
**DEFINING BOUNDARIES:
THE CONSTITUTIONAL ARGUMENT
FOR BUREAUCRATIC INDEPENDENCE
AND ITS IMPLICATION FOR THE
ACCOUNTABILITY
OF THE PUBLIC SERVICE**

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1 Introduction

This paper will explore the constitutional boundaries which establish the basis for relations between the political and bureaucratic spheres of government.¹ Some suggest the boundaries between Ministers and political staff on the one hand (who I will refer to together as “the political executive”), and public service managers, public officials and line employees of government on the other hand (who I refer to collectively

as the “public service”), are matters of political expediency rather than constitutional principle.² I believe the primacy of political expediency has created a climate with insufficient safeguards against political interference in public service decision-making. In my view, recognizing the primacy of constitutional principle would be a salutary and constructive response to the Sponsorship Affair and ought to underpin any recommendations aimed at preventing incursions against the non-partisan character of the public service in the future.

Treasury Board is the government department responsible for public service management. In the recent Treasury Board report, “Review of the Responsibilities and Accountabilities of Ministers and Senior Officials,”³ prepared as a response to the 2003 Auditor General’s Report into the Sponsorship Program, the lack of constitutional status of the public service is described in the following terms:

(Emphasis added)

Departments, as apparatuses for the exercise of authority and responsibilities that reside in ministers, are the basic organizational unit of executive administration in the Westminster system, and ministers act principally through the public servants in their department. The role of the Public Service is to advance loyally and efficiently the agenda of the government of the day without compromising the non partisan status that is needed to provide continuity and service to successive governments with differing priorities and of different political stripes. In order to do this, public servants must provide candid, professional advice that is free of both partisan considerations and fear of political criticism, which in turn requires that they remain outside the political realm. But, while public servants provide advice, the democratically elected ministers have the final say, and public servants must obey the lawful directions of their minister. In short, all government departments, and all public servants who work for them, must be

accountable to a minister, who is in turn responsible to Parliament. Were this not so, the result would be government by the unelected. *In keeping with these principles, public servants as such have no constitutional identity independent of their minister.*⁴

It is true that no express provisions in any of Canada's constitutional texts accord the public service constitutional status (as they do, for example, the judiciary), but it is equally true that a range of unwritten constitutional conventions and principles clearly give rise to obligations, responsibilities and constraints on decision-making by members of the public service which arguably together confer constitutional status on the public service as an organ of government. Thus, in my view, it is misleading to suggest that public servants have no constitutional identity independent of their Minister, or to suggest that public servants are subject to no constitutional or legal accountability beyond loyalty to their Minister. I elaborate on this conclusion below.

While I believe that constitutional norms provide the point of departure for the doctrines and principles which govern the public service, there is little to be accomplished by simply cataloguing such doctrines and principles. It is important to determine how these boundaries operate, and to ensure, when necessary, they function as "lines in the sand" and not merely "ropes of sand." To this end, these boundaries must be articulated and enforced in ways that are compatible with democratic institutions and political realities. If the integrity of these boundaries is to be sustained, they must permeate the culture both of the political executive and the public service. The Sponsorship Affair has illustrated a culture where the boundaries between the interests of Ministers and the obligations of public servants were blurred and distorted.⁵ Clearly, the status quo can and must be improved upon.

The analysis below is divided into two parts. The first part will explore the legal and constitutional terrain of the relationship between the political executive and the public service, including the constitutional

convention of public service neutrality, the constitutional principle of the rule of law, and the common law duty of loyalty operating on public servants in their relationship with the political executive. While this section focuses on the constitutional rationale for boundaries between the political and public service spheres, mutual respect and interdependence between the various organs of the executive branch of government are key prerequisites for the success of government and a foundation of Westminster democracy. Mutual respect and interdependence are only possible, I argue, between organs of government which also enjoy separate identities and a measure of independence from one another. The second part of this paper will explore avenues to develop, monitor and enforce the boundaries identified in the first part. These avenues may include judicial review, Auditor General's investigations, public inquiries, parliamentary committees, and Privy Council Office (PCO) or Treasury Board reviews, but I conclude that there is a compelling case for a truly independent Public Service Commission, with supervisory jurisdiction over enforcing and adjudicating a revamped legislative Public Service Code (which could form the basis for a robust campaign of public education and professional training initiatives).

2 The Constitutional and Legal Terrain

2.1

Constitutional Boundaries

The first section of the paper canvasses the constitutional bases for the boundaries between the political and bureaucratic spheres of executive government. At least two constitutional principles directly address the role and responsibility of executive decision-makers: First, the constitutional convention of bureaucratic neutrality operates to ensure that public servants owe a primary obligation to the Crown (and, by extension, to the people of Canada) and not to the party which happens to control the government of the day; and second, the rule of law ensures

that executive decision-making is animated only by proper purposes, good faith and relevant criteria set out by law. Together, I argue, these principles represent a constitutional norm of bureaucratic independence. This norm suggests a requisite spectrum of separation between bureaucratic and political decision-making. In some areas, this separation will be near absolute, as in the case of criminal justice decision-making involving courts or prosecutors. In other cases, such as policy-making spheres, where political direction may be decisive, the separation may be subtle. The Sponsorship Program, and procurement generally, lie toward the end of the spectrum requiring more independence. While political direction may create a sponsorship program, for example, it is difficult to imagine appropriate political intervention in the decision as to which advertising agency to award a contract.

2.1.1 The Constitutional Convention of a Non-partisan Public Service

The point of departure for any discussion of public service independence as a constitutional norm is the constitutional convention that the public service remains neutral as between partisan interests (the “Convention”).⁶ Kenneth Kernaghan has outlined the content of the Convention in an oft-cited list of six key principles:

- (1) Politics and policy are separated from administration; thus, politicians make policy decisions and public servants execute these decisions;
- (2) Public servants are appointed and promoted on the basis of merit rather than of party affiliation or contributions;
- (3) Public servants do not engage in partisan political activities;
- (4) Public servants do not express publicly their personal views on government policies or administration;
- (5) Public servants provide forthright and objective advice to their political masters in private and in confidence; in return, political

executives protect the anonymity of public servants by publicly accepting responsibility for departmental decisions; and

- (6) Public servants execute policy decisions loyally, irrespective of the philosophy and programs of the party in power and regardless of their personal opinions; as a result, public servants enjoy security of tenure during good behaviour and satisfactory performance.⁷

There is, in my view, an important omission in this list. The Convention also includes the duty of public servants to question and, if necessary, to decline to follow instructions which are motivated by improper partisan interests. While Ministers are responsible for the decisions of the department, officials alone are responsible for their obligation to remain non-partisan. In relation to the Crown, the public service serves as guardians of the public trust (and, by extension, the public purse). In addition to their primary constitutional obligations toward the Crown, public servants also owe a common law obligation of loyalty to the government of the day, which includes a duty to carry out lawful instructions and not publicly criticize government policy or take public sides in partisan debates. The limit on this secondary obligation of loyalty to the government is dictated by the primary obligation of responsibility to the Crown. In other words, it is not constitutionally permissible for public servants to discharge their loyalty to the government of the day where to do so would require public servants to take part in partisan activities (or, as discussed below, to contravene the rule of law).

While the Convention could suggest that the public service operates independent of the political executive, in many if not most governmental contexts, government could not function on such a basis. Public servants are deeply enmeshed in supporting the political executive as it forms and finalizes policy preferences. Public servants help in shaping legislation and have a leading role in the drafting of regulatory and policy

instruments to further legislative aims. Public servants give life to government programs through the exercise of discretion and control over implementation. Public servants are responsible for oversight through internal audits and accountability measures. In many of these settings, senior public servants work hand in glove with political staff in the employ of Ministers (referred to federally as “exempt staff,” as they are exempted from the terms of the legislation which applies to the public service), who themselves may be deeply enmeshed in decision-making around policy formation and issues management. As a former senior public servant opined, the idea that you can keep the political and bureaucratic roles distinct at the highest levels of government decision-making is “naïve and non-productive.”⁸ It is because of this commingling of the bureaucratic and political, however, that the constitutional principles which demarcate the appropriate sphere of bureaucratic and political activity become so crucial.

The interdependence of the bureaucratic and political domains of the executive can be threatened in two ways: first, when the political executive (i.e. the PM and PMO, Cabinet Ministers and their political staff) seeks to politicize the public service for its own advantage; and second, when public servants act for partisan ends on their own initiative. In the case of the Sponsorship Affair, the Convention was compromised in both senses. It has been in response to such threats that the courts, elaborating upon the Convention, have played a central role.⁹

In order to determine how best to articulate and enforce the Convention, it is important to place it within the context of the general rules applicable to constitutional conventions. Constitutional conventions are not part of written constitutional texts but arise from historically accepted practices and customs with respect to the machinery of government. In *OPSEU v. Ontario (A.G.)*,¹⁰ the Supreme Court of Canada offered the following observation on conventions:

As was explained in *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 876-78, with respect to the Constitution of Canada—but the same can generally be said of the constitution of Ontario—“those parts which are composed of statutory rules and common law rules are generically referred to as the law of the constitution.” In addition, the constitution of Ontario comprises rules of a different nature but of great importance called conventions of the constitution. The most fundamental of these is probably the principle of responsible government which is largely unwritten, although it is implicitly referred to in the preamble of the Constitution Act, 1867...¹¹

The constitutional convention of a politically neutral public service is part of what is sometimes referred to in the public administration literature as the “iron triangle” of conventions consisting of political neutrality, ministerial responsibility and public service anonymity.¹² The fact that these duties are not part of the written Constitution does not detract from their centrality to Canada’s constitutional system.¹³ Put differently, a non-partisan public service is as important as ministerial responsibility to Canada’s constitutional order. However, as Wade and Forsyth explain, writing in the British context, the convention of neutrality and anonymity for public servants may be seen as interwoven with ministerial responsibility:

The high degree of detachment and anonymity in which the civil service works is largely a consequence of the principle of ministerial responsibility. Where civil servants carry out the minister’s orders, or act in accordance with his policy, it is for him and not for them to take any blame. He also takes responsibility for ordinary administrative mistakes or miscarriages. But he has no duty to endorse unauthorised action of which he disapproves, though he has general responsibility for the conduct of his department and for the taking of any necessary disciplinary action.¹⁴

As Kernaghan has observed, ministerial responsibility is rarely defined, and this lack of a shared understanding of its requirements “permits confusing, creative, and misleading interpretations of its meaning.”¹⁵

While the principle of a neutral public service may well complement the principle of ministerial responsibility, the better view in my opinion is that the neutrality and impartiality of the public service is not contingent on ministerial responsibility and represents instead a free-standing constitutional principle, which owes its modern origins to the rule of law. Whether Ministers actually resign when they should, or actually can make their ministries as accountable to the legislature as they should, the logic behind insulating public servants from undue political interference, and restricting partisan activities among public servants, remains justified. In other words, even if the principle of ministerial responsibility erodes, as many have suggested it has,¹⁶ this does not undermine the rationale or requirement for a neutral public service. Indeed, as the Sponsorship Affair demonstrates, the more the concept of ministerial responsibility appears out of step with the actual practices of government, the more the importance and urgency of an independent public service grows.

Conventions do not and cannot exist in the abstract. They are constitutional rules whose contours are set by practice over time—they are determined to a considerable extent on a particular view of history. The history of the public service, however, reveals several different stories. At least since the time of Confederation, a principal feature of responsible government in colonial Canada was security of tenure for public servants, but the merit system did not take hold in Canada until the late 19th and early 20th Centuries.¹⁷ Patronage was rampant,¹⁸ remains common in a variety of board and agency appointments and is not precluded even at the highest levels of the public service.¹⁹ Public service anonymity is now routinely breached.²⁰ Not only are such breaches of anonymity common, they are, I would suggest, now

expected. In an era where “secret guidelines” and “behind-closed-door” politics are viewed as inconsistent with transparent accountability, public service anonymity would be viewed favourably in few quarters. Naming public officials, however, should not be interpreted as sanction for the public humiliation of public officials. The value at stake in such settings is not secrecy but respect for the public service as an institution.

In OPSEU v. Ontario (A.G.), the Supreme Court appeared to recognize the aspirational quality of political neutrality as a convention rather than its empirical foundation in political practices of the time. The Court cited with approval the following passage by MacKinnon ACJO, writing for the Ontario Court of Appeal:

Clearly there was a convention of political neutrality of Crown servants at the time of Confederation and the reasoning in support of such convention has been consistent throughout the subsequent years. Whether it was honoured fully at that time in practice is irrelevant. The consideration is, as stated earlier, not as to the social desirability of the legislation but rather the fact that historically there was such a convention existing in 1867. It is difficult to take exception to Mr. Justice Labrosse’s conclusion that: “Public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power” (p. 173 O.R., p. 328 D.L.R.). The impugned provisions seem to do no more than reflect the existing convention.²¹

In other words, whether a non-partisan public service represented the rule or the exception at Confederation is not the point of the inquiry. History has a vote but not a veto over the scope of constitutional conventions. Ultimately, it falls to judges, not historians, to determine their reach. While they may determine the requirements of such conventions, courts cannot order either the executive or the legislative branch to comply with them.²² Nonetheless, the importance of

conventions has been enhanced by the growing significance of unwritten constitutional principles more generally and the strengthening of the role of the courts as a catalyst for constitutional evolution through the exposition of such principles.²³

The most detailed discussion of the effect of this convention is contained in the Supreme Court's judgment in *Fraser v. Public Service Staff Relations Board*.²⁴ Fraser was a gadfly who worked at Revenue Canada, but whose hobby appeared to be publicly criticizing the government's policies, especially on metrification (he was photographed in the *Whig-Standard* with a placard that read "your freedom to measure is a measure of your freedom").²⁵ Mr. Fraser was sanctioned for his conduct and challenged this sanction on the grounds that public servants should be free to criticize the government of the day if they disagree with their policies or practices. In the course of finding that Mr. Fraser enjoyed no legal protection against being sanctioned for his behaviour, the Supreme Court held that "[A] public servant is required to exercise a degree of restraint in his or her actions relating to criticism of government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties."²⁶ Dickson C.J. characterized the public service as built around values such as "knowledge...fairness...and integrity" and emphasized that its duty of loyalty was to the Government of Canada, not to any political party that might enjoy power at the time.²⁷ Dickson C.J. invoked the "tradition" in the Canadian public service which "emphasizes the characteristics of impartiality, neutrality, fairness and integrity."²⁸

While finding no bar to the sanctions in the case before him, Dickson C.J. asserted that it would be inappropriate to penalize a public servant for opposing government policy in public where the government was involved in illegal acts; or where the government's policies jeopardized the life, health or safety of public servants or others; or where the public servant's criticism has no impact on his or her ability to perform

effectively the duties of a public servant or on the public perception of that duty.²⁹ In other words, if this logic is followed, all public servants enjoy a measure of legal protection should they decide to become “whistleblowers,” whether or not specific whistle-blower legislation exists to protect them.³⁰ The Court in *Fraser* affirmed that a public servant’s duty of loyalty to the Crown, and through the Crown to the public interest, must in some circumstances be a higher obligation than the duty of loyalty owed to the government of the day. Even to characterize this as a convention raises questions. Could a government enact legislation exempting some or all of the public service from its non-partisan obligations? I would suggest a non-partisan public service is a constitutional norm or principle which reflects a crucial check on executive authority and could not be open to manipulation for partisan ends. An attempt to accomplish this, whether by legislation or executive action, would be in my view an unconstitutional act.

The principle of bureaucratic neutrality has been described by courts as “a right of the public at large to be served by a politically neutral civil service,”³¹ as an “essential principle” of responsible government,³² as a matter of the “public interest in both the actual, and apparent, impartiality of the public servant,”³³ and finally, as an “organ of government.”³⁴ Can a non-partisan public service be simultaneously a “right” of the people, an “essential principle” of responsible government, and a “policy” in the public interest? The answer is undoubtedly that constitutional conventions (as well as norms and principles) can and do have multiple rationales and serve multiple ends. This is consistent with what might be accurately characterized as the plural nature of the executive branch in Canada’s constitutional system.³⁵ Another example of a plural requirement in Canada’s constitutional order is the requirement to preserve and promote the rule of law, to which my analysis now turns.

2.1.2 The “Rule of Law”

Public servants are entrusted with public authority in order to implement the policy agenda of the political executive. They have no legitimate alternative set of interests or agendas, and the existence of such alternative public servant interests and agendas would pose a threat to democratic accountability and Westminster principles under which all public authority must adhere to the rule of law.³⁶ Parliament, the political executive and the public service all must conform to the rule of law, and this is a separate and independent duty on each organ of government.

The obligation to comply with the rule of law would be a straightforward constraint on government action but for the fact that the rule of law is a deeply contested notion which also must be balanced against other unwritten constitutional principles such as democracy and parliamentary sovereignty.³⁷ While the rule of law has been recognized as the animating principle for the judicial review of administrative action,³⁸ and is mentioned alongside the supremacy of God in the preamble to the *Charter of Rights*, the rule of law remains largely unexplored as a constitutional norm by courts in Canada. In the *Secession Reference*, where the Supreme Court of Canada affirmed the rule of law as an underlying constitutional principle, it described the importance of the rule of law in terms of subjecting executive authority to legal accountability and protecting citizens from arbitrary state action:

The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, is “a fundamental postulate of our constitutional structure.” As we noted in the *Patriation Reference*, supra, at pp. 805-6, “[t]he ‘rule of law’ is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known

legal rules and of executive accountability to legal authority.” At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.³⁹

The executive accountability to legal authority referred to in this passage is accomplished by another constitutional postulate—all executive authority is subject to judicial review on the grounds that the rule of law has been contravened.⁴⁰

While the rule of law imposes a special set of duties on government lawyers and the Attorney General as Chief Law Officer (which includes, for example, the obligation on a Deputy Attorney General to resign if an Attorney General rejects advice that a particular course of action is unconstitutional, and a correlative duty on Attorneys General to resign if Cabinet refuses their advice on similar questions),⁴¹ its reach is not and should not be limited to lawyers or judges. The rule of law doctrine imposes a public trust obligation on public servants to ensure that the rule of law is respected and that government directions which are inconsistent with the rule of law are not followed. To view the administrative state in rule of law terms means, for example, that it would be unlawful for a public servant to carry out an exercise of public authority which was based purely on political whim or the desire to curry favour with political authorities or through improper political pressures.⁴² This also suggests that public servants have a constitutional obligation not to carry out directions which are themselves unlawful.⁴³ But how is the rule of law, in this sense, to be enforced?

In *Public Service Alliance of Canada v. Canada*,⁴⁴ one of the few cases to raise the implications of the rule of law as an underlying constitutional norm in the context of regulating the public service, the Federal Court considered whether federal “back to work” legislation rendered

ineffective a negotiated agreement which confirmed correctional officers' right to strike. The Public Service Alliance of Canada argued that the legislation violated the rule of law. The Court rejected this argument on the grounds that an underlying constitutional principle such as the rule of law, even if it could be said to be violated (on which the Court declined to make a finding), could not have the effect of invalidating legislation.⁴⁵ In *Lalonde v. Ontario (Commission de Restructuration des Services de Santé)*,⁴⁶ however, the Ontario Court of Appeal confirmed that underlying constitutional principles, in that case the principle of protecting minority rights, constrain the exercise of discretion and application of public authority, and in that case effectively reversed a government decision to close a hospital serving a minority francophone population.

