

III

CHAPTER III

**STRUCTURE, ORGANIZATION
AND OPERATION OF THE
GOVERNMENT OF CANADA^I**

3.1

General Principles of Responsible Government

Canada is a constitutional monarchy and a democracy with a system of responsible parliamentary and cabinet government based on the British Westminster model. The structures and conduct of executive authority are governed by law and by conventions and customs that have evolved and been developed over the history of responsible government in Canada. Constitutionally and technically, the power of the State flows from the Crown; in reality, the Crown acts only on the advice of its Ministers, who collectively form the Cabinet and are chosen by the Prime Minister. The government may remain in office only so long as it retains the confidence of a majority of the members of the House of Commons.

Responsible government in Canada is based on the individual and collective responsibilities of Ministers to Parliament. Ministers of the Crown are responsible for the conduct of government. They are accountable to Parliament.

Three words are used to designate the duties of Ministers: responsibility, accountability and answerability. The meanings of these words are the subject of learned writings which are not in every respect in agreement, and the application of the concept of ministerial responsibility will vary according to the circumstances of each particular case. Nonetheless, some basic principles can be stated.

A Minister is responsible for the department of which he or she has the overall direction and management. I will come back later to the concept of ministerial responsibility, to attempt to describe it more completely.

A Minister is accountable in that he or she must render an account to Parliament of how his or her ministerial responsibilities have been carried out. The Minister must take corrective action should problems have occurred, must correct any problems that have been identified, and must accept the consequences if the problem is attributable to the Minister's own actions or inactions.

Answerability refers to a duty to inform and explain to Parliament what has occurred in a department of the Government. A Minister is answerable to Parliament for the department under his or her jurisdiction, even if the subject of the questions refers to the administration under a previous Minister.² Accordingly, answerability is narrower in scope than accountability in that it entails neither responsibility to take action nor the personal consequences associated with accountability.

3.2

The Prime Minister and the Prime Minister's Office (PMO)

The Prime Minister is the leader of the political party that has been able to form a government that has the confidence of the House of Commons, usually by holding a majority of the seats or through coalition with another party or parties. The Prime Minister is responsible for organizing the Cabinet, providing the direction necessary to maintain its unity and setting the broad course of government policy. The Prime Minister is responsible for allocating Ministers' portfolios, establishing their mandates and standards of conduct, identifying the priorities for their portfolios and clarifying the relationships among Ministers.

As head of government, the Prime Minister has special responsibilities in the areas of national unity, national security, and intergovernmental and international affairs. In his testimony, the Right Honourable Jean Chrétien said that Canadian unity had been his number one priority as Prime Minister.³ This may have led him to take a special interest in certain areas under the responsibility of individual Ministers. There are no established limits to restrict the involvement of the Prime Minister and his or her senior staff in whatever issue they decide to take over and manage. The Prime Minister's accountability for the Government as a whole is heightened by such direct involvement,⁴ but in principle each Minister retains primary responsibility for what is done within his or her portfolio, and is accountable for it.

The Prime Minister is supported politically by the PMO and bureaucratically by the Privy Council Office (PCO). Although these are separate organizations, they are expected to work closely together to ensure that consistent timely advice is provided on the subjects of greatest importance to the Prime Minister.

The PMO includes political staff headed by the Chief of Staff. They provide advice on policy development and appointments, draft speeches and other public statements for the Prime Minister, and generally assist in dealing with matters of a political dimension. *The Chief of Staff works more closely than anyone else with the Prime Minister, or at least that was the case*



when Jean Pelletier was Prime Minister Chrétien's Chief of Staff, which covers the period under review by this Commission. They met on a daily basis. Mr. Pelletier was among a select group of advisors and was the Prime Minister's closest collaborator. The evidence discloses that no one else had that kind of access.⁵

3.3

The Privy Council Office

The Privy Council Office is responsible for providing the Prime Minister with non-partisan and non-political advice on government policy and operations. The head of the PCO is the Clerk of the Privy Council, who also acts as Secretary to the Cabinet and is the head of the public service. In effect, the Clerk of the Privy Council is the Prime Minister's Deputy Minister, and meets with the Prime Minister and his or her Chief of Staff every morning. Jocelyne Bourgon became Clerk of the Privy Council on March 28, 1994, and occupied that post for almost five years. She was succeeded by Mel Cappe on January 18, 1999.

The PCO, as the Prime Minister's department, has a primary mandate to provide support for all of the Prime Minister's areas of responsibility. This mandate includes determining the Government's priorities and agenda, providing support for the Cabinet decision process and providing general assistance for the Prime Minister's chosen priority areas.

3.4

Ministerial Responsibility⁶

"Ministerial responsibility" has to do with the relationship between a Minister and public servants working in the department of which the Minister has charge.

So far as the Minister's department is concerned, law, tradition or convention dictate that the Minister has sole authority for the management and direction of the department to which he or she has been appointed. However, within the Government as a whole, the Minister is only one member of a team, so

that the principle of Cabinet solidarity requires that the Minister seek the approval of or inform other members of the Cabinet about policies and decisions that may have relevance to other portfolios and the conduct of government as a whole. In addition, the Minister must be mindful of the obligation to report to Parliament, which represents the citizens of Canada and has a duty to safeguard the public purse. Parliament can discharge this obligation only if it is kept informed of the commitment and disbursement of public monies by individual Ministers and their departments.

