

March 3, 2006

The Right Honourable Stephen Harper,  
Prime Minister of Canada,  
House of Commons,  
Ottawa KIA OA6

Dear Prime Minister,

We are writing to you in response to the Gomery Commission's second report (the "Report"), which was made public on February 1<sup>st</sup>. The signatories of this letter include private sector leaders, representatives of the voluntary sector, former senior officials in provincial and federal governments, and former political leaders of different partisan stripes from across the country.

We are united by two major beliefs: that Canada is best served by a professional, non-partisan public service, and that any changes to existing governance systems should not reduce the powers and accountability of elected representatives.

The Commission makes a number of useful recommendations which, if implemented, should serve to improve how we are governed. Unfortunately, the Report also includes some other recommendations that do not take adequate account of how governments actually function, and thus could do a good deal of harm. It is for this reason that we have decided to write to you.

The useful recommendations include:

- providing increased resources to enable Parliamentary committees, and particularly the Public Accounts Committee, to function more effectively
- more effective regulation of lobbyists
- prohibiting political staffs from giving instructions to officials
- de-politicizing the appointment of Crown corporation CEOs and directors
- reducing the rate of turn-over of Deputy Ministers
- avoiding the imposition of further regulations and red tape on the operations of government
- making government more transparent

However, the Report also includes four major recommendations that cause us concern: the proposal that the public service should assert a constitutional identity independent of elected governments, a new system for the appointment of Deputy Ministers, a change in the role of the Clerk of the Privy Council, and the requirement that Ministers issue written instructions if they wish to over-rule administrative measures recommended by their Deputy Ministers.

At the outset of his Report, Justice Gomery says, “It is not the Commission’s intention to recommend radical solutions, a transformation of our parliamentary system, or a complete overhaul of the doctrine of ministerial responsibility.” Some of his recommendations would, in fact, amount to changes of this order, and we believe they are out of proportion to the problem he was asked to address. Justice Gomery acknowledges in several passages that the Sponsorship scandal was an aberration, and in no way was representative of present day governance in Canada. Yet the Commission’s response is quite drastic.

At the heart of the Report is the proposition that unelected public servants possess, and should assert, a constitutional identity independent of Ministers. The Report speaks of “tensions between the duty of the public service to serve the Government, and its ethical obligation to promote the public interest”, and proposes that when such tensions arise in the management and administration of government programs, the views of officials should prevail.

Such a system would represent a major departure from how governments function in Canada. We are opposed to increasing the powers unelected officials at the expense of Ministers. For the public service to assert a constitutional identity of its own, and not to be subject to direction by Ministers in the fields of management and administration, would break the chain of accountability that today culminates with Ministers. The result would be confusion as to who was accountable to Parliament for what.

In addition, for this proposal to be workable, it would be necessary to effect a clear separation between the roles of Ministers and officials. Experience demonstrates that this is impossible. No one has ever found a way of unscrambling the governance omelet in which politics, policy, management, and administration are mixed. To use an example cited in the Report, how is one to separate politics from administration when a Minister and officials disagree about the application of a set of financial rules to a particular situation?

To point out, as the Report does, that Deputy Ministers have statutory responsibilities under the *Financial Administration Act*, does not advance matters, since Ministers too have statutory responsibilities, and they include “the management and direction of the department”. There has never been any determination of what is to happen when the two statutes conflict, nor could there be, given the impossibility of establishing a clear and durable separation of politics from management. In any case, when such conflicts arise, legal analyses are usually not much help.

Another part of the Report that causes us serious concern is the recommendation that in future, Deputy Ministers should be chosen by their Ministers. We strongly believe that Canada should retain the current practice in which Deputy Ministers are appointed by the Prime Minister. This practice serves to underline to all concerned that a Deputy's knowledge, loyalty, and engagement must extend beyond a single department to the whole of government. This concept of a Deputy's responsibility is a precondition for managing issues effectively and offering policy advice on difficult questions that cross traditional portfolio boundaries.

If Deputies were to be appointed to serve the specific interests of a Minister and his/her department, there is a risk that this could exacerbate the problem of “silos” that bedevil most large organizations and particularly governments. The Deputy Minister is key to ensuring that the department does not lose sight of government priorities.

