrangements, they can also supplement one another.

- The exact manner in which each of these three means could be used is secondary; the essential question is whether or not the three means (or any of them) is available to a department. In many cases, they are not. There is no pattern, at least in departmental statutes.

- Statutory amendments have been made on an ad hoc basis to provide for these three types of statutory provisions. This ad hoc approach seems to have worked in practice. There are a number of such arrangements in place, many involving provincial governments.

- Some of these are reciprocal, for example regarding inland fisheries. Resource management is a federal responsibility, but is carried out by provincial officials designated as federal fisheries officers (as noted above).

- The inspection of processed fish is in part a federal and in part a provincial responsibility. In certain provinces, DFO inspection officials are designated as provincial inspection officials and, thereby, carry out inspections of processed fish whether such inspections are pursuant to federal or provincial authority.

- There appears to be a gap in federal statutory authorities, in that none that we have reviewed makes any provision for the federal government (or its officials) to exercise an authority conferred by provincial governments (as occurs, for example, in the case of inspection of processed fish).

## THE ALBERTA GOVERNMENT ORGANIZATION ACT

The Alberta *Government Organization Act* contains a range of authorities broader than that needed to implement the five types of service delivery being considered by the Task Force. Nonetheless, it is worth careful review.

Purpose of the Act

(1) It replaces departmental statutes (the Lieutenant Governor in Council can create departments; schedules to the Act define departmental mandates).

(2) It provides a common set of powers to all Ministers (e.g. to delegate) .

(3) It provides the Lieutenant Governor in Council with considerable flexibility in organizational matters (e.g. the transfer of responsibility for Acts, programs and appropriations among Ministers).

Flexibility in Organizational Matters

(1) The Lieutenant Governor in Council may establish departments s.2(1).

(2) The Lieutenant Governor in Council may transfer among Ministers: responsibility for legislation (S.16), programs (S.17) and appropriations to match the foregoing transfers (S.18).

(3) Fourteen schedules to the Act set out the various Ministerial (departmental) responsibilities, e.g. "Agriculture":

*That part of the administration of the Government relating to agriculture is under the responsibility of the Minister, unless administration is specifically assigned under this or another Act to some other person.*

Powers Common to All Ministers

A Minister may:

(1) establish programs to "carry out matters under his administration", s.8(1).

(2) delegate any power, duty or function conferred by statute or regulation s.9(1).

(3) make federal-provincial, inter-provincial or international agreements s.10(1) and (2).

(4) charge fees for any service or function s.12(1).

(5) make grants pursuant to regulations made by the Lieutenant Governor in Council, provided there is authority for the expenditure in a supply vote S.13.

- Legislative Counsel in other provinces were contacted and asked whether any legislation comparable to the Alberta legislation is in place. All replied in the negative.

## FINANCIAL AND PERSONNEL MATTERS

Financial Administration

- Parliament authorizes expenditures under the *Estimates* and the *Appropriation Acts*. Treasury Board oversees expenditures authorized by Parliament. The *Financial Administration Act* (FAA) sets out Treasury Board's authorities and responsibilities in this regard.

- The FAA itself seems to contain few impediments to putting in place arrangements for the five types of service delivery being considered by the Task Force.

- In certain respects, the FAA provides for flexibility. For example, S. 31 (regarding allotments of an appropriation) refers to "the deputy head or other person charged with the administration of a service" and s.33 (regarding the requisitioning of funds) refers to "the Minister of the department for which the appropriation was made or ... a person authorized in writing by that Minister". In neither instance is there a requirement in the FAA that the "person" be an official in the Minister's department.

- However, for personnel management, S.12 is an impediment in that it permits a deputy head to delegate authority for this only to "persons under his jurisdiction".

- Nonetheless, there are reported to be many impediments under the FAA to using various types of service delivery, other than by the Minister's departmental officials. The reason for this could be:

(1) more impediments in the Act than is apparent;

(2) impediments in the regulations; or

(3) the guidelines for the application of the Act and regulations have given rise to impediments.

- The remedies for each of the foregoing is different:

  (1) to the extent the Act contains impediments, statutory amendments would be needed;

  (2) to the extent the regulations contain impediments, these could be amended by Treasury Board; and,

  (3) to the extent the guidelines for the application of the Act and regulations give rise to impediments, these could be changed as a matter of policy by Treasury Board.

- A detailed examination of these matters falls outside the scope of this study. Such an examination seems essential, however, to ensure that the government can proceed expeditiously with arrangements to put in place the five types of service delivery being considered by the Task Force.

## Personnel Administration

- Public servants are engaged, promoted, etc. under the authority of the Public Service Commission, pursuant to the *Public Service Employment Act.*

- Authority for personnel administration is conferred by the FAA on the Treasury Board.

- In many respects, these authorities are delegated to departments.

- Collective bargaining and grievances come under the Public Service Staff Relation Board pursuant to the *Public Service Staff Relations Act.*

- The five types of service delivery being considered by the Task Force have impacts on the employment situation of public servants (e.g. job security, performance evaluation, mobility within the public service, pensions, grievance procedures, collective bargaining rights).

- While these are important matters, they do not relate to the accountability of Ministers and, therefore, fall outside the scope of the study. As with the case of financial administration, personnel matters should be thoroughly reviewed in order to identify and deal with impediments to the five types of service delivery being considered by the Task Force.

## Crown Liability

- The general rule is that the Crown and its agents are liable in tort and contract for wrongful acts. The Crown is not liable for the wrongful acts of its contractors (unless they happen to be Crown agents).

- Whether or not someone is an agent of the Crown can be decided by common law rules or established by legislation. Crown liability in the context of various types of alternative means of service delivery may need to be clarified in legislation or the arrangements with provincial governments or the private sector.

- While sorting out Crown liability is important for the types of service delivery being considered by the Task Force, it is peripheral to accountability and, therefore, is not dealt with further in this study.

# MAJOR ISSUES

## Acceptability

- Ministerial accountability follows from Ministerial authority. However, this operates only to the extent that Parliament, the media and the public ***accept*** a given transfer (or sharing) of Ministerial authority.

- If they do not ***accept*** such a transfer, then as a practical matter the Minister will continue to be held accountable, whatever his authority. This is a matter, ultimately, of awareness and politics.

- Central to matching Ministerial authority with accountability in practice is transparency in any arrangements that are put in place.

- A Minister who answers in the Commons that he or she no longer has authority over a given matter because that authority has been delegated is likely to get a rough ride if this fact was not understood in advance.

- Arrangements should not only be on the public record, they should be readily accessible to anyone who has an interest in understanding them.