The principle of a Minister's accountability to Parliament is well described in the following extract from *Governing Responsibly: A Guide for Ministers and Ministers of State*:

Clear Ministerial accountability to Parliament is fundamental to responsible government, and to ensuring that Canadians have confidence that their government is acting in an open, honest and transparent manner. A Parliament that makes real decisions requires parliamentarians who have and can use information and tools to promote the interests of the regions they live in, and to hold the government to account for its decisions. The Prime Minister expects Ministers to place a high priority on ensuring that Parliament and its committees are informed of departmental policy priorities, spending plans, and management challenges. Ministers are expected to seek the views of parliamentarians and parliamentary committees on future plans and priorities, and to dedicate time to consulting and engaging their colleagues in Parliament in order to earn their support. These elements are key to bringing the public will and the purpose of a government into productive alignment.

Parliament confers the powers of the state on Ministers on the condition that they, and through them the officials under their management and direction, be accountable to Parliament for their actions. Parliamentary review of spending is a key element of this accountability.⁷

One of the difficulties in the attribution of ministerial responsibility derives from the size of modern government. Most commentators say that it is not fair today to hold a Minister responsible for errors or maladministration attributable to departmental officials if the Minister was not aware of them. The exception occurs if it can be determined that the Minister failed to ensure that appropriate systems were in place to manage the risks that led to those errors or instances of mismanagement. This subject is addressed in paragraphs 70 and 71 of the Attorney General's written submission to this Commission:

[Emphasis added]

70. Ministerial accountability does not require that the Minister be aware of everything that takes place in his or her department. Similarly, accountability does not mean that the Minister must accept blame, for example, by resigning, whenever something goes wrong in his or her department. Accountability and blame are different: *blame applies only if problems are attributable to the action or inaction of the Minister.*
71. To support a Minister's accountability for a department, the Minister and his or her Deputy Minister must work together to understand the level of detail in which the Minister expects to be involved in the department's work. This will vary according to the circumstances and style of individual Ministers. Broad direction rather than transactional engagement is the norm, especially with respect to administrative matters, although Ministers will give more specific direction on key priorities such as Cabinet documents and Treasury Board submissions. *But, whatever the level of detail in which the Minister becomes involved, the Minister and Deputy Minister need to ensure that appropriate systems are in place to manage the risk of problems and to correct them when they occur.*⁸

The foregoing paragraphs reflect similar views found in Chapter 6 of *Responsibility in the Constitution*, under the heading "Ministers and Their Departments":

[Emphasis added]

The legislative bases for the departments of government make explicit the individual responsibility of the ministers who preside

over them, and as has been noted, provide one of the legal bases of the minister's responsibility. The way in which ministers fulfil their responsibilities and are called to account for the exercise of their statutory authority is subject to practice and convention. All departmental acts provide for the formal appointment of the minister by the Crown (informally on the advice of the Prime Minister), set out the powers, duties, and functions for which the minister will be responsible, *and give him or her the management and direction (control and supervision) of the financial and public service resources deployed in the department*. These statutory provisions are given life through the conventions of the constitution, which determine at any given time the way in which ministers fulfil their respective roles and the circumstances of their answerability to Parliament for their actions, and offer further safeguards through the conventional responsibility of ministers collectively.

The individual responsibility of the minister requires that he or she be personally responsible for the activities carried out under his or her authority. This concept is fundamental to the long struggle to impose responsibility on the exercise of power. Parliament has insisted that ministers be directly accountable to it by being part of it. Ministers are, therefore, assailable on a daily basis for their actions and those of their officials.

The duties of the minister are set out in the statutes and are usually very general in character, leaving it to the minister to propose specific means of fulfilling them; these are then presented to Parliament in the estimates for its approval. If the minister wishes to seek an appropriation for a program whose provision is not covered in the general duties set out in the departmental Act, it is usually necessary for the minister to seek the necessary authority through legislation. Normally, however, *the duties described in the minister's acts cover a wide variety of functions, ranging from policy formulation and program development to program implementation and departmental administration*. These functions, whether policy, program, or administration, may be devolved upon the minister's senior permanent adviser in the latter's quality as the minister's deputy.⁹

It is therefore incumbent upon a Minister, according to law and the relevant government policies, to work with the public service to ensure that the proper implementation of government policy is delivered through the program or activity under the Minister's charge. Mr. Alex Himelfarb, the present Clerk of the Privy Council, testifies that when policies are to be translated into action, they have to be implemented jointly by the Minister, his or her department and the public service. He expands upon this concept in the following extract from his testimony:

Mr. Himelfarb: Now, it is true—and to be fair to all the parties, it is true that in a large department, a complex department, a minister cannot possibly be expected to know all the details, nor is anyone implying that they would, but they can't expect to know all the details or all the aspects of a program, and the style of ministers and their relationship with deputies varies extraordinarily. There is a lot of flexibility. There are some active ministers that one might describe as micromanagers, positively or negatively, depending on one's view, who are much more actively on top of the details and others who trust much more the public service to do that. In a sense, that is a shared accountability and the public service has to—that, by the way, does not in any way diminish the accountability of the elected official. It is non-delegatable.

The Commissioner: If he chooses not to micromanage, he nevertheless remains responsible?

Mr. Himelfarb: Exactly so. Exactly so, Commissioner.¹⁰

Some witnesses and the submissions made by certain participants take the position that individual Ministers and Cabinet are limited to formulating policy and that it is the responsibility of their administrative officials, directed by the appropriate Deputy Minister, to implement the policy. Thus,

if errors occur in the implementation of policy of which the Minister is unaware, he or she bears no responsibility other than the obligation to take the appropriate corrective measures. According to the proponents of these submissions, the Minister is entitled to assume that the public servants charged with the implementation and administration of the policy decisions made by the Government will act honestly and competently and will, of their own volition, adopt appropriate practices and procedures in so doing.

