

**THE EMERGING WORLD OF ACCOUNTABILITY AND ETHICS:  
PARLIAMENTARY SCRUTINY AND REDRESS OF GRIEVANCES**

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## **I. Introduction**

I have been asked to provide some “brief” luncheon remarks. When I speak it always seems too brief to me, but audiences usually have a different view of how long and worthwhile my speeches are.

Not only am I “antique” in person, I am also something of a “constitutional antiquarian” in my scholarly interest in Parliaments. I am interested in how the traditional principles and practices of cabinet-parliamentary government are being interpreted and modified in the early years of the 21<sup>st</sup> century. Governments are rethinking their roles within society, they are redesigning their structures and processes and they are trying to respond to a public mood of cynicism, mistrust and disillusionment with the political process. Clearly, there are profound implications for the role and relevance of Parliaments in these general trends and specific developments.

To my old-fashioned and simple way of thinking, Parliament is a political forum which exists to promote ultimate democratic accountability on the part of a small group of partisan politicians called the Prime Minister and Cabinet. This group of insiders is given the authority and resources to define and implement public policy. They do this subject to the requirement that they regularly boast and confess about their performance before the public’s elected representatives.

Parliament's role is mainly to examine and to react to the government's policies and actions. This point was well made by John Stuart Mill in his book, *Considerations on Representative Government* (1861) when he wrote that: "Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government." Watching and controlling has clearly become a huge, if not impossible, job for Parliaments given the scope and complexity of government activities today compared to 1861 when Mill wrote.

Modern legislative scholars would say that Parliaments perform a number of official and unofficial functions within the national and provincial political systems. In more old-fashioned terms, approving legislation and spending, providing scrutiny of policies and administration and providing specific redress of grievances are the historical tasks usually attributed to Parliaments.

## **II. Watching and Controlling Modern Governments**

I want to focus on the last two tasks – scrutiny of administration and redress of grievances. These are clear expressions of the watching and controlling function of Parliaments written about by Mill a long time ago.

The watching and controlling roles of Parliaments are targeted at both the political executive and the professional public service. Today, I want to focus on the relationships between Parliaments and bureaucracies.

Watching and controlling activities by Parliaments reflect the uneasy relationship presumed to exist between democracy and bureaucracy. There is the fear that, if left unchecked, bureaucracies can become arrogant, uncontrollable, self-interested, unresponsive and ineffective. Yet societies are forced to rely upon large public organizations with specialized knowledge and skills to achieve productive actions. These facts of life account for our ambivalence (for some people it rises to the level of hostility) towards public bureaucracies.

I am not going to debate the issue of whether the negative stereotype of public bureaucracies is accurate or whether the fear of all-powerful bureaucracies is justified. My view is that both images represent gross exaggerations. Also, not all public organizations are the same in terms of being amenable to top-down political direction and control or in terms of their responsiveness to society and

individuals. Designing mechanisms of control and scrutiny need to recognize these differences.

Given the vast scope and shifting contours of modern governments, watching and controlling have become difficult, indeed impossible tasks for Parliaments to perform comprehensively on their own.

Recognizing this, Parliaments were forced to depend greatly upon controls within government and on the professionalism of the public service to ensure integrity and fairness in the exercise of public power. They also increasingly sought the assistance of independent agencies serving them to stretch their limited capacity to oversee the decisions and actions of ministers and public servants and to provide complaint mechanisms for individual citizens.

Put simply, independent parliamentary agencies are meant to serve two broad functions: first, to deal with individual complaints about a lack of fairness involved with various types of actions and inactions, and second, to promote improved performance and appropriate standards in the delivery of public programs and services. The two functions are complementary and parliamentary agencies are not doing their whole job if they stop at resolving individual complaints and fail to analyze patterns of decision-making which need improvement.

Clearly, unaided Parliaments could not provide the necessary continuous surveillance of the vast range of administrative decision-making and actions affecting individual citizens. Parliamentarians have always used “casework” on behalf of constituents to oversee the bureaucracy. When problems were blatant or left unresolved, matters could be raised in Question Period or in committees when Estimates were being examined. These efforts were useful as a “spot check” on the exercise of bureaucratic power. By providing a “visible” person to whom citizens could take complaints, constituency service activity puts a “human face” on “big” government. However, the casework approach relied upon the willingness and capacity of individual parliamentarians to secure information, explanations and changes to the decisions of permanent officials. Eventually, Parliaments concluded that the right of citizens to fair treatment should not be as variable as the political redress mechanism left open.

The creation of various parliamentary agencies helped to make a few citizens feel less isolated and alone in dealing with large, often intimidating bureaucracies.

