

**Federal Government Public Service Ethics:
Managing Public Expectations**

by

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B.A., Carleton University, 1990

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ABSTRACT

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The federal government ethics regime is built on the premise that public service values emerge spontaneously from reflection, and in particular that democratic and ethical values are among these a priori values. This thesis is an examination of this premise. It includes as part of this examination an analysis of the modern emergence of an identifiable and bureaucratized ethics practice in the Canadian federal government, starting with a privy-council led initiative in 1995. Three areas of tension engendered by this premise are also explored – empowerment, loyalty and transparency.

To further explore the claim about a priori public service values and the practical impact of the discourse on values, the RCMP Inquiry into events at the 1997 APEC meeting in Vancouver is also reviewed. The APEC meeting took place at a time when ethics was becoming central to public administration in Canada but before the formalized code and its supporting regime had been developed. Some issues explored by the inquiry into APEC will be reviewed as a window to how public service values are used in debate and to what extent democratic and ethical values, which are said to exist but had not yet been formally promulgated, were reflected in actions of public servants or drawn upon for guidance. The tensions evident in the ethics regime will be explored with respect to the APEC inquiry.

Biographical Note:

The author of this thesis was spokesperson for the federal government at the APEC hearings. Between 1998 and 2004, she also held positions in the federal departments of Fisheries and Oceans and Environment. Prior to 1998, she worked as exempt staff to ministers of Public Works, Health, Fisheries and Oceans, and Environment.

The author was not a part decision-making on legal strategy or other substantive matters related to the federal government's involvement in the APEC hearings, or in any of the organization and decision-making for the APEC meeting itself. Neither was she privy to any decision-making related to the federal government's ethics regime.

All material relied upon and referenced in this thesis is available publicly.

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Chapter I: Introduction

In 2003, the Government of Canada announced the completion of the *Values and Ethics Code for the Public Service of Canada* with a statement from the President of the Treasury Board, who said that, “In view of the critical role that the Public Service of Canada plays in serving Canadians and supporting democratic government, a Code of Values and Ethics is an essential foundation for public administration.”¹ The Code was announced in June 2003, with a coming-into-effect date of September 1 of the same year. Along with a new Guidance for Deputy Ministers and a Management Accountability Framework for senior public service managers, the Code was one of a triptych of measures to ensure accountability and transparency and was the culmination of several years of work within the public service. The *Code* is the central guiding document of the federal Treasury Board’s Office of Public Service Values and Ethics, which was established in 1999 as a “centre for expertise and leadership responsible for furthering values-based management within the Public Service.”²

The *Values and Ethics Code* is part of a federal government ethics regime – a regime described as “not a single initiative but rather a comprehensive series of initiatives, mutually supporting and complementing one another.”³ It is promoted through training and through the work of the Office of Public Service Values and Ethics, and is one element of an extensive education and training regime that the federal government employs to support its philosophy of continuous learning.

¹ http://www.tbs-sct.gc.ca/media/nr-cp/2003/0619_e.asp

² http://www.hrma-agrh.gc.ca/veo-bve/index_e.asp

³ http://www.hrma-agrh.gc.ca/veo-bve/ethique_e.asp

The work that preceded publication of the *Code*, as well as the manner in which the *Code* was and continues to be presented to both public servants and the public, could reasonably lead to a number of conclusions, including:

- That the federal government ethics regime is a comprehensive, professional code of conduct;⁴
- That the *Values and Ethics Code for the Public Service of Canada* applies to the federal public service broadly defined;⁵ and
- That the Code – and the ethics regime more broadly – provide tools and direction for public servants who are grappling with difficult decisions.⁶

However, these conclusions relate to a conceptual analysis or understanding of the Code. Analysis of how the Code is practically applied to the activities of public servants, and particularly its application to the management of complex issues where its public service values are tested, leads to a markedly different

⁴ Information from the website of the federal Office of Public Service Values and Ethics defines applied ethics as “an education practice ... a political practice ... [and] a philosophical practice” and concludes that “naturally this threefold perspective on applied ethics implies the introduction of a detailed program to promote values and ethics in the public service.” http://www.hrma-agrh.gc.ca/veo-bve/ethique_e.asp#2

⁵ *Values and Ethics Code for the Public Service*, Treasury Board of Canada Secretariat, 2003, p. 6. The *Code* states in its introduction (page 6) its objective to “set forth the values of public service to guide and support public servants in all their professional activities. It will serve to maintain and enhance public confidence in the Public Service. The *Code* will also serve to strengthen respect for, and appreciation of, the role played by the Public Service within Canadian democracy.” Nowhere does the Code make a distinction between public servants who are or are not governed by the code. Additionally, material on the website of the federal Office of Public Service Values and Ethics reinforces the importance of the Code as central to federal government ethics while acknowledging that “Since different organizations have different culture, Deputy Heads are free to create the structures they consider appropriate” to “ensure implementation of the Code.” http://www.hrma-agrh.gc.ca/veo-bve/who_e.asp

⁶ The website of the federal Office of Public Service Values and Ethics (OPSVE), in the context of a discussion about the meaning of values, ethics, and applied ethics, states: “In the end, it is the development of conscience, of course, but also the ability to judge that constitutes the primary task of the OPSVE. However, in considering this mission, we cannot assume that everyone, every public service employee, shares the same degree of understanding and ethical judgment. Thus our action must include a training component designed to strengthen public service employees’ capacity for ethical judgment.” http://www.hrma-agrh.gc.ca/veo-bve/ethique_e.asp#2

set of conclusions – that the Code is the foundation for a loose set of highly contextual and subjective guidelines, in many cases customized for particular arms or activities of government, and used more effectively as a mechanism for explaining or rationalizing outcomes than as a guide to decision-making. The recent history of the ethics regime in the Canadian federal government is explored below as an introduction to analysis of the APEC Leaders' meeting of 1997, which took place in Vancouver and was followed by a lengthy quasi-judicial review. The actions of federal government employees at the APEC leaders' meeting are highly suggestive of the possibility that public service values described by the literature of the ethics regime as being *a priori* are not manifest by, and therefore might not be instinctive to, public servants who are faced with real-time, crisis decision-making.

The lack of evidence that public service values and ethics are instinctive to public servants – that they are a manifestation of public service as a calling – does not suggest the futility of an ethics regime. On the contrary, this analysis leads to the further conclusion that the ethics regime provides tools for public servants to explain a broad spectrum of their behaviours and outcomes in a way that is consistent with values that have been endorsed internally and validated with the public. Whether explaining the intent or outcomes of programs and policies, responding to accusations of wrongdoing or mismanagement, or defending individual public servants, the invocation of a set of values that are ostensibly shared with or at least understood and accepted by the public has become an effective device to frame discussion of public service actions in terms of how they are advancing the public interest, protecting the common good, or preserving good government. Through the practice and language of ethics, the ability of government to advance the common good is increasingly related to a demonstration of transparency, accountability and openness rather than to substantive policy decisions.⁷

⁷ See, for example, "The notion of 'democratic values' and what it means in the daily life of public servants," from the website of the Office Public Service Values and Ethics, which states: "Changes in the

The usefulness and importance of these practices is most evident in the greyest areas of government accountability.

The first of these grey areas is the space between that which is strictly lawful and that which is lawful but may be perceived as wrong. This is a space identified by the ethics regime, in its admonition that public servants “loyally implement ministerial decisions, lawfully taken” and “work within the laws of Canada,” but also “act at all times in a manner that will bear the closest public scrutiny: an obligation that is not fully discharged by simply acting within the law.”⁸

The political advantage to be found in this space – for example, by those who can make the case that the government has broken a law or not fully complied with its spirit – has driven the need for increasingly sophisticated rhetorical tools to explain or rationalize behaviour. The normalizing terms of the ethics regime, and in particular the regime’s appropriation of the public interest and good government – help to address this need while also providing some limits to the definitions of these terms. However, the lack of clarity created by the potentially conflicting demands of legality and perception can strain public service values, for example the value of empowerment. This tension is explored in detailed below.

Another grey area is the question of who is governed by the ethics regime. Ministers and Members of Parliament are not, although they have a separate code and some may recognize the distinction between the legislative and the executive branches of government. While the core values identified in the Values and Ethics Code are meant to apply broadly, many arms of government have supplemental or entirely different codes of behaviour. The prescribed ethical

public service thus tend toward the accountability of public service employees and the transparency of the decision-making process, and all of this for the common good.” http://www.hrma-agrh.gc.ca/veo-bve/val_e.asp

⁸ *Values and Ethics Code for the Public Service*, Treasury Board of Canada Secretariat, 2003, pp 7, 8 and 9.

obligations of the political staff of ministers, also known as exempt staff, are minimal – they are required to make confidential financial disclosures and are limited by post-employment restrictions. However, they can exercise considerable power while their real accountability is marginal. And while their relative accountability to the public service is nil, the impact of their decisions can have disproportionate consequences. The uncertainty about the relative accountability of different categories of public servants – and whether they are properly called public servants – contributes to strain on public service values, including loyalty and transparency. This tension is also explored further below.

A third grey area is conflict of interest. The most concrete and tested tools of the federal ethics regime are designed to assist public servants in avoiding real or perceived conflicts of interest. However, allegations of conflict of interest have become widespread, and difficult and expensive to disprove. While, like other ethical questions, the federal ethics regime provides tools to characterize actions as consistent with one or another public service values, conflict of interest remains one of the more challenging ethical issues for government to manage. This difficulty is also explored below through analysis of the 1997 APEC Leaders' Meeting in Vancouver and the RCMP Public Complaints Inquiry review that followed it.

This case study is relevant in the context of the evolving federal government ethics regime because it highlights the confusion created by these grey areas of accountability in government, areas that are either not addressed or further complicated by the ethics regime. The ethics regime has been developed or at least promoted on the basis that there are *a priori* public service values. One way to test this claim is to analyze whether, in moments that demand instantaneous decision-making, these values are evident. Analysis of the APEC events suggests that tools for ethical decision-making are not so ubiquitous as is suggested by government literature, and further suggests that problems of accountability – the grey areas – that have at least in part driven the need for an

ethics regime remain unaddressed. This analysis is based on a review of key areas of tension generated by differences between what the code or regime describes itself to be and how it must practically be applied.

The broad shift in government away from substantive policy activities and toward process questions, and the tendency to divorce substance from process and define the common good in terms of the extent to which process or public service values have been adhered to, is parallel to a broader political and sociological change in concepts of how government can advance the common good.