If the rule of law is to play a constructive role in boundary drawing between political and public servant spheres, this will have to do so through the inculcation of administrative culture. Courts, tribunals, Auditors General, and public service commissions all provide important venues where these boundaries are identified and developed, but it is what lies below the surface that matters most. Bureaucratic independence, in other words, rises or falls with the day-to-day values of the public service (and of the political executive), rather than with the occasional, ex-post pronouncements of those exercising oversight.⁴⁷ Without a rule of law culture, proliferating rules and procedures are unlikely to produce accountability or compliance with a set of institutional boundaries.

To understand how the rule of law may shape the relationship between the public service and the political executive, consider the example of the "Magna Budget" affair in Ontario. In the spring of 2003, the then Tory government announced it was going to announce its annual budget, not in the Legislature, but rather in a closed circuit studio hastily erected at a Magna auto parts plant owned by a prominent and generous supporter of the Progressive Conservative Party (it was later introduced

in the House in the usual manner). A minor constitutional crisis ensued. Critics in the media and opposition decried the arrogance of the decision to “end-run” legislative debate on the budget, while the Speaker of the House obtained a legal opinion suggesting the decision violated parliamentary and constitutional convention.⁴⁸

The “Magna Budget” implicated bureaucratic independence in at least two ways. First, it fell to the constitutional lawyers of the Attorney General’s office to ensure that the government was not embarking on an unconstitutional course of action, and second, it fell to Cabinet Office to ensure that public servants and public resources were not deployed in support of partisan activities. The Attorney General, when pressed, would neither confirm nor deny that an opinion on the budget delivery had been sought from government lawyers, but reiterated that he would be compelled to resign if an opinion had been sought and if it had indicated that the proposed course of action was unconstitutional. Therefore, it was by negative implication presumably that the Attorney General was signalling either that no opinion had been sought or that the opinion sought was not unfavourable.⁴⁹ The Secretary of Cabinet was asked by the Liberals, then in opposition, to prevent the public service from being dragged into a partisan exercise by providing their services to facilitate the delivery of the budget at the auto parts facility.⁵⁰ The Secretary later issued a press release indicating “no civil servant was involved in any inappropriate activity.”

The “Magna Budget” reflects both the possibilities and limits of bureaucratic independence. On the one hand, it remained within the power of the Attorney General and Cabinet Office effectively to prevent the budget from being delivered outside the legislature. Both the AG and Secretary of Cabinet were called upon to give, in effect, their imprimatur to the action contemplated by the government. On the other hand, the political realities made that approval almost a foregone conclusion. This is so for at least three reasons. First, determining

whether a proposed course of action violates the constitution is more often an exercise in risk analysis than in raising red flags. Even if a *Charter* breach is apparent, it is much more difficult to say with certainty how a court will respond to section 1 evidence. At most, government lawyers could identify a high risk with respect to some courses of action over another. When a government has in fact infringed a convention is less certain still.⁵¹ Thus, occasions when an Attorney General must advise a government not to pursue its desired course will be few and far between (especially where the Attorney General wishes to remain in Cabinet). Second, it is unclear whether the Secretary of Cabinet may seek legal advice independent of the Attorney General's office. Therefore, although the government of the day and the public service might not always have identically convergent interests, they remain bound by the same ambiguities in relation to government legal opinions. Third, there are few if any means to resolve disputes between the head of government and the head of the public service who is herself or himself a political appointee (other than the head of the public service resigning or being replaced, neither of which impose any accountability on the political executive). When push comes to shove, it is the public service that more often than not ends up back on its heels.

Constitutional crises like the "Magna Budget" affair are rare.⁵² They reflect only the visible tip of a largely submerged iceberg of political and bureaucratic entanglements. Most forms of political pressure on public service decision-making arise and are resolved quietly, without the anxiety of a constitutional crisis, with a phone call or email between the Clerk of the Privy Council's office and a Minister's office, or between Attorney General lawyers and line ministries, on a weekly and sometimes daily basis. Occasionally, once a month or so, one or two might bubble to the surface and become an issue, briefly, between a Minister and a Deputy Minister, or between Cabinet Office and the Premier's Office. In rare instances, a leaked memo or document leads to some news coverage

and perhaps the attention of opposition parties. In the overwhelming majority of cases, few records will attest to the tensions such friction might produce, and more rare still will be records of how such friction will be resolved (i.e. did one side blink or lack backbone, or was a compromise fashioned?). It is far from clear that the status quo provides the public service with the capacity (and legitimacy) to fulfill its obligations to ensure respect for the rule of law. In the current climate, we are left to question whether a culture of intimidation is more likely than a rule of law culture to prevail when political pressure is brought to bear on public servants. Can a rule of law culture, however, flourish in contexts where public servants owe duties of loyalty to carry out governmental direction? It is to this aspect of the relationship between the political executive and the public service that I now turn.

2.2

The Duty of Loyalty

I would contend that neither the Convention of a non-partisan public service nor adherence to the rule of law are incompatible with the public service's duty of loyalty to the government of the day. The ability of that political executive to carry out its policy mandate depends entirely on the loyalty and professionalism of the public service. As the Ontario Law Reform Commission noted, however, one cannot understand the relationship between political neutrality and independence without also factoring in the common law duties of loyalty, good faith and confidentiality:

The common law duties of loyalty, good faith and confidentiality should be seen, then, as having two essential roles, both of which are manifestations of the "public interest": to secure the sound administration of the various branches of government, and to foster and maintain the traditional independent role of the public service. However, it is essential to emphasize that the "public interest" so served is not monolithic; rather, it is the result of the delicate

balancing of frequently competing interests, that of the employee wishing to exercise individual rights of expression and to engage in political activity, and that of the government, wishing to maintain the existence and the appearance of independence and impartiality in the public service and to ensure effective administration in the Province.⁵³

At least in theory, the duty of loyalty and neutrality are complementary attributes. The relationship between the two was aptly summarized by Sir C.K. Allen in the following terms:

[T]he civil servant is expected to give, and with very few exceptions does give in full measure, the qualities of loyalty and discretion. He is not to obtrude his opinion unless it is invited, but when it is needed he must give it with complete honesty and candour. If it is not accepted, and a policy is adopted contrary to his advice, he must and invariably does, do his best to carry it into effect, however much he may privately dislike it. If it miscarries, he must resist the human temptation to say “I told you so”; it is still his duty, which again he invariably performs, to save his Minister from disaster, even if he thinks disaster is deserved.⁵⁴

In *Fraser*, Dickson C.J. states that the characteristics of impartiality, neutrality, fairness and integrity are associated with the public service, and a person entering the public service is deemed to understand that these values require caution when it comes to criticizing the government.⁵⁵ Knowledge, fairness, integrity and loyalty all are core characteristics which characterize the public service’s aspirations.⁵⁶ Dickson C.J. recognized a qualified rather than absolute duty of loyalty owed by public servants.⁵⁷

It has fallen to subsequent courts interpreting the qualified nature of this duty to resolve the dilemma raised by *Fraser*—how disputes should be resolved in which the ideals of neutrality and loyalty come into conflict.

Importantly for the present purposes, these cases have concerned breaches of loyalty where public servants have criticized the governments. Canadian public service jurisprudence has not yet adequately confronted the issue of excessive loyalty or “capture” by the government of the day, which is the issue confronted in the sponsorship program setting.

A number of labour cases involving disputes between public servants and the Government followed the release of *Fraser*. An analysis of a sampling of such cases demonstrate how rarely loyalty and neutrality are in fact complementary values. One of the most significant of these cases was *Haydon v. Canada*.⁵⁸ The case concerned two scientists who spoke on national television about their concerns regarding the drug review process in Canada. They raised serious allegations, including the claim that the scientific integrity of Health Canada was undermined by the undue influence of partisan political considerations. In the Government’s submissions, the two Health Canada scientists had breached their duty of loyalty to the Government. The Director of the Bureau where the two scientists worked issued a written reprimand to the scientists, emphasizing, “Your decision to pursue your outstanding complaints in a public forum is in my view in conflict with your obligations as a public servant. . . . Public denunciation of management is incompatible with a public servant’s employment relationship.”⁵⁹

The issue for the Federal Court in *Haydon* was both whether the duty of loyalty itself violated the expressive freedom of public servants and whether the Associate Deputy Minister (ADM) of Health Canada acted reasonably in denying the scientists’ grievance over the reprimand. Tremblay-Lamer J. held that the common law duty of loyalty, as articulated in *Fraser*, did not in and of itself violate the freedom of expression found in the *Charter*. She held:

In my opinion, these exceptions [from *Fraser*] embrace matters of public concern. They ensure that the duty of loyalty impairs the

freedom of expression as little as reasonably possible in order to achieve the objective of an impartial and effective public service. Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence.⁶⁰

Tremblay-Lamer J. further held that the onus for determining whether the criticism or disclosure in a particular case fell within the exceptions to the duty of loyalty recognized in *Fraser*, fell to the Government wishing to sanction the public servant. In other words, by upholding the reprimand in *Haydon*, the ADM was deemed to have made a finding that the exceptions from *Fraser* did not apply to the criticism by the scientists of Health Canada. Having thus framed the “*Fraser* test,” Tremblay-Lamer J. concluded that the ADM committed an error in law by failing to consider the scientists’ allegation of undue political pressure, which in her view clearly fell within the first exception to the duty of loyalty recognized in *Fraser*, namely, disclosure of policies that jeopardize life, health or safety of the public. Tremblay-Lamer J. also confirmed that the allegations of political interference should be raised, at first instance, through the internal supervisory structure. This is an important point to emphasize, as it addresses the concern that if all officials have constitutional duties outside the scope of ministerial responsibility, and may decline to follow instructions whenever they deem those instructions to impinge the rule of law or a non-partisan public service, the result could well be chaos. Requiring that concerns be raised internally (unless there are exceptional circumstances) means, in effect, that the boundary issues will be raised at the ADM or Deputy Minister level. In this way, neither internal discipline nor confidentiality are compromised by the public servants’ constitutional duties.