Parliamentary agencies have also stretched the limited organizational capacity of legislatures to provide scrutiny of the operations of departments and agencies. Agencies have provided Parliaments with valuable countervailing information necessary to hold public organizations accountable, especially given

the development within governments of a sophisticated communications apparatus intended to put the most positive “spin” possible on their performance.

In summary, I start from the premise that the rise of independent parliamentary agencies has been positive. In important and significant ways they have strengthened democracy and accountability. Parliaments in this country could not fulfill their responsibilities in any meaningful way without the assistance of the auxiliary agencies established mainly over the past three decades. So that is the good news.

### **III. The Surveillance Challenge**

Just because parliamentary agencies serve noble causes on behalf of Parliament does not mean that they are perfect institutions, or that their relationships with other institutions and with citizens are ideal. I want to raise two challenges.

The first and broader challenge involves the intersection and interaction of the changes taking place within governments and the public services of this country and Parliaments.

Many forces, developments and specific events have caused the public to lose a great deal of trust and confidence in governments. Politicians found themselves living in a “dog house” of suspicion to the extent that they even began to doubt their own democratic credentials and capacity to demonstrate leadership and responsible behaviour in public office. Increasingly, they have set up bodies to “police” their own behaviour.

The rise of the “reinventing government” movement and the new public management approach to public sector reform both reflected and reinforced the “anti-politics” mood which had been growing since the 1970s.

In the slogan made popular in the U.S.A., the public wanted governments which “worked better and cost less.” Working better included adhering to higher ethical standards. In combination the loss of confidence in the political process



and the rise of new public management have led to a focus on “managerial” solutions to what are essentially political problems.

A clear example of this trend is the creation of new, and the strengthening of existing “watchdog” bodies to regulate and oversee the behaviour of public officials, whether they are elected or appointed.

The latest example of this tendency is the proposed Federal Accountability Act which by my count will create eight new monitoring bodies and will strengthen the mandate and add resources to several existing monitoring bodies both inside government and serving Parliament.

Watching (surveillance) and controlling (regulation) have become a significant growth industry within the public sector. The main players in this relatively new accountability industry are familiar: auditors (both internal and external) general and specialized ombudsmen, conflict of interest and ethics commissioners/commissions, information and privacy commissioners, whistleblower protection officers, human rights commissions, lobbyist registrars, election/party financing officials and the list goes on.

Ottawa may lead the accountability parade and things may not have gone as far in most provincial capitals, but I would recommend that you stay tuned because coming soon to a government near you will be an ever expanding watching and controlling apparatus.

It occurred to me that there are already enough protective bodies around to create a new comic book series of public sector superheroes – let’s call them “The Integrity League of Superheroes.” The League would include: the waste watcher, the citizen protector, the ethics guardian, the performance police and the sleaze buster. Each would have a nifty uniform, with a symbol emblazoned on the front. For example, as waste watchers Auditors General could display the stylized letters “CCFA” to indicate they possessed the quasi-mystical superpowers of comprehensive auditing which supplies the missing “bottom line” in government.

I make this suggestion, in jest, of course. However, there is an irony and several concerns associated with the rise of the new regulatory/surveillance industry operating in the public sector.

The irony is that governments were supposedly becoming smaller and reducing their regulatory presence in the private sector. Yet, simultaneously they were developing an extensive, complicated and specialized internal regulatory apparatus for the public sector.

The concerns associated with the new accountability apparatus involve the potential for unforeseen impacts on the performance of governments. In the most general and simple terms we need to ask the question: will the new regulatory/surveillance industry lead to too much checking and not enough doing?

The concerns arise from the fact that the new regulators represent different, not always consistent values like cost minimization (Auditors General) versus humanity (Child Advocates). The new regulators work relatively independently from one another and there is no attention paid to the cumulative impact of the requirement to anticipate and to comply with the reports and recommendations of the various oversight bodies, only some of which are connected to Parliament.

The new regulation within the public sector appears to be based on the idea that in a democracy there can never be too much accountability. An alternative view would be that too many accountability mechanisms impose direct costs of compliance and also stifle creativity and risk taking because of the fear that mistakes or simply unforeseen events will be criticized and negative consequences will follow for the organizations and individuals involved. Notwithstanding rhetoric to the contrary, the prevailing approach to accountability is based on the “gotcha” mentality of detecting wrongdoing and pinpointing blame. Multiple watchdogs contribute to this mentality, whether they mean to or not, because public reports of problems or abuses always end up being amplified, distorted and sensationalized in Parliaments and in the media. More positive or balanced assessments tend to be ignored or crowded out by all the negative publicity.

