

Legislating Accountability: a Study.

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The revelations of corruption around the Sponsorship Program have come to define the beginning of the twenty-first century in Canadian politics. The Sponsorship Scandal's effects were apparently far-reaching: aside from implicating the long tenured incumbent government to the public as unethical and leading to the slow dislocation of the 'natural governing party' from power, the implications of Justice Gomery's inquiry had deep effects on the Canadian political culture as a whole. The most telling indication of Sponsorship's profundity was what has been characterized as "a highly significant shift in the culture of Ottawa" that has emerged in the scandal's wake<sup>1</sup>. While Gomery spoke extensively of the "culture of entitlement"<sup>2</sup> prevalent in a Liberal-governed Ottawa, the greatest latent affect of his report was doubtless the "cult of accountability"<sup>3</sup> that was born in the backlash. In Ottawa, a culture has emerged in which accountability "is preached as the answer to every political conundrum"<sup>4</sup>, an unchallenged normative good that everyone advocates, despite its plasticity of meaning.

To fully address the response to the Liberal 'culture', one must examine the proposed courses of action tabled by those charged—whether by the legislature or by their own initiative—to 'fix' the accountability of Canadian political institutions. In this regard, the final recommendations of the report from Justice Gomery's commission of inquiry and the Conservative Government's Federal Accountability Act are essential literature. The examination of the incongruities and overarching themes of these two pieces is critical to understanding the substance, character and consistency of the response to the Liberal Party scandal. Through contrast, one will note there is no panacea

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<sup>1</sup> Coyne, Andrew. 2006. "Has Gomery Gone Far Enough?". *National Post*. Volume 8, Issue 87. Pp. 14-15.

<sup>2</sup> Gomery, John. 2005. *Who is Responsible? Phase One Report*. Ottawa: Public Works and Government Services Canada. Pp. 7.

<sup>3</sup> Stobo, Gerry. 2006. "Accounting for the Sins of the Father". *Summit*. Volume 9, Issue 3. Pp. 16.

<sup>4</sup> Stobo. 2006. Pp. 16.

for the deficit in ‘accountability’ we are witnessing today, how these proposals reveal the deep cleavage in belief about the kind of reformation our parliamentary structure requires and the difficult nature of accountability legislation itself. For the purposes of this essay, Justice Gomery’s broad definition of accountability will be employed: that the closest to a consensus of the prevailing opinion on the issue supposes accountability as “the ability to explain and accept responsibility for carrying out an assigned mandate in light of agreed upon expectations”<sup>5</sup>. In essence, accountability in government is defined here as being not only the responsibility for an initiative, but also the responsibility to meet broader public beliefs about one’s performance<sup>6</sup>.

Both the Gomery Report and the FAA are clear responses to the revelations of corruption surrounding Sponsorship. However, while the political situation instigated by the Gomery Inquiry created an atmosphere in which the Conservative Party could claim the moral authority to rebuke Liberal policy on accountability, it isn’t evident that the former report had much tangible effect on the latter. The critical assumption of each document is similar: both imply that the problems of accountability are not because of the current, stringent rules around the idea, but that these rules lack the necessary resources for their enforcement and oversight. This said, the two documents take very different approaches as to how this ideal should be pursued. While the final Gomery recommendations do much to propose the decentralization of the structure of government and to empower both individual members of parliament and the bureaucracy, the FAA essentially creates another level of independent oversight for parliamentary operations.

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<sup>5</sup> Gomery, John. 2006. Restoring Accountability, Phase Two Report. Ottawa: Public Works and Government Services Canada. Pp. 21.

<sup>6</sup> Boyer, J. Patrick. 2003. Just Trust Us: The Erosion of Accountability in Canada. Ottawa: The Dundurn Group. Pp. 29.