The challenge of balancing loyalty with neutrality requires not only operational principles that are sensitive to political realities but also

developing standards which are sufficiently flexible. Those standards must, on the one hand, provide meaningful protections to those disclosing confidences in order to uphold the public interest while, on the other hand, frustrating any attempts by partisan-motivated public servants to obstruct the Government's pursuit of its legitimate interests. As Cooke J. observed in *Alberta Union of Provincial Employees v. Alberta*, the duty of loyalty exists to ensure that government can effectively work towards legitimate goals, notwithstanding the private opinions of its public servants.⁶¹ If the goals are not legitimate (for example, where political interference is involved), it cannot and should not be used to compel obedience from public servants.

The courts resolve the tensions implicit in the “duty of loyalty” case law by emphasizing the pursuit of balance. Whether using the *Charter* or the common law, the task of the courts remains the same, to ensure that restrictions on the ability of public servants to speak out on matters of policy and politics are informed by the legitimate expectations of government to loyalty and by the legitimate expectations of the public to impartiality and guardianship on the part of public servants. Public servants, because they exercise significant discretion in the implementation of public authority, or development and implementation of public policy, can never be simply “servants” to political “masters.” They must always keep an appropriate distance, literally and figuratively, from the partisan interests of the Government. In this sense, Crown employment is not like other labour settings; the duty of loyalty among public servants is not like the ordinary duty of loyalty owed by employees to employers.

While the framework in *Fraser* provides a helpful point of departure for this balancing exercise, too often the tendency of lower courts faced with adversarial disputes between public servants and government has been to treat that framework as a “test.” Rather than thoughtful reflection on, and flexible application of the principles underlying *Fraser*, the

courts have contented themselves with a narrow analysis of whether the impugned activity in a given case fits within any of the exceptional categories recognized in *Fraser*. This approach leaves open how a court might respond to a public servant who fails to raise red flags where rule of law or neutrality issues arise—in other words, does *Fraser* permit public servants to criticize the Government publicly (or refuse to carry out government direction) where it is justified to do so, or does it require such action if there is no other reasonable means for the improper activity to come to light? This gap in the jurisprudence on the duty of loyalty highlights the need for an independent Public Service Commission with jurisdiction over matters of loyalty, ethics and political interference (this proposal is outlined below).

In light of the analysis above, the content of bureaucratic independence must address, at a minimum, what conditions, structures, guarantees or protections are required to ensure the political neutrality of the public service, adherence to the rule of law, and respect for the duty of loyalty. Bruce Ackerman has argued that a new separation of powers doctrine for the 21st Century must take as its point of departure the realities of the administrative state and the challenge of how a modern constitution “should be designed to insulate certain fundamental bureaucratic structures from ad hoc intervention by politicians.” A primary bulwark against politicization remains the merit principle for public service hiring and promotion.⁶² The integrity of the public service, however, cannot end with labour relations but must also extend to the day-to-day interaction between the political executive and the public service. In these settings, there must be an equivalent “merit” principle at stake.

Ultimately, however, the greatest guarantee against political interference is not objective in character; rather, it emanates from political will. Judicial intervention in high profile disputes is unlikely to change a culture which sees appointments of friends and partisan associates to senior public service management as a vehicle for implementing policy. Constitutional

principles cannot be left entirely in the hands of the political executive or the public service to work out as they please. The courts have a role to play in resolving disputes and elaborating boundaries. The mere fact that the relationship between organs of executive government involves constitutional principles does not imply that it must be left entirely for lawyers to define, either. Bureaucratic independence engages norms of constitutional and administrative law, the political process and public administration. Only measures which resonate in all of those spheres will be effective.

3 Evaluation and Evolving Boundaries

The analysis concludes by reviewing the potential strengths and weaknesses of enhancing the independence of public servants. This requires, as I indicated above, balancing the value of independence against other important values such as accountability and the legitimate expectations of loyalty and professionalism by elected governments. There is a role for several institutions in this process, including the Auditor General, public inquiries, the courts and policy-makers. I will not focus on the development of new institutions such as the Accounting Officer model (discussed in the paper by Professor Franks) or revisiting existing institutions such as the role of ministerial responsibility, Deputy Ministers or the Clerk of the Privy Council, which are being developed in other papers. I will focus instead on a range of institutions and mechanisms which might affect the day-to-day relationship between public servants and Cabinet Ministers and which might lead to change in the culture of both spheres of executive government.

3.1

Role of Judicial Review

It is neither practical nor desirable to have public servants initiating a judicial review when they wish to question or challenge the actions of the Government. However, the development of bureaucratic

independence as a constitutional norm has occurred in large part due to the Supreme Court's jurisprudence in cases such as *Fraser*. Judicial review serves at least three important roles:

- confirming and clarifying the scope of the convention on political neutrality and the rule of law;
- interpreting constitutional and statutory texts, from the *Charter* guarantees of freedom of expression and equality as applied in public service settings, to the public service acts; and,
- developing and disseminating the common law standards applicable to public servants, such as the duty of loyalty.

There are, however, significant limitations to the effectiveness of judicial review to maintain the boundary between the political and public service spheres. First, judicial review occurs only subsequent to the events in question, often many years after those events. Second, the evidence which forms the basis for the decision may be quite limited, due to Cabinet privileges as well as solicitor-client privilege. Third, judicial review is too cumbersome and expensive to handle any degree of volume. Issues of legal representation and cost may also compromise access to judicial review.

Finally and most significantly, it is not clear that public servants would have standing to bring a freestanding legal action based on political interference or improper political conduct. Would this be a public action for declaratory remedies? Could it form the basis of a claim for damages? Assuming it is a judicial review in the administrative law sense, again the remedy is unclear—would it be a declaration of invalidity, or quashing a decision? Could violation of the “statement of values” be referred to a court?

Where judicial review has played a role in the elaboration of the political executive/public service relationship to this point, is in settings of

labour relations disputes (usually with employee grievances following departmental sanctions). This is not an ideal environment for the interpretation of the constitutional duties of public servants. A specialized body with a broader supervisory mandate over the day-to-day activities of public servants would be preferable as a body to interpret at first instance the duties of public servants.

3.2

Role of the Auditor General

Unlike courts, which must wait passively for cases to be brought before them, the Auditor General of Canada and the provincial Auditors General provide an important source of proactive accountability for government activities. This oversight extends to the relationship between the political executive and the public service. Because the Auditor General is a parliamentary office, and operates at arm's length from the executive branch, it is well-placed to monitor the relationship between the political executive and the public service in relation to specific programs, departments or divisions.

The Auditor General, however, cannot enforce the legal boundaries which shape public service action—its only remedial authority is a reporting requirement to Parliament (which itself can be potentially manipulated by the timing of parliamentary sittings). Further, while an Auditor General, as in the case of the review of the Sponsorship Program, may uncover incidents of rules being broken or procedures being ignored, the Auditor General's mandate does not extend to exploring the root causes of such problems.

3.3

Role of Parliamentary Committees

One of the few bodies aside from the courts with the legitimacy to hold accountable Cabinet Ministers and to confer legitimacy on bureaucratic independence, is Parliament. Parliamentary committees may open a door,

in turn, to greater accountability concerning the actions both of senior public servants and Ministers. The first investigation into the Sponsorship Affair in 2004, following the Auditor General's 2003 Report, was undertaken by a parliamentary committee, and this served to demonstrate the limitations of the existing parliamentary committee system. The committees have extraordinarily few resources to draw upon to conduct effective investigations and are beset by partisanship. Several commissions and reviews already have called for a more robust parliamentary committee system and a greater capacity of Parliament to hold the government of the day accountable, but progress has been slow and incremental at best.⁶³

In its 10th Report, the Public Accounts Committee issued a set of unusually activist recommendations which, even more unusually, enjoyed multi-party support on the Committee. The report, *inter alia*, recommended that Canada adopt an Accounting Officer model akin to that of the UK, under which Deputy Ministers are directly and personally accountable to Parliament for the overall organization, management and staffing of the department and for department-wide procedures in financial matters.⁶⁴ The Government's response to the 10th Report rejected the Accounting Officer model and contained the following key assertion:

The report conveys the general impression that there is ambiguity in the current system; however, there is no ambiguity with regard to the assignment of accountability—ministers are responsible for and accountable to Parliament for the overall management and direction of their departments, whether pertaining to policy or administration and whether actions are taken by ministers personally or by unelected officials under ministers' authority or under authorities vested in them directly.

Nor is there ambiguity in the accountabilities of deputy ministers. Deputy Ministers are accountable to their ministers (and ultimately, through the Clerk of the Privy Council, to the Prime Minister) for

the discharge of their responsibilities, as outlined in legislation or in management policies approved by the Treasury Board. Even when senior officials support the accountability of ministers by providing information publicly, such as when appearing before parliamentary committees, they do so, on behalf of their ministers. These officials are answerable to Parliament in that they have a duty to inform and explain. They do not have direct accountability to Parliament and may neither commit to a course of action (which would require a decision from ministers) nor be subjected to the personal consequences that parliamentarians may mete out.

