
CLARIFYING THE DOCTRINE OF MINISTERIAL RESPONSIBILITY AS IT APPLIES TO THE GOVERNMENT AND PARLIAMENT OF CANADA

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1 Doctrine

1.1

Introduction: The Constitutional Doctrine of Ministerial Responsibility

In academic studies, comparisons between Canada and other countries based on the Westminster model, that is, the United Kingdom, Australia and New Zealand, are so familiar as not to elicit comment. Yet they should, for together these countries stand apart in sharing—virtually replicating—a constitutional, legal and linguistic inheritance. Of course, there are differences among the quartet: Canada and Australia are federations, the United Kingdom and New Zealand unitary systems.

But it is the similarities that attract, none more so than the fact each is a monarchy that shares a common sovereign.

The relevance of a common constitutional legacy and similar governmental institutions is this: the frame for political discussion is much broader than is found in countries with singular constitutions, such as the United States and France. At the same time, the scope for variation in relations that obtain between Minister and Crown, or minister and legislature, or minister and civil service—the component elements of constitutional monarchy—is extensive. Constitutional monarchy operates largely by means of conventions, what John Stuart Mill described as the unwritten maxims of the constitution. For that reason, advice, consultation and understandings play a critical part in arriving at decisions. The same indeterminate atmosphere pervades the conduct of the Commons on matters of great importance. Consider, for instance, the “Speaker’s Ruling on the Application of the Progressive Conservative Democratic Representative Coalition for Recognition in the House of Commons,” in which Speaker Milligan commented: “In matters relating to the status or designation of individuals or groups in the House, the House makes its own decisions without necessarily limiting itself to standards and definitions used outside the House of Commons.”¹

In a Westminster system, constitutional principles are largely unwritten and generally non-justiciable. *The Constitution Act*, 1867, constitutes the federal union with fewer than half its sections devoted to the structure and operation of the executive and legislature. Responsible government does not appear, its provenance instead a simple instruction in 1847 from the Colonial Secretary (Earl Grey) to Nova Scotia’s governor (Sir John Harvey), to the effect that in future the governor select as his advisers those who controlled the local assembly. The same communication contained a paragraph of direct relevance to the topic of ministerial responsibility. It spoke about the future place of the civil service and, more particularly, the relationship that should obtain

between Minister and civil service in the era of responsible government about to dawn. Since the relationship between Minister and Deputy is a central concern of this study, Grey's instruction to Harvey should be quoted in full, at the same time noting (once again) the conventional form this cardinal principle of the reformed constitution assumed:

Those public servants, who held their offices permanently, must upon that very ground be regarded as subordinate, and ought not to be members of either house of the Legislature, by which they would necessarily be more or less mixed up in party struggles; and, on the other hand, those who are to have the general direction of affairs exercise that function by virtue of their responsibility to the Legislature, which implies their being removable from office, and also that they should be members either of the Assembly or of the Legislative Council.²

It is no coincidence that debate today over ministerial responsibility is taking place at a time when there is strong criticism of prime ministerial power and of the rigid party discipline that makes it possible. Much is said about the failure of the House and its members to speak for or be responsive to public and constituency opinion. The implications for cabinet, individual ministers, members of Parliament on both sides of the House and for the public are profound. Thomas Axworthy goes so far as to say that "lack of attention to accountability as an overriding goal of our political system has resulted in many citizens choosing to opt out of the political process."³

Parliament is a self-contained political system. Only in the 1860s did parliamentarians in Great Britain and in Canada go out to the people, and only thereafter were governments usually made and unmade at the hands of the electorate outside the House. Even with this change, and even with the arrival of the *Canadian Charter of Rights and Freedoms*, politics continue to be played out almost totally within the parliamentary

dimension. There are three reasons for making this assertion. First, since before Confederation and up to the present, Canadian politics are partisan, indeed extensively so. Partisanship pervades the House and infects every aspect of its activities. Second, the executive is drawn from and is accountable to the legislature. Public and media attention focus on the House, to the exclusion of the Senate and even the courts much of the time. A final, but often neglected, reason for the Commons' drawing power is that under monarchical, parliamentary government, civil servants serve the Crown but are subject to direction of the political executive. In Canada, the civil service is statutorily-based; in Britain, where the civil service is still considered "an extension of the royal household," the foundation is convention.⁴ In this hermetic world, there is no provision, either in theory or in practice, for inclusion of the people in the formation or conduct of public policy. Herein lies the explanation for continuing concern about the health of the doctrine of ministerial responsibility.

1.2

Ministerial Responsibility

Ministerial responsibility is the hinge of the Constitution. Individually and collectively, ministers are the conduit between the people's representatives and the Crown in whose name government is conducted: "For every action of a servant of the Crown a minister is answerable to Parliament."⁵ Parliament is both a representative institution and the seat of government. By convention all ministers must have seats in Parliament, and, by custom today in Canada, all ministers but the Government Leader in the Senate are members of the Commons. Indeed, one of the complications associated with transforming the Senate into an elected body is the implication that reform would have for the operation of ministerial responsibility. Would ministers sit in the upper as well as the lower chamber? Would the government and its ministers be responsible to both houses? In Australia, a quarter or

more of the ministers sit in the Senate, although that body is not considered a confidence chamber. The source of the difference between Australia and Canada in this matter is beyond the scope of this study, except in one respect that requires emphasis. The Canadian Senate is not a federal chamber in the sense its counterparts are at Canberra and Washington. That difference is the source of much criticism in Canada, where the federal dimension is reflected at the centre solely through the composition of the cabinet. Two consequences relevant to the present discussion flow from this feature of the Canadian Constitution. First, ministers are the primary bearers of administrative responsibilities for their province, which in Australia would be shared with members of the Senate. Second, the business of government in Canada, a country of immense size and varied and rapidly changing economic, social and demographic characteristics, is concentrated in the hands of ministers.

Canada's is a double federation—territorial and linguistic. For this reason, there is a need for caution in drawing comparisons between it and other Commonwealth countries, particularly Australia, that share the heritage of monarchical, cabinet-parliamentary government. Caution is all the more needed because in a world of invisible rules, which is another way of describing unwritten conventions, comparisons are deceptively simple. On its surface, ministerial responsibility is easy to comprehend: responsibility is a civic virtue, with citizens taught from childhood to be responsible for their actions. A coda to that lesson is the consequences (often in the form of penalties) that ensue for failure to act in this manner. Ministerial responsibility is both comprehensible and consequential, except that the sequence might more usefully be reversed. Consideration about ministerial responsibility tends to occur after the fact, that is, in a context where it is perceived to have failed. Thus, scandal and controversy often precede and then engulf discussion of the subject. The provenance of the discussion dictates a predictable outcome, an imperative for action: "This must not happen again: What

can be done to see that it does not happen again?” In this atmosphere there is no assurance that the long view of the doctrine, policy or administration will necessarily prevail, an assessment captured in the title of a much-quoted Canadian article on ministerial responsibility: “Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem.”⁶

1.3

Individual and Collective Ministerial Responsibility

The comments that follow privilege individual over collective responsibility. Only by doing so can the relationship between Ministers and Deputy Ministers be explored. Still, there is a linkage between the two variants that needs to be made explicit. In the words of British political scientist David Butler: “There are two key elements to collective ministerial responsibility. The first is that all ministers . . . once they know of a government policy, must defend it—or keep silent about it; otherwise they must resign. . . . The second element . . . is that if a government is defeated on a vote of confidence, it must recommend a dissolution, or it must resign.”⁷ Hang together or hang separately. The group protects the individual, but only if the individual acquiesces or is forced to agree. Here is the rationale and the requirement for discipline; and here the motive power for parliamentary politics. Collective responsibility regulates the lives of ministers, individual responsibility the lives of officials, none more so than Deputy Ministers.