- At present, this can present difficulties, as there is no central repository for the documents putting in place such arrangements. This is true for the government overall and seems to be true for departments.

- As well, there seems to be no requirement and no regular practice of tabling such documents in Parliament.

- Tabling such documents in Parliament and placing them in central repositories (e.g. in each department) would both seem worthwhile.

- In addition, it would seem to be worthwhile to consult with affected groups before such arrangements are put in place and to provide information to them concerning arrangements once the arrangements are in place.

- Beyond making Parliament and the affected public aware of such arrangements, it would seem prudent to build into arrangements means for the federal Minister to deal with problems as they arise.

- This could consist of commitments to provide information to the federal Minister on request, to consult on matters of concern to the federal Minster and for the federal Minister to vary (or even revoke) the arrangement where this seems necessary in response to problems.

- Where such elements are built into arrangements, this should assist in matching in a practical way Ministerial authority and Ministerial accountability. (These elements are referred to further in the Recommendations).

Risk Management

- While Ministers rarely resign because of problems in handling of matters under their responsibility, their careers can nonetheless be damaged by such problems.

- The current system of authorities is designed to maximize control and, therefore, minimize risk.

- Moving to any of the five types of service delivery being considered by the Task Force involves less direct control by Ministers and, therefore, some greater degree of risk.

- The degree of increased risk is less a function of the model of service delivery and more a function of the particulars of the arrangement to put it in place.

- For example, a simple delegation of a federal Minister's authority to a provincial Minister with no provision for ensuring provincial officials are qualified to carry out the responsibilities, no means to deal with problems, etc. would expose the federal Minister to considerable risk.

- The policy framework/checklist described below in the Recommendations is intended to assist in reducing risk to acceptable levels.

Asymmetry (Within and Among Provinces)

- The types of service delivery being considered by the Task Force will, in certain instances, give rise to asymmetry within and among provinces.

- For example, some provinces might wish to carry out federal functions pursuant to delegations of federal Ministerial authority; some provinces might prefer to enter partnership arrangements with the federal government; other provinces might choose to allow the federal government to carry out the function in their province. This would lead to considerable asymmetry among provinces.

- If the federal government enters partnership arrangements with the private sector in several areas within a province, that could well give rise to asymmetrical service delivery within a province.

- Of course, many asymmetrical arrangements are already in place. One example is police services; certain provinces use the RCMP for general policing, while others do not. Another example is immigration, particularly the arrangement with Quebec. A further example involving Quebec is the arrangement for collection of taxes (relating to harmonization of the tax base for provincial sales tax and the GST).

- Asymmetry among provinces is likely to be more readily accepted where a similar arrangement is offered to all provinces, even though it may be taken up by only some of them, e.g. provincial sales tax and GST. Asymmetry is likely to be less readily accepted where an arrangement is put in place for one province but not offered to the others, e.g. immigration in Quebec.

- In contemplating asymmetrical arrangements among provinces, consideration should be given as to the cumulative affect of all such arrangements. Presumably, there is a minimum federal presence that one would wish to maintain in all provinces.

- Aside from this concern, the acceptance of asymmetrical arrangements would seem to be an important starting point for efforts directed at a more efficient and responsive federal structure in Canada, without the need for constitutional reform. It is an element of reforming the federation that could have appeal in all parts of the country.

- The acceptability of asymmetrical arrangements within a province is likely to be considerably increased where these are put in place only following consultation with the provincial government. Of course, the decision whether or not to put in place such arrangements would remain with the federal government; however, the federal government might well choose to build into arrangements within the province common elements to meet concerns expressed by the provincial government.

## ACCOUNTABILITY AND OTHER REFORMS

Reform of the Federation

- The Prime Minister's speech on October 24 (as quoted above) points to reform of the federation to:

  (i) make our federation more flexible;

  (ii) forge effective cooperation among governments;

  (iii) bring decision-making closer to citizens;

  (iv) [achieve] greater decentralization;

  (v) [operate within the] reality ... of government budgetary constraints;

  (vi) provide [services] at the right government level; and,

  (vii) [deliver] some services [that are] better delivered by the private sector.

- The types of service delivery being considered by the Task Force are valuable tools towards achieving these seven goals.

- The types offer the potential to respond to differing aspirations and circumstances that exist in various parts of the country, while through the careful design of various arrangements maintaining an appropriate on-going role for the federal government.

- This is especially useful in the context of federal-provincial partnerships

based on a functional approach to problems, rather than one based simply on jurisdiction.

- The types offer an avenue to demonstrate that Canadian federalism can adapt to changing circumstances, without the necessity of constitutional change.

- As well, the types offer alternatives to simple devolution of federal authorities (although that may be appropriate in certain circumstances).

- Thus, there is considerable importance to working through the steps needed to more readily allow federal-provincial and other arrangements to be put in place.

- The Recommendations section outlines steps to do this.

The Splitting of Policy and Operations

- Various means can be used to split the policy/regulatory functions of government from the delivery of services.

- The five types of service delivery being considered by the Task Force are among the means to achieve this. So are special operating agencies and the proposed new special service agencies and service enterprise corporations (discussed briefly below).

- The five types could be used to split policy and operations as follows:

(i) **federal officials from more than one department**

  - Officials from more than one department could be grouped in functional clusters, e.g. to provide services to a common clientele.

- These units would be responsible for the delivery of programs based on policies worked up in the (smaller) departments of which they had once been a part.

(ii) **federal-provincial**

- Federal and provincial officials would operate in units separate from their former departments to deliver services decided on by both levels of government.

(iii) **federal officials and the private sector**

- Federal officials and persons from the private sector (not-for-profit or commercial enterprises) would operate in units outside of the department(s) that would continue to carry out policy/regulatory functions.

(iv) **service delivery by provincial officials**

- This would be different from devolution, in that the policy/regulatory functions would continue to be carried out by the federal government, while services would be delivered by provincial officials.

(v) **service delivery by the private sector**

- This would involve a splitting of the public policy/ regulatory functions from service delivery, in that public servants would no longer be involved in service delivery.

Special Operating Agencies

- This study is about the five types of service delivery being considered by the Task Force rather than the use of special operating agencies (or the proposed new special service agencies or service enterprise corporations). Thus, comments on these agencies will be brief.

- Accountability and special operating agencies has been addressed, to some degree, in the early discussion of Executive Agencies in Britain and state-owned enterprises in New Zealand.