The federal government suggests in its literature that the ethics regime is a mechanism for improving the behaviour of public servants and therefore achieving the common good. The Office of Public Service Values and Ethics (OPSVE) states on its website that:

“... honest dialogue is the basis of the democratization of structures and the ethical management of public funds. Basically, it is a matter of “encountering the good” by deploying a democratic conscience shared through dialogue.”⁹

While the OPSVE is clear in its understanding that “no rule alone can encourage citizens or public service employees to develop the conciliatory spirit that will enable them to act responsibly, honestly and fairly,”¹⁰ there is an unavoidable sense that the regime provides a path that leads to good or better decisions in achieving this common good. Does it?

To answer this question, the analysis below looks at whether there is evidence of instinctive – or a priori – public service values in the actions of public servants. The recent history and socio-political context of the federal ethics regime is reviewed, and a series of public service values are identified that, while being

⁹ http://www.hrma-agrh.gc.ca/veo-bve/ethique_e.asp

¹⁰ http://www.hrma-agrh.gc.ca/veo-bve/ethique_e.asp

conceptually rational, are subject to tension in their practical application. To more closely analyze real-time public service decision-making, the APEC leaders meeting of 1997 and the subsequent quasi-judicial review are looked at in detail, both as a test of the presence of public service values in the actions of public servants and, finding little evidence of this, as a further review of what, then, is the utility of an ethics regime.

Chapter II: Context

“Ethics” and “values” are increasingly popular concepts in government. There are varied theories about the reasons for their ascendancy in public administration. One argument is that certain values are organic and “come naturally to mind as one thinks about public service.”¹¹ Another argument is that these concepts have been developed as a response to growing uncertainty about the constitutional convention of “responsible government,” an uncertainty that has resulted at least in part from the failure of this convention to ensure or reassure that “elected or appointed officials [are] being held responsible and accountable.”¹² This uncertainty has spread beyond elected officials to include public servants, who are both subjects of and suffering from the problem, and has driven scrutiny of government. It can in turn be argued that “ethics” and “values” are concepts that have become increasingly important to public administration because of their centrality to government’s public relations and their utility in allowing the government to measure and explain itself in terms that are general, positive and reassuring while effectively limiting substantive public policy debate.

¹¹ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p.53.

¹² Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform*. Canada School of Public Service, 2005, p. 9.

Government has come under increasing scrutiny for a multitude of reasons – perhaps because the numbers of news outlets and competition for audience have increased or because government is making more mistakes and generating more controversy. Whatever the cause, one result has been that politicians are frequently in the news, providing material for opposition critics to pursue in question period and in turn fuelling another day's media stories. In western parliamentary practice, cabinet ministers have traditionally been considered to be accountable for the decisions and actions of government, while public servants have been afforded relative anonymity to implement the agenda of the government and can generally expect to continue in their positions when the government changes. While it has probably never been well understood, the notion of an anonymous public service has been devolving in recent decades and scrutiny has spread to public servants. This shift has in part been driven by elected officials who are uncomfortable answering for the mistakes or bad judgment of public servants,¹³ and has helped expand the definition of accountability through a more formal inclusion of "answerability" in cabinet's responsibilities.¹⁴ This has had important effects on the public service – including new questions about the relationship between elected officials and the public service. Although this shift in accountability has evolved over several decades, observers generally point to the 1991 case of Mohammed al-Mashat as a watershed moment in ministerial accountability and bureaucratic anonymity.¹⁵

¹³ Savoie, Donald J.: *Breaking the Bargain: Public Servants, Ministers, and Parliament*. University of Toronto Press, 2003.

¹⁴ Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform*. Canada School of Public Service, 2005, p. 10. The authors write: "When a minister refuses to accept personal responsibility and accountability, in the sense of culpability, for something that has gone wrong in her or his department because of what her or his officials may have done without her or his instructions or knowledge, the minister is still required to "answer" questions ... However, once the minister knows or should know of the issues in question, the minister becomes accountable for what corrective action, if any, is needed, because he or she has the authority and responsibility to do so."

¹⁵ The 1991 case of then-Secretary of State for External Affairs Joe Clark refusing to take responsibility for entry of Mohammed al-Mashat, Iraq's Ambassador to the United States, into Canada. See, for example: Sutherland, S.L., "The al-Mashat Affair: administrative accountability in parliamentary institutions." *Canadian Public Administration*, Vol. 34(4) (winter 1991), pp. 573 – 603.

Tightly bound to the increasing calls for improved accountability in government has been the evolving federal government ethics code, both of which have moved at varying speeds depending on the political context. Accountability is central to representative democracy as the means by which politicians remain subordinate to the electorate,¹⁶ and it is the mechanism for holding both elected and unelected representatives responsible for their actions. Public service values and ethics are formulated to influence and moderate those actions. Answering the call for improved accountability means providing a clear answer about who reports to whom for what¹⁷ and requires transparency for the electorate:

The conditions under which democratic institutions generate incentives for government to be accountable are quite stringent: they are not met by all institutional frameworks. Governments are accountable only when voters can clearly assign the responsibility for performance to competing terms of politicians, when the incumbents can be effectively punished for inadequate performance in office, and when voters are sufficiently well informed to accurately assess this performance.¹⁸

The relationship between accountability and values/ethics derives from demands for increased transparency in government. As Przeworski suggests above, assessment of performance is central to accountability. Performance therefore requires measurable parameters that are relevant to and resonate with the electorate. The formalized and evolving government ethics code is one means by which the federal government in Canada has endeavoured to provide parameters to and controls over the behaviour of individual public servants. Its evolution in the Canadian federal system has been entwined with successive new government initiatives including, for example, modern comptrollership, whose purpose is in part to provide the basis for measuring performance and whose

¹⁶ See, for example: Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform*. Canada School of Public Service, 2005, p. 13.

¹⁷ Axworthy, Thomas S., "Addressing the Accountability Deficit: Why Paul Martin's Minority Government Must Pay More Attention to the Three A's." *Institute for Research on Public Policy Working Paper Series no. 2004-11*, p. 1.

¹⁸ Przeworski, Adam, *Sustainable Democracy*. Cambridge University Press, 1995, p. 108.

effectiveness relies upon shared understandings or, at a minimum, awareness of public service values within the public service.

The evolution of the ethics regime over the past decade is fundamental to the centrality of ethics and accountability to the current government. In other words, the ethics regime itself has become self-perpetuating and the importance placed on it as a contained discipline and pursuit within the public services has ensured its continuing centrality. Many would also argue, however, that the current importance of ethics in government derives more directly from successive, high-profile controversies, the most recent (and highest profile) of which was the allegation of corruption concerning the government's sponsorship of cultural and sporting events and its advertising activities.

The November 2003 *Report of the Auditor General of Canada* included a "Government-Wide Audit of Sponsorship, Advertising, and Public Opinion Research" with the following findings:

- "... that the federal government ran the Sponsorship Program in a way that showed little regard for Parliament, the *Financial Administration Act*, contracting rules and regulations, transparency, and value for money."
- "... widespread non-compliance with contracting rules in the management of the federal government's Sponsorship Program, at every stage of the process."¹⁹

In succeeding Jean Chrétien as Prime Minister, Paul Martin chose to deal with the ongoing controversy generated by this report by striking a Commission of Inquiry, led by retired Justice John Gomery and charged with the double mandate of, first, investigating and reporting on questions raised by the November 2003 report of the Auditor General and, second, making

¹⁹ Office of the Auditor General of Canada, "Government-Wide Audit of Sponsorship, Advertising and Public Opinion Research." November, 2003, p. 1.

recommendations to the Government in order to prevent such mismanagement in the future.²⁰

Justice Gomery issued two final reports – one detailing “who is responsible” and the second with recommendations for “restoring accountability.” The first was released while Prime Minister Martin still led a minority parliament. Its findings laid the basis for some of the key themes of debate in the federal election that followed in January 2006. During that election, the Conservative Party of Canada (CPC) took the position that the Liberal government had demonstrated a lack of ethics and accountability, and identified government accountability as the first of its five priorities for government. *Stand Up for Canada*, the CPC’s 2006 election platform, states:

People who work hard, pay their taxes, and play by the rules want accountability from their political leaders. We don’t expect politicians to be perfect. But we do want to know that our tax dollars – money we’ve worked for – are being spent properly and wisely. Above all, we want and expect our dollars to be spent legally.²¹

As government, the Conservative Party followed through on this commitment and recently passed the *Federal Accountability Act*, legislation that potentially moves the ethics regime further towards a legislative and further away from a philosophical framework. The act makes substantive changes to 45 statutes and amends over 100 others, including:

- Reform to the financing of federal political parties;
- A ban on secret donations to political candidates;
- Stronger role for the ethics commissioner (including a new *Conflict of Interest Act*, a new Conflict of Interest and Ethics Commissioner with judicial or quasi-judicial background and powers to fine violators and consider public complaints);

²⁰ <http://www.gomery.ca/en/index.asp>

²¹ *Stand Up for Canada: Conservative Party of Canada Federal Election Platform, 2006.*
<http://www.conservative.ca/media/20060113-Platform.pdf>, p. 7.

- Tougher *Lobbyist Registration Act*;
- Improved procurement of government contracts;
- Real protection for whistleblowers;
- Improved access to information legislation; and a
- Stronger role for the Auditor General.²²

High-profile government “scandals” have resulted in increased calls for ever-improved ethical conduct by public office holders. The Gomery commission was notable, among other reasons, for its very detailed findings and recommendations, and its possible effects on the government’s ethics regime. Although the inquiry report was careful to put wrongdoing in context,²³ it nevertheless contributed to the perception of an increase in wrong-doing by and in government over the past two decades, despite the ongoing attention paid during the same period to the development of an ethics regime. And it has not set a new precedent for disclosure by government, for the government’s practice continues to be to respond to media and public questions about alleged wrongdoing by affirming the centrality of accountability to government activities and the importance of ethical behaviour by public servants²⁴ rather than, for

²² http://www.tbs-sct.gc.ca/media/nr-cp/2006/1212_e.asp

²³ Commissioner Gomery writes, in the preface to “Who is Responsible: A Fact Finding Report”: “Because of the sensational nature of some of the evidence presented at the Commission’s hearings, the publicity given to it, and the political context in which the Inquiry took place, the impression may have been created that in Canada the administration of public affairs by the federal government is generally careless, incompetent, and motivated by improper considerations. People may also be persuaded that the persons involved in Canadian political life are inspired by improper motives, and unscrupulous. Let me suggest that the Inquiry proves the contrary. Without diminishing the importance of the findings of impropriety and wrongdoing in the Report, the evidence presented reveals that, in general, the administration of government programs by the federal bureaucracy is competent and praiseworthy, a conclusion that has been emphasized by the Auditor General herself.” http://www.gomery.ca/en/phase1report/ffr/FF_Eng_preface.pdf

²⁴ One example of this approach is in the government response to the November 2003 *Report of the Auditor General*, which includes the following: “The government has taken action on most of the issues and will take action on any new issues raised ... The government is committed to excellence in management, and it continues to make significant progress in modernizing and strengthening its management practices ... it has implemented a broad-based government-wide agenda to strengthen and modernize management, including a new Management Accountability Framework for the public service, Guidance for Deputy Ministers, and a new Values and Ethics Code for the Public Service ... the government looked to the future by implementing a completely new management and accountability regime ... a comprehensive action plan was also put in place with respect to advertising management practices guided by the objectives of transparency, accountability, value for money and increased competition.” From: Office of the Auditor General of Canada, “Government-Wide Audit of Sponsorship, Advertising and Public Opinion Research.” November, 2003, p. 3 – 4.

example, explaining circumstances and taking specific responsibility for mistakes. This practice has contributed to and reinforced the need for a definable ethics practice – for, if one is to refer to practices and actions as having been ethical, one must also be prepared eventually to define “ethical” and demonstrate how ethics are maintained. This separate-ness is now reflected in their bureaucratic ordering, with an ethics regime being run out of the Treasury Board Secretariat as a distinct operation of government.

