Chapter 2

Values

[G]iven the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.

— Hon. Claire L'Heureux-Dubé[1]

The Terms of Reference require me to conduct my analysis of the subject matter of the inquiry through the prism of a number of fundamental concepts affecting the position of the legislative branch of government in our constitutional system. I am required, for example, to make recommendations that would ensure that the *accountability* and *compliance* practices employed in the House of Assembly are appropriate. I am also authorized, in making my recommendations, to take into account opportunities to enhance *accountability* and *transparency* of MHA expenditures, but without undermining the *autonomy* of the legislature.

It is important, therefore, for there to be a better understanding of these fundamental concepts - and a number of others that are inextricably connected with them - before embarking on a detailed analysis of the subject matter of the review.

This chapter will also briefly examine recent trends relating to governance within both the executive and legislative branches of government and consider to what extent those trends are reflective of the values, principles and concepts that have been discussed. It is important to be alert to these trends, as well as trends in governance in other areas, like the corporate sector, insofar as they may inform the present study in the development of recommendations for reform.

[1] *R.* v. *Hinchey*, [1996] 3 S.C.R. 1128 at para.18.

Autonomy

The notion of legislative autonomy, or legislative independence, is important in the context of this review, not only because it affects the scope of the review, but also because, as will become apparent later, it has been used as a justification for decisions that were made that severely affected the accountability of the legislature and weakened the financial controls that were employed over House expenditure.

What is usually meant by the use of the phrase "autonomy of the legislature" in the context of political institutions is the political and legal status of the legislature under the doctrine of the *separation of powers*, buttressed by the doctrine of the *supremacy of parliament.*

The doctrine of *separation of powers* has been stated to be an "essential feature" of our constitution.[2] The Supreme Court of Canada has described it thus:

> There is in Canada a separation of powers among the three branches of government - the legislative, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.[3]

The essence of the notion of the separation of powers is that the three basic governmental functions (legislative, executive and judicial) should be exercised by three separate organs of the state - the legislature (the law-maker), the executive (the law administrator) and the courts (the law adjudicator) - and that, ideally, the separation and performance of these functions in and by different bodies should act as a check on the power of the other, thereby reducing the possibility of tyrannical exercise of absolute political power by one person or body. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,[4] the rationale for separation was expressed thus:

> It is fundamental to the working of government as a whole that all these parts [i.e. the Crown, the executive, the legislature and the courts] play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.[5]

The doctrine of *supremacy of parliament* (derived from English constitutional history from the time of the enactment of the Bill of Rights in 1689) is that the legislative organ of

---

[2] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, per Major J. at para. 52.
[3] *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 45, per Dickson C.J. at para. 39. See also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 138-139.
[4] [1993] 1 S.C.R. 319.
[5] Per McLachlin J. at p. 389.

government, as representative of the people, is the superior organ of government because at the end of the day the legislature can, subject to certain constitutional limitations, pass laws nullifying the actions of the executive and the courts.

In relation to the executive, the legislature is also supreme because the executive, through the convention of *ministerial responsibility*, is accountable to the legislature for its actions. Ministers of the Crown can be made to answer for the proper functioning of their respective departments through examination before legislative committees and during question period in the House. Ultimately, through the convention of *collective responsibilities*, the whole of the executive branch of government is accountable to the legislature in the sense that it must maintain the confidence of the House in order for it to survive in office.

From these dual notions of separation and superiority it follows, it is said, that the executive should not be able to tell the legislature what to do. The legislature is supreme within its own sphere - master in its own house, as it were.

In fact, however, institutions of government are interconnected in the constitution. It is necessary, therefore, to examine the idea of legislative autonomy more closely to determine how it might apply to the issues that are at stake in this review.

It is a truism to say that, in a constitutional democracy, no organ of government is completely autonomous in the dictionary sense of being completely "a self-governing community."[6] The functioning of any organ, be it the legislature, the executive or the judiciary, is constrained by the constitution, which sets out, either explicitly or implicitly, the nature of the powers each may and may not exercise and the rules that govern their interrelationship.

Parliamentary supremacy in Canada is limited by our federal constitution, which limits, by the division of subject matter of legislative powers between federal and provincial legislative bodies,[7] the extent to which any particular legislature may exercise its law-making mandate. Furthermore, the power of any legislative body in Canada is limited by constitutional norms such as those in the *Canadian Charter of Rights and Freedoms* and in constitutional principles of general application.[8]

The doctrine of separation of powers has had a long history in political theory. It finds expression in the writings of Aristotle, Locke, Blackstone and Montesquieu, among others.[9] The modern concept of the doctrine is usually regarded as stemming from

---

[6] *Concise Oxford Dictionary*, 4th ed., s.v. "autonomous."
[7] *Constitution Act, 1867*, ss. 91, 92.
[8] See *Simpson v. MacMillan Bloedel Limited v. Simpson*, [1995] 4 S.C.R. 725, per Lamer C.J. at para. 15.
[9] See Aristotle, *Politics*, (Connecticut: Easton Press, 1964), Book 4, Chapter 14; John Locke, *Two Treaties of Government*, (London: Abraham & Churchill, 1698), Book 2, Chapter 12, paragraphs 143-144; William

Montesquieu's writings. It was his theorizing that influenced the formulation of the separation of the legislative, executive and judicial powers in the United States constitution. He felt that, as a defense against tyranny and the protection of political liberty, the power of the state should not be aggregated in one body but should, instead, be divided amongst three branches, which should act independently of each other in carrying out their respective roles. Each would then act as a check on the other and, in theory, one branch could not be called to account by any other.[10]

Montesquieu formulated his theories based on what he believed to be the way the English constitution functioned at the time. As has been pointed out by others since,[11] there has never been a true separation of powers in parliamentary systems based on the English model.[12] The operation of responsible government, with the Cabinet being responsible to the legislature, precludes it. It is this interconnection between the executive and the legislature that also weakens the notion of supremacy of parliament in practice. It leads, in fact, to a situation where the executive in many practical respects controls the legislature.

As the Supreme Court of Canada observed in *Wells v. Newfoundland*:

> The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature.[13]

Blackstone, *Commentaries on the Laws of England*, (Oxford: Clarendon Press, 1765), Book 1, Chapter 2; and Baron de Montesquieu, *The Spirit of Laws*, (Dublin: Ewing and Faulkner, 1751),Volume 1, Chapter 7.

[10] *The Spirit of Laws*, (Dublin: Ewing and Faulkner, 1751), Volume 1, Chapter &: "In every government there are three sorts of power: the legislative; the executive; … and[the judicial]…When the executive and legislative powers are united in the same person, or in the same body of magistracy, there can be then no liberty."

[11] See *e.g.* Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), Chapter 5.

[12] See *Reference Re Secession of Quebec* [1998] 2 S.C.R.217 at para.15 "…The Canadian Constitution does not insist on a *strict* separation of powers" [emphasis added]; and *Douglas Kwantlen Faculty Association v. Douglas College* [1990] 3 S.C.R. 570 per LaForest, J. at para.53: "while in broad terms, such a separation of powers does exist … it is not under our system of government *rigidly defined*" [emphasis added] Professor Peter Hogg goes farther and states in *Constitutional Law of Canada*, 4th ed. (looseleaf), p. 7-24: There is no general "separation of powers" in the Constitution Act, 1867. The Act does not separate the legislature, executive and judicial functions and insist that each branch of government exercise only "its own" function. As between the legislative and executive branches any separation of powers would make little sense in a system of responsible government." Bagehot's classical description of the "efficient secret of the English Contribution" stresses the "close union the nearly complete fusion, of the legislative and executive power. No doubt by the traditional theory, as it exists in all the books, the goodness of our Constitution lies in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link [between the executive and parliament] is the Cabinet." W. Bagehot, *The English Constitution* (1867) (London: Fontana, 1993) p. 67-68.

[13] [1999] 3. S.C.R. 199, per Major J. at para.54.

This *de facto* control of the legislature by the executive occurs because:

> on a practical level … the same individuals control both the executive and legislative branches of government. As this Court observed in *Attorney General of Quebec v. Blaikie* [1981] 1 S.C.R. 312 at p. 320:
>
> > There is a considerable degree of integration between the legislature and the Government. … [I]t is the Government which, through its majority, does in practice control the operations of the elected branch of the legislature on a day to day basis.
>
> Similarly, in *Reference Re Canada Assistance Plan* [1991] 2 S.C.R. 525...at p. 547:
>
> > [T]he true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms "government," "Cabinet" and "executive." … In practice, the bulk of new legislation is initiated by government.[14]

This last point - that the bulk of new legislation is initiated by the executive - is underlined especially when it comes to financial matters. Constitutionally, "money bills"[15] may only be introduced into the legislature by or with the consent of the executive.[16]

One of the manifestations of autonomy in the legislative context is the doctrine of *parliamentary privilege*.[17] This doctrine refers to "the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and the provincial legislative assemblies, and by each Member individually, without which they could not discharge their functions."[18] Parliamentary privilege encompasses a wide variety of disparate matters[19] as they pertain to Members individually and to the assembly collectively. For individual Members, it includes freedom of speech without being called to account in the courts in respect of proceedings in, but not outside, the assembly; freedom not to answer to court subpoenas when the assembly is in session; exemption from jury duty; and freedom from obstruction, interference, intimidation and molestation, including intimidation by the

---

[14] *Wells* v. *Newfoundland* at para. 53. See also *Reference Re Canada Assistance Plan* at para. 39.

[15] "Money bills" are bills that provide for the appropriation of public money for expenditure purposes by agencies of government.

[16] *Constitution Act, 1867*, Ss. 54, 90; *Newfoundland Act*, Sch., Term 3.