We also believe that the selection of these officials, who will be a key source of support to you and your Cabinet colleagues, is too important a task to entrust to any kind of independent selection system detached from the political process. You, as the head of the government, need the ability to organize it in ways that best respond to your objectives, and to place in the most senior positions the professionals who, in your judgment, are best able to meet the needs of a particular department and agency. It is difficult to contemplate how any large business organization would survive if vice presidents and senior officers were selected by a group independent of the CEO.

It follows that the Clerk of the Privy Council should continue to be your advisor on Deputy Minister appointments. More broadly, we believe that the Clerk should function as your Deputy Minister in all respects, and should not, as the Report proposes, merely be a representative of the public service.

The Report proposes that in situations where an important disagreement between a Minister and a Deputy cannot be resolved, the Minister could over-rule the Deputy only by issuing a written instruction that the Deputy would then send to the Comptroller General and would also be available to the Auditor General. We have very serious concerns about instituting such a practice.

The Commission's recommendation is modeled on a British system that was instituted many years ago. In Britain, the system the Commission has in mind exists mostly in theory and is far from being a normal practice. An analysis by a Canadian academic has found only 37 cases of a Minister issuing a written instruction in the past 23 years, or 1.6 cases per year across the entire British government. Moreover, most of these cases involved the heads of what the British call Executive Agencies rather than departments. The Permanent Secretaries – the British equivalent of our Deputy Ministers – almost never avail themselves of their right to seek a written instruction.

The reasons are obvious. A system whereby officials regularly insisted on being issued written instructions would simply be unworkable because of its destructive effects on the

working partnership that is indispensable to any successful relationship between a Minister and a Deputy.

Moreover, there is no need to institute such a system in Canada to guard against Ministers at times making decisions that were contrary to the public interest. In cases where a Minister insists upon proceeding with an improper decision, the established practice is for the Deputy to inform the Clerk of the Privy Council, who in turn can bring the matter to the attention of the Prime Minister. The resolution of the matter then lies with the Prime Minister and the Minister, who will be accountable to Parliament for the outcome. In the extremely rare event of a Prime Minister supporting an improper action by the Minister, there is every probability that the decision taken would become known, whether through internal audits that are now routinely made public, or through the work of the Auditor General, or through the *Access to Information Act* – as was recently demonstrated in the case of the Sponsorship scandal. The electorate would then be in a position to render a judgment about the issue.

We are also puzzled by the Commission's recommendations concerning appearances of officials before Parliamentary committees. The Report devotes a considerable amount of text to a perceived problem in officials appearing only on behalf of their Ministers, although at a later point it acknowledges that "little will change" if in future officials should be required to appear in their own right.

The concept that officials appear on behalf of their Ministers is largely a formality and primarily serves to keep intact the chain of accountability that culminates with the Minister. In practice, it is of about the same import as the formal designation of the Governor General as Commander-in-Chief of the armed forces. Officials are always at the call of Parliamentary committees, and are required to show Parliament that proper financial procedures are being followed and that public funds are being properly and well managed. It is simply out of the question that a Deputy Minister of Transport, in appearing before the Public Accounts Committee to explain a cost over-run on the construction of an ice-breaker, would somehow seek to shelter behind the notion that he/she was only appearing on behalf of the Minister.

In the same vein, the recommendation that officials rather than Ministers should appear before the Public Accounts Committee simply calls for what is the established practice. We find it puzzling that the Report takes no cognizance of the fact that, for decades, Ministers have appeared before this Committee only in the most exceptional circumstances. Officials, for their part, can be and are required to give an accounting to the Committee for all aspects of departmental management, and sometimes are given the benefit of the Committee's views in response.

In conclusion, we wish to state that we were reassured by your prudent response to the Commission's Report when it first appeared. Some measures in the Report, which we summarized at the beginning of this letter, would improve governance in Canada, and we hope you will implement them. As you have pointed out, many of these measures

coincide with the provisions of the *Accountability Act* to which you committed yourself during the election campaign.

However, other recommendations in the Report deal with complex matters and could have far reaching effects – effects that in some cases, we believe, would be very damaging. It is important that you should take enough time to make a careful assessment of your own before deciding which of Justice Gomery's recommendations should be implemented.

Yours sincerely,

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