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The unaccountable Federal Accountability Act: Goodbye to responsible government?

L'irresponsable Loi fédérale sur la responsabilité…

S. L. Sutherland

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Article abstract

The article argues that the Federal Accountability Act or, as of November, 2006, C-2, is an unaccountable piece of legislation in the sense that it is not explicable or intelligible. Second, to take the risk of imposing so many unrelated measures on federal institutions at one time is not a responsible action. There is an unevaluated risk of destabilizing the institutions of government and the public service. Certainly some provisions of the bill, such as the creation of a parliamentary budget office as an executive agency, and the creation of a federal director of public prosecutions, might well merit study as selfstanding measures. But most other provisions, on examination, threaten to destabilize or end responsible government in Canada. The paper argues that several measures clearly fall into this latter category. Among these are measures to provide for heavy regulation and summary punishment of both parliamentarians and senior public servants, as well as for the "naming and blaming and shaming" of senior public servants at the cost of introducing a policy-administration dichotomy, plus the excessive grants of powers to agents or officers of Parliament and the creation of new "parliamentary" bureaucracies that in fact perform executive functions. The manner of passing the bill in the House was also of doubtful fairness, given that the New Democratic Party joined in a partnership with the government to rush the bill through the Legislative Committee of the House of Commons.

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L'irresponsable Loi fédérale sur la responsabilité…

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S.L. Sutherland

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Accountability is a slippery concept, and it is most definitely even more slippery in the long wake of the *Federal Accountability Act* (Bill C-2). The Act has no preamble, and, where former codes have been cast into statutory form, their preambles as codes are removed. No definition of accountability is provided in the more than 250 pages of C-2's text, which extends to 300-plus clauses in more than 200 pages, amending 70 different statutes – several of which must be read alongside the provisions of C-2 to bring the reader any sense of what the underlying policy might be, and some grasp of probable outcomes, or even intended consequences.

Those who doubt that an imperfect bill would be tabled given the importance of its subjects, including the establishment of a federal director of public prosecutions, need only glance over the evidence taken by the Standing Senate Committee on Legal and Constitutional Affairs on October 19, 2006. At this meeting, the former Chief Justice of Canada, Antonio Lamer, gave evidence, followed by Bruce MacFarlane, Q.C., of the Faculty of Law at the University of Manitoba, and Michael Lomer, a defence practitioner and a member of the executive of the Criminal Lawyers' Association of Canada. Antonio Lamer repeatedly asks the Senators for information about the policy intentions of the government in drafting the bill, and both he and MacFarlane try to put themselves in the place of the drafters by imagining what the intentions might have been. At one point, MacFarlane, who favours the director of public prosecutions system that the bill introduces, recommends that to decode the intentions of C-2, the public prosecutor provisions should be read with one's copy of the *Criminal Code* open to section 2, so one can study the definition of Attorney General.[1] It is also fair to say that all three witnesses are stunned by the provision, as summarized by Senator Baker, "that extend in a couple of acts of Parliament the time period to 10 years in which to prosecute a summary conviction offence."[2] As Michael Lomer says, "[the provision] has clearly lost sight of what summary offences are supposed to be … quick, judicious, expeditious…."[3]

This vast omnibus bill is divided into five parts as a management measure. We can begin with its form, which alone gives an indication of its variety. Part one concerns conflicts of interest, election financing and lobbying, and ministers' staff. Part two, called supporting Parliament, covers the appointment of agents/officers of Parliament, and establishes the parliamentary budget officer.[4] Part three sets up a new executive officer, the director of public prosecutions, who will prosecute offences against federal statutes other than the general criminal law which remains under the administration of the provinces. Part three also makes some adjustments to administrative transparency and disclosure of wrongdoing (whistleblowing). Part four attempts to consolidate provisions for administrative oversight and accountability. This segment takes in the establishment of the public appointments commission, and brings together provisions for internal audit, accounting officers and prosecution of fraud. Part five is on procurement and contracting, creating the procurement auditor and also adding to the Auditor General's powers by providing immunity from prosecution for libel for both the Auditor General (AG) and the Office's staff. This part also adds a specific provision that the AG can examine the use made of federal grants and contributions by their recipients. Overall, then, the bill contains provisions for regulating individual conduct and for system-wide reforms, without any organizing framework.

Although many good lawyers have worked hard on the Act since its first tabling at committee in the House (May 2006). Because of its size alone, it will likely never be free of errors in translation – instances where the French and English versions differ significantly. Both such drafting flaws plus unusually severe provisions affecting individuals will invite the judiciary into the business of the legislature, leading also to a judicialization of the public service environment.

Besides legislating many provisions that had formerly been set out in codes of conduct, the bill provides for new summary conviction offences, and even creates a small number of criminal offences explicitly for a purely federal statute, even though these latter offences are already in the *Criminal Code*.
In the conflict of interest provisions, it re-introduces 21st century Canada to the notion that explicit public "shaming" of public office holders, including non-politicians, can be usefully added to fines and prison as both a deterrent and a punishment.

Given the lack of definition in the bill, and its many diverse aspects, checking the meaning of "accountable" in the *Oxford Concise* can clarify one's thoughts. One finds that the first meaning of accountable is "responsible," meaning "required to account for one's conduct … or one's actions." The second sense of accountable is "explicable,

understandable." C-2, the *Federal Accountability Act*, is then *unaccountable* because it is not explicable or understandable in many individual parts, and its presentation as an omnibus act, that will impose all these many measures on federal institutions at one time, is not intelligible.