Gomery's final recommendations reflect a clear view that the strengthening of the historical parliamentary mechanisms of accountability will prevent the kind of abuses seen in Sponsorship from being repeated. Amongst his proposals are the provision of more capital and power to parliamentary committees<sup>7</sup>, the creation of a legal and administrative staff to strengthen the public accounts committee<sup>8</sup> and a greater emphasis on decentralized policy decision-making. While giving more power to parliament to check itself, Gomery also advocates for a cleaner definition of roles between parliament and the bureaucracy. From here, one can infer that Gomery works on a critical assumption in the necessity of the doctrines of ministerial responsibility and partitioned governance to the Canadian parliamentary system. His endorsement of these concepts are supported by an enormous precedent in Canadian politics: they make up, as Donald Savoie writes, the "great bargain" that has governed relations between politicians and the bureaucracy since parliament's inception. These systems are designed to ensure that each set of actors are kept to the sphere in which they are relevant: for politicians, this is partisan decision-making, while for public servants this the administration of their departments<sup>9</sup>.

While public servants are responsible directly to their ministers, these ministers are then responsible to both the parliament and their public through regular elections, ensuring that their legitimacy is grounded in a democratic mandate. The parliamentarians represent democratic legitimacy, while civil servants provide non-partisan expertise and

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<sup>7</sup> Gomery. 2006. Pp. 61.

<sup>8</sup> Gomery 2006. Pp. 80.

<sup>9</sup> Savoie, Donald. 2003. Breaking the Bargain: Public Servants, Ministers and Parliament. Toronto: University of Toronto Press. Pp. 12.

stability<sup>10</sup>. Although ministers must still oversee their department's activities because of their direct liability, the actual process of administration is to be left to the agents of the 'neutral' bureaucracy to ensure their freedom from political intrusion. And though Gomery's final recommendations suggest that the public service be subject to the scrutiny of the Public Accounts Committee, he emphasizes that this is to give a robust check on the honesty in *implementation* of policy, and that the policy itself must be the sole concern of the minister in charge and the parliament<sup>11</sup>. The obvious benefit of this system is its simplicity—the lines of accountability and communications are apparent, and each actor has a clear superior to whom they are responsible. Many believe that Canadian democracy cannot exist without the constant renewal of these foundational ideas. As Prime Minister Joe Clark once said, "if we destroy principle of ministerial responsibility, we destroy the system of government we have in this country"<sup>12</sup>.

While Gomery's second report is not directly about these concepts, he does provide a strong defence against charges that they have been discredited by the repetitive historical occurrence of scandal. Blame for recent immoral activity is addressed in the opening pages of Justice Gomery's second report: "a key failure in the management of the Sponsorship program [was] the failure of parliament to fulfill its historic and traditional role of watchdog of spending by the executive branch of the Government"<sup>13</sup>. In his assessment, the commissioner argues that the problems that lead to the Sponsorship Scandal had more to do with the actors involved obstructing the traditional relationship of parliament and the bureaucracy than any fault of the accountability mechanisms in place.

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<sup>10</sup> Savoie. 2003. Pp. 18.

<sup>11</sup> Gomery 2006. Pp. 50.

<sup>12</sup> Savoie. 2003. Pp. 3.

<sup>13</sup> Gomery. 2006. Pp. 15.

Private accounts reveal that Gomery himself was goaded by how Chrétien used his knowledge of the governmental system to concentrate power into an “all powerful Prime Minister’s office”. It was Gomery’s view that Chrétien’s obstructions of parliament not only centralized power, but allowed for the abuses of the system by his direct subordinates<sup>14</sup>.

Gomery makes apparent his belief that such abuse is hardly indicative of an irrelevant system in need of replacement. “On the surface of it, it is tempting to say that the doctrine of ministerial responsibility has become one of mutual deniability”, Gomery asserts, but that such an assumption would not do justice the doctrine’s proper application<sup>15</sup>. For ministerial responsibility to maintain accountable relations, it requires the authority for ministers to manage their department free of interference<sup>16</sup>. Without both the authority and autonomy to administer one’s department properly, as occurred under Sponsorship, the responsibility to hold one’s subordinates to account becomes meaningless<sup>17</sup>. By not keeping up the proper “firewalls”, Gomery argues, Sponsorship was allowed to happen, though more through administrative will than a failure of the system<sup>18</sup>. The system is not an unworkable one—it simply requires strong renewal of the doctrines that make it work.