[17] See, *Canada (House of Commons) v. Vaid*, [2005] S.C.C. 30 at para. 21: "Parliamentary privilege … is one of the ways in which the fundamental constitutional separation of powers is respected … Each of the branches of the State is vouchafed a measure of autonomy from the others."

[18] *Vaid*, para. 29, item 2. In Newfoundland and Labrador, the *House of Assembly Act* R.S.N.L. 1990, c. H-10, s. 19 provides that the House and its members "hold, enjoy and exercise those and singular privileges, immunities and powers that are now held, enjoyed and exercised by the House of Commons of the Parliament of Canada and by the members of that House of Commons."

[19] A number of examples are given in *Vaid*, para. 29, item 11.

Speaker. The privileges of the House as a collectivity include the right of the House to discipline Members (censure, reprimand, summoning to the Bar of the House, imprisonment and expulsion); the authority to maintain the attendance and service of its Members; the power to exclude strangers from the precincts; the right to institute inquiries; the right to administer oaths to witnesses; and the right to publish papers containing defamatory material.

When properly invoked, the effect of the privilege is to insulate the person or the institution invoking it from interference from either the executive or the courts. It becomes a matter for the legislature, and for the legislature alone, to deal with and regulate the matters that fall within the parliamentary privilege umbrella.[20] In this regard, therefore, the application of parliamentary privilege *does* reflect a separation between the legislature and the executive with respect to certain functions.

In a sense, parliamentary privilege, properly invoked, amounts to an exemption from the general law. However, the mere claiming of the privilege does not necessarily provide the shield. In *Canada (House of Commons) v. Vaid*,[21] Binnie J. quoted from a United Kingdom parliamentary report, with approval, to the effect that parliamentary privilege "does not embrace and protect activities of *individuals*, whether members or non-members, simply because they take place within the precincts of Parliament;" and he stressed that "legislative bodies … do not constitute enclaves shielded from the ordinary law of the land."[22] The ability to invoke the privilege depends on whether the immunity claimed is *necessary for the legislators to do their legislative work.* "The concept of necessity," conceded Binnie J., is to be construed broadly as including what the "dignity and efficiency of the House" require, but it is generally regarded as having to be related to the legislature's "legislative and deliberative functions, and the legislative assembly's work in holding the government to account …"[23]

In *Vaid*, Binnie J. stated that:

> The idea of necessity is … linked to the autonomy required by legislative assemblies and their members to do their job.[24]

He also pointed out that the references to "dignity" and "efficiency," as encompassed within the concept of necessity,

---

[20] See for example the recent decision of Orsborn, J. of the Newfoundland and Labrador Supreme Court in *March v. Hodder et al*, 2007 NLSCTD holding that parliamentary privilege precluded the justiciability of a claim by the Citizens Representative, an officer of the House of Assembly, claiming that he had been denied due process in the manner in which the House purported to dismiss him from his office.
[21] [2005] S.C.C. 30.
[22] *Vaid*, para. 29, Item 1.
[23] *Vaid*, para. 41.
[24] *Vaid*, para. 29, Item 4.

> [a]re also linked to autonomy. A legislative assembly without control over its own procedure would, said Lord Ellenborough C.J. almost two centuries ago, "sink into utter contempt and inefficiency" (Burden v. Abbott (1811), 14 East 1, 104 E.R. 501, at p. 559). Inefficiency would result from the delay and uncertainty that would inevitably accompany external intervention. Autonomy is therefore not conferred on Parliamentarians merely as a sign of respect but because such autonomy from outsiders is *necessary* [emphasis added] to enable Parliament and its members to get their job done.[25]

Parliamentary privilege and legislative autonomy are thus clearly linked. Both privilege and autonomy are supported by the same justification. They must be grounded on the notion of the necessity of the assembly and its Members to perform their functions effectively. It is the *purpose* of parliamentary privilege or the claim to autonomy that governs - and limits - their proper application. In discussing the role of the courts in these areas, the Supreme Court in *Vaid* observed that "a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that *exceeds the necessary scope of the category of privilege*."[26]

Legislative autonomy is not, therefore, some ritualistic incantation that can be invoked unthinkingly to justify reclusive and unfettered action for any purpose whatsoever. When it is invoked properly, it will find a justification in the idea that there is a necessity to exclude outside interference to enable the legislature and its Members to function effectively and properly.[27] To invoke it in other circumstances to justify insulating the legislature from external interference is to invoke it improperly. For example, independence and autonomy, in the abstract, do not justify exemptions from accountability, particularly in the financial field. How can it be said, as a general proposition, that legislative autonomy entitles Members of the assembly to avoid accounting for their stewardship of public money? While there might be individual instances where being required to disclose particular financial transactions could be said to interfere with a Member doing his or her job freely and unimpeded (such as where disclosure might expose the name of a constituent in a sensitive personal matter), it does not follow from this that, as a blanket proposition, a Member should have no responsibility to account at all.

There are dangers associated with any type of thinking that places emphasis on separation and independence. It can have a tendency to lead to a "we-they" attitude - a bunker mentality, as it were. When the notion of separation becomes defensive, i.e., to repel interference in protection of self-interest, or if it is used unthinkingly as a knee-jerk reaction without keeping in mind what is its underlying purpose, it can be misused. That purpose is, as I have stated, to ensure that the functioning of the legislative branch in its legitimate activities in the public interest, without any outside influence, is not impeded. It is not

---

[25] *Vaid*, para. 29, Item 7.
[26] *Vaid*, para. 29, Item 11 [emphasis added].
[27] *Vaid*, para. 20, referring to "the need for its legislative activities to proceed unimpeded by any external body or institution" and eschewing "potential interference by outsiders in the direction of the House".

sufficient simply to mouth the mantra of legislative autonomy in a defensive way, to repel interference in protection of self-interest, without always seeking to ground it in its fundamental purpose. If insistence on legislative autonomy cannot be justified in that way, reliance on it is an abuse.

There is a second danger in focusing on autonomy and separation - the creation of a "club-like" atmosphere with its own sense of morality. This may lead to an overriding sense of loyalty, a feeling of obligation to protect the group to the detriment of the public interest. One group of observers has described the situation as follows:

> There is a powerful sense of cohesion among politicians and especially legislators. They share a large number of rather exclusive experiences: in effect they all belong to the same club. And since this club makes the rules for everyone, it remains strongly in favour of policing its own members with no interference from anyone else. There is a suspicion on the part of legislators that no one "outside" really understands what they go through and in part this is correct. But this insularity and collegiality can be invoked to protect the legislature and members who have apparently misbehaved from outside scrutiny or punishment. Legislatures must have a high degree of autonomy at the institutional level if they are to make the hard choices that are often required in government. But this institutional autonomy also has a dark side, in that legislatures and legislators can too easily see themselves as above the law or beyond the reach of ordinary ethical restrictions.[28]

These two dangers, working in tandem, can easily lead, I would suggest, to a tendency to play the "autonomy card" inappropriately, in self-interest, out of a sense of loyalty to the group and without necessarily justifying the assertion in terms of its necessity in the circumstances to promote its proper purpose.

The result of this analysis is that the legislative branch of government does not, and cannot, have complete autonomy from the other branches of government, particularly the executive branch. In reality, too much can be made of the notion of legislative autonomy in practical terms. It can be invoked and relied on for improper purposes and thereby be counterproductive to other notions, such as accountability and transparency.

Nevertheless, legislative autonomy operating within its proper sphere is a vitally important value to be preserved and observed. It provides the foundation on which Members of the House can operate to do their jobs as legislators effectively, free from external impediment, especially from the executive. It is particularly important as support for the work of opposition members facing a government majority dominated by the executive. It is

[28]Mancuso, Maureen; Atkinson, Michael M.; Blais, André; Greene, Ian; & Nevitte, Neil; *"A Question of Ethics: Canadians Speak Out"* (Don Mills: Oxford University Press, rev ed. 2006), p. 24.

often the only trump card an opposition member has to enable him or her to resist domination by an aggressive government, by allowing the opposition to carve out an area of activity which the government's majority control of the legislature cannot touch. The challenge facing this inquiry is to devise a system that preserves and enhances legislative autonomy in its proper area of operation which at the same time does not allow it to become an instrument of improper application and hence an instrument of abuse.