The Standing Senate Committee on Legal and Constitutional Affairs has issued its fourth report (October 26, 2006), dedicated to C-2, after hearing more than 150 witnesses in 30 days of hearings, with 156 amendments to clauses. There is, even at this late date, a disquieting implication that neither the government nor its sponsor, Treasury Board President John Baird, care about the contents or the future of the bill. For example, the Treasury Board President, appearing before Senate on October 23, literally changed his mind during the course of his appearance on the basic issue of whether the government would be receptive to *any* amendments from the Senate. He would, he said initially, be glad to take the bill back in the same form it had been sent to the Senate. But towards the end of his appearance, he abruptly promised open collaboration.[5]

Another sense in which the bill is unaccountable and misleading is in the way the government and the NDP explain it to the media and the public. The minority government's ally for the bill, the New Democratic Party, made the bill's swift passage through the House possible. For the *Federal Accountability Act*, the government had a majority. But without taking responsibility, the NDP, often presented as the party of thought and ideas, has created the impression that two political parties at different poles of the ideological spectrum can agree that the *Federal Accountability Act* is urgent, internally consistent and good. Thus C-2 is almost invariably summarized, and accepted by the media, as a unified "ethics" package that is "aimed at a single target: cleaning up the way government does business in the wake of the Liberal-era sponsorship scandal."[6] Pat Martin, the NDP spokesman for the bill, is actually mentioned by name by several witnesses before the Senate Committee as having popped up from nowhere, without consultation, with amendments that seemed to them to be mischievous. One example is his amendment bringing the Canadian Wheat Board, a commercial single-market organization that government does not fund, under the *Access to Information Act*. Martin, who comes from Winnipeg and would fully understand the implications of this surprise for the Wheat Board, does however have a rationale for his party's support for the bill in general: "… I guess when it comes down to it, the enemy of my enemy is my friend."[7]

A considerably more important sense in which the bill is unaccountable, however, is that it draws haphazardly on provisions for the architecture of representative institutions and for the regulation of individuals inside these organizations that are outside of, and flatly contradict, responsible government. The bill could pass into law provisions that could interact to fundamentally damage the prospects of responsible government in this country and would certainly destabilize the public service for the medium term.

It is absolutely inexplicable that major self-contained pieces of legislation that should not be seen as radical in themselves were not presented as their own statutes so they could have had the careful drafting and cautious review they deserve.

In what follows, I will primarily devote my discussions to the ways in which the bill is harmful to responsible government.

Punishment before public business: let's just get those penalties right

Bill C-2 nowhere expresses what I would call an "ethics of human relations." In so far as the bill creates a mood, it is a theme of punishment. The mechanisms include new laws, criminal and summary offences, and the enforcement bureaucracy created as officers of Parliament. In addition to factors mentioned in the introduction, one finds the following:

- the ethics commissioner has discretion about ruling on summary offences by public office holders, with automatic punishment – including naming and shaming – following on a failure to pay or defend against a fine levied at the commissioner's discretion;
- two of the new agents/officers of Parliament will act upon public office holders (politicians and the most senior public servants) and former public office holders;[8] and
- the mechanisms of accountability of agents/officers of Parliament *to Parliament* are limited to pre-appointment approval of a candidate by party heads, confirmation in the House, and removal for cause by the Governor in Council on joint address.

In the cases of public servants, the ambient assumption that every contribution to policy or administration must unfailingly be attributable to one individual – thus available for punishment – is not new with the *Federal Accountability Act*. The new public management (NPM), which has dominated Canadian academic public administration since the 1980s, is constructed on the assumption that a policy/politics-administration dichotomy describes all management generically, and thus applies equally to government.

This doctrine of responsible managers, and of a politics-administration dichotomy in selected areas was however

prefigured by both the Office of the Auditor General (OAG) and by the Lambert Royal Commission's report.

The Liberal government of the 1970s was also responsible. It modernized state audit in Canada by, first, writing in 1977, albeit under pressure, what may be the loosest and most incomplete set of responsibilities for a state auditor in existence, and, second, appointing senior people in the bigger private sector consulting and auditing firms to the position of state auditor. Auditors general have ever since pushed hard for access to evidence and authority to publicly name and blame career public servants. Kenneth Dye, auditor general in the 1980s, believed that ministerial responsibility existed only as an obscure blanket doctrine that stood in the way of authoritative assignments of blame. He accordingly took the government of the day to the Supreme Court to get access to Cabinet papers. He hoped to be able to make factual attributions of named public servants who put forward flawed information and advice.[9]

More importantly, starting even before the Act was promulgated in 1977, the Office of the Auditor General has reinterpreted its Act to mean that its principal duty is to enforce the adoption of "management controls" (the three e's of economy, efficiency and effectiveness), later to be known as "value for money" audit and most recently, as performance management, throughout government. By periodically looking for the presence of management control, and sometimes assessing quality of management control in programs and program components, the Office will, in principle, contribute to both honest government and to enforcing the achievement of the "results" that are promised in the goal statements of the Estimates. But no metric has been devised, and performance measurement techniques are nowhere clearly defined. In the term "performance measurement," the word "measurement" is a metaphor. But for the auditors general, reliable performance measurement does nevertheless exist. Thus deputy ministers (DM) must simply get on with it, show willingness, and take "personal" responsibility for implementation of programs before Parliament.