But such defence does not mean that a dedication to ministerial responsibility and partitioned governance will be without problems. While it is certainly desirable to separate the partisan decision-making and the neutral implementation processes, it is held

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<sup>14</sup> Perreault, Françoise. 2006. Inside Gomery. Toronto: Douglas & MacIntyre Ltd. Pp. 172.

<sup>15</sup> Gomery. 2006. 18.

<sup>16</sup> Aucoin, Peter et al. 2004. Responsible Government: Clarifying Essentials, Dispelling Myths and Exploring Change. Ottawa: Canadian Centre for Management Development. Pp. 32.

<sup>17</sup> Aucoin. 2004. Pp. 28.

<sup>18</sup> Potter, Andrew. “As a Way to Fix the Government, This Report is a Non-Starter”. MacLean’s Magazine. Volume 119, Issue 8. Pp. 10.

by many that such a thing has become impracticable. It is hard to imagine that a minister, whose responsibility it is to account for the actions of his or her department regardless of his or her influence, could remain out of the department's normal operations with so much of their reputation at stake<sup>19</sup>. It is equally naïve to think that a public servant could provide any kind of “fearless” advice to their superior—to “speak truth to power”, as Donald Savoie supposes is their mandate—without allowing judgment of some political realities to colour their decisions. Facing public scrutiny, it is hard to imagine to what extent a public servant could defend their department's actions without having to defend partisan choices<sup>20</sup>.

Difficulty in implementation aside, by strengthening the partition between decision-making and administration, Gomery has the incidental affect of strengthening the bureaucracy's authority to a point that raises concern amongst many scholars. To, as Gomery suggests, create a strong and independent civil service, a certain level of autonomy must be provided to the bureaucracy that stands in contradiction to their position as subordinate to their political overseers. The allowance for bureaucrats to refuse their superior's demands if they are seen as unreasonable—while necessary for the prevention of partisan interference in their work—would give the public service more power than citizens expect unelected officials to possess, since they are supposed to, in theory, take instruction unflinching from the democratically elected branch of

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<sup>19</sup> Skogstad, Grace. 2003. “Who Governs? Who Should Govern?: Political Authority and Legitimacy in Canada in the Twenty-First Century”. Canadian Journal of Political Science. Volume 36, Number 5. Pp. 955.

<sup>20</sup> Savoie. 2004. Pp. 12.

government<sup>21</sup>. This provision may in fact have the effect of weakening the democratic accountability on which the idea of ministerial responsibility is supposedly built.

Gomery also makes proposals regarding the strengthening of the Office of the Auditor General and the creation of an Officer for Appointments; however, such recommendations are out of step with his general theme on the importance of strengthening parliament's current *internal* mechanisms of accountancy. In this way, his proposals are in sharp contrast to those of the Conservative government. While Gomery proposes the renewal of existing institutions and ideas about accountability to ensure an honest parliament, the Tories take a different approach, advocating for an "additional layer" for the task. In their centerpiece legislation, the "Federal Accountability Act", the most significant provisions for ensuring accountable governance come in the form of new extra-governmental officers designed to oversee and deter deviance amongst those inside the system of governance. This list includes, but is not limited to:

- The creation of a Public Service Integrity Commissioner, whose function is to strengthen the provisions of the existent PSI act;
- A Public Appointments Commission, designed to ensure fairness in the appropriation of public employment;
- A 'Budget Office' to provide an "unbiased" look at national finances and economic trends and to oversee the spending of crown officials, and;
- A veritable army of new auditors to oversee every governmental department and ensure consistencies in financial reporting.

Aside from these new agents, the bill also calls for the strengthening of the offices of the Auditor General, the Ethics Commissioner, the Information Commissioner and the

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<sup>21</sup> May, Katherine. 2006. "Gomery Legacy Doomed by Election". Ottawa Citizen. February 28<sup>th</sup>, 2006. Pp. A3.

comptroller general, amongst other Officers of the Crown, to allow greater powers for gathering information during investigations<sup>22</sup>.