- While there are important differences between these agencies in Canada and those in Britain and New Zealand, the essential common element is that they all involve the Chief Executive Officers of the agency running the agency without being subject to the direct authority of the Minister.

- It is critical to work through clearly and publicly the authority that remains vested in Ministers and that which is conferred on the Chief Executive Officer of such agencies.

- Failing that, Parliament, the media and the public will continue in a practical sense to hold Ministers accountable for the operation of the agencies, without Ministers having the authority necessary to exercise control over such agencies.

- This could result in serious confusion and embarrassment for Ministers and a general disenchantment by the public with a mechanism that, in appropriate circumstances, could be used to achieve greater efficiencies in service delivery.

## RECOMMENDATIONS

<u>The Full Range of Statutory Authorities</u>

- As noted above, where the government wishes to enter into an arrangement for delivery of a program that,

  (i) involves decision-making and not merely operations, and

  (ii) where this program is to be delivered by anyone other than the responsible Minister's departmental officials,

  then this must be provided for in statute.

- There are three main types of statutory provision to provide for this:

  (i) delegation;

  (ii) designation; and,

  (iii) federal-provincial agreement.

- Statutory amendments have been made on an ad hoc basis to provide for these three types of statutory provisions. This ad hoc approach seems to have worked in practice.

- An ad hoc approach to amending statutes to authorize such arrangements fits with a situation where such arrangements are put in place relatively infrequently. In those circumstances, getting a statutory amendment is probably not too great a problem, especially as the amendments are likely to be seen as not controversial.

- However, if there are to be many more such arrangements put in place, then the ad hoc approach is likely to give rise to serious delays. Parliament will become a bottle neck if many such amendments are brought forward individually. As well, if Parliament sees numerous such amendments brought forward, this could well give rise to a more in-depth questioning of each.

- In addition, if a change in approach is made, to use such arrangements far more extensively, then it would seem better to receive Parliament's sanction for this through legislation whose purpose is clearly to provide for the implementation of such a policy.

- All of this points to the usefulness of legislation to provide departments with the full range of statutory authorities (delegation, designation and federal-provincial agreement) that would allow them to enter into any of the five types of service delivery that the Task Force is considering.

- A related matter could be dealt with in such legislation. While various federal statutes provide for the exercise of federal authority by provincial governments, there seems to be none that contemplates the federal government exercising authority conferred on it by a province.

- The form of the legislation would be a matter for consideration by the Department of Justice. However, two broad approaches seem obvious.

- The first is a Bill that would make a series of similar amendments to a number of individual statutes. This would be valid omnibus legislation, in that it would be directed to a single purpose, albeit affecting many statutes.

- The second would be a Bill to create a separate statute that would confer on the government the authority to enter into the five types of service delivery being considered by the Task Force. This would be in the nature of the Alberta *Government Organization Act*, albeit with less sweeping authority conferred on the government than in that statute.

- The *Public Service Rearrangement and Transfer of Duties Act* is probably the closest federal precedent. It confers authority on the Governor in Council to:

  (a) transfer any powers, duties or functions or the control or supervision of any portion of the public service from one Minister to another, or from one department to another, or from one portion of the public service to another; or

  (b) amalgamate or combine any two or more departments under one minister and one deputy minister.

  This allows the government to shift authority from department to department, but not to share it between departments or with other levels of government or the private sector.

- Subject to the views of the Department of Justice, a Bill of the second type would seem an easier and more straight forward way to proceed. However, the form of such legislation is secondary to its purpose, which is the essential policy decision to be made.

- The acceptability of such legislation is linked to the next topic in these recommendations, i.e. a policy framework within which the authority conferred under such legislation would be exercised.

A Policy Framework/Checklist

- Whether the ad hoc amendment approach or (as suggested above) an overall legislative approach is followed, it would seem worthwhile to establish a policy framework in which the five types of arrangements being considered by the Task Force are put in place.

- This policy framework could contain a checklist of the considerations that should be taken into account whenever the government is contemplating an arrangement for service delivery other than the one in which delivery is by the Minister's departmental officials.

- The purpose of the checklist would be to ensure that any such arrangement:

  (i) achieves the goals under the relevant legislation;

  (ii) achieves other federal goals; and

  (iii) is demonstrably reasonable and prudent.

  Essentially, it would set out what should be taken into account to put in place arrangements in such a way that accountability concerns are met.

- This policy framework/checklist could be applied both with respect to arrangements under which decisions are made and to arrangements that are simply operational.

- An example of an arrangement involving decision making is the delegation by the Minister of HRDC to Alberta public servants working in Canada/Alberta Service Centres of authority to refer UI claimants to training under S.26 of the UI Act.

- An example of an arrangement involving only operational matters is the joint federal-provincial Winnipeg Government Service Centre. This arrangement is for a single window for both federal and provincial programs directed toward small business.

- In the Winnipeg Centre, federal public servants continue to make decisions with respect to federal programs and provincial public servants continue to make decisions with respect to provincial programs.

- However, even with respect to such operational matters as the provision of information, the federal government will wish to ensure that, for example, the *Privacy Act* and the *Official Languages Act* are adhered to, where as a matter of law or policy this should to be done. Ministers continue to be accountable to Parliament pursuant to this (and other) legislation whether information on federal programs is provided by provincial or federal officials.

- The essential point here is that Ministers remain accountable to Parliament where there is an arrangement involving more than one federal department or a provincial government or the private sector. However, the nature of what they are accountable for is to some degree varied where such an arrangement is put in place.

- Ministers should be accountable for:

  (i) putting in place proper arrangements;

  (ii) dealing properly with problems as they arise under the arrangements; and

  (iii) properly informing Parliament concerning the arrangements.

  The proposed policy framework/checklist is intended to assist in ensuring that these three things take place.

- The description of the contents of the policy framework/checklist that follows focuses on arrangements involving decision making. These are clearly more sensitive than arrangements involving only operational matters. Many elements of the description would apply, as well, arrangements involving operational matters.

(I) DOES THE ARRANGEMENT ACHIEVE THE GOALS OF THE LEGISLATION WITH RESPECT TO WHICH IT IS MADE?

- Are the persons who will carry out the tasks under the arrangement properly qualified, trained, etc. to do so?

- Is proper provision made for the monitoring, control, etc. of their work?

- Are proper means in place to receive reports on the carrying out of the tasks and for dealing with problems as they arise?

(II) DOES THE ARRANGEMENT ACHIEVE THE GOALS OF OTHER FEDERAL LEGISLATION AND POLICIES THAT ARE RELEVANT?

- Examples include the *Official Languages Act*, the *Privacy Act* and the *Access to Information Act*.