The Lambert Commission, which was led by a banker, reported in 1979, when it was becoming common wisdom among management experts that "the evaluation of the effectiveness of programs in achieving their stated objectives" would shortly be a matter of routine. Since it was believed that program evaluation would not present any insurmountable technical problems, and would thus develop factual information, reporting on effectiveness (results) could be part of the deputy minister's role – further, a responsibility for which DMs would report to the Public Accounts Committee (PAC). The Lambert Commission's remarks on the "personal" responsibility of officials in and to the representative (political) institutions provide what is probably the first example of identifying, for officials, a form of individual accountability that "must be strictly personal." [10] One of course sees the idea of personal responsibility of DMs before the House taken up again in the McGrath Report, among many examples.

The formula in current use is that deputy heads "personally" hold the accountability for exercise of the duties assigned to them under the *Financial Administration Act*.[11] This view of official independence as a support for their direct responsibility in the representative or political arena is adopted by at least two of the research papers (Professors Ned Franks and Lorne Sossin) contracted for by the research directors to assist Commissioner Gomery[12] in writing his final report.

In Britain, except in rare political circumstances, or in the case of the Public Accounts Committee that hears accounting officers, other politicians will normally want to interrogate a member of the government about departmental performance, to establish the minister's grasp of problems. Matthew Flinders notes that the British Conservative government struggled to draw a distinction appropriate to responsible government, using the words accountable and responsible, in the 1980s and 1990s. The formula became the following: A minister was *accountable* to Parliament for his or her department: 'but is not *responsible* [emphasis added] for all the actions in the sense of being blameworthy," whereas "a civil servant is not directly accountable to Parliament for his actions [cannot answer in Parliament] but is responsible for certain actions [is blameworthy outside Parliament] and can be delegated clearly defined responsibilities."[13] While the formula is difficult to remember, it does make the point that blame is connected with the events for which one is an agent. Constitutional correctness does not require ministers to drop like flies. (Further, accounting officers in Britain do offer answerability for a restricted area of operation to the Public Accounts Committee, but this is primarily role answerability that will not "extract" responsibility except as the rare exception. This is made clear by the fact that differences of opinion between accounting officers and the comptroller and auditor general (C&AG) or even Treasury are tolerated and discussed, sometimes for years.)

The heavy tendency in Canada, as indicated, is almost the opposite of British thinking. The solution to measurement problems, as discussed above, is to deny that the problem exists. But the legal impediment to holding public servants directly to account demands a legal solution. The legal impediment is that, in responsible governments, ministers are named in departmental statutes as the heads of administration to whom all statutory powers in their jurisdiction are assigned; powers flow to elected actors and not to organizations. The solution for those who want to bring about direct accountability of officials before Parliament is to argue that *some* public servants, as a class, hold the powers assigned to their roles in one statute, the *Financial Accountability Act*, *in their own right* – as in directly and without sharing with the minister.

Thus another actor must bring the articles of impeachment against the top officials, as it were. That actor must be, in

the minds of some public administration scholars, the committees of the House of Commons (holding evidence provided by performance measurement). Professor Peter Aucoin, in his evidence on C-2 before the Senate Standing Committee on Legal and Constitutional Affairs, uses the phrase that House committees should undertake "naming, blaming and shaming" of deputy ministers. Deputies are in this view, in their areas, responsible and thus blameworthy actors in the House in the same way as are elected ministers of the Crown. These two sets of actors stand, he says, in a similar relation to Parliament in that they cannot be dismissed directly by parliamentary committees but only by the Prime Minister.[14] He believes that parliamentary committees thus have an "obligation to *extract the account*, not just to listen [my emphasis]."[15] He further proposed that any element of accountability that cannot be distributed among current actors must eventually be distributed among the persons who were veridically the agents of error:

It is important that we lay to rest this notion that people cannot be held to account once they have left the office. They could be dead and can be held fully to account.[16] (Cromwell was dug up and hung again," Senator Cools replies.)

When this view is held by a sophisticated scholar of institutions, one wants to proceed carefully when taking it up and examining it. One can however suggest that if the system were to become preoccupied with holding to account everyone who was veridically an agent in any significant error, the political actors would risk turning political life into a permanent Gomery Inquiry that stops government at a certain time, with the accompanying media circus. The permanent inquest mode leaves other potentially more serious mistakes that are occurring in real time unattended. For this reason – that time is the most-valued currency – our system of responsible government tends to protect its time for events that matter to the population's welfare by allowing ongoing issues of blame to be worked out in rough and approximate ways in the political arena.

In accepting responsibility – in providing answerability and accountability – for a difficult state of affairs in his or her jurisdiction and under his or her watch, the minister is not inevitably in each case accepting "personal" or veridical responsibility, and therefore inviting blame and shame and possible dismissal. He or she is gaining power, time, and the support of ministerial colleagues to be allowed to directly address the situation and perhaps the tragedy that a mistake has created or contributed to in the lives of those affected. Thus when a minister accepts responsibility for, as an example, the contamination of the blood supply that led to the deaths and illnesses of users of the system, he or she is not protecting the guilty or accepting guilt as personal culpability. The minister is proposing that we get on with the necessary actions to remove the contamination and to compensate to the extent possible the people who were affected, and to trace the problem to its causes. If, on the other hand, the minister was, in contrast, factually guilty of some major misdeed such as lying about the availability of a test for the harmful substances (perhaps to ensure a market for a locally-patented test) all three of the prime minister, the House and the judiciary will come into play in a tumultuous way. And if the minister is responsible before the House for his or her personal performance as the leader of administration for the department, the deputy minister cannot be "personally" responsible to a House committee that has rights to blame and shame. In case of a minister's resignation, the next minister will assume the blanket responsibility to ameliorate the problem that the former minister no longer has the right to accept. In short, one or the other of the minister or the DM must be accountable (answerable) and perhaps blameworthy. The person will be the boss.