This leads me to ask the question: “Are governments at risk of weakened performance due to a new contagious ‘MAD’ syndrome?” The full, medical name

for this insidious, creeping disease is “multiple accountabilities disorder.” At present, MAD is not a politically respectable disease which is discussed in polite company, but we need to begin discussions of the cumulative impacts of the new regulations in the public sector.

Another consequence of the new regulation is to provide more opportunities for ministers, central agencies and even senior public servants to place the blame for abuses of authority, misspending or program problems on the shoulders of career public servants further down the line in departments.

This happens for example, when Auditors General stop short of criticizing policy design and blame deficiencies in program performance on mismanagement. The federal Auditor General’s report on the HRDC’s grants and contributions program was an example where the Auditor avoided direct criticism of policy, but blamed program officials for what was mislabeled in Parliament and the media as a “billion dollar boondoggle” of law-breaking and unaccountable spending. The fact that when “the dust settled” only \$60,000 of undocumented spending was found did not change the public perception that a massive fraud had taken place.

Another consequence of the growing surveillance apparatus is the gradual loss of anonymity for senior public servants. Public servants may not always be named (although it is happening more frequently than in the past) in investigative reports, performance audits, annual reports from parliamentary agencies and during

the course of parliamentary committee hearings, but their identities are often known to people in government, in Parliament, advocacy groups and in the media. There can be real damage to their reputations and their careers from the new investigative processes. Putting parliamentary agencies within the scope of access to information/freedom of information acts, as has been recently suggested, could lead to the premature release of tentative findings and create even greater risks for public servants.

There is a submerged and opaque quality to those processes. We do not know how thorough, procedurally and substantively fair and balanced such processes are. Are public servants entitled to due process when they deal with investigative bodies? If they are the subject of a negative report, what recourse do they have? Even if they are not named, how do they recover their reputations and the trust of others who know they have been the target of an investigation? I once interviewed a group of access to information coordinators in federal departments. A minority of them felt they had been “pushed around” by aggressive staff from the Information Commissioner’s office which regularly issued annual reports full of “high octane” rhetoric about a “bureaucratic culture of secrecy.” Such passages provided wonderful fodder for parliamentary theatrics and the media machine, while more tempered and balanced observations went unnoticed. Access coordinators felt trapped between the public’s right to know and the department’s

obsession to protect its reputation. Even if the coordinators managed to stay out of trouble, theirs was in many respects a lonely and thankless job with no clear career ladder to climb. Front line public servants make the protective laws work, they deserve our respect and are entitled to support and fair treatment.

In summary, when it comes to the watching function, there is no shortage of mechanisms both within government and serving Parliaments. Yet, Parliaments must still depend greatly upon the internal controls within departments and agencies and, even more importantly, on the professionalism of the public service, to ensure efficient and equitable public programs.

#### **IV. Redress of Grievances**

Redress of grievances refers to processes for appealing decisions, dealing with delays, inaction, arbitrariness, bias and even incompetence. It involves getting things put right. Of course, redress mechanisms do not always find in favour of people making complaints or bringing an appeal. Yet, redress processes should provide people with the assurance that they have been properly and fairly treated or that a disputed decision has been made in conformity with the relevant rules.

In the same way that Parliaments have increasingly relied upon other bodies to supplement their scrutiny efforts, they have also given over the redress function to specialized agencies. Most of the work of parliamentarians on behalf of their constituencies and constituents is done informally behind the scenes through contacts with ministers and public servants. Parliamentarians only deal with a small percentage (perhaps 10 percent) of their constituents. Apparently constituency service is expected of Parliamentarians because surveys tell us that most constituents would not reward helpful MPs on that basis alone. In the U.K. a Fabian Society report (G. Power, *Representatives of the People*, 1998) suggested that MPs spent too much time on constituency work which they were ill equipped to handle. My impression is that Canadian parliamentarians are strongly attached

to constituency work because it allows them to do something helpful and most are shut out of any significant role in lawmaking and spending decisions.

Only a tiny minority of the problems citizens encountered in their dealings with public bureaucracies were brought to the attention of their elected representatives. Use of the courts to remedy problems was also not satisfactory because of the time and costs involved and the fact that often the problems were not strictly legal in nature. Most departments had internal appeal mechanisms, or even semi-independent appeal bodies, but they were seen as “part of government” and therefore lacked credibility with citizens in terms of providing a fair hearing of their case. The multiple potential mechanisms for “putting things right” was confusing for citizens. For example, rigidly separating complaints from appeals meant there were two redress mechanisms with different mandates and organized in different ways.