In the question of collective ministerial responsibility the choice is simple: resign or seek dissolution when defeated on a matter of confidence. As Canadians saw preceding the formal vote of want of confidence in the Martin Government in May 2005, there may be disagreement over what constitutes a defeat of a government in the legislature, but once that is resolved, the choice is clear. Individual ministerial responsibility is a very different matter, beginning with the question of resignation.

Governments resign when they are defeated; ministers, who in any case are not in a position to be “defeated,” do not resign. That at least is the conclusion to be drawn from statistics assembled by scholars in Canada, Australia and Great Britain.⁸ Sharon Sutherland, in her study of 151 ministerial resignations in Canada between 1867 and 1990 found that only two ministers had resigned for “maladministration in their portfolio.” Eleven exited due to breaches of ethical standards, 28 due to lack of solidarity with their colleagues (for example, Lucien Bouchard’s defection from the Mulroney cabinet in 1990 over “the government’s method of dealing with constitutional change”) and 62 due to receiving a government appointment. David Butler’s statistics on ministerial resignations between 1901 and 1996 in Australia and Britain found 28 percent of resignations in the first (but only 15 percent in the second) due to “personal fault in a public capacity.” “Accepting blame for public servants” explained five percent of resignations in Great Britain but none in Australia.

Resignation is the measure and the meaning of ministerial responsibility—to the media, who need only to fix their focus on an individual, and to the public, who take their understanding of ministerial responsibility largely from the media. James Mallory, who wrote more on cabinet government in Canada than anyone in the last half of the 20th Century, assigned to resignation a “homiletic value.”⁹ The more usual language is to say it is symbolic. Whether one attributes this response to a “blame culture,” a desire for metaphorical “public hangings,” or a “shooting gallery mentality” is of secondary importance to the predictable recurrence of the response and the equally predictable failure in all but a very small number of instances for that wish to be realized.¹⁰ Noteworthy is Ken Kernaghan’s conclusion: emphasizing the need to resign even though it seldom happens “explains in large part the view that the doctrine of individual ministerial responsibility is dead or at least severely weakened.”¹¹ Kernaghan argues that the resignation

quest deflects attention from where it should be directed—on the securing of information. He calls it “the answerability component”—Parliament’s need to know what went wrong and how to avoid its happening again.¹²

1.4

The Meaning of Responsibility

British academic Diana Woodhouse presses this corrective even further. Using H.L. Hart’s terminology, she argues for distinguishing between role and causal responsibility, maintaining that “this would make a more appropriate distinction between the accountability of ministers and officials and... would move the emphasis away from personal culpability toward the requirements of explanation and amendatory action.” The concern here is to escape the binary, and in her opinion, unhelpful division between accountability and responsibility, where the minister explains what went wrong but takes no responsibility because he or she is not directly involved in what went wrong. In this interpretation, culpability is the key to responsibility. Woodhouse rejects this approach because it presumes hermetic worlds of operations and policy—an “artificial division” she says—and because the role of the minister, in her view, should be that of overseer of both policy and operation.¹³

The fault or tort criterion is out of favour with some critics in Canada. In *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*,¹⁴ the author notes the suggestion made to the Task Force that “Canadian ministers traditionally involve themselves more often in certain details of administrative decision-making than do ministers in most other parliamentary countries. If this tradition continues, it is natural to expect ministers to accept corresponding personal consequences for these decisions.” Perceptively, the Task Force recognizes that changes in roles and responsibilities do not occur in a vacuum, and that Canadian

political culture is an influential consideration. In particular, the high turnover of MPs “reduces the capacity to build substantive expertise on public administration in the House.” The competence of ministers “may limit the room to manoeuvre.” Conversely, if the pendulum swung the other way and public servants were given “more direct authority and . . . more direct accountability to Parliament,” then this would undercut the authority and responsibility of ministers.

While the public service and public administration are its primary concerns, the Task Force is unusually sensitive to the political dimension of government. That is to say, it acknowledges what reformers sometimes neglect—the federal and partisan worlds ministers inhabit. To reiterate, ministerial responsibility monopolized protects authority, while ministerial responsibility shared depreciates it.

1.5

De-Politicizing Ministerial Responsibility

A quarter of a century ago, the Report of the Royal Commission on Financial Management and Accountability (The Lambert Commission Report) first broached these kinds of questions. That is, who is (or is not) in charge; who should be in charge; and, in particular, how to reassert control? In his Report for 1975, the Auditor General said that “Parliament—and indeed the Government—ha[d] lost or [was] close to losing effective control of the public purse.” Lambert’s importance to the discussion of ministerial responsibility lay in his recommendation to neuter the doctrine as a political concept. Accountability, at least as far as financial matters in departments, would lie in the hands of officials, most specifically, the Deputy Minister. To oversimplify: fixing financial control would make auditing easier. Ultimately, the recommendation was never implemented, but the debate that followed the Report is relevant for the present discussion. In particular, the argument against de-politicizing policy decisions was just that: politics

were being extracted from government, which by its very essence was political in operation, “an endless series of rolling compromises,” according to Douglas Hartle, a strong critic of the Report.¹⁵

Another interpretation of the Report’s perspective is to say it sought to personalize accountability in a manner Sharon Sutherland described as “a kind of individual moral accountability of people as natural persons.”¹⁶ Where the traditional union represented by ministerial responsibility was between ministers and House, and ultimately minister (and government) and the electorate, through mechanisms such as Question Period, in the new version it was between a singular civil servant and, necessarily, a parliamentary committee. To the critics, there were several flaws with the reconstituted doctrine of responsibility, beginning with the fact that it was not ministerial, either individually or collectively. In their eyes, the loss was not compensated by making a civil servant accountable to a parliamentary committee whose competence and interest in the matter of exacting accountability, as opposed to winning public credit with the electorate, were suspect.

Moving responsibility from Ministers into the hands of civil servants (most probably those of Deputy Ministers) and out of Parliament into one of its committees constituted a significant reversal of constitutional development. There is an unresolvable tension between the function of parliamentary committees and the conduct of responsible government: if, as James Mallory once said, “responsible government undermines parliamentary independence,” the reverse is also true.¹⁷ Even in the “good” cause of checking the executive, as its proponents advance, the result of the reform is the same: weaker and less accountable government and maybe weaker Ministers and Deputy Ministers, since the symbiotic relationship between the two could not help but be affected by the increased power of the deputy with the potential loss of confidence of the minister. The hallmarks of civil servants in the parliamentary mode are anonymity and neutrality. They advise without

fear or favour ministers who decide the policy to adopt from choices presented. Much could be said as qualification to this general statement, but the values themselves are unequivocal. Equally important, they are realizable only in a climate of confidentiality.

Monarchical-cabinet government, based largely on unwritten conventions interpreted individually and personally, depends upon secrecy in order to promote candor among participants. The confidence that comes from the understanding that discussions and advice between Ministers and departmental officials are privileged cannot help but be compromised when those officials may be answerable to parliamentary committees. The relationship between Minister and Deputy is of a piece with the relationship between first minister and the Crown's representative, the Governor General—private, personal and political (but not partisan). In this privileged milieu, accountability assumes a distinctive limited meaning—for example, to one principal and for one program. Hierarchy discourages dissemination of information and diffusion of authority.