The Rule of Law

The notion of the rule of law is central to the Canadian system of government. It is recognized as "a fundamental principle of our constitution"[29] and is enshrined in the preamble to the *Canadian Charter of Rights and Freedoms*.[30]

The idea behind the concept is that people are governed by law alone and not by the arbitrary or discretionary decisions of government. No category of citizen, not only the governed but also the governors, is exempt from obeying the law, as established by mechanisms that are constitutionally recognized and accepted. The concept is also used in the broader political sense of a preference for community order rather than anarchy, and in the notion that law should be expressed in such a way that people are able to be guided by it. It was described thus by the Supreme Court of Canada in *Reference re: Manitoba Language Rights*:

> [T]he rule of law … must mean at least two things. First, that the law is supreme over officials of government as well as private individuals and thereby preclusive of arbitrary power … Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life … As John Locke once said, "A Government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society."[31]

The notion of the rule of law is a unifying constitutional principle that cuts across the doctrine of separation of powers. It applies to the legislative as well as the executive branches of government. As the Supreme Court of Canada noted in *Canada (House of Commons) v. Vaid*, "[l]egislative bodies created by the Constitution Act, 1867 do not constitute enclaves shielded from the ordinary law of the land."[32] The doctrine of parliamentary privilege operates within this overarching umbrella. In *Vaid*, the Supreme Court enunciated the idea that unless a particular privilege could be demonstrated to have existed at the time of Confederation, its recognition would have to depend on the ability of

---

[29] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 59. See also *Roncarelli v. Duplessis* [1959] S.C.R. 121, per Rand J. at para. 142 ("*a fundamental postulate of our constitutional structure"*).
[30] *Constitution Act, 1982*, Part I, Preamble.
[31] *Reference, re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 64.
[32] *R.* v. *Vaid*, [2005] SCC 30 at para. 29, Item 1.

the claimant to demonstrate that its recognition was "necessary" to enable the legislature to perform its work effectively. If the existence and scope of a privilege have not been authoritatively determined, the court:

> [W]ill be required … to test the claim against the doctrine of necessity, which is the foundation of all parliamentary privilege … [I]n order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which the privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative work with dignity and efficiency.[33]

Even under the doctrine of parliamentary privilege, therefore, a legislative Member or the legislature itself is regarded as bound by the law of the land and, unless the person or body seeking immunity from that law can justify the immunity according to the concept of "necessity," the general notion of legislative autonomy cannot be used to claim exemption from the rule of law. One cannot, in asserting legislative autonomy, take it upon oneself to avoid the law. Thus, to take an example - the removal of the Auditor General from auditing the House of Assembly - that has been the subject of some public discussion, and will be discussed at some length later in this report: the fact that the Commission of Internal Economy was successful in using legislative autonomy as one of the reasons for barring the Auditor General from the House does not then justify it in not complying with the amended legislative provision that nevertheless required that "an audit" by *someone* be completed. Just because success was achieved in repelling outside influence, the acquisition of power, internally, to regulate the audit process did not mean that the IEC was a law unto itself and could ignore with impunity the obligation of having an audit performed. The legislative branch is still bound by the general requirements respecting protection of public money.

Indeed, this is as it should be. The people who make laws of general application should surely be expected to apply them to themselves. As law-makers, they should be on the front line of scrutiny as to the application of the rule of law. If they are seen as making laws that do not apply to themselves - so that they are "above the law," so to speak - then others in society might well legitimately ask, "If not them, why us?"

I asserted above that the notion of legislative autonomy is not necessarily incompatible with notions of accountability, provided the underlying rationale for autonomy is not undermined. One can go further and say that legislative autonomy without accountability is inconsistent with the rule of law.

---

[33] *Vaid*, paras. 40 and 46.

Trust

Trust is an important feature of human relations, both between individuals and between and among social groups. It also figures prominently in the political context, at the heart of the relationship between citizens and those who represent them. Trust affects how people think and feel about politicians and, by extension, politics and political institutions generally.

While trust, in the political context, is probably engendered and maintained by a variety of factors, including economic and social well-being, cultural attitudes, historical experience and political tradition, it is fair to say that its continued maintenance is also hindered and placed in jeopardy by perceptions of political corruption or other indications that the politicians in positions of authority are not acting with the public good in mind. This is because the placement of trust in an individual or institution is rarely made unconditionally. "Trust rests on the belief that the individuals, groups or institutions are worth the reliance assigned to them."[34] When the trust is regarded as having been betrayed, it can lead to a reassessment of the relationship.[35]

Trust must exist not only in the political institutions themselves but also in the actors who operate within those institutions. Widespread mistrust of the individuals as a group can lead to mistrust in the institution. It is for that reason that our democratic system cannot function effectively without a minimal level of trust by the populace in our politicians. To operate, democratic governments need consent based on trust because, in the end, they cannot rely on force to get citizens to comply with their will or to enable them to remain in office.

This fundamental notion of trust as underlying the effective functioning of our political system has led to the description of politicians as being charged with *trust obligations*. For example, Franklin D. Roosevelt, when governor of New York, observed that "the stewardship of public officers is a serious and sacred trust." This observation was noted and approved by Justice Tallis, writing for the majority in *R. v. Berntson*[36] - one of the cases arising out of the constituency allowance "scandal" in Saskatchewan - when he observed that

> [a] heavy trust and responsibility is placed in the hands of those holding public office or employ. The public are entitled to expect persons in such positions to observe the "honour" system that they have put in place when it

[34] Jean Crete, Rejean Pelletier and Jerome Couture, "Political Trust in Canada: What Matters: Politics or Economics?" (Delivered at the annual meeting of the CPSA, York University, Toronto, June 1-4, 2006) online: Canadian Political Science Association < http://www.cpsa-acsp.ca/papers-2006/Crete.pdf >.

[35] As noted in Chapter 1, footnote 29, editorials and opinion pieces aired and written in early 2007 in this province have suggested that, as a result of breaches of public trust evidenced by the constituency allowance "scandal," none of the current Members of the House of Assembly should be returned in the next election.

[36] [2000] SKCA 47.

> comes to the expenditure of public funds for various allowances … [T]he integrity of the system of allowances of members of the Legislative Assembly depends entirely on the honesty and personal integrity of each individual member.[37]

The notion of the politician as a "trustee" permeates political discourse and even finds its way into the criminal law. Specific offences exist that criminalize behaviour that is found to be a breach of trust by public officials.[38]

It probably cannot be said that the position of an elected Member constitutes, generally, an office of trustee, in the technical private law sense of a recognized jural relationship, in which the requirements of the three certainties of intention, subject matter and objects are present.[39] Yet there are those, like Roosevelt, who have suggested that the political position of an elected Member exhibits fiduciary characteristics which, of course, are a defining characteristic of trust relationships.

Fundamental to a fiduciary relationship is the notion of putting someone else's interests ahead of one's own. As McLachlin J. said in *Norberg v. Wynrib*, "The fiduciary obligation has trust, not self-interest, at its core."[40] Few would dispute that elected politicians are expected to sublimate self-interest in the work they do on behalf of constituents.

While no one theory is universally accepted as the basis of the existence of a fiduciary obligation, the notion of having a power to affect the interests of another who is peculiarly able, by virtue of vulnerability or other circumstances, to be affected by those actions, is central.[41] One theorist, J.C. Shepherd, suggests a theory based on the notion of "transfer of an encumbered power":

> A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to utilize that power in

---

[37] *R. v. Berntson*, at paras. 24 - 25.
[38] *Criminal Code of Canada*, R.S.C. 1985, c. C-46. s. 122.
[39] See Waters, *Law of Trusts in Canada* (Toronto: Carswell, 1974), p. 99.
[40] [1992] 2 S.C.R. 224. See also *Canadian Aero Service Ltd.* v. *O'Malley* [1974] S.C.R. 592 at para. 606, where it is observed that the fiduciary obligation is an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest."
[41] In *Frame* v. *Smith*, [1987] 2 S.C.R. 99 (affirmed in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574) Wilson J. stated, three general characteristics of a fiduciary relationship at paras. 40-42 : (i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (iii) the beneficiary is particularly vulnerable or at the mercy of the fiduciary holding the discretion or power. While some (*e.g.* Sopinka J. in *Lac Minerals*) say that the third characteristic, vulnerability, must be present in all cases, others (*e.g.* LaForest J. in *Lac*) say that vulnerability is a "relevant consideration" though not a necessary ingredient.

the best interests of another, and the recipient uses that power.[42]

Of interest in the present context is that the notion of an encumbered power in the private law context was developed by Shepherd using broader notions from political philosophy as one of his bases. He refers to the social contract theory of John Locke as encompassing the idea of an encumbered power as a central feature of his political theory. Locke described the legislative power as a "fiduciary power to act for certain ends" and asserted: "For all Power given with trust for the attaining of an end, being limited to that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited and the Power devolve into the hands of those that gave it."[43] In so doing, Locke relied on the notion of fiduciary obligation flowing from the concept of a trust to argue for limits on governmental power.

This theory of constitutional government, calling for restraint by public authority, has been adapted by some to argue for treating individual public offices as having a fiduciary character. For example, commentators in the United States, in describing the standard of impeachment of the President under the U.S. Constitution as a fiduciary standard, interpret Locke's theory as the basis for encumbering public office with fiduciary obligations:

> Officials would not enjoy power as a personal right but would hold it subject to a burden; the Government's power should be encumbered with a trust to act on behalf of the beneficiaries - all those who had created government by social contract … The public delegates power to their representatives so that they may act for society's benefit; neither the executive nor the legislators can use that power arbitrarily or exceed the limits imposed by the fiduciary obligations of the public trust … Like a trustee of private property, an officeholder has no right to assert private "dominion" over the power he holds; his use of property must be limited to such acts as will benefit those who gave him his power.[44]

The idea of adapting trust and fiduciary concepts from private law into the public sphere has been utilized in other, disparate areas; for example, in recognizing a fiduciary relationship between the Crown and aboriginal communities,[45] and in describing the duty of a municipal authority to its taxpayers as analogous to that of trustees of the property of others.[46]

---

[42] J.C. Shepherd, *The Law of Fiduciaries*, (Toronto: Carswell, 1981), p. 96.

[43] John Locke, *Two Treatises of Government,* (London: Abraham & Churchill, 1698), Book II, Chapter XIII, para. 149.

[44] E. Mary Rogers and Stephen B. Young, "Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard," (1974), 63 Georgetown Law Journal 1025 at 1026.

[45] See *Guerin v. Canada,* [1984] 2 S.C.R. 335.