There are two more or less distinct streams of activity within a broadly defined ethics regime in government – one applying to elected office holders and one applying to public servants. The distinction between the two and their intended application is not always clear. The ethics regime in government, while relying in part on existing legislation, has until recently taken a quasi-judicial and even philosophical approach. (However, it is difficult to draw conclusions at this point as to the practical impacts of the *Federal Accountability Act* on the ethics regime, particularly in the public service, and to what extent the *Act* might move the practice of ethics along the legalistic end of the continuum.)

At present, the public service ethics discourse is labelled “Serving Canada with Honour, Excellence and Integrity” and is described as follows:

Honour stands for the important and special role that the public service plays within Canadian democracy and in service to Canadians. Excellence is our service standard and drives us to continually improve and innovate. Integrity represents the way in which we do the work we do: keeping our commitment to serve honestly, fairly and with respect for the democratic, professional, ethical and people values of the public service that we have a duty to uphold.²⁵

The development of the federal government ethics code was designed to “maintain and enhance public confidence in the integrity of the Public Service” and to “strengthen respect for, and appreciation of, the role played by the Public

²⁵ Office of Public Service Values and Ethics, http://www.hrma-agrh.gc.ca/veo-bve/w-f/v1/n1/page02_e.asp

Service with Canadian democracy.”²⁶ The first of these goals is meant to “guide and support public servants in all their professional activities”²⁷ and supports the laboured enterprise of measuring performance in government. The second of the two goals reflects a second ongoing agony of the public service – how to improve the public’s perception of the bureaucracy and help the Canadian public better appreciate their government. The ethics regime is intended as a support to both of these related endeavours. First, it supports successive new government approaches, including for example modern comptrollership, by providing a framework for acceptable behaviour in areas that tend to elude quantitative assessment. Second, it supports the public relations function of government by providing depth and definition to self-affirmations of the government’s probity.

The language of the ethics regime constitutes a protective membrane that allows practitioners to construct a difference between wrong and right, good and bad. Against these definitions, it is possible to contend that someone or something is opposed to ethics and accountability and therefore to suggest that they are *for* something lesser – one can be portrayed as being opposed to the effective use of taxpayers’ dollars, for example. This practice of ethics allows for considerable innovation in language; for example, the current practice of transparency or “full disclosure” is a recent refinement²⁸ that is meant to reinforce the notion that government acts in the best interests of its citizens by providing all available or relevant information on an issue, with the intent of being fully transparent. Full disclosure can be at odds with the necessity of secrecy – often mandated by, among other things, the federal *Access to Information and Privacy Act* and conventions on cabinet secrecy. Yet the federal government can say it is transparent and has practiced “full disclosure” when describing relevant actions by having imbued the terms with a certain contextual meaning.

²⁶ *Values and Ethics Code for the Public Service*, Communication Canada, 2003, p 6.

²⁷ *ibid*, p 6.

²⁸ Edelman, Murray: *The Symbolic Uses of Politics*. University of Illinois Press, 1964, pp 117 – 118.

The calculus for analyzing policy and political positions and decisions has changed in the context of growing awareness of and demand for the high ethical standards that government ethics codes are meant to support. Positions that were once based on, or at least described in terms of, their impact and cost now seem more frequently taken, or at least assessed and defended, based on a rationale of their inherent right or wrong and of the character of those promoting them. Some have described this as the result of a growing hegemony of intuitions²⁹ that engenders black-and-white/right-and-wrong assessments of policies and politicians. One effect has been a narrowing of substantive policy options, which in turn results in unavoidable and sometimes violent policy agreement among political parties who must therefore find other ways to differentiate themselves.

On the current question of Canadians in Afghanistan, for example, the main political parties can support the effort but must differentiate themselves on the question of why the effort is being undertaken. A similar discourse can be found in the United States regarding its war in Iraq, as Francis Fukuyama writes: "By invading Iraq, the Bush administration saw itself not as acting out of narrow self-interest but as providing a global public good."³⁰ In other words, others may support an invasion of Iraq but only out of narrow self-interest. Constructing a relationship between an action and an acceptable value helps create the rhetorical tools required to dismiss those who do not share one's opinion on the basis that they are unprincipled or unethical. This can be seen in the (new) public

²⁹ Baron, Jonathan, *Judgment Misguided: Intuition and Error in Public Decision Making*. Oxford University Press, 1998. Baron discusses intuitive beliefs and their potential danger, particularly in the political sphere. For example, he writes on page 4: "Elected officials in modern democracies are, in general, highly sensitive to public opinion. ... expressions of political opinions and moral views ... are part of the total body of opinion that guides the behaviour of nations and other institutions ... we cannot ignore the potential consequences of our political action so long as we care about our effects on others. Yet the ... view, that our voice has little effect, often encourages us to express our intuitions without even thinking about the consequences."

³⁰ Fukuyama, Francis, *America at the Crossroads: Democracy, Power, and the Neoconservative Legacy*. Yale University Press, 2006, p. 95.

service value of “never cut and run.” Rather than allowing for the exploration of policy options of, for example, intervention in Afghanistan or Iraq, those who do not support the intervention can be portrayed as lacking the moral character required to make and stand by tough decisions.

One may intuitively think of an ethics code as a roadmap to the right thing to do. But the tendency for discussions about ethics and morality to engender absolutes and the growing pre-eminence of absolutes in adversarial public debate is shifting focus away from the more substantive discussion about public policy and accountability that can help identify a right or good course of action.

The absolutist approach to debate has had the related effect of constraining the ability of decision-makers to change their mind when it might otherwise be prudent to do so. It also makes compromise more difficult, even if compromising would be a good thing to do.³¹ The practice of appealing to apparent *a priori* principles – which the ethics regime posits are found in the public service values therein identified – as foundational to an argument or position can mean that changing one’s position suggests or would require a change to these same *a priori* principles – therefore robbing them of their *a priori* status and exposing one to criticism (of, for example, doing a flip-flop). An additional stifling impact of this practice of debate is the tendency to focus on personal character rather than policy substance, an almost unavoidable outcome owing to the personalization of values.³²

³¹ Baron, Jonathan, *Judgment Misguided: Intuition and Error in Public Decision Making*. Oxford University Press, 1998, pp 8 – 10. Baron discusses four commonly-held intuitions: “do not harm,” “the status-quo effect,” “nature knows best,” and “autonomy and individual rights.” He says, “Instead of thinking of these principles as rules of thumb, we elevate them to the level of absolute constraints on action. The do-no-harm principle, for example, becomes an absolute prohibition against hurting some people in order to help others, even when the help is great and the hurt is small ... When absolutes conflict, compromise becomes more difficult.”

³² *A Strong Foundation*, which will be explored in detail below, discusses values and ethics as follows: “For us, values are enduring beliefs that influence attitudes, actions, and the choices we make. In this report, public service ethics are discussed as a sub-set of public service values: they are enduring **beliefs** that influence out **attitudes** and **actions** as to what is right and wrong.” (p. 4) (emphasis added)

Constrained public debate can have the effect of eliminating the need or desire for possibly more risky policy options to be developed, explored or implemented. Such policy options can expose public servants to criticism if they are politically questionable or if they fail, and there is often little appetite even for the debate that such options can encourage. This is exacerbated by the constraints placed on public servants by “democratic values,”³³ including the requirements of loyalty to the institution that, on the one hand, compel public servants to support ministers in decisions legally taken and, on the other hand, offer no practical advice about how to behave when being ethical requires more than simply acting within the law.³⁴ History provides many examples of politically palatable (and legal) public policy developed out of a fear of (political or career) consequences and resulting in harmful and sometimes irreversible effects.³⁵

Donald Savoie writes, that “all prime ministers since Trudeau [have] chosen to pursue only a handful of key objectives, managing the rest by bolts of electricity, and essentially [giving] up on producing a comprehensive policy agenda.”³⁶ While this may be a deliberate decision of political leadership, it may also be an unavoidable outcome of an increasingly constrained policy arena, resulting at least in part from the dominance of the ethics regime. As a central expression of government, “ethics” can blur the distinctions between policy choices (actual

³³ As described in *Values and Ethics Code for the Public Service*. Treasury Board of Canada, 2003, p. 7.

³⁴ *Values and Ethics Code for the Public Service*. Treasury Board of Canada, 2003, pp. 7 – 10. Page seven includes the requirement to “loyally implement ministerial decisions, lawfully taken.” Page 10 says that “public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.” The government’s website material on the duty of loyalty highlights that public criticism is warranted only in cases of illegality or in the event of threats to life, health or safety.

³⁵ Baron, Jonathan, *Judgment Misguided: Intuition and Error in Public Decision Making*. Oxford University Press, 1998, pp 19, 21 – 35. Baron discusses the case of overfishing on the east coast of Canada and the United States, the opposition of fishermen to regulations that would limit their catch, and the frequent capitulation of governments to this opposition. Baron concludes in part that, “... we should base decisions that affect the common good on our understanding of consequences, results, effects.”