For example, the Honourable Alfonso Gagliano, when interviewed on September 8, 2003, by a representative of the Office of the Auditor General, stated that the role of politicians is to make policy, but that public servants run the Government.¹¹ If there are problems in the management of programs, they are often hidden from the Minister, who will only learn of the problems from the media.¹²

Mr. Pelletier testifies that Prime Minister Chrétien, on taking office in 1993, met with all of the Deputy Ministers and expressed the view that they would be entirely responsible for government administration, and that the politicians would be responsible only for policy decisions. Here is how Mr. Pelletier describes what Mr. Chrétien said at that meeting:

[Unofficial Translation]

He clearly indicated that the deputy ministers were the heads of the bureaucracy and that the bureaucracy's territory was everything administrative and legislative; and that the political elements were the responsibility of the office of each minister, under the direction of an executive assistant, if you will, a chief of staff.

I was at that meeting between the Prime Minister and the deputy ministers and agency heads, and clearly this was extremely enlightening for me, I would say, because it signalled to me what the subsequent policy of the Prime Minister's Office would be, namely, that we handled the political aspects. We had no administrative responsibilities. We had no administrative authority. We did not have to give instructions to public servants, and if such instructions had to be given, they were to come either from the deputy minister of the department concerned or from the Clerk of the Privy Council.

Nonetheless, Mr. Pelletier acknowledges that subordinate officials might obtain advice from the Prime Minister’s Office about a program such as the Sponsorship Program, all the while retaining full responsibility for any administrative decisions, even those made following suggestions from persons such as Mr. Pelletier himself. Mr. Pelletier does not consider this to be political interference in administrative matters. Here is an extract from his testimony referring to Mr. Joseph Charles Guité, the public servant in charge of the implementation of the Sponsorship Program:

[Unofficial translation]

So, he frequently consulted the Prime Minister’s Office in order to get our opinion, which was perfectly logical for us, because, as I explained earlier, one of the roles of the Prime Minister’s Office is to provide relevant political advice.

Therefore, since the program—and I stress that this advertising program had a political but non-partisan scope—it was perfectly normal that the Prime Minister’s Office be consulted, and that it give its opinion. I believe, moreover, that, in his testimony, the current Deputy Minister of Public Works told the Commissioner that if Guité had not consulted the Prime Minister’s Office he would have been shirking his responsibilities, and I agree completely.

So, we gave our opinion. Guité showed up with the lists. The only kind of lists I saw were lists with names of events and the amounts requested. I never saw any lists with the names of agencies or intermediaries who had been designated to handle specific files, let alone details about the payment of the intermediaries.¹³

3.4.1 Exempt Staff

Ministerial responsibility for a department is to be distinguished from the Minister’s responsibility for the political staff (also known as “exempt staff”) in his or her office. The Minister chooses to employ his or her staff members (they are “exempt” from the general authority of the Public Service Commission, including the appointment process governing public servants)

and works with them closely. According to *Governing Responsibly: A Guide for Ministers and Ministers of State*,¹⁴ a Minister is personally responsible for the actions of his or her political staff. Therefore, if a staff member becomes involved in the department's program administration, the Minister is directly and personally responsible for any consequences, including unfortunate ones, of such involvement. Some activities undertaken in a Minister's office by exempt staff are subject to Treasury Board rules and policies such as travel and hospitality allowances.¹⁵ If political staff were to breach those rules or policies, again the Minister would be personally responsible.

3.4.2 Ministerial Responsibility for Program Administration

As appears from authorities cited earlier, the proposition that Ministers and their political staff have no responsibility whatsoever for seeing to the proper implementation and administration of government programs and policies is an inadequate and incomplete expression of the principle of ministerial responsibility. A Minister must give attention to policy and program implementation and, in concert with the Deputy Minister, be assured that adequate means to deliver government policies are in place. It is the Minister's responsibility to see that the political decision or program has been sufficiently defined so that no misinterpretation of its objectives can occur. The Minister should take steps, in consultation with the Deputy Minister, to see to it that trained personnel are available to administer any new initiatives. The establishment of proper procedures and oversight are particularly important where the discretionary expenditure of public funds is involved. Above all, the Minister should give sufficient directions to the Deputy Minister so that the Deputy will be able to supervise properly the actions of the subordinate personnel who will administer the program and activities foreseen by the policy.

If the Minister fails to take these precautions, he or she cannot subsequently take refuge in the claim of being unaware of problems until they arose and became public. In other words, a Minister can be reproached for inaction as much as for positive actions that lead to unfortunate results. Willful ignorance of administrative inadequacies will not suffice to disengage a Minister from responsibility for failures within the department.

3.5

Role and Responsibilities of the Deputy Minister

For information and guidance on this topic, the Commission relies on a government publication entitled *Guidance for Deputy Ministers*, last modified on June 20, 2003. It states general principles applicable to the period relevant to the Commission's mandate. It begins by defining the responsibilities of Ministers of the Crown as being collective, in support of the Cabinet team; and individual, for their performance in carrying out the responsibilities of the portfolio assigned to them.¹⁶

The responsibilities of a Deputy Minister are best understood in the context of the support they provide to Ministers. The Deputy Minister is the principal source of support for a Minister in fulfilling his or her collective and individual responsibilities. In particular, the Deputy Minister is responsible for ensuring:

- sound advice on policy development and implementation;
- effective departmental management; and
- fulfillment of authorities that have been assigned to the Deputy Minister or his officials.¹⁷

With respect to the obligation to provide advice to the Minister, the publication describes this obligation in the following paragraph:

The Deputy Minister supports both individual and collective ministerial responsibilities with respect to policy development and implementation. The Deputy Minister is counted on to provide the highest quality of advice on all relevant dimensions of a departmental issue, be they economic, social or administrative. Within the priorities, objectives and standards established by the government, the Deputy Minister must provide advice on the possible impact of initiatives on the public, the department, and the government. Advice must be timely and candid, presented fearlessly, and provide the best

possible policy options based on impartial review of the public good and the declared objectives of the Minister and the government. Advice must challenge, guide and clarify, and generate new possibilities for improving the lives of Canadians. It must also demonstrate policy coherence from the perspective of departmental and portfolio management.¹⁸

In the foregoing extract, emphasis is put upon the importance of the advice to be given to the Minister on policy development and implementation. It must be assumed that the decisions are to be made by the Minister, probably on the basis of the advice received, but that the Deputy Minister is not the person making the decision. This concept corresponds to what has already been said concerning ministerial responsibility and the obligation of the Minister to work with the Deputy Minister and to give direction to him or her concerning the development of policy and its implementation. These matters are not left to the entire discretion of the Deputy Minister.

The relationship of the Deputy Minister with the political employees (“exempt staff”) of the Minister’s office is the subject of a short paragraph in the publication, which reads:

The Deputy Minister needs to be attentive to maintaining good working relations with the Minister’s office in providing complementary support to the Minister. It is important to remember, however, that exempt staff of a Minister do not have the authority to give direction to public servants. When they ask for information or convey a Minister’s instructions, it is normally done through the Deputy Minister.¹⁹

In his testimony Mr. Ronald Bilodeau, a former Associate Secretary of the PCO, described the relationship between a Deputy Minister and his or her Minister and stated that the role of the political official is not only to be in charge of political matters, but also to have an awareness of management and administrative matters. The role of a Deputy Minister is to be in charge of management and its administration, and also to be sensitive to the political side. Each must clearly understand his or her role and work together as a partnership.

Mr. Bilodeau went on to say that decisions made in a department are made by the Minister. Sometimes legislation gives specific responsibility to the Deputy Minister, but the final responsibility is that of the Minister. Ministers may exercise some discretion in what they delegate to their Deputy Ministers and what decision-making authority they retain. If there is a disagreement between a Minister and a Deputy Minister, the Minister may contact the Prime Minister, and the Deputy Minister may contact the Clerk of the Privy Council, and the problem would be worked out between them.²⁰

Generally speaking, the Deputy Minister runs his or her department and the Minister should avoid interfering in the day-to-day management of the department, even though the Minister is responsible for it. Nevertheless it is sometimes difficult to prevent the people in the department from communicating directly with their Minister. The Honourable Marcel Massé, who has long experience not only as a politician but also as a senior public servant, says that the appropriate policy to follow is to ensure that the Deputy Minister is immediately informed about any contact between one of his or her subordinates and the Minister, so that the Deputy Minister is always aware of the information that is being conveyed. Without remaining current on such contacts, a Deputy Minister could lose control of his or her department. According to Mr. Massé, Deputy Ministers cannot be held accountable or responsible for decisions in which they had no part.²¹

Ms. Bourgon agreed that a Deputy Minister would have the following obligations in the context of the management of a project or a program:

- to ensure that there was the appropriate structure in place to address the project or program;
- to require that there were appropriate policies in place to administer the program;
- to require and ensure that the program was staffed by apparently competent people; and
- to require and ensure that there was an appropriate risk management scheme in place.

She added that the Deputy Minister must always be assured that the program or project is within the authority of the department, that the managers assigned to it have clear delegated authority and that normal information management systems are in place so that the Deputy Minister can receive feedback on the project.²²

3.6

Treasury Board

The Treasury Board, supported by its Secretariat, functions as the Government's management board, overseeing the operations of the entire federal government. It is created by section 5 of the *Financial Administration Act*²³ (FAA), which provides that the Board shall consist of the Minister of Finance and four other members of Cabinet, and shall be presided over by the President of the Treasury Board, who is also a member of Cabinet.

Section 7 of the *Financial Administration Act* enumerates the areas of jurisdiction of Treasury Board, which include general administrative policy in the public service of Canada; the organization of the public service of Canada; financial management, including estimates, expenditures and procedures; and personnel management.

The role of Treasury Board has been modified over the years. Prior to legislative changes in 1966 resulting from the recommendations of the Glassco Royal Commission,²⁴ it presided over a highly centralized system for authorizing expenditures and a standardized accounting system. The Glassco Commissioners concluded that this operated as a disincentive to effective departmental management and argued, in effect, for a reassertion of ministerial authority through a higher degree of ministerial autonomy. In a post-Glassco environment the mantra became "let the managers manage." However, in 1976 the Auditor General of Canada concluded that financial management and control in the federal government continued to be inadequate. A new Royal Commission was appointed, chaired by Allen Lambert, which noted in its Report in 1979:

After two years of careful study and consideration, we have reached the deeply held conviction that the serious malaise pervading the management of government stems fundamentally from a grave weakening, and in some cases an almost total breakdown, in the chain of accountability, first within government, and second in the accountability of government to Parliament and ultimately to the Canadian people.²⁵

It appears that similar problems in financial management continually reoccur in the administration of the federal government.

At present, Treasury Board performs its role through the following general functions:

- setting management policies and guidelines for departments and agencies in areas such as expenditure management, procurement, human resources and information technology;
- holding departments and agencies to account for how they allocate resources, described generally as “oversight”; and
- acting as the principal employer of the public service.

Treasury Board establishes standards through its policies, but of course it cannot oversee the compliance by Deputy Ministers with respect to every transaction. It exercises its oversight role most actively through its review of Treasury Board submissions for spending initiatives.²⁶ It also endeavours to ensure that expectations of accountability, legality and propriety are clear for departments. I must say, however, after struggling through books of documents, that clarity is not always a characteristic of its written policy manuals.