As indicated above, I disagree with the characterization of public service accountability as entirely subsumed within ministerial responsibility. Based on my analysis, there are no constitutional impediments which preclude Deputy Ministers from being accountable directly to Parliament through the committee system. Further, some constitutional principles suggest such accountability may be desirable. There are two such principles I have highlighted (accountability for the maintenance of a non-partisan public service, and accountability for adherence to the rule of law). In both these settings, when Deputy Ministers (and ultimately the Clerk of the Privy Council) may be called before parliamentary committees to account for the conduct of public servants (and their own conduct), they speak to Parliament as the leadership of the public service, a distinct “organ of government” with a voice independent from their Ministers.

3.4

Role of Public Inquiries

While this may be the most obvious point raised in the paper (in light of the attention which this Commission has focused on the issue of political interference and the frailty of the non-partisan public service), it is important not to lose sight of the role of public inquiries in

exploring, elaborating and developing the legal boundaries between public servants and the political executive.

While inquiries do not make findings of law and in this sense are distinct from courts, they may offer analyses of policies, practices, institutions and procedures in their fact-finding or recommending roles, and in that sense may go further than courts in serving as a catalyst for change and reform. In addition to the Sponsorship Inquiry, the Arar Inquiry and the Ipperwash Inquiry, all currently underway, are investigating, *inter alia*, allegations of political interference or a lack of impartiality in the actions of public servants.

3.5

Role of Public Service Commissions

While the courts clearly perform a critical role in establishing and elaborating the boundaries between political and public service spheres, they are not ideal institutions to deal with monitoring or refining those boundaries. This may well better fit the flexibility and specialized expertise of a commission or tribunal. Most Canadian jurisdictions in fact have public service commissions of one kind or another, but their mandates do not extend to governing the relationship between Cabinet Ministers and public servants.

As part of the federal government's modernization of the public service governance, the Canadian Public Service Commission will become in December 2005 an independent institution which reports to Parliament. Section 23 of the *Public Service Employment Act*, scheduled to come into force at the end of 2005, provides that the Commission's reports be tabled in Parliament:

- (1) The Commission shall, as soon as possible after the end of each fiscal year, prepare and transmit to the minister designated by the Governor in Council for the purposes of this section a report for that fiscal year in respect of matters under its jurisdiction.

- (2) The minister to whom the report is transmitted shall cause the report to be laid before each House of Parliament within the first fifteen days on which that House is sitting after the minister receives it.
- (3) The Commission may, at any time, make a *special report to Parliament* referring to and commenting on any matter within the scope of the powers and functions of the Commission where, in the opinion of the Commission, the matter is of such urgency or importance that a report on it should not be deferred until the time provided for transmission of the next annual report of the Commission.

Further reinforcing the independence of the Public Service Commission is the fact that Parliament will approve the appointment of the President of the Commission and that Presidents will serve for fixed seven-year terms.

Protecting the political impartiality of the public service is one of the core missions of the Commission under its new empowering legislation. The Public Service Commission has multiple mandates, which include the development of policy, investigation, auditing, adjudicating and remedial measures (including ordering the termination of a public servant's employment).⁶⁵

However, the scope of the Commission's power in relation to the non-partiality of the public service is limited in at least two key areas. First, the Commission is concerned with narrowly party-related political activity. This would catch activities by public servants to advance the interests of the Liberal Party of Canada, as occurred in relation to the Sponsorship Program, but not activities designed to advance a particular political cause (for example, separatism in Quebec) but unrelated to a particular party. Second, the Commission's role in relation to political activities relates primarily to oversight over public servants who wish to run for office or become involved in political campaigns. The Commission is not designed to monitor and enforce protections against political interference on a day-to-day basis (the one exception to this

is in the field of staffing, where the Commission plays a key role in ensuring that staffing decisions are made without partisan manipulation). There is also some question as to the sufficiency of the Commission's resources and its capacity to obtain the resources it would need, should it seek to fulfill a broader mandate. In this regard, it may be advisable to clarify one of the Commission's most important powers, which is to act as a Commission of Inquiry with all the necessary powers under the *Inquiries Act*, where necessary.⁶⁶

Another potential limitation to the independence of the Commission is its reliance on Department of Justice lawyers for legal advice. Again, as in the case of independent legal advice to the Clerk of the Privy Council on matters of the constitutional duties of public servants, it may be necessary for the Commission to stake out a position that is at odds with the government of the day (this is especially the case where the Commission intervenes before the administrative tribunal overseeing labour disputes with public servants).

This raises a crucial dilemma—who has the last word when it comes to the nature and scope of public service duties under the Constitution? The Attorney General must have the last word for the Government on matters of constitutional propriety (and must resign if the Cabinet rejects her or his advice). If it is not for the Attorney General to speak for the Public Service Commission (or the Clerk of the Privy Council), then whose view prevails where there is a conflict between the constitutional position of the political executive and the position of the public service? And, further, what if there is a conflict between the Clerk and the President of the Commission in this regard? Resolving this dilemma in part relates to reforms to the Clerk of the Privy Council's mandate and the protections against politicized appointments to this position.⁶⁷ Since the role of the Clerk is to represent the public service to government, I would suggest it cannot also be to represent the Government to the public service. This potential conflict between voices articulating

constitutional and legal boundaries between political and public service spheres will be complicated still further if and when new whistleblower legislation is enacted which would create yet another body with authority over the interface between political and public service spheres.

This dilemma goes to the core propositions of this paper—first, that the public service does have its own independent constitutional duties and responsibilities for which ministerial responsibility is inappropriate (as those duties relate directly to checks on ministerial power), and second, that in light of the independent nature of these duties, they must be subject to independent oversight, vested in a body beyond government control. While this remains a critical area of constitutional propriety to resolve, it may be prudent simply to provide for a reference power to the Federal Court to provide guidance where potential conflicts emerge.

Whatever the scope of the Public Service Commission to oversee the relationship between the political executive and the public service, it should have a primary role in elaborating the standards to which public servants should comply. Those standards, as suggested above in relation to *Fraser*, may be found to some extent in case law, but more specifically are set out in legislation and guidelines. It is to the other sources of such standards that I now turn.

3.6

Civil Service Codes and the Role of Soft Law

The question of who has carriage of overseeing the political/public service relationship dovetails with the question of the source of the standards and boundaries which govern this relationship. I have suggested that constitutional norms and principles provide an important and too often overlooked source for these standards and boundaries. The need for clarity and consistency, however, makes codifying these standards

and boundaries desirable. This is the function and aspiration of civil service codes and statements of civil service ethics and values.

While civil service codes can be legislative in nature,⁶⁸ they may also come in the form of non-legislative codes, guidelines and statements of values. Guidelines and codes are a species of what is sometimes termed “quasi-legislation,”⁶⁹ or “soft law.”⁷⁰ The distinction between legislative and non-legislative instruments is significant, as legislative codes have been held to be “binding” and enforceable, while codes and guidelines, developed by and for the executive, are “non-binding.”

Ethical codes and policy guidelines vary across different political and bureaucratic settings. While non-binding, these codes can nevertheless provide important guidance and can help to shape the ethos and administrative culture of the public service. For example, because ministerial responsibility is an unwritten constitutional principle, it might be subject to varying interpretations. The Privy Council Office’s (PCO) guideline, entitled *Governing Responsibly: A Guide for Ministers and Ministers of State*, commits the Government to a particular interpretation (even if unenforceable in the courts).⁷¹ These instruments are sometimes developed in response to external pressures and sometimes due to internal initiative. Still other bureaucratic settings have no code of ethics or policy guidelines at all. This *ad hoc* development of codes and guidelines calls into question their ability to ensure the accountability, coherence and fairness of public administration governance.⁷²

Codes of ethics typically set out conduct under which conflicts of interest are prohibited, based on pecuniary or associational conflicts of interest, and identify circumstances in which a public official must disclose certain information, or take certain remedial steps to prevent a prohibited conflict from arising.⁷³ For example, the U.K. *Civil Service Code* includes the following provisions:

- (1) The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales constituted in accordance with the Scotland and Government of Wales Acts 1998, whatever their political complexion, in formulating their policies, carrying out decisions and in administering public services for which they are responsible.
- (2) Civil servants are servants of the Crown. Constitutionally, all the Administrations form part of the Crown and, subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve.
- (3) This Code should be seen in the context of the duties and responsibilities set out for UK Ministers in the Ministerial Code, or in equivalent documents drawn up for Ministers of the Scottish Executive or for the National Assembly for Wales, which include:
 - accountability to Parliament or, for Assembly Secretaries, to the National Assembly;
 - the duty to give Parliament or the Assembly and the public as full information as possible about their policies, decisions and actions, and not to deceive or knowingly mislead them;
 - the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the Civil Service Code;
 - the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions; and,
 - the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice.

(11) Where a civil servant believes he or she is being required to act in a way which:

- is illegal, improper, or unethical;
- is in breach of constitutional convention or a professional code;
- may involve possible maladministration; or,
- is otherwise inconsistent with this Code;

...he or she should report the matter in accordance with procedures laid down in the appropriate guidance or rules of conduct for their department or Administration. A civil servant should also report to the appropriate authorities evidence of criminal or unlawful activity by others and may also report in accordance with the relevant procedures if he or she becomes aware of other breaches of this Code or is required to act in a way which, for him or her, raises a fundamental issue of conscience.

(12) Where a civil servant has reported a matter covered in paragraph 11 in accordance with the relevant procedures and believes that the response does not represent a reasonable response to the grounds of his or her concern, he or she may report the matter in writing to the Office of the Civil Service Commissioners....