Monarchical-parliamentary government is an important explanation for the disposition to resist diffusion in Canadian politics. Still, it is not the only explanation. Daniel Elazar has said of American federalism that it is neither centralized nor decentralized but rather non-centralized.¹⁸ The same cannot be said, despite the perennial concern expressed at the perceived “Balkanization” and asymmetrical programs, of Canada's federation. Donald Savoie has argued that to the extent power is concentrated, it is lodged in central agencies answerable to the Prime Minister. From the perspective of the central agencies, the maintenance of the federation, seen in terms of Quebec-Canada relations, Aboriginal and First Nations matters, the implementation and protection of civil and minority rights in the era of the Charter, or the enduring quest for regional equality, concentrates attention on matters of control, especially

as a result of the requirement for ministerial accountability for finances under a system of responsible government. At one time, the hierarchy of monarchical-parliamentary control was replicated in departments such as Agriculture with Ministers like James G. Gardiner, in the same portfolio for 22 years and in Bruce Hutchinson's phrase, "a kind of semi-sovereign power" in his own right.¹⁹ Gardiner's agricultural priorities became those of the Government of Canada, indeed of more than one government because of his and his Deputy Minister's long tenure. Today, because of changes in Canadian federalism, national political parties and the advent of new public management policies, continuity and control emanate from the central agencies. The quintessential party politician, Gardiner would have had no qualms about a parliamentary committee questioning his Deputy, although at the same time, no one would have doubted that Deputy spoke for Gardiner. Today, with more frequent turnover of Ministers and Deputies, the unquestioned identification between principal and second-in-command has disappeared.

1.6

The Canadian Practice of Ministerial Responsibility

Yet in the organizational scheme of government, Canadian Ministers who hold a portfolio are responsible and accountable to Parliament. A previous Minister is not responsible and cannot be held accountable or answerable to Parliament or its committees for what went on during his or her tenure. Current ministers are answerable for actions taken by predecessors. Ministers are answerable as well for information on the use of powers by non-departmental agencies assigned to the agencies by statute. For the exercise of these powers the heads of the agencies are responsible not to Ministers but through Ministers to Parliament. Deputy Ministers are answerable, not accountable, before parliamentary committees. Deputy Ministers are accountable to their Ministers, to the Prime Minister and to the Treasury Board but not to Parliament and its committees.

The foregoing is drawn from a submission by C.E.S. Franks to the Standing Committee on Public Accounts in 2004 and quoted, approvingly, in the Committee's Report, *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability* (May 2005). The nub of his remarks is that "responsibility and accountability belong to the office and its current holder." In the period when Jimmy Gardiner held the Agriculture portfolio for more than two decades, this perspective offered few problems as far as accountability to Parliament.

The old union of Minister and Deputy has disappeared for reasons that are familiar. The range and complexity of government programs has multiplied and, as a result, there is the need nowadays to involve more than one department in implementing a program or policy; shared-cost financing has altered the administration of federal and provincial programs; national political parties are weaker and regionally-based parties stronger than at any time in the past; and public attitudes toward government have changed, as reflected in demands for greater responsiveness, in company, paradoxically, with new monetary theories that envision less interventionist government than was accepted after the Second World War, especially in the Anglo-American world. The list is long and the influences itemized contradictory. For example, on one hand, because of scientific research and globalization, policy is complex and requires specialist knowledge, while, on the other, the demand everywhere is for openness, accountability and responsiveness. The scandals involving Human Resources Development Canada (HDRC) and the Sponsorship Program, as well as the continuing critique in a succession of reports by the Auditor General of Canada on the theme of lack of government accountability, suggest urgency in clarifying ministerial responsibility as a practicable doctrine of government.

1.7

The Accounting Officer Alternative

It seems generally agreed that because of the scope of government programs Ministers cannot personally be accountable for everything done in their name. Is there a substitute point of accountability? Significantly—if only because of the absence of rival alternatives—is the British practice of appointing the permanent secretary of departments (the British counterpart to a Canadian Deputy Minister) as Accounting Officer (AO). A full discussion of the role of the AO is beyond the scope of this paper. The essential feature to relate is that this official has “a personal responsibility for the propriety and regularity of the public finances for which he or she is answerable; for the keeping of proper accounts; for prudent and economical administration; for the avoidance of waste and extravagance; and for the efficient and effective use of all the available resources.”²⁰ C.E.S. Franks has argued that the AO provides a focus for accountability in a system where despite frequent reference to the principle of ministerial responsibility, no one can be identified as responsible. Mr. Justice Gomery, chair of the Sponsorship Inquiry, was reported as echoing the frustration of other commentators: “No one seems to be responsible;” and when incompetence was found, observing that “nothing is or can be done about it.” “I don’t think that there is any disposition in the *Financial Administration Act* that authorizes you to fire a grossly incompetent employee. . . I looked and I looked and the more I looked, the less I found.”²¹

Except where a Minister overrules his or her AO, the Officer personally accounts for his or her but not the Minister’s actions before the British Public Accounts Committee. The AO concept had its origins in Gladstone’s time as Chancellor of the Exchequer. It made its way into the government of Ireland (but not to the old Dominions), where it remains a key element of administration. In 2002, the *Report of the Working Group on the Accountability of Secretaries General and Accounting Officers*,

an 89 page report took note of the officers' history in Ireland and paid special attention to the "unusual" system where the Secretary General (equivalent to a Canadian Deputy Minister) is "accountable" to the Minister "for managing the Department," while he or she is "also personally answerable to the PAC for regularity, propriety and value for money" (para. 26). As the Report notes, the Accounting Officer is a structural heretic since the Officer's duties fall "outside the normal system of civil service delegation where, in general, civil servants act in the name of the Minister"(para. 27).²²

This is the point of dispute in Canada. Advocates of the concept see it filling a lacuna in accountability, which by inference, if adopted, will strengthen ministerial accountability. Critics say these claims are exaggerated and misleading. Deputy Ministers, they argue, are required to show Parliament the same respect and adherence to financial procedure in Canada as Accounting Officers do in Britain; and in neither country can Public Accounts Committees reward or sanction, or for that matter direct, a civil servant. Formal signing of accounts by the AO does not alter the reality that it is the Minister who in the House takes responsibility, however that term is interpreted. David Butler has written that "in Australia [he might equally well have said Canada], as in Britain, I have yet to meet a Minister who doubts the extent to which his life is regulated by collective responsibility. I have yet to meet a senior official who denies the centrality of individual ministerial responsibility in everyday bureaucratic life."²³

Those familiar and sympathetic with the work of Accounting Officers continue to seek greater clarity in their functions. Consider, for instance, the recommendation of the Irish Working Group on Accountability:

In the interest of more clearly defining the responsibility of the Accounting Officer and of the Chief Executive Officer, or equivalent, in respect of bodies under the aegis of the Department [in Canada,

Crown Corporations, or executive agencies, for example], which are in receipt of Exchequer funds, their respective roles and the framework and processes of accountability should be set down in writing.²⁴

As with prerogative powers, convention, privilege, ethics, conduct, and now ministerial responsibility, the pressure for change is in one direction only—toward codification of a “new administrative law” and justifiable action. In consequence, Officers of Parliament go to court, while members of Parliament and the public go to Officers of Parliament; direct administrative accountability supersedes indirect political accountability; and ministerial responsibility wanes as the integrity industry flourishes.²⁵ Here is what Australians Richard Mulgan and John Uhr describe as “the changing spirit of accountability”—an abstraction piled on an abstraction—one of which they illustrate with a quotation by Sir Anthony Mason, former Chief Justice of the High Court:

Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the democratic process.²⁶

For much of Canadian history, the traditional concept of ministerial responsibility—which said Ministers were responsible for what happened in their department—may have accurately reflected the prevailing realities of parliamentary government. Today, absolutism in politics, as in almost every other area of human life, is out of fashion.²⁷ Deconstructive and postmodern assumptions about authority prevail, which is to say it is diffuse and dispersed. The old verities of anonymity for the civil servant-administrator and a public persona for the elected politicians who make policy choices no longer coincide with the reality of telescoped activities by the two.