In spite of massive documentation and policy directives, the principal expenditure controls are legislative, and consist of sections 32, 33 and 34 of the *Financial Administration Act*:

[Appropriation]

- 32 (1) No contract or other arrangement providing for a payment shall be entered into with respect to any program for which there is an appropriation by Parliament or an item included in estimates then before the House of Commons to which the payment will be charged unless there is a sufficient unencumbered balance available out of the appropriation or item to discharge any debt that, under the contract or other arrangement, will be incurred during the fiscal year in which the contract or other arrangement is entered into.
- (2) The deputy head or other person charged with the administration of a program for which there is an appropriation by Parliament or an item included in estimates then before the House of Commons shall, as the Treasury Board may prescribe, establish procedures and maintain records respecting the control of financial commitments chargeable to each appropriation or item.

[Requisition for Payment]

- 33 (1) No charge shall be made against an appropriation except on the requisition of the appropriate Minister of the department for which the appropriation was made or of a person authorized in writing by that Minister.
- (2) Every requisition for a payment out of the Consolidated Revenue Fund shall be in such form, accompanied by such documents and certified in such manner as the Treasury Board may prescribe by regulation.
- (3) No requisition shall be made pursuant to subsection (1) for a payment that
- (a) would not be a lawful charge against the appropriation;
 - (b) would result in an expenditure in excess of the appropriation; or
 - (c) would reduce the balance available in the appropriation so that it would not be sufficient to meet the commitments charged against it.
- (4) The appropriate Minister may transmit to the Treasury Board any requisition with respect to which that Minister desires the direction of the Board, and the Board may order that payment be made or refused.

[Payment]

- 34 (I) No payment shall be made in respect of any part of the public service of Canada unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister, or another person authorized by that Minister, certifies
- (a) in the case of a payment for the performance of work, the supply of goods or the rendering of services,
 - (i) that the work has been performed, the goods supplied or the service rendered, as the case may be, and that the price charged is according to the contract, or if not specified by the contract, is reasonable,
 - (ii) where, pursuant to the contract, a payment is to be made before the completion of the work, delivery of the goods or rendering of the service, as the case may be, that the payment is according to the contract, or
 - (iii) where, in accordance with the policies and procedures prescribed under subsection (2), payment is to be made in advance of verification, that the claim for payment is reasonable; or
 - (b) in the case of any other payment, that the payee is eligible for or entitled to the payment.
- (2) The Treasury Board may prescribe policies and procedures to be followed to give effect to the certification and verification required under subsection (I).²⁷

To assist in understanding what these provisions mean, at the risk of oversimplifying, section 32 ensures that funds are available to pay for any goods or services contracted; it means that no government expenditure may be made unless a provision for it has been previously approved by Parliament. Section 33 deals with requisitions for payment; it says that expenditures must be preceded by a requisition by the Minister of the department concerned or his or her delegate, in the form prescribed by Treasury Board regulations. Section 34 ensures that the contracting party has delivered the goods and services and that there is value for money; it says that no payment for goods or services requisitioned by the Government shall be made unless there is a

certification on record that the goods or services have been supplied, that they were in accordance with the Government contract which authorized the expenditure, and that the claim for payment is reasonable.

These provisions are supplemented by Treasury Board regulations, which are binding, and guidelines and policies, which are not binding legally, but which must be followed by public servants.

We return briefly to the oversight function of the Treasury Board. The former Secretary, Mr. Jim Judd, insisted in his testimony that the primary lines of defence against spending irregularities are the oversight function that is expected of each department and the systems that should be in place to control spending. He states:

Given the size and complexity of the federal government, bearing in mind that we are talking about hundreds of different institutions, a multitude of different governance regimes, it is only realistic to expect that departments and agencies, individual institutions of government, have an obligation to have in place appropriate management and oversight and control systems over their operations.²⁸

The Commission is left with the impression that Treasury Board no longer considers its oversight function to be an important part of its overall responsibilities.

3.7

The Federal Budget and the Minister of Finance

The Minister of Finance is responsible for preparing the federal Budget. This is the Minister's primary responsibility, although he or she is also charged with developing tax and tariff policy and legislation; managing federal borrowing on financial markets; administering major federal funding and transfers to provinces and territories; developing regulatory policy for the country's financial sector; and representing Canada at international financial institutions.²⁹

With respect to the Budget, the Minister of Finance is responsible for establishing the fiscal framework within which overall government spending takes place. He or she is, by tradition, the Vice-President of the Treasury Board. However, by custom the Minister of Finance does not attend Treasury Board meetings except when the President of the Treasury Board is unable to attend or when a matter to be discussed by Treasury Board is of special concern to the Department of Finance.

Once the fiscal framework is set, departments are responsible for the management of the expenditures allocated to them, although Treasury Board has its general oversight role. The Department of Finance and its Minister do not play a role in the oversight of expenditures made by other departments.

When the Minister of Finance prepares a Budget, there are two aspects to consider: revenues and expenses. Revenues come mostly from taxation, and the Government estimates its revenues based upon its calculation of how the economy, employment and inflation will affect revenues from taxation.

On the expense side, there are three basic categories of expenses to take into account:

- spending for which the Government is committed by legislation and over which the Finance Minister has virtually no control;
- debt service charges, over which the Finance Minister has little discretion unless Canada chooses to default on its obligations to its creditors; and
- non-statutory spending, or program spending, the area over which the Finance Minister, in consultation with his or her Cabinet colleagues and the Prime Minister, has discretion.