(III) IS INFORMATION ON THE ARRANGEMENT READILY AVAILABLE?

- Was there adequate consultation with affected publics before the arrangement was put in place?

- Is there transparency in the arrangement, i.e. is the arrangement and essential facts concerning its operation on the public record in a way that is accessible to the public?

- Is information on the arrangement provided to Parliament at the time that it is put in place (e.g. tabling in the Commons) and periodically thereafter (e.g. dealt with in the department's annual report)?

---

- If the answer to the foregoing generic questions is "yes", then when the responsible Minister is called upon to account to Parliament (or the media or the public) for the arrangement and what has taken place under it, the Minister should be able to state credibly that what has been done by the federal government has been both prudent and reasonable.

- Such a policy framework/checklist is no panacea. Problems will inevitably arise. Unwarranted accusations will be made. Ministers will inevitably be criticized when arrangements go bad.

- However, such a policy framework/checklist should assist the government to take the steps necessary when arrangements are put in place and thereafter to account properly for and to defend effectively what has been done by the federal government.

- Such a policy framework/checklist should also smooth the passage by Parliament of legislation (either of an ad hoc or an overall nature) to authorize the five types of arrangements being considered by the Task Force.

## The Need for Flexibility in Financial Matters

- There are some impediments to flexibility under the FAA (notably for personnel management, S.12 is an impediment in that it permits a deputy head to delegate authority for this only to "persons under his jurisdiction"). However, most impediments seem to be in the regulations under the FAA or in the guidelines for the application of the FAA and the regulations. These need to be reviewed thoroughly to remove impediments.

- The key to accountability for financial matters is to ensure that expenditures are made in accordance with authorities conferred by Parliament.

- The focus for this should not be a complex set of rules that limits flexibility in service delivery. Rather, it should be dealt with in three mutually reinforcing ways.

- The first is that arrangements should be made clear to Parliament and the public. (See above, "IS INFORMATION ON THE ARRANGEMENT READILY AVAILABLE?")

- The second is that through the Estimates and Appropriation Acts, Parliament should be made aware of the purposes and the means for the delivery of services under various arrangements.

- The third is that arrangements should include provisions so that the responsible Minister can properly account for expenditures under those arrangements. The particulars of this are for Treasury Board to decide.

- This should constitute an element of the policy framework/checklist. It should consist of a set of pre-determined, generic procedures that can be readily and easily applied by departments that are contemplating putting in place arrangements for the five types being considered by the Task Force.

- It should not be necessary to "custom build" such procedures in each instance. Rather, if a department incorporates in an arrangement such a set of pre-determined, generic procedures, then this should satisfy concerns regarding accountability for financial matters.

- Treasury Board should, of course, review proposed arrangements to ensure that the pre-determined, generic procedures are properly incorporated. With a carefully constructed set of such procedures, this should not give rise to either undue delay or difficulty.

## SUMMARY

- Ministerial accountability flows from Ministerial authority. Any change in government organization that affects Ministerial authority necessarily affects Ministerial accountability.

- This is true for the five types of service delivery being considered by the Task Force. It is equally true for other types of alternative service delivery, including special operating agencies (and the proposed special service agencies and service enterprise corporations).

- The five types of service delivery being considered by the Task Force are valuable, indeed necessary, tools for carrying forward the statements made by the Prime Minister in his October 24 speech.

- However, to be able to readily implement the five types, changes in statutory authority will be necessary, as well as further work on financial and personnel administration.

- As well, to help ensure the acceptance and proper operation of the five types, it would be helpful to put in place a policy framework/checklist for such arrangements.

# MINISTERIAL ACCOUNTABILITY

# AND

# THE CITIZEN-CENTERED RENEWAL INITIATIVE

**Submitted by:**

**ROGER TASSÉ, O.C., Q.C.**
**Gowling, Strathy & Henderdon**

**July 9, 1996**

## Table of Contents

# MINISTERIAL ACCOUNTABILITY
# AND
# THE CITIZEN-CENTERED RENEWAL INITIATIVE

## INTRODUCTION

- Ministerial Accountability and Governance

In Canada's system of responsible government, governing is, generally speaking, a function carried out by the executive under authority granted by the legislature. That is, Parliament provides the authority and the executive governs. The executive (or government) is, in turn, responsible to the legislature for its actions. In other words, the executive is mandated by Parliament to administer and enforce the legislation and programs adopted by Parliament. The executive is accountable to Parliament for its governance.

Accountability can be described in many ways. The classic statements, put in their simplest form, refer to three components:

(I) Parliament confers authority;

(ii) this gives rise to a corresponding responsibility on those vested with authority to account for the exercise of that authority; and

(iii) there are sanctions for failure to properly exercise or oversee the exercise of that authority.

Accountability of ministers is a vital part of the apparatus of responsible government in a Parliamentary democracy - a system that balances authority with accountability. Every four years or so, the electorate chooses a government. That is the ultimate form of accountability. However, between elections, the rough and tumble of Question Periods, the probing of the media and the expectations of the public all revolve around ministerial accountability. It is a central element of our governmental and political system.

The most common form of organization used by Parliament for ensuring the good and responsible administration of the legislation and programs adopted by Parliament is a "Department" coming under the authority of a minister directly accountable to Parliament for his or her actions and that of all those coming under his or her direction. There are, however, other forms of organization that have also been developed.

Over the years, various structures and techniques have been developed and adopted to ensure that those charged with the responsibility of carrying out complex government functions remain accountable to Parliament while at the same time allowing those who govern the necessary degree of flexibility in the provision of government services.

- <u>The Citizen-Centered Renewal Initiative</u>

The traditional departmental way of organizing and delivering services is a source of frustration for the public. It is often a source of inefficiencies as well. There is a need to re-arrange service delivery around citizens, whenever possible and sensible, instead of around artificial departmental structures and procedures.

Citizen-centered services require government service providers to work in cooperation and in partnership with other departments, governments and the private sector. It may require officials from more than one federal department to be grouped in functional clusters to provide, for example, services to a common clientele. Another situation might involve federal and provincial officials

operating in units separate from their home departments to deliver services to a common clientele. In other situations, individuals in the private sector (not-for-profit or commercial enterprises) might be needed to be involved in these units. The arrangements might provide for the delivery of federal services by provincial officials or the private sector.

All such arrangements would require the development and making of cross-jurisdictional or horizontal arrangements and a key question is whether this can be done in full respect of the principle of ministerial accountability to Parliament.