³⁶ Savoie, Donald, *Governing from the Centre: The Concentration of Power in Canadian Politics*, University of Toronto Press, 1999, p. 339.

decision points) and the activities of government, or implementation of the decisions. This is because the predominant public relations expression of government has increasingly been a general statement about ethics – that high moral standards have been or are being maintained – and the differences between the various activities of government are subsumed through this language. Expenditures are cost-effective. Programs are efficient. Performance is measured, delivered by a public service that is built on merit and is operating at the highest ethical standards. Government is transparent. Because disclosure by government may or may not be connected to actual events or issues, results – while tracked and measured more meticulously than ever – become irrelevant. Forming distinguishable initiatives from within this homogeneity is a challenge not only because it requires overcoming inertia, but also because of the destabilizing precedent set by highlighting identifiable details of government.

Stay out of trouble³⁷ – that is the key expectation of the prime minister for his ministers, and in turn the key expectation of ministers for their deputies and departments. The ability to reduce public policy debate to non-controversial elements, neutral language and easily understood concepts is critically important to succeeding in staying out of trouble. This can eliminate alternate points of view when such viewpoints can not be easily communicated as being consistent with acceptable principles.

The ethics regime establishes these acceptable principles and provides them in a language that helps to bridge the gap between the public service and its external world. The regime has become a significant enterprise in government, and its importance as a communications tool grows whenever government malfeasance is revealed. Recent commissions of inquiry – for example, the sponsorship inquiry discussed briefly above and more recently the inquiry into the treatment of Maher Ahar – have revealed questionable or even illegal government practices

³⁷ Savoie, Donald, *Governing from the Centre: The Concentration of Power in Canadian Politics*. University of Toronto Press, 1999, p. 344, where he writes: “About the only common understanding found in the Cabinet room will be the need to govern without getting into political trouble.”

and provided lengthy lists of recommendations for how to make government better and improve the ethical performance of public servants. Government responses to these allegations, revelations and recommendations are provided in the context and language of the values and ethics code. This language facilitates difficult debate by helping to shift it to more manageable terrain and providing language that serves as a legitimizing tool by describing issues in ways that correspond to established values and ethics. For example, if there is criticism of a particular public service action or policy, the defence can be based entirely on a summation of the efforts-to-date to instil public service ethics and improve performance and not at all about the specifics of the incident.

The growing hegemony of public relations within government is supported by the ethics discourse, driven as it is by one of the key goals of that discourse – to improve the public's perception of government.

Almost as agonizing to the public service as the public's opinion of it is the ongoing enterprise of measuring public service performance. Is "client satisfaction" meant to be the measure of public service performance? The ability to make a majority of voters happy is not necessarily related to the goals or results of a program and may not correlate to "good" consequences. And yet a lack of client satisfaction is generally thought of as an indication of failure, can be proof of government's lack of accountability, and is a key irritant between elected officials and public servants.

The management framework of the federal government is based on the admission that accountability in the public service can be murky at best. *Management in the Government of Canada* states unequivocally: "Deputy Ministers are not accountable to Parliament, as this would undermine the political accountabilities of ministers and would undermine the non partisan nature of the

Public Service.”³⁸ This is reinforced by Savoie, who points out the federal bureaucracy seems designed to avert accountability. In his discussion on the role of deputy ministers, Savoie comments that Deputies straddle the worlds of politics and administration ³⁹ and further writes:

... to whom is a deputy minister accountable, and how does one measure his or her performance? We know that in theory at least deputy ministers are not accountable to the public. The doctrine of ministerial responsibility makes the minister responsible for everything done in the department and means that career officials have no constitutional responsibility or responsibility distinct from the government of the day. The doctrine also suggests that deputy ministers are not legally accountable to Parliament
⁴⁰
 ...

Although, as Savoie writes, government managers “do not enjoy the same kind of private space as their private-sector counterparts,”⁴¹ the difficulty in assigning accountability at the DM level is only compounded as one ascends into the bureaucracy, for anonymity generally grows layer by layer. It is increasingly rare for a Minister to take accountability for an action or decision by his department (and perhaps that is appropriate as government grows in size and complexity), rarer still for a Deputy Minister to do so – although answerability appears to be on the rise for both. When a problem develops, the public relations response typically is to point to the general collective (“*the department* chose to sole-source the contract,” for example). It can therefore appear from the outside of government that no specific individual is accountable for a decision. The ethics regime helps to bridge the gap between individual and collective accountability through its appearance of being applicable to individual public servants, and

³⁸ *Management in the Government of Canada: A Commitment to Continuous Improvement*. President of the Treasury Board of Canada, October 2005, p 5.

³⁹ Savoie, Donald J.: *Breaking the Bargain: Public Servants, Ministers, and Parliament*. University of Toronto Press, 2003, p. 137.

⁴⁰ *ibid*, p. 161.

⁴¹ Savoie, Donald J.: *Breaking the Bargain: Public Servants, Ministers, and Parliament*. University of Toronto Press, 2003, p. 147.

through the perception that, as a professional code, its application is rigorously maintained.

Savoie and many others have written at length about the difficulties inherent in measuring public sector performance. Savoie writes:

How do you measure the value of a defence program or a diplomatic initiative, let alone the role of the deputy minister in charge? ... Program evaluation and performance reviews have been, at best, problematic since their introduction to Ottawa in the 1970s. The record of program evaluation has been dismal. In 1992-93 Ottawa spent \$28.5 million on 168 internal and external program evaluations. Only 1 per cent resulted in program termination, 9 per cent in reform, and 20 per cent in modification.⁴²

Aside from financial analyses – for example, whether a program was delivered on time/on budget or whether savings were accrued – there are only a limited number of mechanisms available to measure performance in the federal civil service in anything but an ephemeral manner. The ethics code, through its presentation of right and wrong, increases the relevancy of the federal government and helps to demonstrate that it has performed well by demonstrating that there are active measures to ensure public servants are behaving correctly. The *Values and Ethics Code for the Public Service* is meant to be read in the context of *A Guide for Ministers and Secretaries of State*, which provides more definitive standards of conduct.

Murray Edelman has referred to the power of language, writing that, “through language, a group can not only achieve an immediate result but also win the

⁴² *ibid.*, p. 161; see also Weiss, Carol: *Evaluation Research: Methods for Assessment Program Effectiveness*. Prentice-Hall, 1972; Wildavsky, Aaron: “The Self-Evaluating Organization.” *Public Administration Review* 32, no. 5 (Sept./Oct. 1972), 509-20.

acquiescence of those whose lasting support is needed.”⁴³ The relationship of ethics to performance measurement is a method of employing “language to sanctify action” and thereby winning acquiescence [of the electorate, Parliament].

A key to the success of an ethics regime is to ensure consistent use of language amongst those governed by the regime, a requirement which may or may not result in consistent behaviour. It was argued above that there are fewer and fewer policy options being developed and presented as a result of the tendency to absolutes in public debate. The discourse of ethics contributes to this constriction because of the difficulty in presenting policy options that may seem to be inconsistent with the values and ethics code (although not necessarily immoral or unethical), and also because of the tension created by the differences between how the regime is presented and its expectations on those it governs. For example, new approaches to public service management place value on practices that are seen to be more businesslike and entrepreneurial. In practice, it is likely that public servants will find numerous constraints should they endeavour to demonstrate these qualities, including concern about competition with the private sector. The notion of empowerment is central to the ethics regime and championed by new approaches to public service management, but at odds with the controls required in a vast bureaucracy.⁴⁴

The values of private citizens, the private sector, and/or the media may not always be relevant to a public service that serves the public well. But an inability of the public service to in some way relate to these external values and

⁴³ Edelman, Murray, *The Symbolic Uses of Politics*. University of Illinois Press, 1964, p. 114.

⁴⁴ Savoie, Donald, *Governing from the Centre: The Concentration of Power in Canadian Politics*. University of Toronto Press, 1999, p. 332, 333. Here, Savoie discusses the case of the Canada Communications Group, a Special Operating Agency set up post-Program Review whose mandate was quickly curtailed after complaints from the Parliament and the private sector. Savoie also writes that, “Any decision a government manager makes can become the subject of a public debate, a question in Parliament, or give rise to a ten-second clip on the nightly news ... Empowerment in government has important limits, not so much because the centre of government opposes the concept, but because a code of behaviour is expected of government managers that is not expected anywhere else.”

expectations can result in exposure to criticism, scorn, and even scandal (which is not to say that scandal cannot exist outright or that criticism is never warranted). And because of what can often be the complexity of government work, developing mechanisms that assist in explaining government in general and soothing terms is easier and less time-consuming than attempting to explain the details of why or how a decision has been made. It is also safer.

Existence and endurance of the government's ethics regime is in some respects evidence of the failure of horizontal management. Savoie has written extensively of the warring cultures within government:

“Indeed, they are such that we now have several cultures warring in the bosom of the federal government's political and public service institutions. The differences are sharp, and they even exist within the centre of government itself. In brief, organizational culture within the federal government itself is plural, not singular. Expressed in its most basic form, culture consists of shared meanings and common understandings, which provide the basis for concerted action.”⁴⁵

In the absence of what Savoie and others have suggested could be effective mechanisms for horizontal management, the importance of an effective ethics regime grows because of the ability to use it as a tool to promote shared meanings and common understandings (referred to by Savoie). It may be one of only a few available mechanisms of control – of keeping the lid on – at the centre of the public service.⁴⁶

But perhaps ethical conduct by public servants cannot or should not always correspond to the “lid being kept on.” Perhaps the media or the general public

⁴⁵ Savoie, Donald, *Governing from the Centre: The Concentration of Power in Canadian Politics*. University of Toronto Press, 1999, p. 337.

⁴⁶ *ibid*, p. 336, where Savoie discusses the role of central agencies of government and the extent to which they have become politicized. He writes: “... for the centre of government, coordination now means operating an early warning system for the prime minister, anticipating and managing political crises, and pursuing prime ministerial priorities. The emphasis is less on policy coherence and more on keeping the lid on, so that the prime minister and the centre can get things done in areas that matter a great deal to the prime minister.”

would be (or are) scandalized by public service decisions or actions that are “good” (by some definition) but at odds with public expectations, powerful interest groups, or conventional wisdom. If there is little appetite for defending good but controversial actions, the ethics regime assists in curbing public service actions that might be considered controversial and therefore helps ensure that ministers are not exposed to criticism. It has not been designed (only) as a tool to support the public service, but rather as a mechanism to shield the government from criticism and, when it is nevertheless exposed to criticism, to limit the damage.

With the ethics regime, perhaps language has become “a sequence of Pavlovian cues rather than an instrument for reasoning and analysis if situation and appropriate cue occur together.”⁴⁷ Perhaps, too, “the most commonly used and most abstract terms are ... those that reassure the anxious that the “public interest” or the “national security” or the “national health and safety” are being protected.”⁴⁸ Presented in the abstract, these soothing principles are central to the ethics regime.