That at least is the complaint heard in much of the recent literature on ministerial responsibility—no one is responsible, or everyone is responsible. The interweaving of roles and responsibilities destroys the purity of the fabric of the constitution or, to change metaphors, it “breaks the bargain” of expectations and understanding of how government is supposed to be conducted.²⁸ The result is that as opposed to a one-on-one relationship of Minister and civil servant, ministerial responsibility may better be envisioned as “a set of nested relationships,” of which Minister and civil servant is one, but others include Minister and Minister, Minister and Prime Minister, Parliament and media, media and public opinion.²⁹

If this depiction is accurate, or even partly accurate, how then can we affix responsibility, on accounting officers and in parliamentary committees? British academics talk of other avenues, including “a written constitution which ... could place civil servants under allegiance, to the constitution, not to the crown or minister,” or a Bill of Rights.³⁰ Canada has these but no Accounting Officers; Great Britain the reverse. Which is better, or is the question meaningless unless there is agreement on the problem? It does seem evident that in the matter of the Accounting Officer too much is expected in some quarters in Canada. In a paper in which he advocates adopting the British practice, Thomas Axworthy throughout refers to the position as the “accountability officer.”³¹ The misnomer betrays an analytical and theoretical confusion that does nothing to clarify the concept of ministerial responsibility.

2 Roles

Statutory and other formal provisions are clear but incomplete in defining the roles, responsibilities and accountabilities of Ministers and Deputy Ministers. The legal base of the responsibility of Ministers lies in the Privy Council oath all cabinet ministers take on becoming members of Council. It is the Privy Council which, according to section

11 of the *Constitution Act*, 1867, “aid[s] and advise[s] in the Government of Canada.” At any particular time, the current Cabinet is the active part of the Privy Council, although it speaks and acts in the name of the entire Council. “[T]he Governor General acting by and with the advice of Cabinet [is] the first emanation of executive power.”³² Ministerial authority for a portfolio established by departmental statute originates in a second oath Ministers swear on appointment to Cabinet, an Instrument of Advice and Commission under the Great Seal being the necessary formality.

Ministers are chosen by the Prime Minister, their appointment recommended to the Governor General, and their tenure in a portfolio at the discretion of the Prime Minister. Ministerial dismissal or ministerial resignation occurs only on the agreement of the Prime Minister. Similarly, the life of a government is tied to the decision of the Prime Minister, since he or she is the sole adviser to the Governor General.

Deputy Ministers are appointed, and may be dismissed, by the Prime Minister as one of his or her “special prerogatives.” That power is regularized in Order in Council going back to Sir Wilfrid Laurier’s time. It authorizes the Prime Minister to recommend to Council the appointment and dismissal of Deputy Ministers and the tabling of the Order in Council that does the same. Re-affirmed by successive Prime Ministers until Mackenzie King, it is now regarded as conventionally established. As with Ministers, the Prime Minister’s control over senior departmental officers underlines, first, the Prime Minister’s importance and, second, the importance of the ministry as a collective entity.

The authority of the Deputy Minister derives from the *Interpretation Act*. The Act states that a Deputy may exercise the power of a “Minister of the Crown to do an act or thing except to exercise any authority . . . to make a regulation.” But Deputy Ministers are more than alter egos of their Ministers. The *Financial Administration Act* gives broad statutory power to Deputy Ministers in both financial and personnel

administration. Deputy Ministers also have responsibilities under other statutes, including the *Public Service Employment Act* and the *Official Languages Act*.

In public pronouncements such as *Guidance for Deputy Ministers* (2003), the Privy Council Office is adamant in maintaining the proposition that “Parliament confers powers of the State on Ministers on the condition that they are accountable to the House for their actions . . . A Deputy Minister is equally responsible for the authorities equally assigned to him or her by a person . . . by a body . . . or by law, regulation or policy.”³³ In this depiction, the Minister is the actor and the Deputy Minister the enabler, lacking public voice, or identity, or individual opinion on policy. His or her duty is to support the Minister (and Department), as well as the Prime Minister and the government. Here are grounds for rejecting any suggestion that Deputy Ministers possess authority or responsibility that is not delegated from above. Yet, Franks maintains facts and, more particularly, laws do not sustain the government’s contention. Contrary to the statement in *Guidance for Deputy Ministers* that “through departmental legislation, Parliament has vested the ‘management and direction of the Department’ in the Minister, and enumerated the Minister’s ‘powers, duties and functions,’” Franks notes that under s. 12(1) of the *Financial Administration Act*:

The Treasury Board may authorize the deputy head of a department or the chief executive officer of any portion of the public service to exercise and perform, in such manner and subject to such terms and conditions as the Treasury Board directs, any of the powers and function of the Treasury Board in relation to personnel management in the public service and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted.

The Deputy Ministers are the beneficiaries directly (not indirectly) of powers and responsibilities assigned by statute: “The powers belong to the deputy ministers in their own right.”³⁴ The government’s

interpretation of ministerial responsibility in Canada conflicts with such explicit assignments of power. The language used in *Guidance for Deputy Ministers* hints, at the same time as it seeks to disguise, the contrast in interpretations: “In addition, certain provisions in the *Financial Administration Act*, the *Public Service Employment Act*, and the *Official Languages Act* assign some powers directly to the deputy head.”³⁵ Franks has described as “absurd” the proposition that Deputy Ministers are accountable to Ministers in all matters. From his point of view, the proposition undermined (by blurring) the determination of responsibility and accountability.³⁶ The official Canadian view places Ministers in charge of all things, with the consequence that, notwithstanding the ideal of a merit-based civil service, the partisanization of the bureaucracy or, more especially, of particular programs remains possible.

3 Interpretation

In December 2003, the Privy Council Office published *Governing Responsibly: A Guide for Ministers and Ministers of State*.³⁷ In an abbreviated text, the Guide discussed, among other topics, individual and collective ministerial responsibility, ministerial accountability and answerability, and the “complex set of multiple-accountabilities” that face Deputy Ministers. Although terse, the document’s language clearly reflected the concerns of the era that produced it—responsibility, responsiveness, participation, accountability, and more. Perhaps because it was intended as a guide for politicians and not a constitutional exegesis, the statement lacked theoretical foundation and, consequently, conviction. “Parliamentary accountability,” it states, “recognizes that only the person to whom responsibility and authority are assigned can take action.” The consequences of this assertion of the government’s position have yet to be explored.

Yet there is a rationale, a strongly articulated one, to be found in an earlier Privy Council Office publication, *Responsibility in the Constitution*.³⁸

Originally in the form of a submission in 1979 to the (Lambert) Royal Commission on Financial Management and Accountability, and republished in 1993 to give it wider circulation, *Responsibility in the Constitution* is precise in the theory of the constitution it advances. According to that theory, “constitutional responsibility” is “elemental”: “Ministers are constitutionally responsible for the provision and conduct of the government.” The importance of that brief—and at first glance, unexceptional—description cannot be exaggerated, for the reasons that follow. Individual ministerial responsibility is based on law (the Privy Councillor’s oath and the specific statute setting out a particular Minister’s duties and powers); collective ministerial responsibility is based primarily on convention. The Minister is “personally answerable to the House of Commons.” As a result, he or she is “unique” and distinct from “others who hold office under the Crown.” Significantly, for a paper written 30 years ago, *Responsibility in the Constitution* adopts an unorthodox (for its time) view of ministerial resignation: “Because the House determines the circumstances in which it operates, the principle has ... flexibility [while] ... the circumstances [are] ... a matter of political judgement and bear little relationship to whether a minister had prior personal knowledge of the events for which he or she is being held responsible.”