The fundamental thesis of this paper is that ministerial accountability can be maintained in the making of cross-jurisdictional or "horizontal" arrangements to provide "citizen-centered" services. This will necessitate an approach to the development of these arrangements that stresses clear lines of responsibility and accountability, clear purpose and objectives and a high degree of transparency to ensure Parliamentary and public support.

Thus, the purpose of this paper is to examine certain of those structures and techniques adopted by Parliament to ensure accountability and flexibility in government organization, the manner by which they balance authority, accountability and flexibility, and to recommend an approach building on this experience to maintain, and if possible strengthen, the fundamental accountability to Parliament in the development and making of horizontal arrangements supporting the federal government Citizen-Centered Renewal Initiative.

- Accountability and the Rule of Law

The authority and powers conferred upon ministers and officials as well as public offices and agencies for the good governance of the country, find their source in legislation adopted by Parliament. Ministers, officials, etc. are mandated by Parliament, speaking through its laws, to exercise State authority and powers. They are ultimately responsible and accountable to Parliament for the actions taken and decisions made under that authority and in the exercise of these powers.

This paper is primarily focused on the legal aspect of the rules that govern the responsibility and accountability of officials in the chain of the authority owed ultimately to Parliament itself.

Firstly, the paper discusses various government structures and techniques adopted by Parliament to ensure accountability in government organizations (Part A). This, in turn, will lead to a discussion of possible ways and means to maintain accountability in the development and making of the arrangements needed in support of the Citizen-Centered Renewal Initiative (Part B). The paper ends with some concluding remarks and recommendations (Part C).

## A. Ensuring Accountability in Government Organization

We propose in this Part to review the various organizational models and legal techniques that have been adopted to provide for efficient governing with concomitant accountability. This will include an examination of the departmental approach, which is most common, as well as other approaches. The case of Crown Corporations is of special interest for our purposes and will be briefly discussed. We will then draw some conclusions from this review.

### 1. The Departmental Approach

While the departmental approach is still the most common in Canada, it is not as rigid and inflexible as might appear at first sight. Indeed, there exist techniques, such as the delegation of authority, the designation of non-departmental officials and arrangements between governments and others, that provide a certain degree of flexibility in institutional organization. This is what will be discussed in this Part.

(1) The Traditional Structure

The traditional, and still most typical, organizational structure in Canada is the departmental approach. The executive is thus divided into departments, headed by a minister who is a member of both Cabinet (the executive) and Parliament (the legislative). In this structure, Ministers exercise the authority that is conferred by statute. The simplest, most common arrangement is to confer all authority for a department on a minister. Thus, departmental statutes usually provide that the minister has the management and direction of his or her department and specify the powers, duties and functions of the minister with respect to the specific matters over which Parliament has jurisdiction and which are often spelled out in the statute. For example, the *Employment and Immigration Department and Commission Act* provides:

> *"S.3(1) There is hereby established a department of the Government of Canada called the Department of Employment and Immigration over which the Minister of Employment and Immigration appointed by commission under the Great Seal Shall preside.*
>
> *S.3(2) The Minister holds office during pleasure and has management and direction of the Department.*
>
> *S.5 The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to*
>
> *(a) the development and utilization of labour market resources in Canada;*
>
> *(b) employment services;*
>
> *(c) unemployment insurance; and*
>
> *(d) immigration".*

The principle is that the minister is responsible to Parliament for his or her actions as the head of his or her department and for decisions made or actions taken under his or her authority and for all aspects of the departmental work. A further and corollary principle is that the minister is not responsible for the actions of persons that do not come under his or her authority.

A statute may confer different forms of authority upon the minister and the department. For our purpose here, there are two forms of authority that need to be mentioned: discretionary and operational. Generally speaking, discretionary authority involves the exercise of decision-making affecting the rights or interests of citizens. Operational authority involves activities such as the provision of information or the running of a ferry service, for example.

Discretionary (*i.e.* decision-making) authority conferred by statute on a minister can only be exercised by the minister or by an appropriate official in the Minister's department. It is exercisable by the minister's departmental officials pursuant to the common law and Section 24(2) of the *Interpretation Act*. No express delegation of authority from the minister to officials is necessary for the exercise of this authority.

However, for others, such as federal public servants outside the minister's department, provincial public servants or persons in the private sector, to exercise discretionary authority conferred by Parliament on the minister does require express provision in the statute. This is so because, in law, a person to whom authority has been delegated cannot, unless expressly authorized to do so, delegate his or her authority to another person.

In contradistinction, operational actions that do not require discretionary decision-making can be carried out by people other than the minister's officials without provision for this in the statute. Minister's officials can contract or enter into memoranda of understanding for the provision of these services, although the minister will usually designate the officials in his or her department to have the authority to act on his or her behalf.

Instead of conferring authority directly upon a minister, Parliament may through a statute create an office and directly confer on the holder of that office authority and powers that can only be exercised by the office holder and persons coming under his or her management and direction. Examples of this would include the Superintendent of Bankruptcy and the Director of Combines and Research.

(2) Legal Techniques that Ensure Flexibility

Within the broad rubric of the departmental approach, there are a variety of legal techniques used to ensure flexibility and to allow the Minister to rely on non-departmental officials or persons not coming under his or her management and direction to carry out ministerial authority. These include:

(i) the delegation of authority;
(ii) the designation of persons to exercise authority; and
(iii) arrangements with the provinces and others.

(i) The delegation of authority

Delegation involves a Minister conferring on someone else (another federal Minister or a provincial Minister, or an agency in the private or public sector) a discretionary authority conferred on the Minister by Parliament. A delegation is possible only where Parliament has so provided in the departmental statute; otherwise delegation is not permissible.

Statutes authorizing the making of a delegation may define the scope of, or provide the terms and conditions to be attached to, the delegation; or the minister in delegating his or her authority may specifically limit the scope or set out the terms and conditions of the delegation.

An example of delegation within the federal government is that made by the Minister of Public Works and Government Services to another Minister for procurement pursuant to S.7 of the *Department of Supply and Services Act:*

> *"For such periods and under such terms and conditions as he deems suitable, the Minister may delegate any of his powers, duties or functions under this Act to an appropriate Minister within the meaning of the Financial Administration Act".*

It is noteworthy, but not surprising, that the power to delegate is limited to other federal ministers. The section also specifically provides that the delegating minister may set out terms and conditions to apply to the delegation.