In Canada, by contrast, the federal civil service is governed by a “Values and Ethics Code for the Public Service,” which includes, in addition to a statement of values and ethics for the civil service, conflict of interest guidelines, guidelines as to post-employment restrictions and a section entitled “Avenues of Resolution.” This section provides:

Any public servant who wants to raise, discuss and clarify issues related to this Code should first talk with his or her manager or contact the senior official designated by the Deputy Head under the provisions of this Code, according to the procedures and conditions established by the Deputy Head.

Any public servant who witnesses or has knowledge of wrongdoing in the workplace may refer the matter for resolution, in confidence and without fear of reprisal, to the Senior Officer designated for the purpose by the Deputy Head under the provisions of the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*.

Furthermore, any public servant who believes that he or she is being asked to act in a way that is inconsistent with the values and ethics set out in Chapter 1 of this Code can report the matter in confidence and without fear of reprisal to the Senior Officer, as described above.

If the matter is not appropriately addressed at this level, or the public servant has reason to believe it could not be disclosed in confidence within the organization, it may then be referred to the Public Service Integrity Officer, in accordance with the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*.

It is expected that most matters arising from the application of this Code can and should be resolved at the organizational level.⁷⁴

There is significant room for this Code to be strengthened in at least two areas. First, the Code should clearly set out that political interference in the impartiality of public service decision-making is unacceptable, and second, the Code should set out express constraints over the activities of ministerial and exempt staff.

While “soft law” may all fall into a “non-binding” category, the form and content of these codes sends signals of varying strength to those affected. The UK *Civil Service Code*, because it is legislative and because it expressly invites civil servants to report political interference or incidents of instructions which are improper, illegal or unethical or which may lead to “maladministration,” arguably sends a stronger message than the

Canadian “Statement of Values and Ethics.” Even more important, the UK civil servant who remains dissatisfied by the response from his or her department may refer the matter to the Civil Service Commission, a recourse not provided by the Canadian statement.⁷⁵ However, revealingly, the introduction of the Code, while hailed as “Whitehall’s Cultural Revolution,”⁷⁶ has in fact produced remarkably little change. Only six complaints have been forwarded to the Civil Service Commissioners in the seven years the Code has been in operation and, according to the head of the Civil Service Commission for the U.K., “the *Code* has not seeped into the culture—it has not changed the way people behave or respond.”⁷⁷ This is an important cautionary tale. An important aspect of the Sponsorship Inquiry’s Phase I Report, while paying tribute to the ideals which generally govern the public service, revealed the troubling consequences of a culture permeable to political interference.

Civil service codes, in my view, should be entrenched in legislative form to indicate both the gravity of the issues dealt with under the Code and to establish Parliament’s imprimatur on its provisions (and in this respect, it is important that such a Code be approved by all parties in Parliament if at all practicable).

3.7

Treasury Board & Privy Council Office

The two governmental settings with a mandate covering the relationship between public service and political spheres are Treasury Board and the PCO, headed by the Clerk of the Privy Council. Both these departments played a key role in the Sponsorship Program.⁷⁸

I have already referred to the importance of the Clerk of the Privy Council Office on several occasions in this paper. As the representative of the public service to the government of the day, the Clerk plays a key role in operationalizing the boundaries between the public service and the political executive described above. The role of the Clerk in

acknowledging the accountability for the Sponsorship Program with the Prime Minister is outlined in the Sponsorship Inquiry's Phase 1 report.⁷⁹ Ms. Bourgon, former Clerk of the Privy Council, is credited with repeatedly warning the Prime Minister about the difficulties of his taking personal responsibility for the sponsorship fund. I believe, however, that if the recommendations I have supported were adopted, a Clerk of the Privy Council would have to go further, and ascertain that the sponsorship fund was not being run outside the rule of law, before permitting public service personnel and resources to be deployed to support the management of this fund.

In addition to its role in safeguarding the integrity of the public service, the PCO is particularly important as a source of information and advice for ministers. I believe it may also be appropriate to take a lead role in elaborating the standards and guidelines applicable to political staff (especially if, as recommended in this paper, they are made no longer exempt from public and enforceable standards of conduct).

Treasury Board, as the nominal employer of the public service, clearly plays a crucial role in the clarification and recognition of public servants' constitutional duties. Treasury Board sets the standards, policies and practices which govern civil service conduct, particularly in relation to oversight of financial activities. Based on the testimony before the Sponsorship Inquiry, the Commissioner concluded, "The Commission is left with the impression that Treasury Board no longer considers its oversight function to be an important part of its overall responsibilities."⁸⁰

Treasury Board has been the primary locus of reform following the 2003 Auditor General's Report. This response has included several initiatives to tighten reporting and accountability requirements for departmental managers.⁸¹ At a recent appearance before the Public Accounts Committee, the Minister responsible for Treasury Board, the Honourable Reg Alcock, summarized this activity in the following terms:

The current Prime Minister came in with a very clear set of objectives at the time of transition, one of which was to reinforce Treasury Board's role as the central management agency of government, and to have it strengthen its internal oversight capabilities. Along with that, I had direct instruction from the Prime Minister to recreate the position of controller general. Rather than review all of that activity, though, I want to make one point at the outset, which is that management change, change in any large organization is a process, as opposed to a series of one or two major decisions.

I have undertaken, over the course of the last 18, 19 months, a series of almost, I think, 158 separate decisions that affect the management of government that have been done by myself and my colleagues in PCO and government services, and have resisted the normal course of putting down a big plan, the grand design, because I felt that we were far better served, and citizens are far better served, and the public service was far better served by simply addressing problems, moving step by step to improve the systems.

On Friday, I made several more announcements on the management agenda, an area that we had flagged early on and had done some work on in the Crown's report was this issue of internal audit. I had made announcements almost a year ago of an intention to move to a new, more vigorous form of internal audit. I was able to announce on Friday, the completion of that policy, which has been adopted by Treasury Board and is now part of the internal management structure of government. We have other work to do on the senior financial officers that the controller general is working on now.⁸²

The responses of Treasury Board to strengthening oversight lie beyond the scope of this paper, but to the extent that this has included reviewing

the accountability of Ministers and senior public servants, as observed in the introduction above, the view of Treasury Board is in my view unduly narrow and fails to appreciate the independent constitutional duties of the public service.

3.8

Role of Training and Learning

Training and education clearly are the cornerstones to building a new and vigorous administrative culture for the public service in which political/public service boundaries and the commitment of the public service to uphold the rule of law figure prominently.

In conducting interviews for a study on bureaucratic independence, I interviewed a number of Directors, ADMs and DMs with respect to how newly-hired public servants learned the boundaries between the public service and political staff and Ministers. Most of the answers indicate that this is left to “osmosis” and “mentorship” and “learning by example,” but virtually no formal instruction or training of any kind specifically addressed these issues. This situation must change.

A revamped Public Service Code and strengthened Public Service Commission could and should provide a catalyst for more training (both formal and informal) dedicated to disseminating information about the boundaries between the political executive and the public service.

4 Conclusions

In this paper, I have attempted to demonstrate that constitutional and legal boundaries do exist and form part of the foundation of the Westminster model of Parliamentary democracy. Further, I have emphasized that these boundaries are dynamic and contextually determined “lines in the sand.” While these boundaries are constitutional in origin, I have argued that they must develop, through interpretation

by public service commissions and public service codes, not simply by judges interpreting constitutional conventions and common law principles. If real change is to occur, it must involve an integrated and concerted effort to re-orient public service culture. Such an initiative cannot, however, be limited to the public service. It is the relationship between the political executive and the public service which must move forward, and do so on the basis of mutual respect and a shared commitment to the rule of law, the Convention of a non-partisan public service, and accountability for the exercise of public authority.

In this paper, I have suggested a basis for some modest recommendations. These include:

- *recognition on the part of government of the independent constitutional duties of the public service and, operationally, the accountability of Deputy Ministers and the Clerk of the Privy Council for the integrity of the public service (separate research papers for the Inquiry explore the role of the Deputies and Clerk in more detail);*
- *a revision of the Code of Values and Ethics for the Public Service into a legislative Public Service Code, which would include an articulation of the responsibility of civil servants to remain non-partisan and resist political interference. The Code would, in effect, give statutory expression to the Constitutional Convention of a non-partisan public service. Such a code could clarify the dual obligations of loyalty owed by public servants to the Crown and to the government of the day. The Code would also set out expressly the role and responsibilities of public servants in relation to political staff (referred to presently as exempt staff). Disputes over the interpretations of the Code and disputes relating to alleged breaches of the Code would, at first instance, be referred to the Commission. The Commission should also take a leading role in initiating investigations and inquiries into matters of concern relating to the integrity of the public service; and,*
- *clarifying and strengthening the role of Parliament in relation to the accountability of the public service. The restructuring of the Public Service Commission to become a Parliamentary office is a positive reform, as would*

be adopting the Accounting Officer model as recommended by the 10th Report of the Public Accounts Committee. Whether or not this model is adopted, I have suggested that the leadership of the public service (the Clerk of the Privy Council, the President of the Commission, etc.) remain accountable for decisions which impinge on the non-partisan activities of the public service and decisions which relate to compliance with the rule of law. These are matters necessarily outside the scope and competence of ministerial responsibility. Further, this relationship of accountability in no way undermines ministerial responsibility over all matters of policy and the political decision-making of the Government, nor does it compromise the duty of loyalty owed by public servants to the Government.