The modern emergence of an identifiable and bureaucratized ethics practice in the Canadian federal government, starting with a privy-council led initiative in 1995, will be analyzed below. Both the formalized practice of ethics and the evolution of government practices that pre-date and informed it will be reviewed. In examining the legitimacy of the claim that some public service values emerge spontaneously, and in particular that democratic and ethical values are among these spontaneous and a priori values, three areas of tension within the regime will be explored – empowerment, loyalty and transparency.

To further explore the claim about a priori public service values and the practical impact of the discourse on values, the RCMP Inquiry into events at the 1997 APEC meeting in Vancouver will be explored. The APEC meeting took place at a

⁴⁷ Edelman, Murray: *The Symbolic uses of Politics*, University of Illinois Press, 1964. p. 116.

⁴⁸ *ibid*, p. 116.

time when ethics was becoming central to public administration in Canada but before the formalized code and its supporting regime had been developed. Some issues explored by the inquiry into APEC will be reviewed as a window to how public service values are used in debate and to what extent democratic and ethical values, which are said to exist but had not yet been formally promulgated, were reflected in actions of public servants or drawn upon for guidance. The tensions evident in the ethics regime will be explored with respect to the APEC inquiry.

This exploration is not undertaken as a criticism of the federal government's values and ethics code, nor as a quantitative assessment of whether the codification of ethics has or can result in an improvement in public conduct (perhaps it can, or has). It is, rather, an exploration of how ethics can be practiced in the rationalization and explanation of government decisions, irrespective of the origins, conditions or outcomes of such decisions, and in the creation of winning conditions for public debate and media scrutiny. It is a look at the diminishing space for acceptable public debate and the means by which the federal public service navigates this space through use of a language that gives "private definition" and allows "[the] hearer to think [the meaning is] something quite different."⁴⁹

CHAPTER III

Development of the Modern Ethics Regime of the Federal Government

The interest in and priority assigned to government ethics in Canada appears to ebb and flow with the electoral calendar, typically as a high-profile priority at the beginning of a mandate, waning as other pressing issues surface⁵⁰ and the

⁴⁹ Orwell, George, *The Collected Essays, Journalism and Letters of George Orwell, Volume 4: In Front of Your Nose, 1945 – 1950*. p. 162

⁵⁰ A decisive moment of the 1984 election win by the Brian Mulroney-led Conservative Party was Mulroney's accusation that John Turner lacked ethics ("you had an option"), and the Mulroney government went on to initiate a number of ethics projects; the Chretien government was elected in 1993 after a

realities of governing settle in, and resurfacing periodically in the face of controversy. The goal of the government ethics regime meanwhile is presented consistently as the desire to limit or eliminate the potential for officials to act in a manner that advances their personal interest. This is a complicated notion because there are a number of definitions of “conflict of interest,” because the limits of impartiality are unclear, particularly in partisan politics,⁵¹ and because what constitutes personal interest is often, by nature, highly subjective.

There have been successive waves of effort to address perceived shortcomings in the behaviour of government officials. Many commentators trace the current scepticism about government (including in Canada) to the American Watergate scandal of the 1970s and suggest it is a desire to allay this public scepticism that has driven the formalized effort to codify an ethics regime. Kenneth Kernaghan writes that, “before [the early 1970s], governments’ ethics rules were few in number and, because they were largely piecemeal responses to particular problems, they were scattered throughout various government documents ... By the end of the 1970s, governments’ ethics rules had become large in number, but, in most jurisdictions, they were still dispersed.”⁵² More recently and in Canada, successive political scandals in the 1980s (documented for example in Stevie Cameron’s book *On the Take*⁵³) were highly publicized, very damaging to the government in power, and had long-standing effects that contributed both to

campaign that highlighted the ethical lapses of the Mulroney/Kim Campbell government; Paul Martin succeeded Jean Chretien in 2003 and identified a series of initiatives to address the “democratic deficit”; and the Stephen Harper-led Conservative Party won a minority government in 2006 after an election campaign that highlighted the sponsorship scandal.

⁵¹ Young, Margaret, *Conflict of Interest Rules for Federal Legislators*. Library of Parliament, Law and Government Division, December 2003.

⁵² Kernaghan, Kenneth, *Research Paper No. 19: The Ethics Era in Canadian Public Administration*. Canadian Centre for Management Development, 1996, p. 6.

⁵³ Cameron discusses corruption in great detail. In the preface, she writes: “What this book is about is how the Mulroney regime caused Canadians to lose faith in their government and why voters crushed a party they had come to despise.” From Cameron, Stevie, *On the Take: Crime, Corruption and Greed in the Mulroney Years*. Toronto, 1994, p. xi.

increased scrutiny of government activities and to a raising of the bar on measuring the ethical standards of government.

Despite the inconsistent attention paid to them and their varying degrees of intensity, ethical issues in government arguably haven't changed substantively in recent decades. Controversial issues at the political level are often characterized as conflicts of interest and frequently involve the alleged misappropriation of funds by politicians who might, for example, be trying to ensure key riding priorities are addressed in order to facilitate re-election. Sometimes a politician finds him or herself in trouble for lying, for hiring or appointing a relative, or for some variation of marital or sexual infidelity – not always or just for the act itself but because it results in a real or perceived conflict of interest and/or because of their desire or effort to keep it secret.

Issues, events, the media, and the public have, in recent decades, pushed traditions of political accountability to evolve, sometimes in ways that have not been immediately apparent and sometimes in a manner more accurately described as revolution than evolution. At the same time, government has explored mechanisms to limit or control inappropriate behaviour, and the direct relationship between the two is frequently taken as a given – that is, the idea that “bad” behaviour has required the development of measures to check that behaviour.

It may be anachronistic to analyze or criticize the lack of a codified government ethics regime prior to the mid-1980s, and overly simplistic to account for the ascendancy of “ethics” and “values” solely on the basis that the public or the media's expectations of government have and are changing. Nevertheless, it is reasonable to argue that government has grown more complex, and that society is less inclined to accept the view that elections are a sole measure of accountability. The development of the ethics regime is sometimes attributed to frustration over the lack of accountability from an anonymous public service, and

a real or perceived malaise within the public service.⁵⁴ Some of these factors, particularly the latter, suggest the ethics regime has been initiated from within and by the public service – and, in fact, the regime is frequently described as having been born of the senior civil service, although based on values that emerge spontaneously from reflection on public service. However, it is equally possible that a rigorous ethical code for the civil service is a result of pressure from and initiative by elected officials, who are the ultimate spokespeople of government and who must regularly face the electorate to defend their record.

A brief history, pre-1995

There are legislative parameters on the behaviour of government officials, elected and unelected, found primarily in four Acts of Parliament – the *Criminal Code*, the *Parliament of Canada Act* (recently changed by *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer)*), the *Canada Elections Act* and, most recently, the *Federal Accountability Act*. There are also the Conflict of Interest and Post-Employment Code for Public Office Holders, the Conflict of Interest Code for Members of the House of Commons, and, perhaps less well known to the public, the Values and Ethics Code for the Public Service.

This canon largely represents the outcome of work undertaken since the mid-1980s, with the establishment of a task force on ethics and its resulting 1984 report, *Ethical Conduct in the Public Sector: Report of the [Federal] Task Force on Conflict of Interest*.

The task force, struck by what ended up being the outgoing Liberal government and co-chaired by Michael Starr and Mitchell Sharp, identified nine forms of

⁵⁴ Zussman, David and Jabes, Jak, *The Vertical Solitude: Managing in the Public Sector*. The Institute for Research on Public Policy, 1989. Zussman and Jabes embarked on an extensive study of public sector attitudes and satisfaction. On p. 195 they write: “We embarked on this study because we saw growing informal evidence of increasing managerial and staff problems in the public sector ...”

unethical conduct to be addressed by use of a code of conduct, legal or quasi-legal procedures, or the implementation of additional codes of procedure:

1. Self-dealing by a public office holder;
2. Discretionary transfer of economic value to a public office holder from a private source;
3. Assistance by public office holders to private parties dealing with the government;
4. Post-employment assistance by former public office holders to private parties dealing with government;
5. Private gain derived from information acquired in an official capacity;
6. Private use of government property;
7. Partisan political activity by a non-elected public office holder;
8. Criticism of government policy;
9. Conduct unbecoming to one's public position.⁵⁵

The nine forms generally revolve around a calculus of personal gain by office-holders and were comprehensive enough that they have largely continued to be the focus of government's work on ethics.

While this paper is concerned with those developments from 1995 onward that focus on and are the work of unelected officials, the Sharp/Starr report provides necessary historical context. Related efforts to curb inappropriate behaviour by elected officials also provide necessary context.

Ethics for elected officials

Prior to *Ethical Conduct in the Public Sector: Report of the [Federal] Task Force on Conflict of Interest*, public office holders had been subject (since 1978) to

⁵⁵ The Honourable Starr, Michael and the Honourable Sharp, Mitchell, co-chairmen, *Ethical Conduct in the Public Sector: Report of the Task Force on Conflict of Interest*. Canadian Government Publishing Centre, May 1984, pp 33 – 49.

post-employment guidelines. Sharp and Starr's report led to the 1985 development and adoption of a *Conflict-of-Interest and Post-Employment Code for Public Office Holders*, whose intent was (and is) to prevent real, potential and/or apparent conflicts of interest.

The *Conflict-of-Interest and Post Employment Code for Public Office Holders* was modified by the Jean Chrétien government in the early 1990s and again, most recently, by the *Federal Accountability Act Action Plan* of the Conservative government. It requires office-holders to arrange their private affairs so as to prevent real, potential or apparent conflict from arising and, with limited exceptions, prevent the solicitation or acceptance of money or gifts. There are also limitations on activities that could be seen to "compromise professional status," on the use of information accessed by virtue of office, and on activities after leaving office. The principles of the *Code* include:

- "Public office holders shall act with honesty and uphold the highest ethical standards so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced;
- "Public office holders have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law;
- "Public office holders shall not have private interests, other than those permitted pursuant to this Code, that would be affected particularly or significantly by government actions in which they participate;
- "On appointment to office, and thereafter, public office holders shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising but if such a conflict does arise between the private interests of a public office holder and the official duties and responsibilities of that public office holder, the conflict shall be resolved in favour of the public interest;
- "Public office holders shall not act, after they leave public office, in such a manner as to take improper advantage of their previous office."⁵⁶

⁵⁶ *Conflict of Interest and Post-Employment Code for Public Office Holders*, 2006, pp. 2 – 3.