Neil Finkelstein, who served as deputy counsel for the Gomery Inquiry, showed that he is alert to this problem in his brief testimony to the House legislative committee considering Bill C-2, on May 29, 2006. He suggested the committee amend C-2 (and, by extension, the changes it makes to the *Financial Administration Act*) to specify that DM powers and responsibility must not extend to policy.[17] He also said that, so far as he is aware, we in Canada will be the first common law country to codify the duties of the DM role.

Thus what response can one offer to the substance of Aucoin's basic proposition that *living* public servants can and must be held directly blameworthy by committees of the House of Commons who are under an obligation to "extract the account?" First, as he would certainly accept, it is not readily believable that Canadian federal MPs would work in concert, without partisanship, like a panel of law lords, to extract justice from public servants. MPs may know only party discipline, and little or nothing about constituting an inquiry under appropriate rules, and may not have a sense of self-restraint about making allegations under parliamentary privilege – allegations that may be more convenient than demonstrably true. Canadian electoral behaviour is volatile, and therefore turnover of members is high after general elections - affecting even cabinets.

Further, Canadians have had experience with House committees seeking justice on more than one occasion. Canadians witnessed the delivery of a guilty verdict by majority vote in a House of Commons Committee when officials were named and blamed, and paraded in shame, for their alleged personal failures in the aftermath of the first Gulf war.[18] We also saw the Public Accounts Committee, after a distinguished start, eventually break down into bitter partisanship under the burden of former prime minister Paul Martin's instruction get to the bottom of events and to lay blame and allocate guilt in its inquiry into the sponsorship events.

Making haste to blame even appears to be counterproductive in the longer term. The PAC inquiry affected Judge Gomery's progress, and the Gomery Inquiry interrupted the progress of criminal cases.[19] Bernard Roy, chief counsel for the inquiry, added his voice to recent complaints by Judge Gomery about the lag in prosecutions, explaining that

Gomery evidence cannot be used in criminal trials, which must collect evidence and hear witnesses independently. “People want to see heads roll,” he noted.

But even more important, addressing the foundational task of the House of Commons – to prevent clandestine government by fulfilling the duty of scrutiny – partisanship fuelled by even small amounts of focussed thought is necessary and beneficial. It should be put to work on occasions when the adversarial spirit of party government can be productively engaged by MPs in scrutiny, to pursue a public interest in contesting a viewpoint or explanation or in uncovering and organizing evidence of public policy failures that matter to citizens.[20]

In conclusion, it is fair to say that social science as a whole has been a major disappointment overall. In the case of management, problems must be simplified and fitted to the available techniques. In any event, “science” is a process and not a one-off product.[21] The Auditor General could and should rebalance the weight that is now placed on performance measurement in favour of work that furthers probity and therefore is appropriate to the scrutiny needs of government, and is readily used within the supply cycle.

Second, a system in which chief executive officers are engaged on limited-term contracts would seem to be a cleaner and neater solution to the desire to find some individual to punish. Some systems of responsible government already engage their deputy head equivalents on a contractual basis. This could be more efficient than pouring effort into a search for persons to punish, and possibly also create a more sober view of punishment’s worth in an ethics of human relations.

The House of Commons marginal to its own work?

There is no theory of parliamentary democracy in the bill – no draftspersons or, more surprisingly, no parliamentarians appear to have given any thought to the fact that officers of Parliament ought to be themselves subjected to an accountability regime under their respective parliamentary committees.

The bill establishes new officers (agents) of Parliament and increases the powers and range of bodies subject to the authority of other officers. Completely new are:

- the Parliamentary Budget Officer;
- the Director of Public Prosecutions (the executive elements are acknowledged); and
- the Procurement Auditor.

Newly formed by C-2 but replacing existing bodies are:

- the Commissioner of Lobbying (replacing the Office of the Registrar of Lobbyists);
- the Conflict of Interest and Ethics Commissioner (replacing the Senate Ethics Officer and the House of Commons Ethics Officer); and,
- the Public Sector Integrity Commissioner (under C-11 and formerly named the Public Service Integrity Officer).

The following entities are not altered in composition by C-2:

- Auditor General;
- Canadian Human Rights Commissioner;
- Chief Electoral Officer;
- Commissioner of Official Languages;
- Information Commissioner;
- Privacy Commissioner; and
- Public Service Commission.

It is worth noting that in Australia, there are no officers of Parliament, but, instead, “statutory officers.”[22] It is in this spirit of realism that Senator Joyal quoted the Law Clerk of the House of Commons in making the important point that “officers of Parliament” are not agents acting under the instruction of and/or for the benefit of work undertaken by the House or Senate, but are, rather simply officials who [should] act in accordance with their own statutory requirements. These officers are not appointed by either house, but by the Governor in Council, which is to say, by the Governor General acting on the instruction of a quorum of ministers. Even though they report to one or both houses of Parliament, through the Speaker in the case of the House, “…as a matter of public law, these are positions of executive function and, as such, are part of the executive branch.”[23]

As Professor Christian Rouillard emphasizes, C-2 only increases confusion between the capacities of MPs and those of officers (agents) of Parliament, with the public believing that the officers of Parliament augment MPs' capacity to promote democratic values and government. [24] In simple fact, as Senator Joyal explains, the new officers both *reign over and displace* elected members of Parliament from their constitutional duties, now including the Houses' conventional duty to be autonomously self regulating. We readily understand that statute law displaces the executive's prerogative powers. But here we witness the continuing removal from the Canadian Parliament of ancient rights of self-regulation, as well as of their work.