These measures essentially create an “additional layer of government”<sup>23</sup>—a group of ‘watchdogs’ independent of the parliamentary structure with the responsibility to ensure honest and accountable public service. This system has a few clear advantages over the mutual system of ministerial responsibility. While elected officials have the mechanism of regular elections to keep them ‘accountable’, a dedicated body such as this one ensures that their activities in parliament are given a more frequent and direct analysis. This additional level of oversight is also useful in addressing the long-standing concern about how to keep bureaucratic actors accountable without making them face unnecessary public scrutiny. Since the election of the Mulroney government, public servants have slowly become more easily accessible for questioning to parliamentary committees and the media<sup>24</sup>. It is held, however, that making bureaucrats publicly accountable for their actions serves to create a situation in which they face the same pressures as elected officials without any of the power of partisan decision-making to help in their defence<sup>25</sup>. Creating an independent body of oversight presents a solution by which bureaucrats are allowed to keep their anonymity, a condition seen as necessary for the ongoing appearance of neutrality, while also creating an oversight body more dedicated to their activities than partisan ministers, ensuring that any indiscretions are more easily caught.

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<sup>22</sup> Government of Canada. Bill C-2: The Federal Accountability Act. Ottawa: Library of Parliament.

<sup>23</sup> Government of Canada. “Debate on Bill C-2, Federal Accountability Act; statement by Stephen Owen”. Edited Hansard for November 1, 2006. Ottawa: Library of Parliament.

<sup>24</sup> Aucoin et al. 2004. Pp. 39.

<sup>25</sup> Aucoin et al. 2004. Pp. 78.

Despite this, the benefits of such measures have to be weighed against the inefficiency they would create in an already leaden system. While “over-burdened and under-funded [officials] are struggling to keep pace with real-time government needs, already swim furiously to keep afloat in the sea of paper, while also serving their political masters”, more rules are likely to impede their performance even more<sup>26</sup>. Further, adding “layers of red tape”, as the FAA would create, to an already complex system may in fact make it easier for “ambitious fraudsters to dance around even the tightest of rules”. In departments where greater oversight has already been implemented, the results have been questionable regarding the provision of a greater level of accountancy. In 2000, for example, Human Resources and Development Canada, in the wake of a damning Auditor General’s Report, hired six hundred new auditors to examine their financial operations. Rather than making their operations more accountable, the department became far too complicated. While creating “ten minders for one actor” may appear to be an obvious formula for better oversight, public servants found that the process in fact led to blurry lines of accountability and a lot of confusion about the performance of their jobs. In this confusion, it is postulated that actors able to understand the complex system would perhaps more easily be able to navigate it for their own selfish purposes<sup>27</sup>.

Aside from these concerns, there is also an inherently undemocratic character to outsourcing a role traditionally expected of parliament to independent actors. This issue drew the ire of opposition critics more than any other problem when the legislation reached the House of Commons. A fear exists that the introduction of these actors will take the power to hold parliament to account out of the hands of the people and will place

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<sup>26</sup> Stobo. 2006. Pp. 16.

<sup>27</sup> Wells, Paul. 2005. “It’s Not Over Yet”. MacLean’s Magazine. Volume 118, Issue 46. Pp. 40.

it in the control of partisan appointees<sup>28</sup>. This may be less of a concern, however, if there was a guarantee that said actors would be working the public interest. The FAA's proposal invests a great deal in the assumption that this newly created level of 'independent oversight' will prove impartial in its activities, with no explanation of how their compellation to neutrality will be any stronger than those in the government bureaucracy, who are supposed to be dedicated to the same thing. Human agency and preference are not taken into account when considering this new class of actors; it is not considered that these actors will be imperfect.