Section 21 of the recent *Department of Human Resources Development Act* provides for delegation of authority to others than federal officials. It reads as follows:

> *S.21 The Minister may authorize the Minister of Labour, the [Canada Employment Insurance] Commission or <u>any other person or body or member of a class of persons or bodies</u> to exercise any power or perform any duty or function of the Minister."*
> [words in brackets and emphasis are added]

A minister delegating his or her authority to someone else will be accountable to Parliament for the use of his or her authority to delegate and would also remain accountable to Parliament for the carrying out of the delegated discretionary authority. Where the authority is delegated to another minister, however, one would expect, as a practical matter, that the minister upon whom the authority has been conferred will also be called upon to account for his or her use of that authority by Parliament, not only the delegating minister.

(ii) The designation of non-departmental officials

Designation is akin to delegation. A designation will usually, but not always, carry with it the vesting of a package of authorities or powers spelled out in the relevant Statute. With this technique, an officer (usually the Minister) is authorized by Parliament to confer statutory discretionary authority or powers on specific persons. Where discretionary authority is involved, the designation of non-departmental individuals (i.e., persons not coming under the management or direction of the Minister) is possible only where Parliament has so provided explicitly or implicitly in the Statute. The designation of non-departmental individuals will be provided for implicitly, for example, if the designation may be made at the entire discretion of the Minister, without any restrictions as to whom he might designate, in which case it might be a provincial official or a member of a private organization. The statute however, may specify that only the holders of certain offices or certain classes of persons may be designated.

By way of example, some statutes authorize a Minister to designate persons (either any individual or else a class of persons) to exercise a package of authorities or powers conferred by the statute on the holders of a given office. Thus, S.5.01 of the *Department of Agriculture and Agri-Foods Act* provides that:

> *"The Minister may designate any person to be an inspector for the purpose of providing the inspection services that the Minister considers necessary for the enforcement of any Act in respect of which the Minister has any powers, duties or functions".* [emphasis added]

Under the *Fisheries Act,* the Minister of Fisheries *"may designate any person or classes of persons as fishery officers or fishery guardians for the purposes of this Act and may limit in any manner the Minister considers appropriate the powers that a fishery officer or fishery guardian may exercise under this Act or any other Act of Parliament."* [Emphasis added]. Provincial wildlife officers have been designated as federal fisheries officers for the purposes of inland fisheries under

the *Fisheries Act.* Other provisions of the *Fisheries Act* spell out the authority and powers of a fishery officer or guardian under the *Act.* Likewise, federal fisheries officials may be appointed by a provincial minister for the purposes of the provincial wildlife legislation, leading to what is often referred to as cross-jurisdictional designations.

(iii) Arrangements with provincial governments and others

In a further technique, the Statute may grant authority to the Minister (or an agency) to make agreements or arrangements for the carrying out of the functions and exercise of the powers of the Minister by provincial governments (or municipalities or third parties in private sector).

The precise scope of the authority granted to a minister to enter into this kind of arrangements or agreements will depend on the words of the relevant statute. In some cases, the wording of the statute will be broad enough to cover, not only operational activities, but discretionary authority as well.

Section 6 of the *Department of Communications Act* is an illustration of one type of statutory provision:

> *"The Minister may, with the approval of the Governor in Council, enter into agreements with the government of any province or any agency thereof respecting the carrying out of programs for which the Minister is responsible".*

While such a provision is relatively broad in scope, it is doubtful that it is precise enough to serve as a basis for the making of an arrangement whereby discretionary authority conferred on the minister could be exercised by the government of a province or an agency thereof. For this to be possible would require that further statutory provisions be in place clearly allowing for the delegation (or designation) of discretionary authority or powers.

Section 6 of the *Department of the Environment Act*, which reads the same as S.6 of the *Department of Communications Act* has served as a basis for agreement with a number of provincial governments to carry out federal environmental programs.

The recent *Department of Human Resources Development Act* is also interesting in that regard as it contains two exceptionally broad provisions that, in some arrangements, might complement each other: S.20 provides for federal-provincial and federal-private sector agreements, and S.21 provides for delegation of authority to other than federal officials and has already been quoted (p. 7). Section 20 reads as follows:

> *"S.20 For the purpose of facilitating the formulation, coordination and implementation of any program or policy related to the powers, duties and functions referred to in section 6 [powers, duties and functions of the Minister], the Minister may enter into agreements with a province or group of provinces, agencies of provinces or financial institutions and such other persons or bodies as the Minister considers appropriate."* [words in brackets added]

An example of provision concerning operational activities is S.4.2 (m) of the *Aeronautics Act* which provides for a federal-private sector arrangement for the provision of aviation weather services:

> *"[The Minister may] ...enter into arrangements with any person or organization with respect to the provision of [aviation weather services] in such form and manner and in such places as the Minister considers necessary."*

(3) A General Comment

Delegation, designation and federal-provincial agreements may well, depending on the language used by Parliament in the relevant statutes, be used as substitutes for one another. In some arrangements, they may also complement one another.

The exact manner in which any of these three means could be used is secondary; the essential question is whether or not any of these three instruments is available to a minister or a department. In many cases, they are not.

Indeed, it appears that statutory provisions containing these instruments have been made on an *ad hoc* basis. There is no provision of general application in regard to these instruments in our statute books. Wherever they exist, they have been adopted only in respect of a specific department or agency. This *ad hoc* approach seems to have worked in practice.

2. Other Approaches

It is trite that Parliament has not limited itself to the creation of departments under the management and direction of Ministers for the carrying out of government activities. Indeed, Parliament has established various types of organizations to carry out specific government functions, whether of an administrative or quasi-judicial nature. In these cases, the relevant functions, duties and powers have often been directly assigned by statute to an agency, or a public office, instead of to a Minister. These agencies and the holders of these offices may be authorized by statute to delegate their powers or discretionary authority, or to designate persons on whom they may confer the authority to carry out their functions or exercise their powers. In these cases, the responsibility and accountability to Parliament, generally speaking, are attached directly to the agency or the office holders and any residual responsibility and accountability of the part of the Minister will depend on the wording of the statute.

Examples of this kind of provision include the *Canada Employment Insurance Commission* and *Boards of Referees*.

## 3. The Case of Crown Corporations

With the proliferation of Crown Corporations in the 1970's and early 1980's, Parliament adopted a new regime, by way of amendments to the *Financial Administration Act*, in 1985, to, *inter alia*, ensure greater accountability on the part of Crown Corporations and clarify the rules concerning the responsibility and accountability of Crown Corporations and relevant Ministers respectively. These new legal provisions were designed, among other things, to clarify the respective roles of Crown Corporations and Ministers in the management of the Corporations and their respective accountability to Parliament. The requirement for the provision of key information concerning the business goals and financial status and plans of the Corporation was meant to bring more transparency in the application of the rules and give meaning to the principle of accountability.