This spring the British House of Commons' Select Committee on Public Administration undertook a review of Ethics and Standards bodies which it familiarly calls "watchdogs".[25] Its work is pertinent to our situation and C-2. We in Canada have never had a comprehensive independent review of our group of federal statutory watchdogs. Not even the oldest of our bodies, the Office of the Auditor General (OAG), has ever been subjected to a review that it did not define, initiate and finance itself, let alone an examination in the light of public law principles. This Office has innovated without restraint in the products it supplies to the House in relation to supply (appropriation), which is the oldest and was formerly the best-understood of the mechanisms of responsible government, and in deciding by its own audit program emphases how well probity will be protected.

The British committee classified ethics and standards "watchdogs" into three groups: stand-alone authorities established by statute; bodies established by statute and given the status of Officers of the House of Commons *because* their statutes define regimes of accountability for them to Parliament and its committees (there are few: the single position called "Comptroller and Auditor General," the Parliamentary Ombudsman and the Commissioner for Standards); and bodies created by royal prerogative – a number of which are supervised by the Select Committee on Public Administration.

The "gold standard" is, the Committee says, the Comptroller and Auditor General and his organization, the National Audit Office (NAO). It is the gold standard because of its thorough-going accountability to Parliament.

How is it accountable? First, the House has a role in appointment and dismissal as happens here in Canada. But the House also has *statutory* rights to provide program guidance to the Comptroller and Auditor General, and to consider estimates and give budget approval. In other words, the details of the relations between the C&AG and its two supervisory committees – the Public Accounts Committee that it serves, and the Public Accounts Commission that regulates the C&AG and the NAO are set out in the 1983 statute for the National Audit Office. The C&AG-NAO unit is independent in its professionalism, but it is dependent on the two House bodies for the politics of audit and for budget.

The C&AG's reports are House of Commons papers. They are published *internally* without fanfare on an as-completed basis, and most are taken up by the Public Accounts Committee. The C&AG follows up on recommendations made by the Public Accounts Committee – and its own recommendations. The NAO and the C&AG have continuously fulfilled their responsibility in law for financial audit of the individual accounts of *all* government departments and agencies and many other bodies as of 2005, a total of 550 accounts each year worth over $700 billion. The financial audit empowers the Public Accounts Committee to inspect and close the previous year's cycle of supply annually. It issues a qualified opinion on about 14 to 18 departmental and agency accounts each year. It also performs "value for money" studies, that are, generally speaking, more operations- oriented than the performance audits of Canada's OAG.

Other commonwealth legislative auditors, including those in some Canadian provinces, have immunity from prosecution for torts committed against individuals in the course of work done in good faith, but the C&AG and the NAO do not have immunity. Instead, it is provided that the consolidated fund assumes the expense of any suit in law, and also for compensation.[26] The NAO's reporting style is circumspect, and it does not conduct direct media relations apart from explaining the subject matter of the press releases that announce the completion of an individual audit. The Public Accounts Committee provides the plain speaking and the drama, and it, of course, being composed of elected parliamentarians, works under parliamentary privilege. Australia and the Canadian provinces that do offer immunity also provide explicitly that the legislative auditor shall conduct an annual financial audit of the individual accounts of departments and agencies – this coverage allows their observations on the quality of "management controls" to be empirically linked to the quality of financial control.

On this definition, it is quite clear that we in federal Canada do not have *any* officers of Parliament. We have instead only "stand alone" bodies created by statutes. They are all, as Senator Joyal explains, executive bodies established in statute. Their periodic duty to report to Parliament is their accountability regime. They are not woven into the work of their parliamentary committees in the way British bodies like C&AG and the Standards Commission work alongside and directly serve their committee. In other words, in Britain, the parliamentary committees hold the mandate or reference. As the British scholar Anthony King explained in his testimony to the previously-mentioned Public Administration Committee, wherever you establish "watchdogs", you must also provide "dog trainers". MPs are dog trainers and, ideally, if allowed, they are themselves the best watchdogs.

It seems to me that the result of the independence of Canadian officers from Parliament leads to stridency in some ignored bodies, faltering in others, and to the autonomous redefinition of mandate in others. This can reshape

institutional capacity to deliver on democracy. For example, as a stand-alone body, the OAG redefined its program of work to resemble that of a private sector firm:

> Our legislative audits include both financial audits and performance audits. A financial audit examines whether the government is presenting its financial information fairly in accordance with accounting policies. Our financial audits are similar to the types of audits you see in the private sector.[27]

At some point, the OAG drifted away from financial and compliance audit in favour of its program of performance audit.[28] This process was probably almost complete before Auditor General Sheila Fraser began her term. It was a significant move, because it created entirely new risks for the political system. Although it is everything to the public, fraud is not an operational concern in such an audit program – as the following testimony before the Gomery Inquiry shows:

> Mr. Finkelstein: In the normal attest audit would you expect to find fraud?
>
> Mrs. Fraser: No, we would not in the *regular audit* expect to find fraud [emphasis added]. Every auditor, though, has a responsibility to evaluate risks that could result in a material misstatement to the financial statements… But in the normal course of an audit, it would be very rare that one would expect fraud to result in a material misstatement.[29]

It should be mentioned that C-2 has met the AG's request for immunity from prosecution for libel for her and her staff, provided they conduct their legitimate duties in good faith. There is at least one good reason to believe that immunity in the federal Auditor General's case is unfortunate. As the Auditor General told Judge Gomery, she instituted a policy of "plain speaking" around 2002, with the goal of making the performance measurement reports instantly comprehensible. Plain speaking apparently involves what one could equally call emphatic speaking, often about abstract judgments. This can be tested by reading the AG's reports on the Office of the Privacy Commissioner in September 2003. Any powerful and authoritative organization that allows the colour and the conviction illustrated in that report, will sooner or later write something demonstrably unfair to some individual. It would be better, in my view, if the consolidated revenue fund would pick up the tab for redress, for both the auditor and the complainant, as in Britain, than to deny due process to a wronged individual, as could be the impact of pure immunity.