Between the original *Conflict-of-Interest and Post Employment Code for Public Office Holders* of the mid-1980s and the current, new *Federal Accountability Act*, there have been a number of plans and actions to limit conflict of interest by elected officials, many of which were purposefully abandoned or died of neglect.⁵⁷ Notable of these were the Chrétien government's early initiatives on ethics, including an *Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer)*, which died on the *Order Paper* in 2003, and Paul Martin's initiatives to address the "democratic deficit."

Despite the death of the *Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer)*, the Chrétien government did establish an Ethics Counsellor. However, because he reported directly to the Prime Minister and had no formal relationship with Parliament, he was consistently criticized for a lack of independence.⁵⁸ While Martin's efforts to increase the independence of individual Members of Parliament died with his government in early 2006, his government did pass *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer)* in 2004. The legislation created:

- a new position, the Ethics Commissioner, who reports directly to Parliament; and

⁵⁷ See, for example, Young, Margaret, "Conflict-of-Interest Rules for Federal Legislators." Library of Parliament, Law and Government Division, December 2003. Young outlines efforts to establish a Register of Members' Interests, four separate bills to regulate conflict of interest that were introduced in the 33rd and 34th Parliaments, all of which died on the *Order Paper*, a Special Joint Committee of the House and Senate whose recommendations were not implemented by the 36th Parliament and a number of Private Members' that were not proceeded with in the 37th Parliament.

⁵⁸ For example, the 2004 election platform of the Conservative Party said this about the ethics counsellor: "In 1993, Paul Martin's Red Book promised the appointment of an independent Ethics Commissioner. For over ten years, Paul Martin and the Liberals failed to fulfill that promise ... Instead, the Liberals appointed a lapdog Ethics Counsellor ..." From *Demanding Better: Conservative party of Canada, Platform 2004*, p. 10.

- a new parliamentary entity, the Office of the Ethics Commissioner, which is vested with parliamentary privileges and is to operate within the parliamentary framework.⁵⁹

The Ethics Commissioner's mandate includes the administration of the *Conflict of Interest Code for Members of the House of Commons* and the Prime Minister's *Conflict of Interest and Post-employment Code for Public Office Holders*. The *Conflict of Interest and Post-Employment Code for Public Office Holders* is the principle mechanism of monitoring the behaviour of elected and appointed officials. Importantly, it does not apply to the federal civil service. The *Code* applies to Ministers, Ministers of State, Parliamentary Secretaries, political (exempt) staff, and some Governor in Council and ministerial appointees, although it is unclear at this point the extent to which the mandate of the office may be broadened as a result of commitments by the current federal government.⁶⁰

The parameters of the mandate of the Office of the Ethics Commissioner derive from *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence* (Chapter 7 of the Statutes of Canada, 2004), and the *Conflict of Interest Code for Members of the House of Commons*. The functions and mandate of the office are described on the Office's website as follows:

“Contrary to some public perception, the Ethics Commissioner is not a federal Ombudsman. His functions and duties are limited to the legislative framework outlined above. With particular respect to the conduct of Members of the

⁵⁹ Office of the Ethics Commissioner, *Annual Report of the Ethics Commissioner on activities in relation to PUBLIC OFFICE HOLDERS FOR THE FISCAL YEAR ENDING MARCH 31, 2005*, p. 4.

⁶⁰ *Stand Up for Canada*, the Conservative Party of Canada's 2006 election platform, criticized the Liberal government for having failed to fulfill its promise of establishing an independent ethics commissioner. The platform includes a commitment to “Prevent the Prime Minister from overruling the Ethics Commissioner on whether a minister, or an official is in violation of the Conflict of Interest Code.” (p. 12). The current *Federal Accountability Act Action Plan* commits to: “a new *Conflict of Interest Act*; a new Conflict of Interest and Ethics Commissioner, an individual with a judicial or quasi-judicial background, with powers to fine violators and consider public complaints; a ban on voting by ministers on matters connected to their business interests; [and] an end to the use of “venetian blind” trusts.” http://www.tbs-sct.gc.ca/media/nr-cp/2006/1212_e.asp

House of Commons, these functions and duties are assigned by the House itself, and are carried within the institution of the House of Commons. In summary, the mandate of the Office of the Ethics Commissioner, carried on behalf of Parliament, is to:

1. **administer** the Conflict of Interest Code for Members of the House of Commons adopted by the House of Commons on April 29, 2004; as part of that responsibility, our Office maintains the registry of the public disclosure summaries of Members. In addition, the Office also administers the Prime Minister's Conflict of Interest and Post-Employment Code for Public Office Holders; within that responsibility, the Ethics Commissioner is also charged with the Public Registry for Public Office Holders, including Ministers, Ministers of state and Parliamentary secretaries;
2. **provide confidential opinions** to Members of the House of Commons and advice to Public Office Holders, on any matter respecting their obligations under the Code to which they are subject; and
3. **conduct inquiries**, on behalf of Parliament, at the request of Members of Parliament, of Members of the House of Commons, either as members or as Public Office Holders, on questions of compliance with either Code, as applicable.⁶¹

The website material wisely corrects a widely-held misperception – that the commissioner has a broader mandate than actually ascribed. The mandate is relatively narrow (it does not include public servants, for example), and his work is, perhaps appropriately, not always of a public nature. However, the powers of the office are more expansive than those of his predecessor, the ethics counsellor. The Commissioner has released a series of public reports, including a 2006 review of the floor-crossing and subsequent appointment to Cabinet of David Emerson, but continues to be criticized for lacking independence and for an allegedly partisan approach to his office.

Ethics for public servants

Concurrent with work to establish ethical guidelines for elected and appointed officials has been the bureaucratization of an ethics regime within the federal public service.

⁶¹ http://www.parl.gc.ca/oec/en/public_office_holders/conflict_of_interest/docs/code_e.pdf

In the mid-1990s, the federal public service was faced with a significant program review that promised to (and did) reduce the size of government. Related to this were increasing expectations that the public sector should be more closely aligned to the private sector in terms of service standards and competitiveness, and that public servants at all levels should be prepared to make (the right) decisions in achieving this higher standard of service. In acknowledging these and other complex forces of change facing the public service, the Clerk of the Privy Council established nine task forces in 1995, led by Deputy Ministers, to explore a variety of issues affecting the public service following a government-wide expenditure and program review. The mandates of the task forces were interrelated and their themes reflected a desire to make the public service more accessible to Canadians, modernize policy development, save money, and prepare for the future⁶² – four goals that are reflected in subsequent iterations of new management approaches.

One of these task forces was focused on values and ethics, with a mandate of exploring ways in which existing values of the Public Service could be maintained. In her *Third Annual Report to the Prime Minister on the Public Service of Canada*, the Clerk of the Privy Council wrote that, “The values of the Public Service must be preserved. It is essential to maintain a non-partisan and

⁶² *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p.vii: “The nine task forces and their mandates were: 1) Service Delivery Models – to examine service delivery issues from a citizen’s point of view; 2) Overhead Services – to identify ways to improve management of overhead services on a government-wide level, with an emphasis on cost savings; 3) Federal Presence – to develop an ongoing database on federal presence across Canada, examine how that presence may change over time, and identify issues from a geographical or regional perspective; 4) Federal Presence Abroad – to report on programs and Canadian government representation outside Canada, and to determine how federal government representation overseas could be made more cost-effective; 5) Strengthening Policy Capacity – to review our current policy development capacity and to recommend improvements; 6) Policy Planning – to provide an assessment of the policy agenda to date, survey the environment, and provide strategic advice on key policy issues; 7) Managing Horizontal Policy Issues – to develop practical recommendations on the management of horizontal issues focusing on improved coherence, and improved collaboration; 8) Values and Ethics – to examine the relationship between existing and evolving values in the public service, and to consider ways to align values with current challenges; and 9) A Planning Tool for Thinking About the Public Service – to identify long-term trends which influence the Public Service, and develop a strategic planning tool.

professional public service governed by fairness, integrity and service to Canadians.⁶³ At the same time, values and ethics were positioned within the broader context of work required as part of an agenda for change and renewal in the public service.⁶⁴

The starting point of the work of the task force on values and ethics was that core public service values – non-partisanship, professionalism, fairness, integrity and service to Canadians – were alive and well but threatened and in need of protection (although there is acknowledgement in the final report that “mistakes have been made, values at times diminished”⁶⁵). The stated purpose of the task force was to “help the public service to rediscover and understand its basic values and assist the public service to recommit to and act on those values in all its work”⁶⁶ at a time when scrutiny of the institution by the media and the general public continued to grow. This scrutiny was a result of a constellation of factors, including changes and challenges to fundamental principles of public administration in Canada and the increasing size and diversity of the public service.⁶⁷ The final report of the task force, *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*, marks the beginning of the current effort to establish an ethics regime in the federal government.

A Strong Foundation has been central to the development of the modern federal government ethics regime. One of its key elements is support for the notion that

⁶³ *Third Annual Report to the Prime Minister on the Public Service of Canada*. Privy Council of Canada, 1995.

⁶⁴ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. ix, which states, “At the deputy ministers’ retreat in May 1995, the subject of public service values was identified as one of several on which it was necessary to undertake work as part of an agenda for change and renewal in the public service.”

⁶⁵ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p.x.

⁶⁶ *ibid*, p.1.

⁶⁷ Although the 1990s Program Review resulted in significant cuts to the size of the public service, it followed and was followed by considerable growth. The 1990 cuts have now been more than reversed.

values and ethics are to be discovered (rather than created). The four key values of public service that have endured through subsequent waves of new public service management approaches are presented as *a priori*:

“Ethical values [or “public service values in action” or “ethics in decision-making”] are one of four families of public service values we **discovered** in the course of our work ... Together with democratic, professional and people values, they constitute the core values of the public service.”⁶⁸
(emphasis added)

And:

“certain values **emerged spontaneously** from our reflection. They are values that come naturally to mind as one thinks about public service, the values without which it is not possible to speak of public service at all.”⁶⁹
(emphasis added)

But *A Strong Foundation* also anticipates the inevitability of conflicts in these values and suggests that such conflicts are resolved when one accepts that, despite their *a priori* nature, values ought to be flexible – or at least approached in a flexible manner – and one ought to be prepared to accommodate alternative values depending on the context:

“... values discourse in the public service ... has not been sufficiently clear and forthright about conflicts between values. We are inclined to think that values conflicts arise only between our values and their opposites. We are not sufficiently alive to what the philosophers call the hierarchy of values, to the fact that our values conflict not only with their opposites but with each other ... because we are not sufficiently conscious or frank about this, **we are sometimes inclined to think that some value or principle is being betrayed when it is only being subordinated or accommodated, in a specific circumstance, to some other important value.**”⁷⁰ (emphasis added)

⁶⁸ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 4.