Generally, under these arrangements, Crown Corporations are responsible and accountable for the carrying out of their to-day activities without ministerial interference. There are provisions concerning the financial management and control of the Corporation which, in key matters, involve both the appropriate Minister and the Governor in Council, and for which they remain directly responsible and accountable.

## 4. Conclusion

The departmental approach is the still most common in the organization of the federal government. The rigidity of a departmental organization may be overcome by techniques such as delegation of authority, designation of non-departmental officials to exercise authority and powers and cross-jurisdictional or horizontal agreements.

These techniques are consistent with the principle of ministerial accountability, and indeed, when properly framed, may well reinforce accountability in practice. The next section of this paper will offer some suggestions as to how this might be done in the context of the Citizen-Centered Renewal Initiative.

B. Maintaining Accountability in Horizontal Arrangements

The Citizen-Centered Renewal Initiative is premised on the desirability of organizing the delivery of government services around the citizen. To achieve this goal, ways and means must be found to overcome the rigidity and limitations of traditional departmental structures but which provide for clear and direct lines of responsibility and accountability to the Minister and Parliament.

To succeed, the Renewal Initiative will require that services of different departments, or different orders of government, or provided by the private sector, be joined in partnership to increase the efficiency and effectiveness of the services provided to the citizen.

The rules concerning traditional departmental organization would not, as we have seen, preclude the making of arrangements with anyone outside the departmental confines where operational activities are involved. A centre for the dissemination of federal, provincial and municipal information concerning the creation of commercial enterprises would normally fall in this category.

Where discretionary authority is involved, however, special statutory provisions would be required if the authority is to be exercised by anyone not under the management and direction of the Minister. As discussed above, there are three instruments in that regard, that might be resorted to: the delegation of authority, the designation of non-departmental individuals, or arrangements with provincial or municipal government or other agencies or organizations.

A number of statutes already provide for some or all of these instruments. Many departments, however, do not have any such power or authority.

An important policy question that arises in respect to these instruments is their impact on ministerial accountability. Obviously, it is easier for Parliament to make ministers accountable for the management and direction of their department when all of those exercising his or her powers or authorities are part of the department.

The essential point advanced by this paper is that this need not be different where any of the three instruments is resorted to. Indeed, not only can ministerial responsibility and accountability to Parliament be maintained, but it can be reinforced.

This part offers some suggestions as to how ministerial accountability could be maintained and reinforced. It will also deal with the question of whether legislative amendments would be required to deal with ministerial accountability in support of the Citizen-Centered Renewal Initiative. It will, lastly and briefly, offers some comments on financial and personnel administration.

1. The Need for a Policy Framework/Checklist

It must be recognized at the outset that each initiative for cooperation or partnership to increase the efficiency and effectiveness of government services to the citizen must be considered on its own merit first. Once a tentative decision has been made as to the government services that could be delivered in cooperation or partnership, a number of key questions should be canvassed to ensure that ministerial accountability can be and will be maintained.

There is a good deal of "*ad hocery*" in existing cooperation or partnership arrangements between federal departments and between governments. It is notably difficult to get information about existing arrangements. There are no clear rules regarding ministerial responsibility and accountability. Monitoring mechanisms where they exist, are uneven. There are rarely arrangements regarding complaints by the citizen and designating authority that will have the responsibility to deal with them.

All these factors make it difficult for proper accountability to be exercised and makes it difficult for the citizen to know who is responsible for what. Indeed, it is imperative, to ensure that those with authority and responsibility be held accountable, that there be a maximum of transparency in any arrangement modifying the traditional lines of responsibility and accountability. The adoption of a Policy Framework or Checklist would ensure that, having regard to the particularities and exigencies of each case, the minimum conditions exist to allow for proper accountability obligations to be discharged.

The development and adoption of such a Policy Framework/Checklist would appear essential to enlist the support of Parliament and the public in general in the use of these instruments in support of greater institutional flexibility.

## 2. A Suggested Policy Framework/Checklist

### (1) Initial Decisions to be Made

To guide decisions in dealing with accountability issues in the development of Citizen-Centered Initiatives, it might be desirable to address the following questions:

1. Do the government services in question involve or require "discretionary decision-making" authority or do they involve merely operational activities?

2. If "discretionary decision-making" authority is involved and authority or powers are to be exercised by persons other than those under the "direction and management" of the Minister, consideration need to be given to whether there are statutory provisions allowing for either

- a delegation of authority or powers;
- the designation of non-departmental officials; or
- cross-jurisdictional arrangements (arrangements between departments or governments or with non-governmental agencies).

3. Depending on the statutory provisions, decide which technique to use. If the statutory provisions do not allow the use of any of the three instruments, consideration should be given to seeking an amendment to the legislation.

If it is decided to proceed further, a number of additional questions would need to be addressed.

(2) A Checklist of other Key Questions

The suggested policy framework would contain a checklist of the considerations that ought to be taken into account whenever a department is contemplating an arrangement for the delivery of its services by someone other than departmental officials and involving the use of discretionary authority or powers.

The purpose of the checklist would be to ensure that any such arrangement:

(i) achieves the goals under the relevant legislation;
(ii) achieves other federal goals; and
(iii) is demonstrably reasonable and prudent.

Essentially, the checklist would set out what should be taken into account in the development of arrangements that will ensure that accountability concerns are met.

This checklist could be applied both with respect to arrangements under which discretionary decisions are involved and to arrangements that are simply operational.

Even with respect to operational activities such as the provision of information or non-discretionary services, the federal government may well wish to ensure that, for example, the *Privacy Act* and the *Official Languages Act* are adhered to, where as a matter of law or policy, this should be done. Ministers continue to be accountable to Parliament pursuant to this (and other) legislation whether the information on federal programs is provided by provincial or federal officials.

The essential point here is that Ministers remain accountable to Parliament even where there is an arrangement involving more than one federal department or a provincial government or the private sector. However, the nature of what they are accountable for may to some degree vary depending on the terms of the arrangement put in place.

In particular, Ministers remain accountable for:

(i) putting in place proper and reasonable arrangements;

(ii) dealing properly with problems as they arise under the arrangements; and

(iii) properly informing Parliament concerning the arrangements.

The proposed checklist is intended to assist in ensuring that these three things take place.

The description of the contents of the checklist that follows focuses on arrangements involving decision-making. These are clearly more sensitive than arrangements involving only operational matters.