[46] See *Roberts v. Hopwood,* [1925] A.C. 578 (H.L.), per Lord Atkinson: "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes … a duty to those latter persons to conduct that administration in a fairly business-like

This is not to say that these usages can be easily adapted to envelop the position of an MHA with strictly fiduciary characteristics[47] in all aspects of his or her work. For present purposes, it is not necessary to do so. It is sufficient to recognize that elected representatives, in carrying out their duties, are entrusted with power to commit and spend public funds through, for example, the use of constituency allowances, and that in so doing they are not using their own property. Furthermore, MHAs have, by the nature of the arrangements that are put in place to assist them in performing their duties, the ability to spend public money in ways that are not easily discernable to observers unless special steps are taken to make their actions transparent. The people who elect them must, to a certain degree, have faith in, or "trust," their elected representatives to act responsibly. In that sense, they are vulnerable by-standers. While this may not bring an MHA strictly within the list of characteristics of a fiduciary in the private law of equity, there are nevertheless fiduciary-like characteristics present. In a different context, it has been said by one commentator that an "equitable duty arises from the concept of public authority as a form of public trust, and the corresponding obligation on public officials to discharge this authority reasonably, fairly, and in the public interest."[48]

Shepherd points out that the transfer of power from a beneficiary to the fiduciary can occur in a number of ways, but it is the fact of the transfer of encumbered power and the position that results that give rise to the fiduciary obligation. For example, the duty of loyalty that is part of the fiduciary obligation is derived from the law itself, not from the specific type of legal transaction that effects the transfer. He observes:

> We can also transfer powers to a person by appointing or electing him to offices which carry with them a decision-making role. When we elect a person to the position of director of a corporation, we clothe him with certain powers, not flowing from any contract (except in the most extended sense), but from the legal and practical realities of the office of corporate director. Similarly, when we elect representatives to government, although there is some form of social contract there, the actual investiture of powers is the result of placing someone in the office, the office having the powers already attached by virtue of the social contract.[49]

It is sufficient for present purposes to conclude that there are analogies to be drawn between a person in a recognized trust or fiduciary relationship and persons in elected

---

manner, with reasonable care, skill, and caution, and with a due and alert regard to the interest of those contributors … Towards these latter persons the body stands somewhat in the position of trustees …"

[47] In *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 (Ch. D.), Megarry V.C. pointed out that "Many a man may be in a position of trust without being a trustee in the equitable sense." See the discussion generally of this and related issues in Lorne Sossin, "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law," 66 Sask L. Rev. 129.

[48] Sossin, footnote 47, p. 129.

[49] Shepherd, footnote 42, p. 99.

political office. The duties that are commonly associated with trust or fiduciary relationships - not to engage in self-dealing; not to place oneself in a position where one's duty and interest may conflict; to preserve the property in respect of which the fiduciary has been entrusted with stewardship; to account for that stewardship; and to provide requested documentation, full information and explanations about the manner in which the fiduciary has acted (in other words, to be transparent) - are commonly what we expect of our politicians. Acting according to such standards is what we expect of persons of integrity. Thus, trust is intimately bound up with integrity. That is why we seek integrity from our politicians.[50] As Tallis J.A. said in *R. v. Berntson*, "[p]rotecting the integrity of government is crucial to the proper functioning of a democratic system."[51] A proper system of controls within the legislative branch of government should therefore be built on expectations that Members of the House will exhibit and adhere to fiduciary-like standards.

The two fiduciary duties last mentioned in the preceding paragraph - the duty to account and the duty to provide information - now lead us to discussions of *accountability* and *transparency*. Confidence and trust in our leaders come from the assurance that they are *accountable* for what they do. However, not only must the system operate properly, it must be *seen* to operate properly. That provides a justification for a general requirement of *transparency*.

Accountability

In recent years, notions of "accountability" have increasingly been the subject of public discourse. Comments such as the following, delivered in conjunction with the Massey Lectures in 2001 are often heard:

> Public accountability is a fundamental right of citizens in a democratic polity. Without accountability, democracy does not work: there is no constraint on the arbitrary exercise of authority. But accountability is difficult to construct and enforce, even in democratic systems of responsible government ... What accountability means, how it is constructed, and what measures are important are part of a much larger conversation about values and purposes. To ignore accountability, or to dismiss it as a technical problem best left to the experts, is to miss one of the most important conversations of post-industrial society.[52]

Of course, accountability means different things in different contexts. The notion surfaces in discourse respecting virtually all aspects of life - from holding persons accountable in the criminal and civil courts, to holding corporate directors accountable for

[50] See *R. v. Hinchey*, [1996] 3 S.C.R. 1128 per L'Heureux-Dube at para. 14: "our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question."
[51] *R. v. Berntson* [2000] SKCA 47 at para. 25.
[52] Janice Gross Stein, *The Cult of Efficiency* (Toronto: Anansi, 2001), p.139.

their roles in corporate governance, to holding athletes accountable for engaging in unacceptable use of performance-enhancing drugs, to holding professionals accountable for failing to meet the standards of their profession, to holding judges accountable for their conduct.

In the political sphere, accountability is used in a variety of senses, depending on context. It can be discussed in terms of the relationship between elected and non-elected officials; between elected officials and the electorate; between elected officials and/or the government collectively, on the one side, and government agencies and institutions that create and purport to enforce standards of behaviour on the other.

Traditionally, accountability in the context of the elected assembly was thought of primarily as *ministerial responsibility*[53] - the idea that ministers are responsible to the assembly for the activities, particularly the stewardship, of the department of government for which they are responsible and can be called to account by questions in the House and before parliamentary committees. The ultimate sanction was resignation. Another concept of accountability in the traditional sense is *accountability to the electorate.* Not infrequently, we hear politicians, when confronted with accusations of impropriety, proclaiming that the ultimate judge of their actions will be the voters at the next election, as if that is a sufficient defense to the accusation in the meantime.

Certainly, one cannot minimize the continuing importance of these notions of accountability. Political life has, however, moved on from these ideas. Accountability is now entering public discourse in many other ways. There is a general expectation, both within government and among the public, that more is needed to ensure propriety of public officials. Accountability is perhaps one of the most written-about concepts in public administration literature in Canada today. One of the most respected commentators on accountability is Paul Thomas. Rather than seeing it as an amorphous concept, he narrows it down to the idea of a process or relationship. In a recent publication, he says:

> Often it is used synonymously, and incorrectly in my opinion, with other terms like responsibility, responsiveness, transparency and fairness. I favour restricting the use of the term accountability to describe a formal, authoritative relationship governed by a process.[54]

Thomas sees the accountability relationship as comprising four components. The first is the assignment of delegated responsibilities to others by a person or body in authority, generally with performance standards or expectations attached. The second is the obligation

---

[53] C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), p. 227: "Nothing could be simpler than the theory of parliamentary accountability. Its essence is ministerial responsibility."

[54] Paul Thomas, "Control, Trust, Performance and Accountability: The Changing Meaning of Four Key Administrative Variables," (Presented to the Professional Planning Exchange – Symposium 2004, Ottawa, May 27-28, 2004), p. 19, online: Performance and Planning Exchange <http://www.ppx.ca/symposium/2004-_symArchivePresentations/ContTrustPerfAccount.pdf >.

to answer for performance or non-performance by those persons or bodies assigned such responsibilities. The third is that the responsible persons or bodies must be given the authority, resources and control over events to be realistically able to achieve the outcomes desired. An important fourth, and last, aspect Thomas mentions is the requirement that the authoritative party in the accountability relationship must have the will and the capacity to obtain information and to monitor performance.[55]

The idea of the rule of law also underlies, and provides a rationale for, the notion of accountability in government. In the *Patriation Reference*, the Supreme Court of Canada noted that the concept of the rule of law entails the notion of "executive accountability to legal authority."[56] The very idea of government officials being subject to the law and being thereby limited in the use of arbitrary power means that they must account for their activities, particularly their financial activities.

The stress on accountability in the public sector serves at least two purposes: it provides a focus on mechanisms to achieve *efficiency* in the expenditure of public funds in the delivery of government programs, and it also emphasizes the *responsibility* of public officials to act properly in the public interest. It is this second aspect of accountability with which I am most concerned. By holding officials accountable for what they do, by exposing their activities to the light of public scrutiny, and by providing a measure against which their actions can be judged, citizens can receive some measure of assurance that officials who are placed in a position of power and influence are employing their power and influence for the public good; in short, they can have a degree of *confidence* that the system is working as it should.

Contributing to this increased stress on public accountability, or perhaps as a result of it, notions of accountability are increasingly receiving emphasis in legislative policy. In the province of Newfoundland and Labrador, we have seen, for example, the recent enactment of the *Transparency and Accountability Act.*[57] Of interest in the present context is that portions of the *Act* have been made applicable to the House of Assembly, thus recognizing that the notion of accountability is not something that should be regarded as foreign to the legislative branch of government.

Acknowledgment of the application of the notion of accountability to the legislature does not mean that the rules of accountability should be the same throughout government. For example, although notions of judicial independence underpin the position of the judicial branch of government, the judiciary is nevertheless accountable for (i) its substantive decisions by the appeal process, with decisions being ultimately subject to reversal by

---

[55] Thomas, p. 20.

[56] *Manitoba (Attorney General) v. Canada (Attorney General); Canada (Attorney General) v. Newfoundland (Attorney General); Quebec (Attorney General) v. Canada (Attorney General),* [1980] 1 S.C.R. 753 at paras. 805-806.

[57] S.N.L. 2004, c. T-8.1. For a brief discussion of this *Act*'s scope, see below under the heading "Transparency."

legislation or the application of the "notwithstanding clause" in the Constitution; (ii) conduct by the discipline process administered by the Canadian Judicial Council or its provincial equivalents; (iii) financial stewardship of funds that come into its possession, by means of the audit process; and (iv) subjecting its processes to public scrutiny through a general open-courtroom policy.

Just as the rules of accountability for the judiciary are modified and applied to take account of its unique position and the values on which it is based, so also should the rules of accountability for the legislative branch be tailored to meet its special position. The fact that the position of the legislative branch is different from the executive branch does not mean that accountability is unattainable or that it should not be applied at all. Legislative independence is no justification, in itself, for not developing and applying appropriate mechanisms of accountability.