Individual ministerial responsibility is “personal” not “institutional.” “It is shared with no one.” Here are the grounds for statements a quarter century later in *Governing Responsibly* that “Ministers must respect the non-partisan nature of the Public Service of Canada,” that “Ministers are individually responsible to Parliament and the Prime Minister for their own actions and those of their department, including the actions of all officials under their management and direction, whether or not the Ministers had prior knowledge,” and that “clear ministerial accountability to Parliament is fundamental to responsible government.”³⁹ Here too are grounds for the Government of Canada’s objection to following the

British practice of designating senior officials as Accounting Officers. The image that informs the argument in *Responsibility in the Constitution* is of a pyramid: “Each minister’s actions reflect the individual and collective responsibilities of the system that has been built up to ensure that they and their subordinates in the public service exercise power in a manner acceptable to a majority of the elected house of Parliament.”⁴⁰

It is the thesis of *Responsibility in the Constitution* that ministerial and prime ministerial control of finance and appointments made responsible government possible. Sharing those powers with the bureaucracy, on the one hand, or, the legislature, on the other, would dilute constitutional responsibility. The same argument is used to rebut Canadian critics who say appointment of Deputy Ministers on the advice of the prime minister depreciates ministerial power. On the contrary, according to advocates of Canadian practice, the prime minister’s power in this matter ensures “the solidarity of the ministry.” That is an object to be sought in a huge country, with a small population divided into regions and by languages, where political parties have little ideology but to win elections, and who, for that reason, depend upon the mobilizing inducements of patronage and public expenditures. The “tone” of a government is set at the top through the imposition of collective ministerial responsibility, but the policies of government “flow from the exercise of individual ministerial responsibility.”⁴¹

It is clear from the documents discussed above and from the recent *Guidance for Deputy Ministers* (2003) that, in the eyes of government, ministerial responsibility rests with the Minister: “If a departmental official makes a mistake, the requirements of ministerial responsibility are satisfied when the Minister answers in Parliament for the mistake and implements the necessary action.” The political as opposed to the administrative tentacles are more complex than that statement allows. In the matter of Deputy Ministers, the obligations, loyalties and, sometimes, referents, may circumvent ministers: “The appointment of

Deputy Ministers on the recommendation of the Prime Minister,” says the *Guidance for Deputy Ministers* document, “reflects the Prime Minister’s responsibility for the government’s overall performance.” Affirmation that ministerial responsibility in Canada is more than one-dimensional can be found in the following conclusive statement: “In the end, the Prime Minister, with the advice of the Clerk of the Privy Council, will determine what, if any, action is appropriate, with respect to the Deputy Minister’s accountability.” For the Deputy Minister, the Prime Minister guards the gate leading to his or her career advancement. For the Prime Minister, the Deputy Minister has it within his or her capacity—because of the Deputy Minister’s pre-eminent administrative role—to undermine the competence of as well as public confidence in government. Ministers are sensitive to the anxieties and expectations associated with this relationship. At the same time, their own ambitions, desires and skills (or failings) raise the complexity of ministerial responsibility to another dimension. As with so much else in Canadian politics, ministerial responsibility can only be understood and appreciated as a ruling concept against the backdrop of prime ministerial government.

4 Comparisons

In this respect, Canada is no different from other systems of parliamentary-cabinet government. In Great Britain, Australia and New Zealand, Prime Ministers rule. Demonstrations of that truth are easy to find, though seldom stated so explicitly or fully as in the *First Report of the Senate Pay Television Committee* in Australia. One chapter of that four-chapter Report is devoted to a discussion of ministerial responsibility. Among its observations are the following excerpted comments, identified by paragraph number:

- (2.11) Whether a minister . . . is to be asked to resign or be dismissed is a political issue and is one for the leader to resolve.

- (2.15) [T]he leader must reach a decision balancing a value judgment about the gravity of the minister's failing and a pragmatic judgment as to what is best for the government's future . . .
- (2.21) Given the ability a leader has to see ministers dismissed, it might appear at first impression that when they err their fate is determined with scant regard to principle. That impression may arise partly through confusing judicial and political processes for resolving issues.
- (2.22) The judicial process involves applying existing and specific laws to a set of facts to reach a decision in accordance with natural justice. The political one involves making an assessment of a variety of influences and pressures and acting according to what they allow.
- (2.23) These political influences and pressures on leaders will usually include ethical ones, including their own sense of morality and community standards. Leaders are subject to real constraints, including peer pressure, oversight by Parliament, scrutiny by the press, party discipline and consciousness of the next election.
- (2.24) Rules of natural justice do not apply to leaders' decisions to have ministers dismissed. But though their decisions are not determined by a set of legal principles and procedures, as would those of a judge, they are nonetheless subject to powerful influences prompting them towards proper conduct.⁴³

There are two reasons for citing this Report at such length. First, the contrast it posits between politics and law, and its application of the former but not the latter to the issue of ministerial responsibility, constitutes a rare acknowledgement in the literature on ministerial responsibility of a fundamental distinction between the two. More common today is the disposition to substitute the latter for the former. Consider, as illustration, the remark by Great Britain's Sir Richard

Scott, author of the *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions, 1995-1996* (popularly known as the Scott Report, on the sale of arms to Iraq):

But it must be recognized that if the obligations of accountability are not accepted by ministers, both in principle and in practice, as binding, and are not, where necessary, enforced by Parliament, the remedy can only lie in reducing at least that part of our unwritten constitution into statutory form.⁴⁴

At issue in the Scott Inquiry was “whether government Ministers had acted unconstitutionally in misleading Parliament over government policy in this area. Scott found that they had. The government disagreed and sought vigorously to defend itself.”⁴⁵ Here, surely, is an elemental disagreement, explanation of whose source is essential when discussing ministerial responsibility. Remarkably, the difference remains largely unexplored in the literature on ministerial responsibility. “Training, culture, and context” have been offered as “contributing factors,” but the difference itself is minimized in favor of the familiar institutional critique, that is, ministerial responsibility as one more casualty in the decay-of-Parliament thesis.

Party discipline fortifies the Prime Minister but does not favor the ordinary member. MPs cannot hold Ministers to account, if by that is meant to compel their resignation. At best, the instruments of the Commons—Question Period, committee and estimates debates—require a giving of account by the Minister. Yet, as the passages from the *Report of the Senate Pay Television Committee*—a legislative body—take care to note, ministerial dismissal is an act of the Crown following prime ministerial advice. Legislatures have never been in a position to dismiss or directly cause the resignation of a Minister, although it might be argued that they are in a stronger position today to apply pressure to this end because of the ubiquity of modern telecommunications and the attention

paid to public opinion. It is also the case, says a former public service minister in Great Britain that party discipline requires ministers “to win and hold the confidence of [their own] Party colleagues.”⁴⁶

The second reason for citing the Australian Senate Report is one noted at the beginning of this study: parliamentary-cabinet government is not a Canadian preserve. On the contrary, it is a shared inheritance and a present activity: the Australian Senate Report bears out this latter claim, when it cites not only Australian but British and Canadian practice to support its view that “issues of maladministration . . . have not resulted in resignation (2.20).”