The growth of ombudsmen schemes of various kinds was meant to deal with these problems. The popularity of the ombudsman concept was based on the relatively low cost of such offices, the informality of their procedures, the flexibility of their potential remedies and the accessibility and lack of cost for complainants. Not only are there general ombudsmen in most governmental systems, there are also specialized ombudsmen for particular fields, such as the health ombudsman in Quebec. The ombudsman represents a rare case in which an



institution created in the public sector eventually became quite common in the private sector. Not all ombudsmen are fully independent of the organizations they oversee; the ombudsman for Canada's military is an example of this situation.

As mentioned above, the functions of resolving complaints and promoting high administrative standards are potentially complementary. In the "big picture" individual cases are obviously important (especially to those individuals adversely affected by bureaucratic action or inaction, but they may not lead directly and immediately to changed procedures and rules. Only if ombudsmen analyze and publicize the patterns of maladministration will individual cases produce a cumulative impact in terms of the adoption of "good practices." In the "real world" of limited financial and staff resources, ombudsmen have to make trade offs between complaint resolution and standards promotion. Outreach and education are a third activity which also requires resources. My sense is that for most ombudsmen the complain function has to take priority.

The fact so little is spent on making the public aware of the office guarantees it will not be used in all the cases where it could be helpful. The Dutch National Ombudsman writes a column in a best-selling newspaper, runs advertisements on TV (showing a woman walking in the crowd and asking people to call if they have a problem) and runs a regular opinion survey on public awareness. The surveys reveal that young people and people from economically and socially marginal

groups are least likely to be aware of the office. Careful thought must be given to how program departments and ombudsmen communicate with the most vulnerable segments of society who depend to a greater extent on public programs and lack the sense of personal efficacy to insist on the respect and benefits to which they are entitled. Ombudsmen must realize the power imbalance which exists between citizens and bureaucracies. They must consider developments in conflict resolution theory and alternative dispute resolution practice in order to promote healthy and balanced interactions.

The trends and developments involved with new public management have implications for the redress function. Partly through the wonders of information and communications technology, governments are increasing access to departments and information. Interaction, including two-way transactions are becoming easier. The language of customer service has been imported from the private sector, with words like competition, choice, information for customers to make informed decisions and performance evidence to know they are receiving value for their scarce tax dollars. Citizens' charters, service standards and customer satisfaction surveys are being introduced. New procedures for redress are being added – both to empower citizen-customers and to keep public servants on their toes.

There is much talk and some action to ensure that programs and services are integrated so that the citizen is not forced to navigate through the bureaucratic maze of separate and disjointed programs. Horizontality, joined-up government, whole-of-government or shared service – pick the slogan you prefer to describe the aspirational goal of one-stop shopping by enlightened consumers carrying their copy of a customer bill of rights and accompanying service standards, and perhaps insisting that they be compensated if they do not obtain the quality of public services they have been promised.

This is not the place to debate all the philosophical and practical implications of the “customer revolution” in the public sector. It clearly has profound implications for the governments, including Parliaments. To the extent that governments are successful in producing “user-friendly” bureaucracies there will be less work for parliamentarians in the constituency service field. This may free them up to spend more time on legislation, spending and scrutiny, but this presumes that they will be given encouragement, support and opportunities to play an expanded role in those areas.

The increasing reliance by governments on performance plans, service and quality standards and performance reports is changing the focus of accountability from process to aggregate results. The new results-based approach to accountability is meant to be more objective, less open to partisan gamesmanship.

It does have the virtue of focusing on the average performance of the bureaucracy rather than on the exceptional or extreme example. However, focusing on performance does little to address problems of improper use of delegated authority. Indeed an insistence on productivity and positive ratings may encourage the neglect or “cover up” of procedural problems.

One of the prominent ways to introduce competition into the public sector is to contract out the delivery of programs to private sector organizations, whether for profit or not-for-profit. One effect of contracting out is to undermine the legal protection for individual citizens who are directly affected by the decisions and quality of services provided by the contracting organization. This problem is not peculiar to social services, but it is more acute in this sector due to the vulnerable position of the “clients” and the significant impacts on their living conditions from negative actions.

The basic question is: What remedy is available to the citizen who has suffered harm as a result of “privatized” activities? There may be remedies in law, but that would be a lengthy, expensive and highly problematic process. So, the issue really is whether we can extend the jurisdiction of ombudsmen to cover commercial firms and non-profit agencies delivering services previously provided “in-house” by government departments. Will this detract from the innovation and productivity gains which contracting out is supposed to deliver? Will governments

vote money to expand the scope of the ombudsmen's function to cover this new terrain?