⁶⁹ *ibid.*, p. 53.

⁷⁰ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 2.

The notion of ethics as a language is reflected in *A Strong Foundation*, where the authors reflected on the notion of client and customer service:

“That is why ... values such as “quality” and customer service have shot to the top of lists of public service values, both here and in the United States. Not because public servants were jettisoning the old, but because the new concepts and language gave them a means to express, renew and update values they had always held. The private sector terms were a verbal device that helped public servants to rediscover their own values.”⁷¹

This passage is notable for its reference to the rediscovery of values, which is problematic in the absence of a discussion of how *a priori* values can be lost. It is also notable in its inferred need for a new language to assist in expressing these rediscoveries. The report is blunt in stating that the public service ought to use such language metaphorically rather than literally. That terms such as “quality” and “customer service” can or should be used to express public service values despite clear divergence in meaning from their more established use in the private sector suggests the practical utility of the ethics code. Whether or not the values of the private sector or the public generally are relevant to the public sector, an ethics code can assist in appropriating the language used to describe such values if such language can strengthen public service:

- By encouraging public managers to find out, with great precision, what the recipients of their services really need or want, and how they actually experience the interaction or transaction;
- By encouraging them to measure more accurately the nature of outputs and the degree to which the recipients value them;
- By encouraging them to see that they have “internal clients” too, either in their own organization or elsewhere in the public service, whom it is their role to serve and assist rather than to control;
- And, finally, by drawing attention to the many business processes which lie behind the delivery of services, and by encouraging managers to streamline and align them to yield a higher level of public

⁷¹ *ibid*, p. 33.

service, both to immediate recipients and to the ultimate “customer,” the people of Canada.”⁷²

The central role of leadership is also described in *A Strong Foundation*:

“If senior officials embody the public service values of loyalty, neutrality, devotion to the democratic process and to the public interest, the chances are others will do the same. If the top public servants display a commitment to horizontality and partnership, a neglect of turf and of turf protection, then this conduct will radiate naturally through their organizations. If top public servants exemplify a balanced life, respecting both work and family, then these values will be widely imitated. If the leaders of organizations show that they are prepared to be publicly answerable for the actions of their employees and do not seek to shift the responsibility or to point fingers at subordinates, then public servants will learn by example, how to conduct themselves responsibly and with dignity.”⁷³

This significant role assigned to and required from public service leaders is also problematic to the notion of *a priori* values and public service as a calling, which although presented almost as natural laws rely heavily on the leadership of senior managers for their perpetuation and success.

There are other problems with the central role of leadership in *A Strong Foundation*, where senior public service managers are expected to lead the discussion on ethics, to establish the relevance of values and ethics to a modern public service, and work to ensure the bureaucracy is operating in a manner that is consistent with the code on values and ethics. Deputy Ministers are particularly charged with this responsibility:

“Deputy Ministers must take the lead in ensuring that they, and the employees in their charge, uphold and demonstrate public service values and ethics. The pre-eminent role of Deputy Ministers ... [is that they are] uniquely responsible to exemplify, in their actions and behaviours, the best

⁷² *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 33.

⁷³ *ibid*, pp 51 – 52.

values of the public service, and to infuse those values into all aspects of their own corporate requirements and culture.”⁷⁴

The idea that senior civil servants are on the leading edge of change is echoed throughout *A Strong Foundation*, including in references to new public management trends. In both cases, however, it may be more accurate (then and now) to suggest that public service leadership is struggling to keep up with accelerating change brought on by technology, diversity, and modern-day complexity. Trends are developing outside and inside of government and are identified by senior managers who in turn endeavour to incorporate them into or manage them through new management practices. Senior government managers likely are not the trendsetters.⁷⁵

Deputy Ministers occupy a space of conflicting demands and growing challenges. Donald Savoie points out that Deputy Ministers “serve ministers,” and:

“At the same time ... operate in the world of administration, which is one of due process, interdepartmental consultations, red tape, evaluation reports, central-agency requirements, equal treatment, and probity and anonymity. They must strive to balance a sectoral or departmental perspective with the views of their political masters, which are often political and seldom sectoral.”⁷⁶

Savoie also talked of the “club” of deputy ministers:

“... deputy ministers constitute a virtual club in Ottawa circles, and peer pressure matters. Deputy ministers do not wish to lose face before their

⁷⁴ *Guidance for Deputy Ministers*. Privy Council Office of Canada, 2003, pp 12 – 13. <http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=> This document references *A Strong Foundation*, including the four families of values – democratic, professional, ethical, and people.

⁷⁵ Although far from comprehensive, a recent survey by the Public Policy Forum found that only 44 per cent of senior bureaucrats felt they were decisive and dealt effectively with change; 42 per cent felt they were financially literate. <http://www.ppforum.ca/en/media/>

⁷⁶ Savoie, Donald J., *Breaking the Bargain: Public Servants, Ministers and Parliament*. University of Toronto Press, 2003, p. 136.

peers, and this factor promotes close collaboration among them ... all pride themselves on being able to keep their minister out of trouble. This has become a key criterion for success within the club as indeed it is to the centre of government. If a crisis develops, club members may wonder if their colleague could have prevented it ... senior officials stress loyalty to the government ... senior officials cannot protect the government while others down the line leak damaging information to the media or the opposition parties.⁷⁷

Deputy Ministers' success in leading the work on values and ethics and exemplifying the elements of the values and ethics code is measured in the same way their overall performance is generally measured – by the extent to which ministers and departments are kept out of the news, out of question period, and out of trouble. Because *A Strong Foundation* repeatedly acknowledges the conflicting nature of values,⁷⁸ it is impossible to escape the report's key themes of compromise and conflict-avoidance.⁷⁹

The changing sense of public service as a calling has been a further trigger for development of the federal government ethics code. Commitment to this notion is a theme throughout *A Strong Foundation*. Tait wrote that, "The ideal of service is one of the deepest sources of public service motivation,"⁸⁰ and that:

"Public service is a special calling. It is not for everyone. Those who devote themselves to it find meaning and satisfaction that are not to be found elsewhere. But the rewards are not material. They are moral and psychological, perhaps even spiritual. They are the intangible rewards that proceed from the sense of devoting one's life to the service of the country,

⁷⁷ Savoie, Donald J., *Breaking the Bargain: Public Servants, Ministers and Parliament*. University of Toronto Press, 2003, p. 48.

⁷⁸ See, for example, page 37 of *A Strong Foundation*: "Every human action or decision requires a choice between values, and in each situation some value or values may predominate over others. This is the nature of life ..."

⁷⁹ See, for example, page 37 of *A Strong Foundation*: "We need to develop a new maturity in our perception and understanding of competing values so that we may see them as complementary rather than contradictory."

⁸⁰ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 32.

to the affairs of state, to public purposes, great or small, and to the public good.”⁸¹

A Strong Foundation takes as a given this organic nature of the public service, while acknowledging the pressures facing the ideal of service, including “a preoccupation with process, with rules and procedures.”⁸² However, the ideal of service (so weak already that it needs an extensive bureaucracy of rules and procedures to maintain it) may be as anachronistic as its sister concept, bureaucratic anonymity.

Donald Savoie has documented the evolution of the Canadian public service from its disorganized early days to the golden years of the 1930s through the 1950s, and on to its contemporary state. The golden years were characterized by men who believed “they were serving a collective purpose that transcended their own personal interest,” and were prepared to make sacrifices, for example through low salaries, as part of a “traditional bargain” that provided job security and anonymity.⁸³ Savoie calls this “life in the village”:

“Canadian civil servants and their political masters shared a common set of values – much as would the inhabitants of a small village. This integrated, elite culture was in part a result of common social backgrounds and common patterns of socialization in school and university ... the two groups were very similar in outlook. In particular, they shared a common interest in governing their societies and in ensuring that the existing system did not change significantly.”⁸⁴

But this village is expanding quickly (despite the program review of the 1990s), with federal spending growing from about \$2.5 billion in 1950/51 to \$211 billion in

⁸¹ *ibid*, p. 63.

⁸² See, for example, *A Strong Foundation*, p. 32.

⁸³ Savoie, Donald J., *Breaking the Bargain: Public Servants, Ministers and Parliament*. University of Toronto Press, 2003, pp. 63, 64.

⁸⁴ *ibid*, p. 66.

2006. The public service has become considerably more diverse. The traditional bargain began to erode in the 1970s, Savoie writes, when Canadian politicians, who in the past had valued the quiet influence of their deputies, became suspicious and openly critical of the public service. After the fall of the Clark government in 1979, both Clark and some of his ministers talked about the agenda-pushing and independence of the public service. The anonymity that secured much of the influence of the senior public servant of the past was eroding, the shared sense of calling and service was in decline, and the ability to micro-manage people and issues was evaporating. Both the public and the political master had grown increasingly suspicious of the motives of the public service, and their ability to deliver. Government downsizing eliminated job security. For senior mandarins who both valued and were judged by their ability to keep their Ministers and departments out of trouble, manage their staff and deliver a complex agenda, there was a growing need for new mechanisms of control. The public service has perhaps moved from the golden years to the celebrity era – defined more by who it is than what it does. And the deepening public and media curiosity about who has their hands at the controls requires mechanisms that first work to maintain the identity of the collective but also ensure that individual behaviour can be explained and defended.

If there is or has been a malaise with the public service, there has or is equally a malaise from within the institution. The tradition of political accountability changed quickly and public service anonymity has disappeared. Zussman and Jabes undertook an extensive analysis of public service attitudes at the end of the 1980s and found that, “as one moves down the bureaucratic hierarchy, managers are less satisfied and less positive about managerial practices in their organization.”⁸⁵ They called this effect the “vertical solitude” and concluded in part that it was not as much a function of organizational layering as it was a result of “managers and senior managers [not sharing] the same type of management

⁸⁵ Zussman, David and Jabes, Jak, *The Vertical Solitude: Managing in the Public Sector*. The Institute for Research on Public Policy, 1989, p. 196.

experiences as their corporate superiors.”⁸⁶ Zussman and Jabes also concluded that the vertical solitude was exacerbated by the revolving door management culture of the public service that “has spawned a generation of executives who, until recent restraint measures, never spent more than a few years in a given department ...management skills in the public sector [have become] more difficult to accomplish, given the fact that jobs are becoming more complex and more difficult because of the inevitable constraints and lack of freedom to manoeuvre and find innovative solutions.”⁸⁷ These conditions have not changed, and the survey results found by Zussman and Jabes have been echoed in more recent surveys of the public service.