We have also to remember that risk in the probity area is created for politicians by management. The levels for "material" losses that will trigger investigation are stipulated; they are not brought to us on stone tablets. Sponsorship was a dream scandal for a political opposition: it stemmed from lack of probity; losses were not material (big enough to matter) year by year, so were allowed to run on and on while attention was concentrated on the potential for material losses elsewhere; politicians were involved; the events were so old, beginning in 1993, that a huge net had to be thrown out to re-create any kind of proper history of what had occurred; and through all these factors, the impression was created among the public of absolute carelessness, blindness and impunity. The scandal only broke in 2001 through the interest of a *Globe and Mail* journalist, and the government in fact had to invite the OAG to conduct her first audit of this program, a simple compliance audit of three Groupaction contracts under the program. Somewhere between $40 and $100 million were thought to have been wasted.

Although it is a non-material and a relatively small loss, even in comparison to a non-political fraud by one individual in the Defence Department of about $147 million dollars, perpetrated in less time, the sponsorship scandal prevented sustained discussion of public policy at the federal level through two general elections and into the present. At this time, October 2006, the Conservative minority government is still making accountability its centerpiece and may take it into the next election.

On the bright side, it now looks as though the government might succeed in getting the OAG to conduct financial audits of the individual accounts of departments and agencies. In September 2006, the Comptroller General of Canada announced plans to bring 22 of the largest departments to "readiness" for external audit; eight departmental "readiness assessments" had already been completed at that date.[30] Among other management benefits, this may reduce risk to elected politicians by deterring fraud through increasing fraud awareness, increasing the numbers of personnel equipped to evaluate internal "whisper-blowing," and by uncovering frauds in a timely way more frequently.

The irresponsible law-making process for the Federal Accountability Act

Treasury Board President John Baird prepared the Senate for his appearance at the Standing Committee on Legal and Constitutional Affairs on October 23, 2006, by providing a long editorial to the *Ottawa Citizen* in advance.[31] "Today marks the 122nd day they [the Senate Standing Committee] have been pawing at the *Federal Accountability Act*," he reported.

In his text in the *Citizen*, Baird praises the thoroughness of the House's work – 90 hours in six weeks. He boils down any reasons the "Liberal-dominated Senate" would take so much time to review C-2 to two primary causes. First, the

Act limits individual donations to political parties to $1,000 a year, leading the Liberal party to put its own fundraising goals ahead of "accountability" for the Canadian public. Second, because "under the previous Liberal government whistleblowers were punished for telling the truth," he says it is "fair to ask" if the Liberal party still fears public servants speaking their minds. He is perhaps suggesting that more public servants would come forward were C-2 provisions in place. Baird's statements are indistinguishable from those of other members of his government, and from those of the NDP member, Pat Martin.

The other "key areas" Baird notes are the increased powers for the Auditor General,[32] the stronger controls on movement of persons between roles in government and lobbying, and improvements to government contracting. He then warns Canadians that the Senate will surely offer "dozens of irrelevant amendments."

Baird himself, in the Senate in person, seems under-prepared, which is completely understandable given the haste of the bill. For example, with Senator Baker questioning the issue of allowing commissioners a ten year period – after an offence is alleged to have occurred – in which to bring charges, Baird replies that the government does not want "someone to get off because the statute of limitations has lapsed."[33] Baker reminds him that there is no statute of limitations for criminal offences in Canada. Baird claims that "not a single member of the House of Commons went on record to oppose the bill." [34] He then recalls Benoît Sauvageau of the Bloc Quebecois, and makes a statesmanlike remark about what a privilege it had been to work with the MP, who died in a car accident this summer. But Sauvageau himself would surely have believed that he personally did place on the record his total dismay over the rushed process of C-2 and its many gaps.

In this regard, an exchange between Pat Martin of the NDP and Sauvageau stands as a small monument to Sauvageau as a measured and fine parliamentarian:

> Mr. Pat Martin: Mr. Speaker … It is important to frame the context in which this debate will take place … There are enemies of this bill who are conspiring to undermine the implementation of this bill. That should be exposed with the same frankness as my colleague from the Bloc spoke of when he was trying to accuse the other parties of undermining his right to do a thorough job and study of this bill. I do not think the Senate needs to take any longer than we did to deal with this bill … A week's worth of witnesses and a week's worth of committee stage should be all the Senate needs …
>
> Benoît Sauvageau: Mr. Speaker … We have been rushed along …throughout our consideration of Bill C-2… both witnesses and the personnel who were directly or indirectly involved in the legislative committee on Bill C-2…I think it is only natural to ask questions. When we asked questions in committee, we were accused of bad faith. We are asking questions today, and we are accused of wanting to delay the procedure, or no one answers us….
>
> Many amendments are being presented today at this stage because of how very quickly Bill C-2 was considered. We had very little time. I ordered a study from the library on similar bills, that is, bills with 300 or more clauses. I learned that the average duration of consideration of these bills since 1988 was roughly 200 days. We had more or less 40 days to review Bill C-2.[35]

Conclusion

Only time will tell if the government that tabled this vast bill has done so in all seriousness in regard to its individual provisions, and will, if push comes to shove, implement it with all its imperfections. Some people may hope that the reason this bill is so imperfect is because the government does not expect to pass it before the next election and perhaps hopes for a fight with the Senate. Others may simply not have the energy or time to study and understand this legislative behemoth. There may also be some that believe that the situation is so desperate that C-2 must be passed.