There can be no doubt that many of the traditional notions of parliamentary accountability do not work well within the legislative branch. Ministerial responsibility, for example, depends for its effectiveness on an active opposition, one that can probe the actions of government within the acceptable bounds of political partisanship. When the legislative branch is dealing with financial matters impacting on Members *qua* Members - matters such as salaries and proper spending of allowances, for example - there is no natural opposition. All Members of the legislature may have similar interests and may be tempted, out of self-interest, not to "rock the boat." There are not the same checks and balances that exist in a system that normally pits opposing interests against each other. There is considerably less likelihood, therefore, that political partisanship will result in criticism of decisions made to benefit all Members. It is all the more important, therefore, that the governing bodies of the legislature (in Newfoundland and Labrador, the Commission of Internal Economy) have other accountability mechanisms built in.

While legislative autonomy might mandate that the legislature not be accountable to the executive branch, there is no reason why high standards of accountability and responsibility to the people of the province in the conduct of all parliamentary matters should not be applied by the legislature to itself and its Members, along with mechanisms for ensuring that those standards are publicly enforced.

Transparency

Transparency is the foundation upon which *accountability* of public officials is built. It implies openness and a willingness to accept public scrutiny. Openness and the potential for scrutiny are also the antidote for suspicion and mistrust. When meetings are open to the media and the public, and when financial records and reports can be reviewed and discussed in public, there is less opportunity for public officials to abuse the system out of self-interest or even to neglect their duties. Transparency thus increases confidence and trust in our democratic system.

Governments, especially their executive branches, are increasingly responding to demands for greater openness in the way in which they make decisions and in the manner in which they do business. Such initiatives as access to information regimes, whereby members of the public can gain access to a wide variety of information in the custody and control of government officials and agencies, are examples of attempts to make government more open.[58] Building on the principle that all government information should be accessible unless an exception can be justified on good policy grounds, governments are going further and actually publishing broad categories of information of their own motion, by means of formalized "publication schemes,"[59] rather than waiting for individual requests for access.

The term "transparency" is slowly working its way into the actual lexicon of government. For example, in this province it finds its way into the title of the *Transparency and Accountability Act*,[60] with the long title describing it as an Act "to *enhance* the transparency and accountability of the government and government entities to the people of the province." The legislation, which is declared to have precedence over other legislation in case of conflict, attempts to achieve transparency by imposing obligations on government entities to prepare strategic, business or activity plans setting out broad strategic objectives for government programs, and to publish those plans, followed by the preparation of annual reports comparing actual results with the projected results. The plans and reports are required to be made public not only by tabling in the House of Assembly, but also by "other effective methods, including electronically."[61] The *Act*, amongst other things, also requires all government departments and public bodies to report financial information in a manner consistent with generally accepted accounting principles. Non-compliance with the requirements for preparation and publication of plans and reports requires a public statement giving reasons for non-compliance. Care is taken to ensure that the information in a plan or report "is in a form and language that is as precise and as readily understandable as practicable."[62]

Although not initially made applicable to the legislative branch, the House of Assembly has subsequently been brought under the umbrella of much of the *Transparency and Accountability Act*.[63] This is important because it signals, in this province, at least, an intent to make the same broad principles of transparency and openness that apply to the executive apply to the legislative branch as well.[64]

---

[58] For examples of such initiatives in Newfoundland and Labrador, see the *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1.
[59] An example is found in the *Freedom of Information (Scotland) Act 2002* A.S.P. 2002, c. 13.
[60] S.N.L. 2004, c. T-8.1.
[61] See, Ss. 5(7), 6(7), 7(7) and 9(10).
[62] Ss. 17(1).
[63] See *Internal Economy Commission Act*, R.S.N. 1990, c. I-14 (as amended by S.N.L. 2004, c. 41, s. 1), ss. 9.1.
[64] I recognize that a number of the provisions in the *Act*, such as the requirement in ss. 19(4) permitting the Treasury Board to direct a public body to make its books and financial records available to the Comptroller General for review, are specifically excluded in their application to the House of Assembly.

The acceptance of the principle that government should generally operate in an atmosphere of transparency has important implications. It sets up a presumption of transparency as the default position whenever the resolution of an issue as to whether to disclose or not to disclose is unclear. While all would grant that there are circumstances where it would not be in the public interest to permit disclosure or publication of certain types of sensitive or personal information, every time secrecy or withholding from public scrutiny is advocated, the proponent of secrecy should bear the burden of justifying why the principle of transparency should be compromised. This approach should also apply to claims to protect information on the grounds of parliamentary privilege. It thus provides a further argument for saying that "the party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence."[65]

Compliance and Controls

The Terms of Reference require an assessment of whether *compliance* practices in the House of Assembly are appropriate. Compliance presupposes a regime of standards against which performance can be judged. It is those standards that determine the extent and nature of the *controls* that must be in place to ensure compliance.

"Control" is a concept with many facets. The Auditor General of Canada has commented:

> Control is both restricting and enabling, an apparent paradox. It is restricting in that it protects against unwanted events such as waste, lapses or probity, or non-compliance with authority. It is enabling in that it helps ensure that objectives are achieved and provides the boundaries within which public servants can take decisions. Control provides the context in which empowerment can be created.[66]

In the context of the MHA constituency allowance issues, the focus inevitably will be on the restricting aspect of control, particularly financial control, rather than its enabling aspects.

Financial control, in the restrictive sense, means following procedures that are meant to ensure economy, efficiency and probity. It includes several matters: clearly defined roles and responsibilities; segregation of duties among commitment of funds, signification of acceptable work completed, and authorization of payment; a clear set of rules for delegation of authority and an authority structure to accompany it; the provision of required information; the establishment of performance standards; and an evaluation mechanism. In

---

[65] *Canada (House of Commons) v. Vaid*, [2005] S.C.C. 30, per Binnie J. at para. 29, item 8.

[66] Canada, Auditor General of Canada, *1992 Annual Report*, Chapter 4, "Change and Control in Federal Government"; online: < http://www.oag-bvg.gc.ca/domino/reports.nsf/html/ch9204e.html >.

the broadest sense, financial control means the promotion of performance and achievement while avoiding unwanted events like lapses in quality, unproductive uses of resources and law-breaking.

At its highest level, financial control in the Canadian system of government means parliamentary control. The elected assembly is the ultimate source of control, and financial control is simply a means whereby parliamentary control can be accomplished. The basic principles of parliamentary control are constitutionally mandated.[67] Essentially, the rules are that the government has the sole authority to initiate financial business; that the elected house (where there is a bicameral legislature) dominates in financial business; and that all public revenue and expenditures and borrowing must be authorized by parliament in legislative form. In that way, what the government intends to do is subject to the legislature's scrutiny, through the examination and debate over the budget (the "estimates"). The government's performance with respect to carrying out legislatively authorized spending is also subject to scrutiny: through comprehensive audit processes, subsequent questions and debate in the legislative chamber, and examination by parliamentary committees, especially the Public Accounts Committee. As we have seen, however, the executive's dominance of the legislature through political majorities often makes parliamentary control ineffective in practice.

At a more mundane level, control means the detailed mechanisms that are put in place to ensure that at every step of the spending process decisions are made in the public interest and that public money is prudently used and not misappropriated. It is at this level that accountants talk of *internal control* - the variety of procedures, like segregation of duties, that provide checks on the ability of persons in the system to abuse their stewardship. The role of the central paymaster, the Comptroller General, is vitally important; it is that office, together with a cabinet committee often known as the "Treasury Board," that develops detailed policies and procedures for implementation of individual spending decisions, including the documentation and authorizations that must be provided before a specific transaction can be completed. Test-checking, through internal audit procedures, provides additional assurance that the system is operating effectively.

A comprehensive audit of the public accounts, conducted by an independent auditor, is vital to ensure that money was spent in accordance with proper procedures, in the way government said it was going to spend it, and that the spending achieved the results intended. In the public sphere, it is often regarded as insufficient to limit the examination to a determination as to whether the financial statements fairly reflect the government's operations in accordance with generally accepted accounting principles; comprehensive, or legislative, auditing goes further - to express opinions on whether there has been compliance with all proper legislative and regulatory spending authorities.[68] This examination achieves a

---

[67] *Constitution Act, 1867*, Ss. 53, 54, 102 and 106. These sections of the *Act* are applicable to the federal parliament; they are made applicable to the legislatures of the four original founding provinces by s. 90, and to the province of Newfoundland and Labrador by the *Newfoundland Act*, Sch., item 3.

[68] For the mandate of such audits in this province, see *Auditor General Act*, S.N.L. 1991, c. 22, ss. 12(2). For a

degree of *transparency* in government because the report is made public; as a result, a measure of *accountability* can be achieved through scrutiny by the legislature's Public Accounts Committee, and through public reaction at the ballot box.

The achievement of compliance through control can occur not only formally, but also informally. Formal control occurs through the external imposition of standards and the provision of specific regulatory procedures with associated enforcement mechanisms. Some examples have already been given. Informal controls, on the other hand, are those that cause persons to alter their behaviour voluntarily because of well-understood expectations that motivate them to comply with certain standards, out of a sense of moral obligation or a fear of exposure to censure if the behaviour were to be publicly known. In other words, the person exercises *self-control*. Compliance with a system of informal controls depends in large measure on *transparency*, so that with the accompanying realization that financial activities will be subject to public scrutiny, persons will be motivated to meet expectations of good financial management.