To be clear, I do not believe that either an enhanced Public Service Commission or a legislative Public Service Code would have necessarily prevented the Sponsorship Affair from occurring, nor that a more robust Clerk of the Privy Council or parliamentary committees with greater capacity could have averted the scandal. The Sponsorship Inquiry arising out of that scandal, however, now provides a catalyst for addressing the more structural problems relating to the failure of key public servants and the political executive to understand and respect the legal and constitutional boundaries which define their duties and their accountabilities. If we are to address these problems effectively, we must adopt strategies capable of shifting political and administrative culture from a culture of secrecy and intimidation to a rule of law-oriented culture. The search for boundaries is not a threat to Canada's Westminster system of parliamentary democracy; rather, it is a means of fulfilling the promise of this system, and of ensuring that improper partisan interests do not frustrate the integrity of the Crown or the public interest.

Endnotes

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- ¹ Some of the arguments and approaches in this paper are developed from L. Sossin, “Speaking Truth to Power? The Search for Bureaucratic Independence” (2005) 55 *University of Toronto Law Journal* 1. I am grateful to Jamie Liew and Erica Zarkovich, both now students-at-law at Borden Ladner Gervais, for their superb research assistance.
- ² D. Savoie, *Breaking the Bargain: Public Servants, Ministers and Parliament* (Toronto: University of Toronto Press, 2003), pp. 4-16. Savoie elaborates, “In the absence of formal rules, politicians and public servants some time ago struck a ‘bargain’... Under the arrangement, public servants exchanged overt partisanship, some political rights and a public profile in return for permanent careers, or at least indefinite tenure, anonymity, selection by merit, a regular work week, and the promise of being looked after at the end of a career... Politicians meanwhile exchanged the ability to appoint or dismiss public servants and change their working conditions at will for professional competence and non-partisan obedience to the government of the day” (pp. 5-6).
- ³ [Http://www.tbs-sct.gc.ca/report/rev-exa/ar_er_e.rtf](http://www.tbs-sct.gc.ca/report/rev-exa/ar_er_e.rtf).
- ⁴ *Ibid.*, p. 13.
- ⁵ The culture of “fear and intimidation” which led to egregious political interference in the operation of the sponsorship program is now documented in detail in the first report of this Commission. See *Who is Responsible: Phase 1 Report* at <http://www.gomery.ca/en/phase1report/> (hereinafter “Phase I Report”).
- ⁶ According to Kenneth Kernaghan and John Langford, “Political neutrality is a constitutional convention which provides that public servants should avoid activities likely to impair, or seem to impair, their political impartiality or the political impartiality of the public service...” See K. Kernaghan and J. Langford, *The Responsible Public Servant* (Halifax and Toronto): IRPP and IPAC, 1990), p. 56; and D. Siegel, “Politics, Politicians, and Public Servants in Non-Partisan Local Governments,” *Canadian Public Administration* (1986), pp. 1-30. See also J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government* (Toronto: University of Toronto Press, 1973), p. 89.
- ⁷ This list is reproduced in K. Kernaghan, “The Future Role of a Professional Non-Partisan Public Service in Ontario,” Panel on the Role of Government Paper, Research Paper series (2003), p. 11; and K. Kernaghan, “East Block and Westminster: Conventions, Values, and Public Service,” in C. Dunn, ed., *The Handbook of Canadian Public Administration* (Don Mills: Oxford University Press, 2002), 104, 106. See also K. Kernaghan, “Political Rights and Political Neutrality: Finding the Balance Point” (1986) 29 *Canadian Public Administration* 639. It was accepted as part of the expert testimony in *Osborne v. Canada*, *infra*, among other cases.
- ⁸ E. Stewart, *Cabinet Government in Ontario: A View from the Inside* (Halifax: IRPP, 1989), p. 49, quoted in *ibid* at pp. 12-13. See also C. Dunn, “The Central Executive in Canadian Government: Searching for the Holy Grail” in C. Dunn (ed.), *The Oxford Handbook of Canadian Public Administration* (Toronto: Oxford, 2002), pp. 305-340.
- ⁹ While the jurisprudence on bureaucratic neutrality is significant, it is worth highlighting that this issue is typically secondary to the actual dispute at hand. The actual dispute is more likely to be a labour issue involving either an individual sanction being grieved or a dispute between a public sector union and the government. This is even more apparent in cases elucidating the duty of civil service loyalty to the government of the day, as discussed below.
- ¹⁰ [1987] 2 S.C.R. 2.

- ¹¹ Ibid., at para. 85.
- ¹² G. Marshall, *Constitutional Conventions* (Oxford: Oxford University Press, 1984), p. 210.
- ¹³ The constitutional texts also say nothing of the obligation of Ministers to resign in the face of maladministration or the obligation of Ministers to defend the actions of their ministries to Parliament, but these are nonetheless core requirements of Canada's constitutional democracy. As Andrew Heard has observed, "The principles of individual and collective ministerial responsibility take form mostly in the informal rules that have arisen to modify the positive legal framework of the constitution. The importance of these rules of responsible government cannot be overstated; without them the nature of our system of government would be fundamentally transformed": A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), p. 48.
- ¹⁴ Wade, H.W.R. and C.F. Forsyth. *Administrative Law* (Oxford: Oxford University Press, 2000), p. 29.
- ¹⁵ Ibid. He cites as illustration the comments of Brenda Elliot, a former Environment Minister under the Tories in Ontario who testified at the Walkerton Inquiry in June 2001 and replied when asked about her responsibility as Minister for the actions of the ministry, "Well, we're now into a very complex discussion about responsibility, which ... has been debated for centuries as part of the Westminster Parliamentary tradition" (quoted at p. 4). Kernaghan also canvasses the various jurisdictions which do attempt to spell out the requirements of ministerial responsibility and the distinction between an official being "answerable" and "accountable" for her or his actions (at pp. 4-11).
- ¹⁶ See S. Sutherland, "Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem" (1991) 24 *Canadian Journal of Political Science*. See also Ontario Law Reform Commission, "Report on Political Activity, Public Comment and Disclosure by Crown Employees" (Toronto: Ministry of the Attorney General, 1986), p. 22; and Sir Richard Scott, "Ministerial Responsibility" [1996] *Public Law* 410.
- ¹⁷ Anson, Vol. II, Part 2, of *Law and Custom of the Constitution* (1908), p. 69, cited by MacKinnon ACJO in his judgment in *OPSEU*, quoted in the Supreme Court's reasons in that case, at para. 96. See also D. Savoie, *Thatcher, Reagan, Mulroney: In Search of a New Bureaucracy* (Toronto: University of Toronto Press, 1994), at pp. 44-86.
- ¹⁸ See D. Smith. *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995). Smith observes, "Notwithstanding the decline of political patronage in the ranks of the civil service, the appointment principle continues to flourish at the deputy minister level and in the multitude of administrative tribunals, boards and commissions created by the federal and provincial governments" (102).
- ¹⁹ Under the NDP in Ontario, for example, David Agnew, a senior political adviser with no administrative experience, was appointed Secretary of Cabinet, the head of the Ontario Public Service. This appointment was chronicled in P. Monahan, *Storming the Pink Palace* (Toronto: Lester, 1995) at pp. 37-38. See also the discussion of the politicization of appointments to lead federal civil service in the 1970s in T. Axworthy, "Of Secretaries to Princes" (1988) 31 *Canadian Public Administration*, p. 247.
- ²⁰ Kernaghan, "The Future Role of a Professional Non-Partisan Public Service in Ontario" supra, at pp. 20-21.
- ²¹ *OPSEU*, at para. 99.
- ²² This distinction was established by the Supreme Court in *Reference re Amendment of the Constitution of Canada* (1981), 125 D.L.R. (3d) 1 at pp. 84-85. For discussion, see E. Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 *UNB LJ* 1; A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), pp. 1-15; and L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999), pp. 172-77. In *Osborne*, discussed below, the Court stated, "Therefore, while conventions form part of the Constitution of this country in the broader political sense, i.e. the democratic principles underlying our political system and the elements which constitute the relationships between the various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation. Furthermore, statutes

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embodying constitutional conventions do not automatically become entrenched to become part of the constitutional law, but retain their status as ordinary statutes. If that were not the case, any legislation which may be said to embrace a constitutional convention would have the effect of an amendment to the Constitution...” at p. 87.

- ²³ For the most prominent example of this phenomenon, see *Secession Reference* [1998] 2 S.C.R. 217. For discussion, see J. Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s L.J. 389 at 407. Leclair, like most observers, does not expressly distinguish between constitutional conventions and the broader category of underlying constitutional principles. Those who favour greater judicial involvement in enforcing these principles point to the Court’s reference in *Secession Reference* to constitutional principles giving rise to “substantive legal obligations.” See also M. Walters, “The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law” (2001) 51 U.T.L.J. 91 and W. Newman, “Grand Entrance Hall, Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada” (2001), 14 Supreme Court Law Review (2d) 197; and J. Cameron, “The Written Word and the Constitution’s ‘Vital Unstated Assumptions’” (forthcoming in *Essays in Honour of Gerald A. Beaudoin*).
- ²⁴ [1985] 2 S.C.R. 455 [hereinafter “*Fraser*”].
- ²⁵ *Ibid.*, at p. 458.
- ²⁶ *Ibid.*, at p. 466.
- ²⁷ *Ibid.*, at p. 470. The duty of loyalty is discussed below. Like the requirement of political neutrality, this duty does not appear to have an express foundation in the written Constitution but arguably is implied. Dickson C.J. simply declared that the public interest in impartiality “dictates a general requirement of loyalty on the part of the public servant,” at p. 456.
- ²⁸ *Ibid.*, at p. 471.
- ²⁹ *Ibid.*
- ³⁰ The issue of whistleblowers and to what protection they are legally entitled is beyond the scope of this paper, but is canvassed in Sossin, “Speaking Truth to Power,” *supra*.
- ³¹ See Federal Court of Appeal’s reasons in *Osborne v. Canada*.
- ³² *Osborne v. Canada* [1991] 2 S.C.R. 69 at 88. Sopinka J. rejected the government’s argument that s. 33 of the *Public Service Act* was immune from *Charter* scrutiny because it codified a constitutional convention, but did observe that the fact a provision reflects this convention “is an important consideration in determining whether in s. 33, Parliament was seeking to achieve an important political objective.”
- ³³ *Fraser*, *supra*.
- ³⁴ *OPSEU*, *supra*, at para. 93.
- ³⁵ L. Sossin, “The Ambivalence of Executive Power in Canada” in Adam Tomkins and Paul Craig (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, forthcoming) (on file with author).
- ³⁶ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142. In that case, Rand J. stated that “there is always a perspective within which a statute is intended to operate” (at 140). In other words, every grant of statutory authority has an implied limitation which restricts its exercise to proper and not improper purposes, in good faith and not in bad faith, and based on reasoned and not arbitrary or discriminatory factors. For discussion, see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 13:1221.
- ³⁷ See *British Columbia v. Imperial Tobacco Canada Ltd.* 2005 SCC 49 at paras. 57-68. For recent appraisals, see P. Hogg, and C. Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005), 55 U.T.L.J. 715 and W. J. Newman, “The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation” (2005), 16 N.J.C.L. 175.