There is an irony in the fact that contracting out, which can be seen as a form of fragmentation, is happening at the same time as there is all the talk of integration of service delivery. Now that there is greater emphasis on service integration, should there be more integrated approaches to redress of grievances? The existing mechanisms grew up over time and separately. The problem of fragmentation is greater in larger jurisdictions where there are multiple specialized ombudsmen in operation. Usually there is communication and some efforts at collaboration, but some organizational consolidation and/or physical and on-line single locations will probably have to be considered in the future to provide citizens with one-stop shopping for resolving their complaints. A rationalized system must not become more bureaucratic. The ombudsman function has become widespread, yet the first annual meeting of the Canadian ombudsman only took place in 2003. There is a need for professionals with similar investigative and mediation roles to communicate regularly and to share best practices. It would also be helpful if they invited elected politicians to their gatherings so both parties could understand and learn from one another.

## V. Conclusions

Parliaments were forced to develop independent agencies to cope with the expanded scope and complexity of government in the 20<sup>th</sup> century. Such agencies have stretched the surveillance capacity of Parliaments. They have provided citizens with a greater chance to obtain fairness in their dealings with bureaucracies. So we need to praise independent Officers of Parliaments for what they contribute to democracy and citizen confidence in government.

Let me conclude with two final, provocative thoughts about the future. Parliaments need to ask whether they have given too many tasks to what has become a sizeable “parliamentary bureaucracy.” Are there any tasks left for Parliament to delegate to auxiliary agencies?:

- there are law reform commissions (no longer in Ottawa) to provide guidance on new laws;
- for past spending there is the Office of the Auditor General;
- for future spending, there will be a Budget Office of Parliament;
- to protect citizens there are general and specialized ombudsmen
- to review order-in-council appointments, there will be a commission at the federal level;
- to monitor their conflicts-of-interest and ethical lapses there are counsellors / commissioners;

Coping with complexity is the main, but not the only explanation for why Parliaments have created their own bureaucracies. These developments also reflect the strong anti-politics mood which has developed in recent decades. Canadians apparently prefer that “non-political” individuals and institutions provide “objective” evidence about the performance of government and also act to resolve complaints they have about their individual treatment by the bureaucracy.

Using a “parliamentary bureaucrat” to catch a “departmental bureaucrat” is not without its problems. The basic problem is how to ensure the right balance between independence and accountability for the relatively new parliamentary bureaucracy. It must be noted that the independence we are talking about for Officers of Parliament is from both the executive and Parliament itself. This is too big a topic to be explored fully here and elsewhere (“The past, present and future of Officers of Parliament,” *Canadian Public Administration* 46, 3, Fall, 2003), I have analyzed the five structural features which determine the balance between independence and accountability.

A key feature with respect to independence is how parliamentary agencies obtain their budgets. If the political executive and/or central budgetary agencies set the budgets, there is the risk of underfunding and a symbolic loss of independence. On the other hand, parliamentary agencies cannot be completely exempt from the fiscal realities facing government. At the national level, there

have been reports from a Commons and a Senate committee on alternative funding mechanisms for Officers of Parliament and in 2005 the Martin government agreed to a two-year experiment involving a “Parliamentary Panel” to which Officers of Parliament will go for budget approval and which will provide “oversight” of their operations. Exactly what is meant by oversight is apparently being debated between the agencies which favour a broad interpretation and the Treasury Board Secretariat which favours a narrower, more strictly financial interpretation. The Harper government agreed to continue the experiment so it will be interesting to see where it leads as a key part of the wider process of balancing independence and accountability for parliamentary agencies.

Certainly there is more work to be done by the appropriate subject-matter standing committees of Parliaments across the country to examine the work of their agencies more seriously, especially on the basis of their annual reports. The fact that agencies serve Parliament as accountability enforcers is no reason why they themselves should be held less accountable. While there is an argument for a more systematic parliamentary approach to overseeing its overseers, this is not a recommendation that Parliaments delegate this task to another oversight body. At some point the trend of Parliament “offloading” its scrutiny and redress functions has to end and parliamentarians have to make the commitment, find the time and provide themselves directly with the resources necessary to do the job of



overseeing the performance of government. Governments must accept that Parliaments have the duty and right to poke and pry around in the operations of government and to ensure that bureaucratic discretion is being used fairly in relation to individual Canadians. Improving the watching and controlling function of Parliaments will provide ministers with another source of intelligence about when policies are not working as planned and will enable them to better direct and control the administrative machinery of government.