Because formal controls are conceived as being imposed from without, this potentially raises questions as to conflict with the concept of an *autonomous legislature*. It may be said, for example, that the idea of controls imposed by the executive over the way in which the legislative branch conducts its business is a fundamental violation of the legislative-executive divide. That is why, it is said, the legislative branch must reject any attempt on the part of the executive to impose its policies of financial control on the legislature. This line of reasoning sometimes leads to the further argument that, once external formal controls are rejected, the only thing left to operate within the legislature is informal, or self, control.

In reality, respecting legislative autonomy does not lead to having to choose between formal and informal control. There is no reason why the legislative branch, acting autonomously, could not decide on its own motion to adopt formal policies of good financial control used by the executive, but perhaps modifying them to account for some of the special peculiarities characteristic of the legislative branch. It must be remembered that both the legislative and executive branches ultimately spend public money from the same source, the Consolidated Revenue Fund. It stands to reason that principles of good financial management should apply to the control of public spending no matter who is doing the spending. It does not follow, therefore, that a refusal to be bound by formal controls used by the executive necessarily leads to the conclusion that all that can be expected of the actors in the legislative branch is self-control. The legislative branch can, and should, develop its own set of financial controls, either by adopting those of the executive or by modifying them to adapt to any special circumstances of administration in the legislature.

---

more detailed discussion of the different types of audits and their scope, see Chapter 8 (Audits) under the heading "Government Audits - What Are They and Why Are They Carried Out?"

In the end, having a reliable set of controls over public spending, controls that can be seen to be working and enforceable, enhances *accountability* and *trust* in our public institutions.

Interrelationship of Fundamental Values and Concepts

The themes of legislative autonomy, the rule of law, trust, accountability, transparency, and control are all engaged in the subject matter of this inquiry. The intersection of these themes, and the degree to which the ideas underlying them were properly observed, go to the heart of the culture of public stewardship - that hard-to-define idea of a shared culture of prudence and probity, as well as a pride and confidence in, and a desire to promote and preserve, our democratic system.

The notion of autonomy does not mean that the legislative branch can choose to be accountable or not. The obligation of accountability is an overarching requirement of democracy. The notion of autonomy does not make accountability optional. The obligation to account arises independently of the concept of the legislature as an independently functioning entity. It arises because of the necessary fact that in a democratic society no body has arbitrary or unfettered or dictatorial powers; and that whenever a body or official is entrusted with power, it must be wielded in the public good. There must be a means to ensure that that occurs, and that people have confidence that it occurs, thereby maintaining trust in our institutions.

Trends in Institutional Reform and Innovation in Executive and Legislative Branches[69]

The values, fundamental principles and concepts of autonomy, the rule of law, political trust, accountability, transparency and control have provided justifications and the bases for a variety of reforms in the executive and legislative branches of government. They have the potential, however, of playing out, in practical terms, in different ways. Occasionally, when applied to concrete situations, they may appear to work at cross-purposes to each other. But what may first appear to be an inconsistency of principle may, on closer analysis, not really be so.

An example is the assertion of legislative autonomy in 2000 as one of the rationales given for excluding audit scrutiny of the accounts of the House of Assembly by the Auditor General, and of excluding pre-audit and internal audit scrutiny of House documents by the

[69] This portion of the report is based largely on "Members' Compensation in the Newfoundland and Labrador House of Assembly: Issues and Opportunities," a research paper prepared for the Commission by Dr. Christopher Dunn.

Comptroller General.[70] While it is true that, as matters developed, the effect of those actions was to work against the notions of accountability and transparency, that need not have been the case. The flexing by the House of its autonomy muscles could equally have been accompanied by the adoption and implementation by the House or its management board, the Commission of Internal Economy, of their own policies relating to proper controls, accountability and disclosure. In other words, autonomy on the one hand, and accountability and transparency on the other, can co-exist. It simply requires an institutional culture, and a will on the part of those in positions of responsibility, to be alert to ensure that consideration and commitment are given to *each* value when any political action is taken. To acknowledge and give effect to one value does not necessarily mean that one has to jettison another.

If we are to make recommendations about best practices to follow in the Newfoundland and Labrador context, it is useful to consider how the values, fundamental principles and concepts that have been earlier discussed are being reflected in developments in executive and legislative governance generally. While the focus of this inquiry is on legislative, as opposed to executive, practices, there may be trends in the executive branch of government which may be instructive and capable of adaptation in the legislative realm as well - a cross-fertilization of ideas, as it were. I will briefly discuss some of the broad trends in the executive branch first, followed by a discussion of trends more specific to legislatures.

Innovation in the Executive Branch

Revenue and expenditure policy-making in the executive government of Westminster systems nationally and worldwide has seen both continuity and innovation. The continuity can be found in continuing concern with collective decision-making. Innovations can be found in disclosure, consultation and expenditure budget models.

(i) Institutionalization

Beginning around the 1960s (or, in the case of Saskatchewan, the 1940s), the institutionalized, or highly structured, cabinet came to replace the unaided, or departmental/unstructured, cabinet in Canada. This cabinet, Stefan Dupré said, had "various combinations of formal committee structures, established central agencies and budgeting and management techniques [combined] ... to emphasize shared knowledge, collegial decision making, and the formulation of government-wide priorities and objectives."[71] There were now "central agency ministers" who reflected the collective concerns of cabinet and "special interest ministers" who continued the older pattern of special-interest politics. Later writers

[70] This matter will be discussed in considerable detail in Chapter 3 (Background).

[71] J. Stefan Dupré, "Reflections on the Workability of Executive Federalism," in Richard Simeon, ed., *Intergovernmental Relations*, Vol. 63, Research Studies for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985) p. 4.

elaborated upon these themes, emphasizing additional implications of the institutionalization phenomenon. Institutionalization was seen as involving alternative channels of policy advice for cabinet and committees, extensive cabinet-level analysis, more cabinet staff, collective and collegial budgeting, and comprehensive and long-term planning.[72]

One of the results of this trend was to concentrate control of decision-making in central agencies of government. In this province, this trend is exemplified by the move towards the centralization of all information technology functions in one office, with government-wide, rather than merely departmental-wide, responsibilities. A similar trend is evident in proposals to centralize all human resource functions in much the same way. In terms of *financial* controls, however, an opposite trend is evident; there appears to be, in this province, in any event, a movement toward decentralization - the shifting of responsibility for the financial control and accountability functions away from central control agencies like the Office of the Comptroller General to senior officials in individual departments. I will be commenting on the implications of this trend on accountability later in this report.[73] It is sufficient at this stage to record the existence of the trend.

(ii) Increased Disclosure

Providing more information to concerned citizens is an innovation for Canadian finance ministers and departments. Increasingly, policy papers, staff research papers and tax expenditure accounts are being published along with budget addresses. These are designed to reveal the government's economic reasoning to the public and, of course, to garner political support in the process. Public finance specialists laud the act of publishing.

In Newfoundland and Labrador, some of the most notable regular papers, for example, are *The Economy*, *The Economic Review*, *Demographic Reports* and sectoral economic branch reports.

(iii) Consultation

Consultation is still another innovation in federal and provincial policy and budget preparation. The Federal Department of Finance was a forerunner in Canada in budget outreach activities, and several provincial governments followed. Beginning in the 1990s, Newfoundland and Labrador finance ministers undertook pre-budget consultations with

[72] Christopher Dunn, *The Institutionalized Cabinet: Governing the Western Provinces,* (Montreal and Kingston: McGill-Queen's University Press, 1995), Chapter 1.
[73] See Chapter 12 under the heading “Delegation of Authority and Effective Control of Public Money.”

publicly funded bodies. Occasionally, this province institutionalized consultation in tripartite economic advisory councils. Public hearings on its economic and social plans have also had some budget implications.

(iv) Expenditure Budget Models

Yet another innovation in financial policy-making is the use of *expenditure budget models*. Each federal and provincial government has followed a unique path in determining how to build the expenditure plan and how to aggregate information for political decision-makers. The models have varied over the years, but the general trend has been to emphasize programs and program units, rather than responsibility centres, and to demonstrate a government-wide concern with planning. The budget process has become tightly integrated with the planning framework.

(v) Accounting officers

The post of *accounting officer* is a way of promoting the accountability of senior permanent officers of the executive branch. The United Kingdom has had accounting officers for about a century,[74] and the Government of Canada has recently enacted legislation to introduce them into the federal service.[75] The idea has gained currency in the last few decades in Canada, especially since it was recommended, in so many words, in the 1979 Lambert Committee Report.[76] Essentially, accounting officers are deputy ministers or equivalents who are held to account before parliamentary committees for the exercise of powers that are directly assigned or delegated to them by legislation. Several parliamentary[77] and academic sources have since made similar recommendations calling for direct deputy accountability. This arrangement changes the reigning practice of most of Canadian administrative history, which has always maintained that the deputy should report to Parliament through the minister, and that the deputy would have no independent

---

[74]For a review of their modern responsibilities, see the Treasury website, online: Government Accounting 2000 < http://www.government-accounting.gov.uk/current/content/ga_04_1.htm >.

[75] *Federal Accountability Act*, S.C. 2006, c. 9

[76]Royal Commission on Financial Management and Accountability, *Final Report*, (Ottawa: March 1979), (Commissioner: Allen Thomas Lambert).

[77]See Special Committee on Reform of the House of Commons, *Third Report*, (Ottawa, 1985), (Chair: Hon. James McGrath); House of Commons Standing Committee on Public Accounts, *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability*, 10th Report, (Ottawa: May 2005); Donald Savoie, *Breaking the Bargain: Public Servants, Ministers , and Parliament*, (Toronto: University of Toronto Press, 2003); Peter Aucoin and Mark D. Jarvis, *Modernizing Government Accountability: A Framework for Reform*, (Ottawa: Canada School of Public Service, 2005); C. E. S. Franks, "Ministerial and Deputy Ministerial Responsibility and Accountability in Canada," (Submission to the House of Commons Standing Committee on Public Accounts), January 11, 2005.

observations to offer other than those that were in support of his or her minister.