A Possible Checklist

(i) Is the Minister satisfied that the arrangement will achieve the goals of the legislation with respect to which it is made?

- More particularly, is the Minister satisfied that the persons who will carry out the tasks under the arrangement are properly qualified, trained, etc. to do so?

- Is there a need for, and in the affirmative, does the arrangement contain proper provision for the monitoring, control, etc. of their work?

- Are proper means in place to receive reports on the carrying out of the tasks and for dealing with problems as they arise?

(ii) Does the arrangement clearly spell out the responsibilities of each party to the arrangement and the objectives pursued and the information that will be collected and provided to monitor the carrying out of the arrangement?

(iii) Does the arrangement achieve the goals of other federal legislation and policies that are relevant?

- Examples include the *Official Languages Act*, the *Privacy Act* and the *Access to Information Act.*

(iv) Will information on the arrangement, financial and other, be readily available?

- More particularly, was there adequate consultation with affected publics before the arrangement was put in place?

- Is there transparency in the arrangement, i.e. is the arrangement itself and essential facts concerning its operation on the public record in a way that is easily accessible to the public?

- Is information on the arrangement provided to Parliament at the time that it is put in place (e.g. by its tabling in the House of Commons) and periodically thereafter (e.g. dealt with in the department's annual report)?

If the Minister is satisfied with the answer to the foregoing generic questions, then when he or she is called upon to account to Parliament (or the media or the public) for the arrangement and what has taken place under it, the Minister should be able to state credibly that what has been done by the federal government has been both prudent and reasonable.

It is obvious that such a policy framework including the proposed checklist, is no panacea. Problems will inevitably arise. Unwarranted accusations will be made. Ministers will inevitably be criticized when arrangements will go bad or appear to go bad. However, the proposed policy framework and checklist should assist the government to take the steps necessary, when arrangements are put in place and thereafter, to account properly for and to defend effectively what has been done by the federal government.

3. <u>The need for legislative changes?</u>

The statutory provisions regarding delegation of ministerial authority, the designation of non-departmental officials to exercise ministerial authority and powers and the making of cross-jurisdictional or horizontal arrangements have been adopted on an *"ad hoc"* basis, presumably in response to specific issues and opportunities arising at the time legislative proposals were under consideration.

So far, this pragmatic approach to these instruments appears to have worked well with the necessary statutory provision being adopted by Parliament when the need arose.

This approach is one that might well be continued, recognizing that some worthwhile Citizen-Centered initiatives might have to wait for Parliamentary consideration and approval of the required statutory instrument.

Another approach that might be considered would be a separate statute of general application to all departments that would confer to ministers the authority to use the three instruments discussed in this paper. This type of legislation would be akin to the federal *Public Service Rearrangement and Transfer of Duties Act* and would spell out, in generic terms, the authority of ministers to avail themselves of these instruments.

Such an approach would probably command itself if it could be shown that this flexibility is really needed in the pursuit of a number of worthwhile initiatives. If it were to be found that legislative amendments are required only in respect of a small number of projects, it might be preferable to continue with the "*ad hoc*" approach.

4. Financial Administration

There are some impediments to flexibility under the *Financial Administration Act* (FAA). Notably, S.12 is an impediment in that it permits a deputy head to delegate authority in respect of personnel management, only to "*persons under his jurisdiction*". However, most impediments seem to be found in the regulations under the FAA or in the guidelines issued for the application of the FAA and the regulations. These regulations and guidelines need to be reviewed thoroughly to remove impediments.

The key to accountability for financial matters undoubtedly is to ensure that expenditures are made in accordance with authorities conferred by Parliament.

The focus for achieving this goal should not be a complex set of rules that limits flexibility in service delivery. Rather, it should, in our view, be dealt with in three mutually reinforcing ways.

The first is that the arrangements, including obviously their financial components and the authorities for expenditures, should be made clear to Parliament and the public. (See above, "Is Information on the Arrangement Readily Available?")

The second is that through the *Estimates and Appropriation Acts*, Parliament should be made aware of the purposes and the means used for the delivery of services under each of the arrangement.

The third is that arrangements should include provisions to ensure that the responsible Minister can properly account for expenditures under those arrangements. The particulars of this are for Treasury Board to decide and should constitute an element of the proposed checklist. It could consist of a set of pre-determined, generic procedures that can be readily and easily applied by departments that are contemplating putting in place arrangements of the type discussed here.

It should not, in our view, be necessary to "custom build" such procedures in each instance. Rather, if a department incorporates in an arrangement such a set of pre-determined, generic procedures, then this should satisfy concerns regarding accountability for financial matters.

Treasury Board should, of course, review proposed arrangements to ensure that the pre-determined, generic procedures are properly incorporated and nothing more is required. With a carefully constructed set of such procedures, this should not give rise to either undue delay or difficulty.

5. Personnel Administration

Public servants are engaged, promoted, etc. under the authority of the *Public Service Commission*, pursuant to the *Public Service Employment Act.* Authority for personnel administration

is conferred by the FAA on the Treasury Board. In many respect, these authorities are delegated to departments.

Collective bargaining and grievances come under the *Public Service Staff Relation Board* pursuant to the *Public Service Staff Relations Act.*

The types of service delivery being considered by the Task Force may have impacts on the employment situation of public servants (e.g. job security, performance evaluation, mobility within the public service, pensions, grievance procedures, collective bargaining rights).

While these are important matters, they do not directly relate to the accountability of ministers and, therefore, fall outside the scope of this paper. As with the case of financial administration, personnel matters should be thoroughly reviewed in order to identify and deal with impediments to the types of service delivery being considered by the Task Force.

## C. Conclusion and Recommendations

In conclusion, Parliament has recognized the need to ensure flexibility in government organization. It has accomplished this by utilizing a variety of techniques. All of these techniques also recognize the concomitant responsibility to ensure accountability while providing for flexibility in organization. In moving to new initiatives and arrangements in support of the Citizen-Centered Renewal Initiative, it is important not to forget these techniques for ensuring flexibility and recognizing and maintaining accountability.

The three instruments discussed in this paper (delegation, designation and cross-jurisdictional or horizontal arrangements), where properly framed will not only maintain, but could reinforce the accountability ultimately owed to Parliament.

The adoption of an appropriate Policy Framework/Checklist by the government would indeed ensure that all matters essential to give meaning to the principle of ministerial accountability to Parliament are considered in a proper and timely fashion. Such a Policy Framework/Checklist is essential to ensure a maximum of transparency in these arrangements without which accountability, in practice, would remain an elusive objective.

Roger Tassé/July 9/96