C-2 is not a conservative bill, it is a radical bill, but one with no theory of government or of human relationships. Even if they were to be implemented one by one, many of the dozen or more provisions in C-2 would have an impact on the character of government and the quality of our democracy. A provision barely mentioned to this point, whistle-blowing, encourages people to break out of their work groups, bypass their managers, and complain directly to a commissioner – with modest financial assistance for legal advice.

One can summarize the reasons that the policy-administration dichotomy is not defensible as a reason for making officials responsible in their own right. The choice of policy tools cannot be left to technocrats who can bear no political responsibility because available means for realizing policy differ in their cost in use, and in their coerciveness of the population targeted. Because value decisions are needed, politicians must allocate resources and make the choices about what restraints on individual freedom are supportable, so that politicians can be held accountable by the electorate. And if politicians choose the means by which policies and programs are to be realized, then public servants are not fully the agents of the achievements or failures that occur while they are in function. They can justly be punished only for that for which they are blameworthy.

Further, in a purely practical sense, the program "results" as described by public servants cannot be authoritatively assessed by another bureaucracy, the OAG, because the departmental official cannot reasonably accept responsibility for what he or she cannot control, and the OAG cannot reasonably assume authority and make judgments in performance measurements where it has no method. Nevertheless, through the OAG's insistence that all its performance work constitutes "audit" and should be called "audit," and is authoritative, the OAG has become a political actor, using its power and institutional authority to solidify the over-estimation by the political system and the public of the reliability of the OAG's work. This use of its media power by the OAG, as a corollary, leads to an unconscionable exaggeration in federal Canada of the kinds and extent of responsibility for outcomes that *bureaucrats* can legitimately assume.

The emphasis on naming, blaming and shaming to enforce personal accountability as blameworthiness is seriously disquieting in the government environment in which collaboration is how work gets done. In Richard Mulgan's analysis, in most cases of institutional failure, "the fault is widely dispersed." This is the "problem of many hands": if everyone has had a finger in the pie or at the least a chance to speak, "the aim of punishing all who are involved appears impractical and unreasonable and often results in everyone escaping comparatively unscathed, thus frustrating accountability."[36] The worry is that if a culprit *must* be found, one *will* be found, and the formula of "personal accountability" will gain a word to become "framing, naming, blaming and shaming."

To conclude, if C-2 is implemented all at once, the prospect of destabilization of both the public sector as a whole and of the representative institutions is likely enough that many witnesses as well as public policy commentators believe a phased implementation would be the sensible thing to do[37] – assuming it is the intention of the government and the New Democratic Party to pass C-2.

In his appearance before the Senate Standing Committee on Legal and Constitutional Affairs, Professor David Smith asked if the Senate might provide in its amendments that C-2 should be implemented in test departments for a period of time, perhaps five years, so that its impact could be assessed before going so far as a general implementation. Senator Stratton replied that a test will not wash in the "real world" of politics. Also a witness, I added to Professor Smith's line of thought as follows: "What about a staggered implementation? One of the great principles of scientific experimentation is that you do one thing at a time …." Senator Stratton replied as follows:

In an ideal world, I would agree. However, this is not an ideal world. We are in a Parliament and reality. The Prime Minister saw fit that this is the route we will take. We had to be seen doing something. The public was out of patience. It really had to be done. You may disagree with it – and the future will determine whether it was right or wrong – but insofar as doing it a bit at a time, if we had the grace of a majority or two terms, then perhaps we would, but we do not.[38]

The question begged is the following: For whom does this have to be done? Is the bill being passed in search of a well-judged public good? Or is the whole package necessary immediately and all at once only because the Canadian public is out of patience? If the latter, I really wish the Canadian public would make itself a nice pot of tea and sit down to read C-2 from cover to cover.[39]

Sharon Sutherland is presently Visiting Professor at the University of Ottawa's School of Political Studies. She earned her doctorate at the University of Essex in England. She has served on faculty in departments of government, political science and public administration at the universities of Essex, Dalhousie, Carleton and Queen's. She can be reached at sharon.sutherland@uottawa.ca.

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1 Wherever the Attorney General is mentioned, the title is used in full. The abbreviation, AG, is used only for the Auditor General.

2 Standing Senate Committee on Legal and Constitutional Affairs, October 19, 2006, 0900-58. The provision for a ten-year period between the date on which an alleged offence took place and the limit for beginning proceedings is in Section 65 of the *Conflict of Interest Act*. In the same place, there is also a five year period allowed between when the Commissioner became aware of the allegations and the date on which s/he must begin proceedings. The same provisions apply in the *Canada Elections Act* and the *Lobbyists' Registration Act*.

3 Ibid., 0900-59.

4 There is rich confusion about which term should be used for several of the bodies. The Parliamentary Library website prefers "officer" as do most of the bodies; while TBS and PCO tend to use "agent" on their sites, on the logic that Parliament's "officers" are those who directly further the business of Parliament; a third expression - servant - appears in the OAG site and regularly in Hansard debates.

5 See the Evidence for the Standing Senate Committee on Legal and Constitutional Affairs for October 23, 2006.

6 CTV.ca News Staff, "The Senate Chamber on Parliament Hill in Ottawa," updated on the Internet as of 2:55 p.m.,

October 24, 2006.