(vi) Freedom of Information

Freedom of information (or, as it has been called in Canada, "access to information") legislation is an idea whose time came long ago, but continues to be expanded in its scope. Information access laws were passed as early as 1776 in Sweden and have continued to be implemented and refined up to the present day in other jurisdictions worldwide.[78] Some of the most notable in recent times include the United Kingdom and Scotland, who enacted legislation in 2000-2001 (but only implemented it in 2005). All are quite extensive in their coverage. In Canada, the scope of the *Access to Information Act* has been expanded recently by the *Federal Accountability Act*'s inclusion of officers of Parliament, Crown corporations, and foundations created under federal statute.

The spirit of openness may be even more pressed by the UK example; the scope of the UK *Freedom of Information Act*, says one comparative observer of this field,

> [i]s somewhat wider than the others; and contrary to the other Information Commissioners and Ombudsmen considered, the U.K. Commissioner has a specific legislative duty to actively promote the legislation. Other key advantages unique to the U.K. scheme include a complementary Code of Practice, linked to but not part of the legislation, which governs the obligations of government officials to keep records, and the presence of an independent Information Commissioner with order-making power and the ability to prosecute for offences under the access legislation.[79]

The present pattern in Canada may be informed by these innovations.

(vii) Public Tendering

The general practice in the executive branch of government at the federal and provincial levels with respect to government procurement is to insist on competitive

---

[78] Some other examples of jurisdictions that have followed this trend are Finland (1951), the United States (1966), Australia (1982), New Zealand (1982), Canada (1983), Newfoundland and Labrador (1990) and Ireland (1997).

[79] Kristen Douglas, "Access to Information Legislation in Canada and Four Other Countries," (April 6, 2006), online: Parliament of Canada - Library, <http://www.parl.gc.ca/information/library/PRBpubs/prb0608-e.htm>, pp. 20-21.

tendering of contracts for goods and services involving the public sector and other public bodies. This is usually expressed in public tendering legislation. Hardly an innovation, it nevertheless often seems like one when the spirit of public tendering is violated by some infrequent episode.

The province of Newfoundland and Labrador has had specific public tendering legislation, as well as legislated purchasing controls, since the early 1970s. The principles underlying such legislation are well accepted within the executive branch of government. Such principles are, of course, equally applicable to all systems involved in the spending of public money; yet there appears to be considerable controversy as to their acceptance and application within the legislative branch of government.[80]

(viii) Whistleblower Policies

The Government of Canada,[81] as well as some provincial governments[82] and other jurisdictions, have legislatively adopted policies designed to encourage internal enforcement of ethical behaviour by providing mechanisms whereby public servants can, without fear of reprisal, disclose others' improper or unethical behaviour of which they are aware; and by providing procedures whereby those disclosures can be investigated by independent legislative officers, often called "integrity commissioners," and remedial action taken. The philosophy behind such legislation is well summed up in the preamble to the original federal legislation:

> Confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings.

These developments follow a trend that has existed in the corporate sector for a longer period of time. They demonstrate how developments in governance-promotion ideas in the private sector can sometimes fuel reforms in the public domain.

---

[80] The province's *Public Tender Act*, R.S.N.L. 1990, c. P-45 only applies to a "government funded body" as that phrase is defined in s. 2(b) of the *Act*. Like many definitions in provincial legislation, it is not completely clear whether or not it applies to the House of Assembly. The definition is not self-contained - it "includes" a variety of entities. None of them self-evidently apply to the House. This report will attend to this deficiency.

[81] See *e.g. Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 as amended by *The Federal Accountability Act*, S.C. 2006, c. 9, Ss. 194-226.

[82] For example, *The Public Interest Disclosure (Whistleblower Protection) Act*, S.M. 2006, c. 35.

Innovation in the Legislative Branch

There have been innovation and reform in the legislative branches of Canada and elsewhere as well. In fact, it is possible to say that the degree of innovation in legislative branches is one of the background stories of the modern state, since it has gone largely unreported, or understated.

(i) Growing Independence

Despite the fact that there is already a substantial amount of independence displayed by legislatures, there is a movement toward increasing the quantum. One tendency in recent years is to have the internal management of the legislature run by a board that has representatives of all parties on it, rather than just the government side, as was historically the practice. Multi-party representation increases the likelihood that the legislature will take stands independent of government in its self-direction, especially if, as in some legislatures, there is party parity on the board. Another sign of growing independence is the practice of having the Speaker chosen by a vote of the whole legislature, rather than leaving the effective choice to the first minister. The House of Commons first elected its Speaker in 1986, and all the legislatures have followed suit.

(ii) Structural Independence for Officers of the Legislature.

Officers of the legislature are neutral officials performing tasks central to the public interest and to the operation of the legislature as a collective body, in a way that is above politics. Their neutrality and independence are enhanced by the fact that they report to the legislature and not to the executive. In recent years, their independent status has increased. Regard what Graham White, a former Ontario Clerk of the provincial legislature and a noted comparative legislature expert, says about appointment independence.

> A small but nonetheless significant sign of movement toward legislative independence is the growing recourse to legislative committees for the appointment of neutral legislative officials such as the clerk, the ombudsman, and the provincial auditor. In several legislatures, all-party committees now make the effective decisions on such key appointments (though a motion and vote in the House is usually necessary to formalize the decision). Until recently, cabinet decided on these important staffing matters, and while care was usually taken to avoid partisan or political taint, transferring this task to a legislative committee, with representation from both sides of the House, clearly enhances legislative autonomy.[83]

[83]Graham White, "Evaluating Provincial and Territorial Legislatures," in Christopher Dunn, ed., *Provinces: Canadian Provincial Politics* (Peterborough: Broadview Press, 2006), p. 265.

Other forms of independence are enjoyed by statutory officers such as ombudsmen**.** The offices are usually created and supported by their own legislation, and the head of the office is called, and treated as, an "officer of the legislature." Such officers are often allowed to hire their own staff and regulate their own workplace, provided they report directly to the legislature and not through a minister. They often have a fixed, non-renewable term; have a committee of the legislature involved in overseeing their office; have a reasonable salary, objectively set; and involve the legislature in setting the officer's budget.

(iii) Professionalization

Increased professionalization is the rough analogue for institutionalization in the executive branch. Professionalization is the provision of structural, financial and staff supports that allow for legislators to perform their work effectively and in an informed fashion.[84] As Graham White says, the pattern of the past was that the legislatures were not very professional.

> Among the indicators of legislative professionalization are adequate levels of pay, based on the presumption that elected life is a full-time calling; sufficient professional staff support, research facilities, and the like; and legislative sessions of reasonable duration. All of this may seem unexceptional, yet just two or three decades ago, all provincial legislatures lacked even the rudiments of professionalization. Members were badly paid, requiring them to hold virtually full-time jobs while serving in the legislature. This was possible because the legislature was only in session a few weeks each year. If they were lucky, members might share a cramped office in the legislative building while the House was sitting and have access to a pool of stenographers to type their letters. Beyond that, members had virtually no staff resources or facilities to assist them in their duties.[85]

While the pattern has changed in the direction of more professionalization, there is still room for improvement. White notes that pay levels have increased, but many Members across Canada take pay cuts in comparison with rates in their former professions; research and staff provisions are generous, but mostly in Ontario and Quebec legislatures; and throughout the country, the legislative sessions have shrunk rather than expanded in length.

---

[84]Gary Moncrief, "Professionalism and Careerism in Canadian Provincial Assemblies: Comparisons to U.S. State Legislatures" *(1994) 17 Legislative Studies Quarterly.* Vol. 19, No. 1 (Feb., 1994), pp. 33-48.
[85] Graham White, footnote 82, pp. 265-266.

(iv) Access to Information

In recent years, a movement is growing to apply the logic of freedom of information legislation - which is now widely accepted in the executive branch - to the legislatures themselves. In most cases, the operative logic - buttressed by notions of the rule of law - is that if legislators are going to impose requirements on society, they should be willing, with appropriate safeguards in place**,** to have such requirements apply to themselves as well. Westminster-style legislatures are a case in point, with Canada as an outlier:

> Unlike Canada, all the jurisdictions … [UK, Ireland, and Australia] include their Parliaments under their freedom of information regimes. In each case there is protection for documents the release of which would infringe parliamentary privilege, or for the confidential papers of a parliamentarian. In the United Kingdom, there are absolute exemptions for materials that must be protected to avoid "an infringement of the privileges of either House of Parliament" or that would interfere in the deliberations of Parliament, the responsibility of ministers or the conduct of public affairs. In Ireland, a similar exemption covers opinion and advice relating to the proceedings of the Oireachtas (Parliament): the Freedom Of Information Act excludes records given to a member of the government or a minister of state for use by him or her or for the purposes of proceedings in either House of the Oireachtas (including a committee of either House), including briefings provided in relation to oral and written Parliamentary Questions. In Australia, an absolute exemption prevents the release of documents the disclosure of which would constitute a breach of parliamentary privilege.[86]

Scotland is another notable example of a robust freedom of information system applying to legislatures. The *Freedom of Information (Scotland) Act 2002* establishes a statutory right to recorded information of any age held by all Scottish public authorities, which includes the Scottish Parliament and its Scottish Parliament Corporate Body (the equivalent of this province's Commission of Internal Economy). It excludes information held by the Parliament or the Scottish Parliament Corporate Body on behalf of members and their staff. Information that is already publicly available by other means does not have to be provided again in response to a freedom of information request. In 2005, the first year of its operation, a total of 327 access requests were received, and the total staff time spent on responding to them was 4,957 hours.[87]

[86] Kristen Douglas, footnote 79, p. 21.
[87] Information provided to Dr. Christopher Dunn by the Scottish Parliament Corporate Body (September 2006).