To prepare the Budget, the Finance Minister goes through the process of reviewing expected revenues and existing spending commitments and determines if there is going to be surplus money, and if so, for what it will be used. If it is decided that the surplus will go to spending, the Finance

Minister takes into account government policy as announced in the Speech from the Throne, the Party's platform and the various spending proposals that have been put before Cabinet. The final result is a Budget that makes an allocation to each department. This is the source of funds for departmental programs.

If the Finance Minister does not put something in the Budget for spending proposals of the department concerned, the process of obtaining new funding is basically over for that department, at least until the next federal Budget. Even if the Finance Minister agrees with a spending proposal and puts it in the Budget, the Minister of the department concerned still requires a number of approvals before he or she can go ahead with the proposed program. None of these approvals comes from the Minister of Finance as such, although as a member of Cabinet he or she is part of the overall Cabinet approval process, like any other Minister.

At some point, the Minister making a spending proposal goes to the Minister of Finance to request that funds be included in the Budget, and must make a presentation to a Cabinet committee to obtain approval in principle for the spending proposal from his or her colleagues.

Once there is a source of funds in the Budget and approval in principle of the proposed expenditure, the Minister goes back to the Cabinet committee, where the proposed project or expenditure is again examined, this time in more detail, before being approved.

Once final Cabinet approval has been obtained, a submission is prepared and goes to Treasury Board, where the proposal is again reviewed in detail. If Treasury Board gives its approval, the proposed spending is prepared for Parliament's approval, as part of the main estimates or supplementary estimates. The Minister can spend money only once Parliament has approved the spending.³⁰

The Finance Minister's only role in this process is to set the financial context or the fiscal framework. Once a proposed expenditure has been approved

through the presentation of the Budget, his or her responsibility for it comes to an end. The Minister plays no role in granting the various approvals, except to the extent that he or she may exceptionally attend the Treasury Board meeting at which the Treasury Board submission is considered. The Minister of Finance has no responsibility to monitor spending once it has been approved.

Once money has been voted to a department by Parliament, it is primarily the role of the department of the Minister concerned to ensure proper management and compliance with legislation. Although Treasury Board has an overall supervisory function to ensure that departments use money allocated to them in the way intended, the main responsibility for the proper administration of the sums allocated to the department is that of the Minister of that department.

3.8

Public Works and Government Services Canada

The Department of Public Works and Government Services Canada (PWGSC) was created in June 1993 by Order in Council through the merger of two departments, the Department of Public Works and the Department of Supply and Services. In 1996, legislation³¹ confirming the merger and establishing the new Department was enacted. Section 5 of this legislation provides:

The Department shall operate as a common service agency for the Government of Canada, and its activities as a common service agency shall be directed mainly toward providing the departments, boards and agencies of the Government of Canada with services in support of their programs.

Accordingly, PWGSC has a general mandate to operate as a common service agency for the Government and to provide all of its other departments, boards and agencies with goods and services “in support of their programs.”

Section 7 of the same legislation provides as follows:

In exercising the powers or performing the duties or functions assigned to the Minister under this or any other Act of Parliament, the Minister shall

- (a) investigate and develop services for increasing the efficiency and economy of the public service of Canada and for enhancing integrity and efficiency in the contracting process;
- (b) acquire material and services in accordance with any applicable regulations relating to government contracts...

Although the *Interpretation Act* and the common law³² provide that any power or responsibility assigned by statute to a Minister may be validly exercised by his or her Deputy Minister or any other person in the Department who is suitably qualified, this provision does not relieve the Minister from his or her responsibilities of oversight. The responsibilities specified in section 7 are of such importance to the Department's function as a common service provider to all government departments that the Minister of PWGSC must take an interest in the contracting process to be followed by public servants in his or her Department. Because the Minister bears the primary responsibility for the Department, he or she is not entitled to leave administrative procedures and regulations to the sole supervision of Department personnel.

The table below, which identifies the various Ministers and Deputy Ministers of PWGSC at the times relevant to this Inquiry, will give the reader a better understanding of what follows in this Report.

Position within PWGSC	Incumbent	Time Period
Minister	David Dingwall	November 1993-January 1996
Minister	Diane Marleau	January 1996-June 1997
Minister	Alfonso Gagliano	June 1997-January 2002
Minister	Don Boudria	January 2002-May 2002
Minister	Ralph Goodale	May 2002-September 2003
Deputy Minister	Ranald Quail	June 1993-April 2001
Deputy Minister	Janice Cochrane	April 2001-June 2003
Deputy Minister	David Marshall	June 2003-present

David Marshall was the incumbent Deputy Minister at the time of writing this Report. His testimony before the Commission provides valuable insight into the problems that affected PWGSC during the years when the Sponsorship Program was operating, and he has put into effect measures designed to reduce the likelihood that such problems will reoccur. His testimony will be of value to the Commission when it comes to make recommendations to the Government, in Phase II.

In the Statement of Evidence submitted on behalf of PWGSC is the following paragraph:

[Emphasis added]

7. The Minister of PWGSC is responsible for the Department and, thus *there is a requirement for daily interaction between the Minister, his or her staff, and departmental officials*. The reasons for these interactions vary but may include such matters as briefings on Treasury Board submissions, presentations on major departmental initiatives, preparation for Question Period and discussions on key communications issues. It is generally the case that these interactions are through the Deputy Minister's Office...³³

The same submission contains the following paragraphs concerning the relationship between PWGSC and the Treasury Board Secretariat:

10. PWGSC interacts with the Treasury Board Secretariat (TBS) in many different contexts. First, because of the number of operational programs for which PWGSC is responsible, it must often seek Treasury Board approvals. PWGSC works with the TBS in preparing Treasury Board submissions. These submissions are necessary to seek access to funds that have already been identified for PWGSC within the fiscal framework and to obtain specific authorities from time to time. For example, Treasury Board approval will be required for contracts whose value exceeds a Minister's authority or for large construction or information technology projects at various stages of their development.