To the unhistorically-minded, the health of ministerial responsibility, as indicated through ministerial resignations, may seem in decline. The statistics cited earlier offer conflicting support for whatever interpretation is given them. In the modern discussion of the concept, numbers are irrelevant. What cannot be ignored, however, is the force of the idea. Woodhouse, quoting Geoffrey Marshall, says the convention, which may “in extreme circumstances” lead to resignation, can be seen to contain “the rules by which the ‘political actors ought to feel obliged.’”⁴⁷ It is that moral imperative that leads Woodhouse to shift the emphasis away from culpability and toward what she calls amendatory action.⁴⁸ An analogous sentiment is to be found in the writing of Judith Shklar, who argues that “hierarchical principles [even in the absence of hierarchical structures] can be sustained only by what [she] calls the ‘necessary myth’ of ‘guilt at the top.’”⁴⁹

Here is an answer to the critics’ lament that too often in the complex structures of modern government, made more attenuated today than in the past by the proliferation of non-departmental public agencies, no one seems to be responsible. In New Zealand, where in 1995 a viewing platform built by the Department of Conservation collapsed killing 14 people, the Woodhouse and Shklar perspective emerged in another guise, the concept of vindicative political responsibility. According to New

Zealand academic Robert Gregory, vindicative responsibility is “the middle-way” between culpability and no-fault. It arises not as a consequence but as a confirmation that “a governmental system is actually capable of caring about those who are victimized by its failings.” At issue here is not what went wrong or why (the accountability factor), although this must be investigated and resolved, but rather that “the humanity and justice of impersonal governmental systems need to be at least symbolically affirmed.” Why this is necessary could scarcely be more fundamental: “Political legitimacy demands that at least a symbolic level of democratic control is maintained.”⁵⁰

Nor is this Gregory’s view alone. Australian political scientists Richards Mulgan and John Uhr concur:

[T]he very term “responsible government” suggests that this governance system is one of delegations of trust which are made conditional on continued confidence of the delegator in the delegatee: the people place great responsibilities in Parliament to represent the nation, and Parliament in turn places great responsibilities in the government of the day to exercise its office as one of trust. Accountability is the bridge between trust and confidence . . .

But what happens when this bridge of accountability fails for whatever reason to allow the easy traffic of trust and confidence? Difficult enough are the situations where Parliament, or one of the two houses of Parliament, revokes the confidence that it has placed in an executive or a minister in the political executive. But much more troubling is the situation of popular withdrawal of confidence in “the government,” because, typically, government is no longer “responsive” to the community.⁵¹

Can it be assumed that the middle way crosses this “bridge of accountability?” Where does it lead? Gregory notes that the Minister of Conservation and the Department’s chief executive officer were slow

in resigning their positions. How is one to read this comment? How different is vindicative from vindictive responsibility; is resignation still not the one true measure?

A less philosophical response to the conundrum of modern ministerial responsibility is to establish a code of conduct to guide ministerial behaviour. Australia's *Guide on Key Elements of Ministerial Responsibility* (1996) followed the Senate Committee Report on Pay Television.⁵² The Committee had recommended a Code of Conduct for Ministers. The Guide, a 27 page document, devotes two pages to "ministerial conduct," mainly about dealing with lobbyists and potential conflicts of interest. (The title of the Guide speaks of "ministerial responsibility," although its Table of Contents uses the plural "responsibilities," while the Guide concerns itself with a range of matters, including facilities and services for ministers.)

Of similar origin—that is, prompted by scandal (this time, arms-to-Iraq) and followed by an inquiry (here chaired by a senior judge)—Great Britain's *Ministerial Code* and *Civil Service Code* are more elaborate affairs. The explanation is suggested in David Butler's assessment of the Scott Report: "[I]t represents the most exhaustive study ever produced of one aspect of that key Westminster doctrine, the individual responsibility of ministers. It is also a fascinating document for what it reveals about the working of bureaucracy and the inter-relationship between ministers and civil servants."⁵³ It is the study of that relationship that raises the Scott Report above the particular facts of the arms sales or the dissimulation of the politicians when questions were asked in the House. The relevance of the Scott Report to this study lies in its unequivocal pronouncement that "the obligation of Ministers to be forthcoming with information in answer to [parliamentary questions] about their departments' activities lies . . . at the heart of the important constitutional principle of Ministerial accountability."⁵⁴

More than that, the Report advances a debate that began a decade earlier at the time of another scandal (Westland), which resulted in the composition of the Armstrong Memorandum, which was penned by Sir William Armstrong, then Head of the Home Civil Service.⁵⁵ Its title, “The Duties and Responsibilities of Civil Servants in Relation to Ministers” and, more specifically, its contents, as revealed in such statements as “the civil service . . . has no constitutional personality or responsibility, separate from the duly elected Government of the day,” or “the duty of the individual civil servant is first and foremost to the Minister of the Crown who is in charge of the Department in which he or she is serving,” suggest a unity of mind on the part of civil servants and Ministers, which had become less absolute by the time of the Scott Inquiry: “[T]he Armstrong Memorandum cannot be given the interpretation that a civil servant has no duties except to the Government of the day.”⁵⁶

A new *Civil Service Code* came into force in January 1996, following upon the Scott Report and consideration of the Report by the Treasury and Civil Service Committee of the House of Commons. While the Code maintained the Armstrong-Memorandum view that civil servants were servants of the Crown, the Code set that relationship in the broader “context of the duties and responsibilities of Ministers.” For the first time, these were stated to include such matters as giving Parliament full information; not deceiving or knowingly misleading Parliament or the public; and not asking civil servants to act in ways that would conflict with the *Civil Service Code*.⁵⁷

Codes are a manifestation of “the audit society.”⁵⁸ To those who sneer at codes (or watchdogs, or charters, or inspectors) as the product of an adolescent Boy Scout mentality, Lord Nolan, retired Law Lord and chairman of the Committee on Standards in Public Life (set up by the government of John Major after the cash-for-questions scandal), strongly

dissents. Codes, he says, fill ethical vacuums, are found in many professions, and provide continuity in a political world marked by personal turnover and policy change.⁵⁹ For Vernon Bogdanor, however, the turning point is “whether the function of a Parliamentary Commissioner for Accountability would be so political as to compromise his or her position.”⁶⁰ Note that the reservation is not about the Commissioner but about his or her function being politicized.

At the present time, it is early days in the life of the Ethics Commissioner in Canada’s House of Commons. The initial occupant, Bernard Shapiro, has been subject to extraordinary criticism as regards his competence as an Officer of Parliament. At issue is his independent judgment as to which public office holders fall within his mandate for investigation. More specifically, does the conduct of special (that is, political) advisers fall within the responsibility of their Minister in the same manner as does the conduct of civil servants who report directly or indirectly to the Minister? This is a matter of significance for the principle of ministerial responsibility and for the operation of parliamentary-cabinet government. Referring to an incident the details of which are not relevant to the theme of this study, the Ethics Commissioner has observed (after some indecision) that the “Prime Minister is ultimately responsible to Parliament for the action of [his Chief of Staff].”⁶¹

Shapiro’s testimony to the Commons committee lends support to Bogdanor’s concern about the politicization of accountability processes. Contrary to the claim made by Ed Broadbent, a member of the committee, that the Commissioner’s decisions should be rendered in “black and white,” enough has been said in this paper to support the contrary conclusion that the principle and practice of ministerial responsibility is ambiguous and complicated.⁶² At least in Canada, as Mr. Shapiro’s indecisiveness demonstrates. But not in Australia, where *A Guide on Key Elements on Ministerial Responsibility* concisely states:

Ministers' direct responsibility for actions of their personal staff is, of necessity, greater than it is for their departments. Ministers have closer day-to-day contact with, and direction of the work of, members of their staff. Furthermore, ministerial staff does not give evidence to parliamentary committees, their actions are not reported in departmental annual reports, and they are not normally subject to other forms of external scrutiny, such as administrative tribunals ...