- ³⁸ See *Baker* at paras. 53, 56.
- ³⁹ *Secession Reference*, supra, at para. 70.
- ⁴⁰ See *Crevier v. Quebec*, [1981] 2 S.C.R. 220. See also M. Elliot, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001).
- ⁴¹ As Chief Law Officer of the Crown, the Attorney General is responsible for ensuring “that the administration of public affairs is in accordance with law.” M. Freiman, “Convergence of Law and Policy and the Role of the Attorney General” (2002) 16 *Supreme Court Law Review* (2nd) 335 at 338-339.
- ⁴² David Dyzenhaus has written that the rule of law, as part of Canada’s common law constitution, entitles those individuals who come into contact with administrative decision-makers to treatment in accordance with values that Canadians regard as constitutional—this may well extend to a right to administrative decision-makers who do not owe their position to political affiliation or patronage alone. See D. Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 *Queen’s LJ* 445 at 503, commenting on *CUPE v. Ontario (MOL)* 2003 SCC 29.
- ⁴³ In New Zealand, for example, public servants are informed that Ministers’ directions should be rejected if “it is reasonably held that instructions are unlawful because it would be unlawful for the minister to issue them . . . where it would be unlawful for the officials to accept them . . . where officials would have to break the law in order to carry out the directive.” New Zealand, State Services Commission, *The Senior Public Servant*, p. 28, quoted in Kernaghan, “The Future Role of a Professional Non-Partisan Public Service in Ontario” supra, at p. 22.
- ⁴⁴ [2000] F.C.J. No. 754 (T.D.).
- ⁴⁵ *Ibid.*, at para. 20.
- ⁴⁶ (2001), 208 D.L.R. (4th) 577 (Ont. C.A.).
- ⁴⁷ See for a discussion of the rule of law as part of civil service culture, L. Sossin “From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion” (2005) 55, *University of Toronto Law Journal* 427.
- ⁴⁸ Two other opinions sought by the Government House Leader contradicted this conclusion and found that no convention requiring the announcement of a budget in the House existed.
- ⁴⁹ A. Baillie, “Contempt ruling shocks PCs; Government lawyers told Tories moving budget venue was illegal” (May 9, 2003) *Toronto Star*, A1.
- ⁵⁰ C. Mallan, “Tory backers to provide setting for budget day” (March 22, 2003) *Toronto Star*, A6: (“Also yesterday, Liberal Leader Dalton McGuinty’s chief of staff sent a letter to the province’s top bureaucrat, Secretary of Cabinet Tony Dean, questioning the Conservative government’s use of non-partisan public servants in the release of what he termed a plan that is “clearly partisan in nature.” Philip Dewan asked Dean to prevent civil servants from being drawn into a political exercise. “I believe the leadership of the OPS (Ontario Public Service) has an obligation to ensure that...Ontario’s dedicated and professional public servants are not placed in the compromising circumstance of assisting with preparations for a partisan event.”)
- ⁵¹ This is attested to by the conflicting constitutional opinions produced by the Speaker of the Legislature and the Tory Government House Leader, which are on file with the author (the opinion produced by the Attorney General, if there was one, was never released).
- ⁵² The last chapter in the Magna Budget affair ended in a courtroom—following the delivery of the budget, a court application was brought by a citizen seeking a declaration from the court that the delivery of the budget outside the Legislature violated parliamentary conventions. The suit was dismissed on a preliminary motion on justiciability grounds. See *Martin v. Ontario* (decision of Superior Court of Ontario, released January 20, 2004).
- ⁵³ OLRC Report, supra, at p. 34.

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⁵⁴ C.K. Allen, *Laws and Orders* (3rd ed.) (1965), pp. 281-282.

⁵⁵ *Fraser*, supra. at p. 471.

⁵⁶ *Ibid.*, at p. 470.

⁵⁷ This was characterized by the Ontario Law Reform Commission as a functional approach to loyalty, in which “Loyalty is necessary to the effective operation of the public service, and the effective operation of the public service is a constitutional imperative that legitimizes some limitation on the individual rights of public servants.” Supra note 54, at p. 47-48.

⁵⁸ [2001] 2 F.C. 82 (F.C.T.D.). This litigation continues. For the most recent decision confirming that the standard of review of grievance adjudicators is reasonableness and that the adjudicator’s finding against Ms. Haydon was reasonable, see [2005] FCA 249.

⁵⁹ *Ibid.*, at para. 32.

⁶⁰ *Ibid.*

⁶¹ [2000] A.J. 1046 (Q.B.), at para. 40 (reversed on appeal [2002] A.J. No. 1086 (C.A.)).

⁶² *Ackerman*, supra, at p. 692.

⁶³ The best known of these is the 1979 Lambert Commission.

⁶⁴ For a detailed and favourable appraisal of this model, see C.E.S. Franks, “The British Accounting Officer System” (research paper prepared for the Sponsorship Inquiry).

⁶⁵ See Public Service Commission’s submission to this Inquiry. See also its last annual report at http://www.psc-cfp.gc.ca/centres/annual-annuel/index_e.htm.

⁶⁶ For discussion of these powers, see *Tucci v. Canada (Attorney General)*, 126 F.T.R. 147.

⁶⁷ While it is beyond the scope of this paper, I have argued elsewhere that the Clerk should not be a political appointment. I would go further and also question the propriety of Deputy Ministers being appointed by the Prime Minister. The system in the UK, whereby the head of the Civil Service Commission chairs selection committees for Deputy Ministers to ensure they are non-partisan appointments has much to commend it as a practice in keeping with the constitutional values advanced in this analysis.

⁶⁸ See the UK Civil Service Code at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpubadm/336/33603.htm#a6>.

⁶⁹ See G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (London: Sweet & Maxwell, 1987) at pp. 16-22.

⁷⁰ The relationship between “soft” law in the form of guidelines, codes, rules, directives, as well as established policies and practices, and “hard” law in the form of statutes and regulations is analogous to the relationship between hardware and software in computers. Hardware provides the infrastructure which is uniform to all users while software must adapt to the user and enable programs to work. This term was also adopted in the context of codes of ethics in Angela Campbell and Kathleen C. Glass, “The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research” (2001) 46 McGill L.J. 473. See also C. Smith and L. Sossin, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government” (2003) 40 Alberta Law Review 867.

⁷¹ See http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=guidemin/guidemin_toc_e.htm.

⁷² For further discussion, see C. Smith and L. Sossin, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government” (2003) 40 Alberta Law Review 867.

⁷³ See, for example, the federal government’s “Conflict of Interest and Post-Employment Code for Public Office Holders” (1994) (<http://strategis.ic.gc.ca/SSG/oe01053e.html>) (accessed May 13, 2002).

⁷⁴ See “Values and Ethics Code for the Public Service” on the Treasury Board of Canada website at http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202820.

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- ⁷⁵ The Code contemplates recourse from a Deputy Head to a Public Service Integrity Officer.
- ⁷⁶ B. Thompson, “Whitehall’s Cultural Revolution,” [1995] 1 Web Journal of Current Legal Issues 1. The UK Civil Service Code was developed as a response to consultations which showed both a breakdown of the “ethos” of the civil service through contracting out and privatization and a lack of confidence in existing civil service structures to respond to alleged government wrongdoing.
- ⁷⁷ Conversation with Baronness Prashar, November 3, 2005.
- ⁷⁸ See the description of each setting in Phase I Report, at pp. 32, 43-47.
- ⁷⁹ *Ibid.*, at pp. 96-100.
- ⁸⁰ *Ibid.*, at p. 47.
- ⁸¹ See “Management in the Government of Canada: A Commitment to Continuous Improvement” at http://www.tbs-sct.gc.ca/spsm-rgsp/cci-acg/cci-acg_e.asp; “The Financial Administration Act: Responding to Non-compliance—Meeting the Expectations of Canadians” at http://www.tbs-sct.gc.ca/report/rev-exa/faa-lgfp/faa-lgfp_e.asp ; and “Review of the Responsibilities and Accountabilities of Ministers and Senior Officials—Meeting the Expectations of Canadians” at http://www.tbs-sct.gc.ca/report/rev-exa/ar-er_e.asp.
- ⁸² Standing Committee on Public Accounts, Evidence No. 51, Testimony of Hon. Reg Alcock, President of the Treasury Board, and from the Privy Council Office, Mr. Alex Himelfarb, Clerk of the Privy Council, October 25, 2005, pp. 2-3.