7 Jane Taber, “Ottawa Notebook” (The PM’s new best friend), *The Globe and Mail*, October 28, 2006, A6.

8 The Honourable Senator Baker points out to Mr. Wild that there are five instances in the act [c-2] of “hybrid offences” for public office holders that “carry penal consequences.” Senate Standing Committee, October 23, 17.

9 See S.L. Sutherland, “Responsible Government and Ministerial Responsibility: Every Reform is its Own Problem”, *Canadian Journal of Political Science*, XXIV, 1, (March 1991), 111-112; and “The politics of audit: the federal Office of the Auditor General in comparative perspective”, *Canadian Public Administration*, 29, 1 (Spring 1986), 141 - 144.

10 Canada, *Royal Commission on Financial Management and Accountability*; Final Report. Ottawa: Minister of Supply and Services, 1979. See 376.

11 The most charitable opinion is that the *Financial Administration Act*, having been drafted before the NPM came on the scene, does not express a clear legal philosophy that can dissolve a conundrum set in motion by the needs of the NPM for infrastructure. In short, the question cannot be settled within the confines of the *Financial Administration Act*. Another view is that Treasury Board holds the financial management powers under the *Financial Administration Act*, and these are delegated from the Board to deputy heads.

12 Canada, *Commission of Inquiry into the Sponsorship Program and Advertising Activities*, Research Studies, three volumes, 2006.

13 Matthew Flinders, *The Politics of Accountability in the Modern State*, Aldershot: Ashgate, 2001, p. 47. The distinction is known as the ‘Butler doctrine’ for Sir Robin Butler, Secretary to Cabinet from 1988 to 1998.

14 See the Evidence for The Standing Senate Committee on Legal and Constitutional Affairs for September 5, 2006, at 1300-12 for Professor Aucoin’s recommendations.

15 Ibid., 1300-13.

16 Ibid., 1300-10.

17 In my interpretation, although Finkelstein clearly was trying to protect the essentials of responsible and elected government, at the same time the advice implies acceptance of a politics-administration dichotomy.

18 See S.L. Sutherland, "The Al-Mashat Affair: Administrative Responsibility in Parliamentary Institutions," *Canadian Public Administration* 34, 4 (Winter 1991): 573-603.

19 See “Gomery Inquiry lawyer says more criminal charges likely in sponsorship affair”, The *Canadian Press*, October 24, 2006 (www.Canada.com).

20 One recent example where the parliamentary scrutiny function worked decisively was when the House of Commons Standing Committee on Government Operations and Estimates in June 2003 requested special reviews to be conducted by the Auditor General and the Public Service Commission on the operations of the Privacy Commissioner.

21 See Charles E. Lindblom, *Inquiry and Change: The troubled attempt to understand and shape society*, Yale: Yale University Press, 1990.

22 Professor John Nethercote, Australian National University, in conversation with the author, October 25, 2006.

23 The Honourable Senator Serge Joyal, speaking in the Second Reading of C-2, Senate Debates, June 27, 2006.

24 Christian Rouillard, “C-2: Quand les effets pervers dépassent les conséquences positives,” *Options politiques*, June 2006, 33.

25 U.K., House of Commons, Public Administration Select Committee (PASC), “Ethics and Standards: An Issues Paper,” as posted on www.parliament.uk, as of 28/06/06.

26 In correspondence between the author and an NAO officer to the effect that so far, no one has brought a case against the C&AG.

27 Sheila Fraser, Auditor General of Canada, Opening Statement to the Standing Committee on Public Accounts,” 11 May 2006.

28 See S.L. Sutherland, “The Office of the Auditor General of Canada: Government in Exile?”, Queens University, School of Policy Studies, Working Paper #31, September 2002.

29 Commission of Inquiry into the Sponsorship Program and Advertising Activities, September 7, 2004, 33.

30 Treasury Board Secretariat, Comptroller General, “Strengthening Financial Management and Accountability in the

Federal Public Sector," a speech delivered at the first Public Sector Reporting Conference of the Canadian Institute of Chartered Accountants, September 11, 2006.

31 "An Achievement in Foot-Dragging," *The Ottawa Citizen*, October 21, 2006, B7.

32 Mrs. Fraser, in her testimony before the Senate on September 27, 2006, stated she would not take up the mandate "to follow the dollar" by routinely auditing recipients of federal grants and contributions. Her role, as the government's external auditor, is to establish whether departments and crowns have the systems and processes in place to achieve their intended purposes and that funds are used appropriately. It is clear that she believes her independence extends to defining her own role as external auditor, regardless of the contents of the Act.

33 The Honourable John Baird, Senate Committee, October 23, 2006, 17.

34 Ibid, 7.

35 House of Commons Debates, 39th Parliament, 1st Session, Edited *Hansard* Number 44, June 20, 2006, at 1005 under Routine Proceedings.

36 Richard Mulgan, "On Ministerial Resignations (and the lack thereof)," *The Australian Journal of Public Administration* 61, 1 (2002): 124. See also "Mediated Corruption in Canadian Parliamentary Life", (499-501), in S.L. Sutherland, "The Problem of Dirty Hands in Politics: Peace in the Vegetable Trade", *Canadian Journal of Political Science*, XXVIII, 3 (September 1995), 479 - 508.

37 This caution would apply also to Gomery's 18 recommendations. Even though his plan does not include so many additional bureaucracies, transitions to statute of existing codes, or novel punishments, it does promote the independence of officials from political influence and thus creates risks for responsible government in its own way.

38 Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 8 – Evidence, September 21, 2006 – Afternoon meeting.

39 The *Federal Accountability Act* (Committee Stage - June 21, 2006) can be downloaded from: http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-