Ultimately, however, ministers cannot delegate to members of their personal staff their constitutional, legal or accountability responsibilities. Ministers therefore need to make careful judgments about the extent to which they authorize staff to act on their behalf in dealings with departments.⁶³

As a doctrine, ministerial responsibility ought to be easy to clarify, especially in Canada, where Ministers are all powerful. That may be part of the problem: omnipotent Ministers will always be under scrutiny and, frequently, attack. Rendering account is never satisfactory, when, in the eyes of opponents, being held to account is politically more advantageous. Ministerial responsibility is about politics. This is an obvious point but one that needs emphasizing. More than that, ministerial responsibility is a parliamentary concept, enforced by the House of Commons. What form that enforcement takes—whether it might go so far as to call for resignation—depends upon the support (or loss of support) for a Minister, as indicated by the actions of the House and the party caucus, but most of all by the response of the Prime Minister. Only here, in this constellation of calculations, does ministerial responsibility take form, be it resignation from office, or amendatory or vindicative action, or the provision of accurate and truthful information. Half a century ago, S.E. Finer observed that ministerial responsibility is “a statement of fact not a code.”⁶⁴ Arguably, in parliamentary government there is very little that is subject to code.

Losing support of the people or losing support of the House is not always determined by reference to numbers.

Are there ways to cut through the haze of understandings and precedents that envelop ministerial responsibility and that make it such an unseizable convention? Codes of behaviour, which owe much to “a post-Watergate mentality” (a reference to the White House-sanctioned break-in of the Democratic Party’s National Committee offices in the Watergate Hotel in Washington in 1972), offer one alternative, although their enforcement has done little to reduce controversy that surrounds debate about ministerial responsibility.⁶⁵ The same can be said of Officers of Parliament, and especially the Office of the Auditor General. British academic, Brian Thompson, says of the contrast between Whitehall and Westminster, “the cultural is constitutional.”⁶⁶ Similarly, the accountability gap in Canada is more than a matter of flawed auditing. It lies in a collision of political and administrative cultures, evident in the different values they embrace, and in their selective and random espousal by politicians, the media and the public.

For the public especially, the traditional boundaries of the debate are disappointing and confusing since they do not admit of public expectations. Modern emphasis upon openness, responsiveness and transparency fits awkwardly with a convention whose practice is determined by shifting calculations of partisan advantage. The belief that resignation is an inevitable stage in the execution of ministerial responsibility makes neither theoretical nor practical sense in parliamentary politics. What does? Do accounting officers not finesse the issue of accountability, which is essentially political? Is there any other exit from this labyrinth of doubt but at where it begins—with Ministers (and no one else), personally and individually, standing in their place in Parliament and facing down, if they can, attacks on the administration of their department and on their leadership?

5 Conclusion

Ministerial responsibility is a layered concept with different meanings—accountability, responsibility and answerability; involving multiple individuals and bodies—the Prime Minister, Ministers, Deputy Ministers, government departments and agencies; and demonstrating a variety of responses—from resignation through providing information to offering apologies. Examination of other Westminster-based systems reveals the same characteristics: layered and diffuse. In each country, there have been attempts to clarify its meaning. But those attempts, themselves, have proven both layered and diffuse. That is, ministerial responsibility has been compartmentalized, as the themes of this paper have done, in order to concentrate attention on a particular element of the concept—in this case, the relationship of Minister and Deputy Ministers. Or, the concept has been subjected to a broad ranging, theoretical analysis, as in the Scott Report. Neither alone is satisfactory from the perspective of making the doctrine more understandable to the public, the politicians or public servants.

Ministerial responsibility has a narrow statutory base. Its operation is principally derived from convention. In Great Britain, support for codifying the doctrine and even giving it a statutory foundation has followed, first, upon a series of highly publicized cases where ministerial responsibility was perceived to have failed and, second, following equally publicized inquiries into the reason for that failure. This is not the case in Canada, where academic debate has focused largely on the relationship between Minister and Deputy Minister. The explanation lies in a long-running argument to make Deputy Ministers “directly and personally responsible and accountable to Parliament for statutory authorities that are assigned explicitly ... by Parliament and for those authorities that are conferred directly ... by the Public Service Commission and the Treasury Board.” In other words, Canada should adopt the Accounting Officer model, a move that would promote accountability by clarifying who makes major administrative decisions.

Only in Canada is ministerial responsibility—even when confined to the topic of Accounting Officer—linked to the larger subject of prime ministerial government. Deputy Ministers are appointed—and their careers influenced—by the Prime Minister. Making Deputy Ministers Accounting Officers on the British model would promote greater independence for the Deputy, greater opportunity for parliamentary committees to hold Deputy Ministers to account, and greater restraint, even if modestly so, on Ministers and the Prime Minister.

6 Recommendations

The recommendations that follow have as their principal object the clarification of the doctrine of individual ministerial responsibility for the benefit of the public, politicians and public servants.

- *A parliamentary resolution should be passed to define the convention of individual ministerial responsibility. Its contents should include reference to the following subjects: the object of the doctrine; its breadth (whether limited to public servants or to include, for instance, political staff of Ministers), as well as theoretical rationale for the position taken; and the principle that should obtain between Ministers and Deputy Ministers, who unlike other public servants, have assigned to them specific statutory authorities and accountabilities;*
- *A parliamentary protocol should be adopted to define the powers of Parliament and its committees in the implementation of the doctrine of individual ministerial responsibility. Among the topics to be included: the range of sanctions available to Parliament and its committees in order to fulfill their assigned role; and,*
- *The British model of Accounting Officer (with adaptation to the Canadian public service) be introduced for an experimental period (three Parliaments, perhaps) or for a limited number of departments, to be subject to review as to its contribution toward improving the practice of individual ministerial responsibility.*