Clearly, any effort to legislate accountability has both attractive qualities and drawbacks. However, these case studies have so far been regardless for a broader question about accountability legislation—whether or not such an issue of human character as 'accountability' can in fact be regulated through rule and law at all. Can one truly legislate an honest and accountable government or, as many scholars of human nature have argued, is there in fact “no way to prevent unscrupulous individuals or coteries from trying to manipulate and exploit the system, even if we were to impose an elaborate menu of red tape”<sup>29</sup>? The Gomery recommendations imply that the assurance of accountability is possible through the dispersion of power across a wide base of actors in parliament, as has been traditionally supposed. Assuming the idea that most actors in either the bureaucracy or government are in fact benevolent in their activities and that apt resources and power are given to critical public mechanisms to ensure honesty, Justice Gomery suggests that the current means of keeping government 'good' can be strengthened to renew accountable government. This prescription makes no

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<sup>28</sup> Government of Canada. 2006.

<sup>29</sup> Spector, Norman. 2006. “Judge Gomery's Guide to Being Accountable”. Globe and Mail. February 6, 2006. Pp. A15.

acknowledgement, however, of the breakdown of this ‘traditional’ bargain in the past and how the current system did nothing to prevent the scandals before it. Gomery’s fatal flaw is his inability to explain how a renewal of the current accountability mechanisms will ensure that they do not fall into the same neglect that allowed Sponsorship to happen.

In contrast, the FAA proposes that a new set of mechanisms can have the effect of unfailingly deterring unaccountable behaviour as well. To understand the logic of the Federal Accountability Act, we must look at the legislation’s critical assumptions. Working on the assumption that malevolent actors—which is not to say all actors, but the few with tendencies contrary to the public interest—are concerned primarily with their self-interest, the legislation of accountability is possible. If enough resources are given to the creation of a more direct, dedicated group of impartial oversight, an atmosphere can emerge in which individuals in the government—specifically the public service—are made to be paranoid of scrutiny and as such more likely to abandon illicit pursuits. If sufficient resources are given to these new actors, the prospect of capture would overwhelm the possibility of success. If we are to consider self-interest the motivating factor of deviant officials in the public sphere, then the legislation of honest governance is a distinct possibility.

This does not make these proposals impermeable to criticism. While based on the need to deter the Machiavellian vein of ruthless, ambition-driven bureaucrats, we find that most observers of Canadian politics, including Judge Gomery himself<sup>30</sup>, are quick to note the abundance of both elected officials and public servants that performed their jobs well and without the taint of self-serving intentions. Is such unnecessary impediment to their productivity worth the effort of what may in fact be an impossible pursuit of

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<sup>30</sup> Gomery. 2006. Pp. 16.

detering the few self-interested actors intent on breaking the rules? As authors like Norman Spector assert, such an endeavour is likely to turn up futile, if precedent is any indication, because of the sheer will of unscrupulous characters to further their own interests and the distinct prospect, regardless of the firewalls in place, for success in the public system<sup>31</sup>.

While accountability is a safe normative plank on which to stand, one finds that being in favour of ‘accountable’ governance does not have any single policy implicit therein. While support for the idea of ‘accountability’ is accepted to be a positive attribute, it provides no guidance as to one’s proposals for action. Evident here is the fact that no particular legislation can strengthen democratic accountability and efficiency without creating some unfortunate latent effects and that no policy can provide a guarantee of success. In all, the only true safeguard for an accountable governing structure is, and will remain, the hope for the nobility of actors. As author Gerry Stobo concludes:

Accountability is not a formula expressed in new legislative verse, nor is it achieved through the appointment of an ombudsman. Rather, accountability exists in the day-to-day work performed by government workers when they follow the ethical standards and policies already in place - standards and policies they agreed to respect the day they joined government...New commandments and high priests will emerge, but none of these will matter if politicians don't keep the faith and if contracting officials ignore the contracting commandments that have long existed<sup>32</sup>.

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<sup>31</sup> Spector, Norman. 2006. “Judge Gomery’s Guide to Being Accountable”. Globe and Mail. February 6, 2006.

<sup>32</sup> Stobo. 2006. Pp. 16.

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