(v) Disclosure of Members' Allowances

One of the interesting developments that is at work in the United Kingdom in the area of access to information in the legislative branch of government involves the disclosure of Members' allowances. Policy-makers have realized that the labour-intensive work of responding to freedom of information requests could be offset somewhat by offering the same sorts of information on a regular basis as part of a "publications program." Much of the publications program is on-line, so this makes the process even more economical. The UK freedom of information legislation not only offers a statutory right to request information from "public authorities" (which includes both Houses of Parliament), but it also specifies that it is "the duty of every public authority … to adopt and maintain a scheme which relates to the publication of information by the authority."[88]

Acting in the spirit of the *Act*, the House of Lords and the Commons decided to provide additional information on Members' allowances. For example, the Commons publishes the annual totals for each Member for a variety of expenditures relating to Members' allowances, such as certain living, travel, staffing, stationery, information technology and incidental expenses.[89] Similar information is provided by the Scottish Parliament, except that it publishes the information on a quarterly basis, which increases its currency.

(vi) Greater Emphasis on Integrity: Codes of Conduct

Several national parliaments around the world, including those of Canada, the United Kingdom, and the United States, and several regional assemblies, including Ontario and Alberta, have instituted formal codes of conduct for their legislators. The bodies or institutions used to investigate and sanction the lawmakers include independent commissioners, parliamentary committees, parliamentary commissioners, the Speaker and the courts.[90]

This emphasis on adopting formal codes of conduct for legislators is reflective of a more broad-ranging focus on developing a variety of mechanisms designed to promote integrity in government across the executive and legislative branches through transparency and accountability. These mechanisms include some of the measures earlier discussed, such as freedom of information legislation, whistleblower protection, greater professionalization,

---

[88] *Freedom of Information Act 2000*, c. 36, s. 19.

[89] United Kingdom, House of Commons Library, "Parliamentary Pay and Allowances, "(Research Paper 05/42), (June 9, 2005), online: UK Parliament - House of Commons <http://www.parliament.uk/commons/lib/research/rp2005/rp05-042.pdf>.

[90] Rick Stapenhurst and Riccardo Pelizzo, "Legislative Ethics and Codes of Conduct," (World Bank Institute - Series on Contemporary Issues in Parliamentary Development), (2004), online: The World Bank <http://siteresources.worldbank.org/EXTPARLIAMENTARIANS/Resources/Legislative_Ethics_and_Codes_of_Conduct.pdf>.

and automatic disclosure of certain types of information. In fact, some commentators, referring to the wide variety of recent initiatives being undertaken at the federal level in Canada, have argued that "Ottawa's many ethics initiatives now constitute an 'ethics program' … a collection of interrelated activities directed towards a common goal … a desire to improve the integrity of government and the most important political processes connected to it."[91]

(vii) Standing Advisory Committee on Ethics.

Legislative institutions in some countries have created standing advisory bodies to promote ongoing ethical behaviour. One such body is the Committee on Standards in Public Life in the United Kingdom. For this purpose, persons in public life encompass "ministers, civil servants and advisors; Members of Parliament and UK Members of the European Parliament; members and senior officers of [certain government service agencies]; non-ministerial office-holders; members and senior officers of other bodies discharging publicly-funded functions; elected members and senior officers of local authorities."[92] The Committee also deals with issues relating to political party funding. In many ways, it is like a standing commission of inquiry.

> This Committee is an independent advisory non-departmental public body (NDPB). It is a standing committee. This is important, because unlike committees created for a special purpose, such as those that examined electoral reform or the House of Lords, the Committee is able to review and justify its actions after it has reported. For example, when the Committee makes recommendations, its permanent character means that it can continue to press for their implementation. It can also answer and clarify queries and review and assess the progress of its own recommendations ... its permanence is one explanation of the notable success of the Committee on Standards in Public Life.[93]

This emphasis on use of a standing committee of the legislature to assume responsibility for standards of conduct can be viewed as a signal of an intent of the legislative branch to be proactive in a direct way in addressing integrity issues in public life.

---

[91] John Langford and Allan Tupper, "How Ottawa Does Business: Ethics as a Government Program," Bruce Doern ed, *How Ottawa Spends, 2006-2007/In From the Cold: The Tory Rise and the Liberal Demise* (Montreal & Kingston: McGill-Queen's University Press, 2006), at pp. 116-117.

[92] United Kingdom, Committee on Standards in Public Life, *First Report*, 1995 (Nolan Report).

[93] Justin Fisher, "Regulating Politics: The Committee on Standards in Public Life," in Justin Fisher, David Denver and John Benyon, eds., *Central Debates in British Politics* (Harlow, England: Pearson Longman, 2003), p. 391.

Innovation in Other Governance Institutions

It must be clear from the previous discussion relating to accountability that concern for making institutions and those who direct or have influence within them accountable for their stewardship, particularly in the financial sphere, is not limited to the areas of public administration. The corporate world, particularly in respect of publicly traded corporations, has for a long time operated within an elaborate scheme, through statute and developed case law, as well as through the role of securities regulators, designed to impose standards of governance on those in control of corporations to protect shareholders and others from financial mismanagement.

In the aftermath of recent corporate scandals such as those involving Enron and Worldcom, a much greater emphasis has been placed on ensuring that standards of corporate governance are effective in achieving their purpose. The wide-ranging regulatory reforms that were adopted by the Securities and Exchange Commission pursuant to the *Sarbanes-Oxley Act* in the United States demonstrate this increased concern. Similar reforms were adopted by the Ontario Securities Commission, the Toronto Stock Exchange and other securities regulators in Canada. These reforms deal with, among other matters, enhancing director independence and due diligence, developing improved standards of corporate behaviour through codes of ethics and other measures, and improving accountability of senior management for the effectiveness of their financial reporting systems. Things have changed in corporate governance as well.

While the ultimate landscape of corporate governance flowing from these developments may not yet be settled - and, indeed, there may be some retreat from current positions as a result of initial reactive overkill - there can be no doubt that the reforms of recent years have had, and will continue to have, a profound impact on notions of accountability in the corporate sector. Indeed, their influence can be seen extending into other areas, such as the not-for-profit sector, which has also seen calls for increased governance standards and adoption of clearer and more comprehensive ethical guidelines for board members.[94]

Any consideration of reform in the public sphere cannot ignore these developments in the corporate world. To the extent to which the approaches taken there are applicable to issues of governance in the public sector, they must be considered. As will be evident in the rest of this report, I have in fact borrowed ideas from corporate law and practice in certain areas and have adapted them to current purposes.

[94] See Donald J. Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 3rd edition (Toronto & Vancouver: Butterworths, 2002). See particularly Chapter 6.

The Smaller World of Institutional Reform: the House of Assembly

The world of the House of Assembly is a relatively small one. There are only 48 Members. The staff of the House numbers only about a hundred, but this includes the political staff serving the Members and the staff of the independent statutory officers of the House. The core administrative staff serving the legislature at the time of the appointment of this inquiry were the Clerk, the Clerk Assistant, the Chief Financial Officer,[95] and the executive officer of the Public Accounts Committee. The budget of the House is small by the standards of the executive government.

Yet though the House is a small world, it has given rise to large issues. They cannot be satisfactorily dealt with in isolation. That is why, in formulating recommendations for improvement in the legislative branch generally, and in attempting to rectify identified problems specifically, it is important to keep in mind the important values and principles identified in this chapter and, as well, to be aware of the trends in institutional reform that seem to be reflective of those values and principles.

As we now move to a discussion of the results of my inquiry's investigations and the articulation of what I believe are the deficiencies in the current financial and governance systems of the House, it will be useful, I believe, to ask at every point how the autonomy of the legislature can be preserved in a manner that its fundamental purposes will not be compromised. It is equally important to ask at the same time how we can ensure that transparency and accountability are promoted and that proper controls over the spending of public money are in place - all with a view to ensuring proper governance, so that public trust and confidence in the integrity of the system and in the persons, both elected and non-elected, who perform in it can be restored. In so doing, we must draw upon the experiences of others.

More specifically, as I have proceeded with my analysis of the issues presented, I have had constantly to ask myself - and I believe the reader should also be asking - such questions as:

- Is the principle of legislative independence inconsistent with principles of good financial management?

- Do the values of financial management need bolstering in the House?

- How can the principle of legislative independence be preserved while at the same time ensuring that accountability for the spending of public money within the legislative branch is achieved?

[95] The position of Chief Financial Officer was newly created shortly before the appointment of this commission of inquiry. The position chiefly responsible for financial matters in the House prior to the creation of the new CFO position was the Director of Financial Operations.

- How can sufficient levels of transparency be achieved within the House without affecting doctrines of parliamentary privilege and legislative autonomy?

- To what degree should the behaviour of Members of the House of Assembly be self-regulated or governed by enforceable rules?

- Is it desirable that standards of budgeting, consultation and financial controls operative within the executive branch of government be applicable within the legislative branch? If so, should they be imposed from without or adopted from within?

- What reforms or innovations can return citizens' trust in the legislature?

With these general contextual questions in mind, we will now turn to a description of events over the past eighteen years that, in my view, touch significantly on the issues of autonomy, legality, trust, accountability, transparency and control that I have discussed.