Endnotes

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 - ³ Thomas S. Axworthy, “Addressing the Accountability Deficit: Why Paul Martin’s Minority Government Must Pay More Attention to the Three A’s,” p. 2. www.queensu.ca/csd/AccountabilityDeficit-IRPP.pdf.
 - ⁴ Norman Lewis and Diane Langley, “Ministerial Responsibility: The Next Steps,” *Public Law* (1996): p. 493.
 - ⁵ David Butler, “Ministerial Accountability: Lessons of the Scott Report,” Senate Occasional Lecture Series, *Papers on Parliament*, No. 29 (March 1997), p. 6. www.aph.gov.au/Senate/pubs/pops/pop29/c01.pdf.
 - ⁶ Sharon Sutherland, “Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem,” *Canadian Journal of Political Science*, 24, no. 1 (March 1991): pp. 91-120. See too, David A. Good, *The Politics of Public Management: the HRDC Audit of Grants and Contributions*. (Toronto: University of Toronto Press, 2003), pp. 14-20.
 - ⁷ Butler, “Ministerial Accountability: Lessons from the Scott Report,” pp. 5-6.
 - ⁸ See notes 5 and 6.
 - ⁹ James R. Mallory, “Responsive and Responsible Government,” *Transactions of the Royal Society of Canada*, 12 (1974): p. 210.
 - ¹⁰ Diana Woodhouse, “The Reconstruction of Constitutional Accountability,” Newcastle Law School Working Papers 2000/01 (to have been delivered to the Newcastle Law School Staff Seminar Series on 8 November 2000), p. 2. www.ncl.ac.uk/nuls/research/wpapers/woodhouse1.html; Public Policy Forum, “Ministerial Accountability: Suggestions for Reform,” (Report from a series of roundtables of experts, June 2004), p. 4. www.pforum.com/ow/ministerial_accountability.pdf; Senate of Canada and House of Commons, Proceedings... 2 October 1995: pp. 4 - 6 (Sharon Sutherland).
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- ²⁴ Ireland, *Report of the Working Group on the Accountability...* para. 23.
- ²⁵ See Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review*, 113 (2000): pp. 633-729. See too Oonagh Gay and Barry K. Winetrobe, *Officers of Parliament—Transforming the Role* (London: The Constitution Unit, April 2003) and Haig Patapan, "Educating Devils: Theoretical Reflections on Ethics and Governance" in *Motivating Ministers to Morality*, ed. Jenny Fleming and Ian Holland (Burlington, Vt.: Ashgate Dartmouth, 2001), p. 30.
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- ³⁷ Canada. Privy Council Office, *Governing Responsibly: A Guide for Ministers and Ministers of State* (2003).
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- ⁴² Canada. Privy Council Office, *Guidance for Deputy Ministers* (2003), p. 26. publiservice.pco-bcp.gc.ca/docs/Publications/gdm-gsm/gdm-gsm_e.pdf. Other quotations in this paragraph are from pp. 26-27 of this document.
- ⁴³ Australia. Parliament of Australia, Senate. *First Report, Senate Pay Television Committee* (September 1993). www.aph.gov.au/Senate/committee/history/paytv_ctte/paytv1/.
- ⁴⁴ Sir Richard Scott, "Ministerial Accountability," *Public Law* (1996): p. 426.
- ⁴⁵ Adam Tomkins, "In Defence of the Political Constitution," *Oxford Journal of Legal Studies*, 22, no. 1 (2002): p. 168.
- ⁴⁶ Barry K. Winetrobe, Home Affairs Section, *The Accountability Debate: Ministerial Responsibility*, Research Paper 97/6, 28 January 1997, p. 31. The speaker was Roger Freeman in an address to the Civil Service College, July 1996.
- ⁴⁷ Diana Woodhouse, "The Role of Ministerial Responsibility in Motivating Ministers to Morality," in *Motivating Ministers to Morality*, p. 37. The internal quotation is from G. Marshall, *Constitutional Conventions*, (Oxford: Clarendon Press, 1986), p. 12. (emph. in orig.)
- ⁴⁸ See above, p. 7.
- ⁴⁹ Judith Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), pp. 63-64 quoted in Robert Gregory, "Political Responsibility for Bureaucratic Incompetence: Tragedy at Cave Creek," *Public Administration*, 76, no. 3 (Autumn 1998): p. 532.
- ⁵⁰ Robert Gregory, "Political Responsibility for Bureaucratic Incompetence: Tragedy at Cave Creek," pp. 533, 519 and 531.
- ⁵¹ Richard Mulgan and John Uhr, "Accountability and Governance," Discussion Paper No. 71 (Public Policy Program), ANU, (Canberra (September 2000), http://www.anu.edu.au/pubpol/ht_docs/discussp.html).
- ⁵² Australia. Prime Minister. *A Guide on Key Elements of Ministerial Responsibility*, Canberra, December 1998. http://www.pmo.gov.au/guidelines/docs/ministerial_responsibility.rtf. In a study of "Ministerial Codes, Cabinet Rules and the Power of Prime Ministers," in *Motivating Ministers to Morality*, p. 52, Patrick Weller refers to this document as a *Guide to Ministerial Conduct*, p. 52.
- ⁵³ David Butler, "Ministerial Accountability: Lessons of the Scott Report." p. 2.
- ⁵⁴ Quoted in *ibid.*, p. 10.

- ⁵⁵ The reference is to “the leaking of two documents about the Westland Helicopter Company which [in the 1980s] was the subject of Cabinet-level discussion and disagreement about the choice between two ‘rescue packages’, one European, the other American. The circumstances of the leak suggested that civil servants had been involved, possibly on the instructions of Ministers.” *The BSE Inquiry: The Report (The Inquiry into BSE and variant CJD in the United Kingdom)*. Vol. 15: Government and Public Administration 8. Standards and Accountability. www.bseinquiry.gov.uk/report/volume15/chapteg2.htm. For the Armstrong Memorandum (“How to be a Civil Servant”), see <http://www.civilservant.org.uk/armstrong.shtml>.
- ⁵⁶ *The BSE Inquiry: The Report ...* vol. 15: Government and Public Administration, 8.32. (emph. in orig.)
- ⁵⁷ The *Civil Service Code* is found at http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service_code.asp
The *Ministerial Code*, along with its Annex, “The Seven Principles of Public Life,” is available at http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code/.
- ⁵⁸ For a rigorous examination of the topic, see Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997). See, too, Onora O’Neill, *A Question of Trust* (Cambridge: Cambridge University Press, 2002).
- ⁵⁹ Rt. Hon. Lord Nolan, “Motivating Ministers to Morality,” in *Motivating Ministers to Morality*, p. 17.
- ⁶⁰ Vernon Bogdanor, “Ministerial Accountability,” *Parliamentary Affairs*, 50, no. 1 (January 1997): p. 82.
- ⁶¹ Simon Doyle, “Martin, Chief of Staff Face Ethics Investigation,” *Star-Phoenix* (Saskatoon), 24 June 2005, A11.
- ⁶² Jack Aubry, “Sgro in Conflict of Interest, Ethics Commissioner Finds,” *Star-Phoenix* (Saskatoon), 22 June 2005, C4.
- ⁶³ Australia. Prime Minister, *A Guide on Key Elements of Ministerial Responsibility*, 13-4. But see the following dissent: “[W]here a minister claims inability to answer a question because of no personal involvement, but the minister was involved, then parliament should have the right to interrogate the adviser. Without this, not only do both adviser and minister escape responsibility, but public servants are ‘placed in the front line’ and instead of ministers answering for their [sic] actions of officials and advisers, officials defend ministers and their staff.” Michael Keating, “Ministerial Advisers and the Search for Accountability,” in *Australian Institute of Administrative Law Forum*, No. 34, cited in Australia National University Political Science Program, “Changing Patterns of Accountability in Westminster Systems: A UK Perspective” (21 April 2005), pp. 6-7. As well, see Anne Tiernan, “Problem or Solution? The Role of Ministerial Staff,” in *Motivating Ministers to Morality*, pp. 90-103, who notes that in “the Travel Rorts Affair ... a minister relied upon his personal staff to provide administrative as well as political advice, blurring the conventional demarcation of roles between advisers and bureaucrats.” p. 101.
- ⁶⁴ S.E. Finer, “The Individual Responsibility of Ministers,” *Public Administration*, 34 (Winter 1956): p. 394.
- ⁶⁵ G. Calvin Mackenzie, *Scandal Proof: Do Ethics Laws Make Government Ethical?* (Washington: The Brookings Institution, 2002), p. 31.
- ⁶⁶ Brian Thompson, “Whitehall’s Cultural Revolution,” *Web Journal of Current Legal Issues*, 1 (1995). [Webjeli.ncl.ac.uk/articles1/thomps1.rtf](http://www.jeli.ncl.ac.uk/articles1/thomps1.rtf).
- ⁶⁷ Peter Aucoin and Mark D. Jarvis, *Modernizing Government Accountability: A Framework for Reform* (Ottawa: Canada School of Public Service, 2005), p. 10.

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