11. Second, there is interaction between the TBS and PWGSC in the preparation of the Main and Supplementary Estimates and the Annual Reference Level Update.
12. Third, PWGSC's financial and contractual activities are driven by Treasury Board policies and guidelines.³⁴

3.9

Definition of a “Program”

In his final oral submissions, counsel for the Attorney General of Canada argues that there was no Sponsorship Program in existence until September 1, 2001, when Communication Canada at last established and published formal guidelines, criteria and procedures to govern the administration of sponsorships for the future. The administration of sponsorships without criteria and involving considerable political input may have been risky or even dangerous, but it was not illegal and it did not constitute a program.³⁵ This submission appears to contradict the Terms of Reference by which this Commission was created, which refer in very specific terms to the creation and management of the Sponsorship Program. It also implicitly contradicts the testimony of many of the witnesses who were directly involved in 1996 in what they themselves describe as the Sponsorship Program, as well as the testimony of the public servants involved in the implementation of the measures decided upon in 1996 by the Government.

The question of whether the administration of sponsorships prior to September 1, 2001, constituted a program is important because the *Financial Administration Act* (FAA) and other legislation create responsibilities and obligations where funds are paid out in the context of a program. For example, section 32 of the FAA imposes upon a person “charged with the administration of a program” the duty to “establish procedures and maintain records respecting the control of financial commitments” made by the Government in relation to the program in question. Other uses of the word “program” appear in sections 7, 11, 29.1 and 32 of the FAA, but nowhere in the Act or other federal legislation is the word defined.

Treasury Board's Statement of Evidence provides a definition of a program as a "formal framework for organizing and undertaking activities so as to achieve a specific and defined set of objectives,"³⁶ but it does not tell us from where this definition is drawn. Probably it reflects what appears to be the prevailing attitude in the public service, since two witnesses with distinguished records of achievement in the Privy Council Office expressed a similar opinion.³⁷

The Commission heard testimony from Ronald Bilodeau, who in 1994, after many years of service as a senior public servant, became Deputy Minister of Intergovernmental Affairs, a ministry that was at that time part of the Privy Council Office. In 1996 he was appointed Associate Secretary of the Privy Council and Deputy Secretary to the Cabinet PCO, which is to say he became the second most senior public servant in the Government, reporting directly to the Clerk of the Privy Council, Jocelyne Bourgon.

In his testimony, Mr. Bilodeau states that, in his opinion, what is described in the Terms of Reference as the Sponsorship Program did not prior to 2001 constitute a program as that word is used in bureaucratic jargon. Rather, it was until then a series of government initiatives, many having elements in common. It was only in 2001 that the Program was publicly announced and given officially approved structure and criteria.

Mr. Bilodeau admits that there is a degree of uncertainty within the public service as to what constitutes a program. In his opinion, in order for a program to exist there would have to have been a detailed proposal submitted to Cabinet and duly approved, which described the objectives sought and which clearly defined who had responsibility for the administration of the program. The following passage from Mr. Bilodeau's testimony expresses his view on the subject:

[Unofficial Translation]

Mr. Bilodeau: Normally, new programs are created by submitting a detailed proposal to Cabinet, that is, a brief to Cabinet spelling out the program objective, the rationale for the program, the steps, the activities to be funded

by or carried out under the program, the pros and cons of the program, the person responsible for it, what Treasury Board and the Department of Finance think about it, etc. Consequently, it was a regular process for Cabinet...

Commissioner: Is it not critical to establish eligibility criteria for programs?

Mr. Bilodeau: Definitely. In the case of new programs it would be the...

Commissioner: Definitely, and would there not be a certain amount of interest taken in the way the program is to be administered, the means to be used, and the person who is to be in charge?

Mr. Bilodeau: Yes, that's true, Commissioner.³⁸

Ms. Bourgon testifies that she had come to the same conclusion as Mr. Bilodeau, and that in her opinion there was no program before 2001 for the administration of sponsorship initiatives; they consisted only of lists of projects which were part of the Government's publicity activity. In her view, in order to constitute a program, the publicity activity would have to have been more structured and of greater importance.³⁹

Section 12 of the *Interpretation Act* says that every enactment is deemed remedial, and is to be given the "fair, large and liberal construction and interpretation that will best ensure the object of the enactment." In the absence of any definition of what constitutes a government program in the law, the rules of interpretation of statutes require that these words or expressions be given their usual and ordinary meaning. A technical or specialized interpretation of an ordinary word is not to be resorted to unless the context clearly requires it.

In the *Shorter Oxford English Dictionary on Historical Principles*, the word “program” is defined in its general sense as “a definite plan of any intended proceedings.” In *Le Petit Robert*, the word “programme” is defined as “suite d’actions que l’on se propose d’accomplir pour arriver à un résultat.” In the *Canadian Oxford Dictionary* (Second Edition) the word “program” is defined as “a course of activities or actions undertaken to achieve a certain result.”

With respect for the contrary point of view expressed by Ms. Bourgon and Mr. Bilodeau, I have come to the conclusion that the series of projects and initiatives launched by the Government of Canada in 1996, in the circumstances described in the remainder of this Report, constituted a “program” as that term is ordinarily used. Sponsorship initiatives were a series of projects or activities planned and undertaken to accomplish the objective of enhancing the visibility of the federal presence and promoting its programs and services. As such, they fit precisely into the dictionary definitions of the word “program.” The fact that the Sponsorship Program was not formally structured and had not been specifically approved by Cabinet, Treasury Board and the Privy Council Office, and that it lacked eligibility criteria and the required bureaucratic oversight, did not make it less of a program, but in fact contributed greatly to the problems and abuses in its implementation that have been described in the Report of the Auditor General.

This completes our description of how the Government of Canada generally functions in the areas relevant to this Commission of Inquiry.

Endnotes to Chapter III

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- ¹ This chapter relies on the testimony of Ms. Jocelyne Bourgon, a former Clerk of the Privy Council, and on the testimony of Mr. Alex Himelfarb, the present occupant of that office, the most senior position in the public service.
 - ² Testimony of Mr. Himelfarb, Transcripts vol. 12, pp. 1889-1894, 1905 (OE), pp. 2009-2014, 2027-2028 (F).
 - ³ Testimony of Mr. Chrétien, Transcripts vol. 72, pp. 12506 (OF), p. 12502 (E).
 - ⁴ Testimony of Mr. Himelfarb, Transcripts vol. 12, pp. 1891-1892 (OE), p. 2012 (F).
 - ⁵ Testimony of Mr. Pelletier, Transcripts vol. 71, pp. 12327-12328 (OF), p. 12326 (E).
 - ⁶ The written submissions of the Attorney General of Canada and the testimony of Ms. Bourgon and Mr. Himelfarb rely on two government publications, which appear to be authoritative. They are *Responsibility in the Constitution*, prepared by the Privy Council Office in August 1977 and last modified on June 1, 1993 (Exhibit GC-2), and *Governing Responsibly: A Guide for Ministers and Ministers of State* (Exhibit P-35), dated December 2003 and also published by the Privy Council Office. The principles they contain apply to any era.
 - ⁷ Exhibit P-35, p. 15.
 - ⁸ Exhibit P-474(GG), paras. 70-71.
 - ⁹ Exhibit GC-2, VI, pp. 1-4.
 - ¹⁰ Testimony of Mr. Himelfarb, Transcripts vol. 12, p. 1851 (OE), p. 1965 (F).
 - ¹¹ Exhibit P-200, p. 14, para. 48.
 - ¹² Testimony of Mr. Gagliano, Transcripts vol. 67, pp. 11547-11550 (OF), pp. 11546-11548 (E).
 - ¹³ Testimony of Mr. Pelletier, Transcripts vol. 71, pp. 12313-12314, 12391-12393 (OF), pp. 12313-12314, 12383-12384 (E).
 - ¹⁴ Exhibit P-35, p. 33.
 - ¹⁵ Treasury Board Secretariat, “Guidelines for Ministers’ Offices,” section 3.3.4.3, Meals; section 6.1.3, Travel Expenses—Ministerial Staff.
 - ¹⁶ Exhibit P-36.
 - ¹⁷ Exhibit P-36, Part II, “Responsibilities of the Deputy Minister.”
 - ¹⁸ Exhibit P-36, Part II, “Responsibilities of the Deputy Minister.”
 - ¹⁹ Exhibit P-36, Part III, “Accountabilities of the Deputy Minister.”
 - ²⁰ Testimony of Mr. Bilodeau, Transcripts vol. 47, pp. 8082-8088 (OF), pp. 8082-8088 (E).
 - ²¹ Testimony of Mr. Massé, Transcripts vol. 64, pp. 11214-11218 (OF), pp. 11211-11215 (E).
 - ²² Testimony of Ms. Bourgon, Transcripts vol. 48, pp. 8335-8336 (OE), pp. 8338-8339 (F).
 - ²³ RSC, c. F10.

- ²⁴ The Royal Commission on Government Organization, 1962 (“Glassco”), recommended, at the broadest level, that departmental management be entrusted with the power of decision in many of the areas that were, at the time, being controlled by Treasury Board staff. The Commissioners concluded that “. . . the defects in government are the consequence of outmoded concepts of public administration and do not reflect on the calibre of Canada’s public servants.”
- ²⁵ Exhibit P-10, pp. 4-7, paras. 12, 13-15, 18, 20, 22.
- ²⁶ Exhibit P-10, pp. 13-18.
- ²⁷ RSC 1985, c. F-11.
- ²⁸ Testimony of Mr. Judd, Transcripts vol. 4, p. 593 (OE), pp. 595-596 (F).
- ²⁹ Exhibit P-51, p. 1.
- ³⁰ Testimony of Mr. Martin, Transcripts vol. 73, pp. 12690-12693, 12698-12705 (OE), pp. 12691-12694, 12700-12708 (F).
- ³¹ *Department of Public Works and Government Services Act*, SC 1996, c. 16.
- ³² In particular, section 24(2) of the *Interpretation Act*, RSC I-23, and the “Carltona principle” endorsed by the Supreme Court of Canada in *R. v. Harrison*, [1977] 1 SCR 238, and in *Comeau’s Sea Foods Ltd. v. Canada*, [1997] 1 SCR 12.
- ³³ Exhibit P-20, p. 2.
- ³⁴ Exhibit P-20, p. 3.
- ³⁵ Testimony of Mr. Lussier, Transcripts vol. 136, p. 25709 (OF), p. 25706 (E).
- ³⁶ Exhibit P-10, p. 54.
- ³⁷ Testimony of Mr. Bilodeau, Transcripts vol. 46, pp. 7917-7918 (OF), pp. 7882-7884 (E); Testimony of Ms. Bourgon, Transcripts vol. 47, pp. 8163-8164 (OF), pp. 8163-8164 (E).
- ³⁸ Testimony of Mr. Bilodeau, Transcripts vol. 46, p. 7918 (OF), p. 7883 (E).
- ³⁹ Testimony of Ms. Bourgon, Transcripts vol. 47, pp. 8163-8164 (OF), pp. 8163-8164 (E).