Recent decades have seen successive waves of effort to adopt new management practices in the public service. Savoie writes that “there has not been a government since John Diefenbaker’s that has not pledged to let ‘managers manage’ and to strengthen management practices. Even more remarkable, they all unveil new management-reform measures and declare their commitment to move from a ‘focus on rules to a focus on results’ as if this were something new.”⁸⁸ The effort to define and establish an ethics framework in the federal government has been a component of successive waves of new management.

The ethics regime has evolved within the context of successive new macro approaches to public administration. Along with ongoing efforts to instil core values in public servants, considerable effort has been invested to evolve and keep the ethics discourse current with management trends, to rename the discourse, adopt new practices, refine language, increase awareness, and train

⁸⁶ Zussman, David and Jabes, Jak, *The Vertical Solitude: Managing in the Public Sector*. The Institute for Research on Public Policy, 1989, p. 197.

⁸⁷ *ibid*, p. 200.

⁸⁸ Savoie, Donald J., *Breaking the Bargain: Public Servants, Ministers and Parliament*. University of Toronto Press, 2003, p. 133.

public servants. The language of these management approaches is incorporated into government documents and dispatches to ensure policies, programs and activities are described consistently in terms of service, transparency, accountability, and above all ethical conduct.

Following *A Strong Foundation*, the federal government introduced its modern comptrollership initiative, part of whose intent was “to ensure that ‘ethics, ethical practices and values are in place’ and at the core of management leadership and the management decision-making process.”⁸⁹ Modern comptrollership focused on four key areas –

- Recognition that the federal government exists to serve Canadians and that a “citizen focus” must therefore be built into all government activities, programs and services;
- The importance of sound public service values;
- The achievement of results for Canadians; and
- The promotion of discipline, due diligence and value for money in the use of public funds.⁹⁰

The modern comptrollership initiative was notable because it perpetuated the ethics discourse and retained its place in the constellation of new public service management practices. More specifically, it embedded the ethics regime in the context of financial management and citizen focus. Modern comptrollership was an effort to manage the empowerment of public servants and ensure they had the tools to effectively implement government policy. It focused on seamless, citizen-centred service and the linkage between spending taxpayer dollars and results. Four management committees were established to correspond to the goals of citizen focus, values, results, and responsible spending,⁹¹ while the Treasury Board Secretariat was tasked with overall stewardship.

⁸⁹ Cochrane, Janice and Serson, Scott, *The Public Service Values and Ethics Agenda – a Presentation to Deputy Ministers*. http://www.hrma-agrh.gc.ca/veo-bve/dmjan12_e.asp, p. 2.

⁹⁰ *Results for Canadians: A Management Framework for the Government of Canada*. Treasury Board of Canada Secretariat, 1999, http://www.tbs-sct.gc.ca/report/res_can/rc_1_e.asp

⁹¹ *ibid*

Treasury Board Secretariat also became the home for an ethics office, consistent with (one of) the recommendations in *A Strong Foundation* that suitable recourse mechanisms, counsellors, or ombudsmen for public servants who may feel they are encountering an ethical dilemma be established:

“One refrain that we have heard from public servants is that there is no point in asking them to uphold public service values or to maintain high ethical standards in public service, if we do not give them the tools to do so. One of the essential tools they will require is some accessible person to whom they can turn, in confidence, to seek advice and guidance, to express concern about instructions given, or to report a serious break of public service ethics.”⁹²

An Office of Public Service Values and Ethics (OPSVE) was established at the Secretariat in March 1999 (and later transferred to the Public Service Human Resources Management Agency of Canada). As per the recommendation in *A Strong Foundation*, a sufficiently senior-level person was tasked.

This recommendation, and its implementation, is also problematic. The implicit suggestion is that an ethical approach is impossible without someone to construct, guide and mediate it, and that “good behaviour” is impossible without guidance from higher authorities. Or, as one commentator wrote:

“An individual, an office, an agency to whom politicians contract out their ethical dilemmas. An official conscience, in case your own is disabled, or was never properly installed.”⁹³

⁹² *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, pp. 43 - 44.

⁹³ Riley, Susan: “Forget the Ethics Investigation, Let’s Just Vote on It.” *Victoria Times-Colonist*, March 15 2006, p.A10.

The displacement of the rules approach by the values approach, embodied by the office, is equally problematic because of the confusion created by its practice.⁹⁴

The OPSVE is described as “a centre of expertise responsible for developing and promoting policies and to ensure that the Public Service has the necessary management infrastructure and practices in place ... to support a strong culture of public service values and ethics ... committed to being a credible, responsive and authoritative source of counsel and a centre of expertise on ethical conduct and on strengthening public service values in the culture and practices of public service organizations.”⁹⁵ Its mission is to:

- “Support Ministers by working with public servants, public service organizations, and other stakeholders to enhance public trust in the institution of the public service;
- Play a leadership role at home and abroad in the continued development of a professional public service dedicated to the public interest, with a strong culture of public service values and ethics.”⁹⁶

The OPSVE exists despite the strong admonition for deputy heads of departments to exemplify ethics and lead the implementation of the values and ethics code, discussed above. Its existence, and its work to create new values to correspond with developing issues, is also at odds with assertions about the *a priori* nature of public service values.

The transmission of values to new generations of bureaucrats has become increasingly difficult. Individual departments have and are encouraged to have a distinct organizational culture while public servants are expected to exemplify a

⁹⁴ Langford, John W., “Acting on Values: An Ethical Dead for Public Servants.” 2005, p. 7.

⁹⁵ Public Service Human Resources Management Agency of Canada, Office of Public Service Values and Ethics, http://www.hrma-agrh.gc.ca/veo-bve/common/us-nous_e.asp

⁹⁶ *ibid*

homogenous ideal of service and *a priori* public service values. Whence the need for an Office of Public Service Values and Ethics (OPSVE).

In a 2001 speech about “Creating a Values-Based Public Service,” the Executive Director of the OPSVE describes the public service as a special calling but abandons the notion that the ideal of public service lies in “the heart of most public servants.”⁹⁷ She says instead that “form(ing) [new recruits to the public service] **in the right mould** requires instilling a vision of ‘public service as a special calling’” and that “a statement of principles **must be integrated** in the day-to-day ethical thinking of public employees, which informs their conduct and influences their decision-making in all things.”⁹⁸ (emphasis added) She further adds:

“Overarching values can serve as the organizational “glue” of common bonding, by helping us to identify and celebrate our identity as public servants. They can provide a framework for more effective decision-making and legitimate governance. They should seek to align personal and corporate values; and they practice leadership as “meaning-making” – **constructing a sense of what is important through understanding and context-setting.**”⁹⁹ (emphasis added)

One tool for striking this mould and creating meaning is *The Values and Ethics Code for the Public Service*, released by the Treasury Board of Canada in 2003. The Code, along with its companion interpretation guide, perpetuates the values- (versus rules) based approach and provides guidance on but rarely answers about appropriate actions in a variety of circumstances. The Code posits the four key values found in *A Strong Foundation* as the core guiding values for public servants:

⁹⁷ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 32.

⁹⁸ *Creating a Value-Based Public Service*. Remarks by Catherine MacQuarrie, Director, Office of Values and Ethics, Treasury Board Secretariat (currently Executive Director, Office of Public Service Values and Ethics, Public Service Human Resources Management Agency of Canada). http://www.hrma-agrh.gc.ca/veo-bve/speeches/creatingavaluebasedpublicservice_e.asp?p

⁹⁹ *ibid*

“Democratic Values: Helping Ministers, under law, to serve the public interest.

Professional Values: Serving with competence, excellence, efficiency, objectivity and impartiality.

Ethical Values: Acting at all times in such a way as to uphold the public trust.

People Values: Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public servants.”¹⁰⁰

The Values and Ethics Code and its interpretation guide are key tools for use by the Office of Public Service Values and Ethics. Despite the concern found in *A Strong Foundation* about “relativism,”¹⁰¹ the OPSVE takes a decidedly situational approach and public servants are advised to pay close attention to the particular details of individual situations. This situational practice was further embedded in a public service where deputy heads are encouraged to “create values-based environments in [their] very different departments and agencies.”¹⁰²

The *Code* was clearly influenced by the fact that, despite the work on and follow-up to *A Strong Foundation* (which encouraged deputy ministers to have an open and honest dialogue with employees), modern comptrollership, the opening of the Office of Values and Ethics in the TB Secretariat, the appointment of DM co-champions and the Report on Values and Ethics, “A Dialogue,” the DM co-champions reported in 2000 that “dialogue [had] not sufficiently penetrated” to the rank-and-file and there was a need for further discussion.¹⁰³

¹⁰⁰ *Values and Ethics Code for the Public Service*. Treasury Board of Canada, 2003, pp. 7 – 10.

¹⁰¹ “The public service is also affected by broad changes in social values, including a broad scepticism about values themselves and a growing acceptance of relativism. A world in which there are few and few absolutes is a world in which it is harder to nourish organizational values, including the values of citizenship, governance and public service.” From *A Strong Foundation*, p. 59.

¹⁰² “Creating a Value Based Public Service.” Remarks by the Director, Office of Values and Ethics. Treasury Board Secretariat, July 11, 2001. http://www.hrma-agrh.gc.ca/veo-bve/speeches/creatingavaluebasedpublicservice_e.asp?

¹⁰³ Cochrane, Janice and Serson, Scott, *The Public Service Values and Ethics Agenda – a Presentation to Deputy Minister*, September 2000. http://www.hrma-agrh.gc.ca/veo-bve/dmjan12_e.asp, p. 2.

The lack of penetration of the ethics dialogue to the rank-and-file public service has occasionally been evidenced by controversies of greater or lesser significance over the past several years. Most frequent have been questions about the expense claims of various public servants, along with concerns about hiring practices in the public service. There have also been questions about the management of dissent within the public service, for example in the permissibility of expressing conflicting opinions about fish stock levels and drug approvals. However, these issues must be viewed in the context of a large public service with a vast budget. In this respect, it is impossible to conclude that there is a profound lapse in ethical conduct in the public service, although certainly not every incident of malfeasance by public servants has been exposed. As Justice Gomery said *Who is Responsible: Fact Finding Report*:

“Because of the sensational nature of some of the evidence presented at the Commission’s hearings, the publicity given to it, and the political context in which the Inquiry took place, the impression may have been created that in Canada the administration of public affairs by the federal government is generally careless, incompetent, and motivated by improper considerations ... Let me suggest that ... the evidence presented reveals that, in general, the administration of government programs by the federal bureaucracy is competent and praiseworthy ...”¹⁰⁴

The allegations surrounding the federal government’s sponsorship program have perhaps posed the most significant ethical questions in recent years. The sponsorship program was initiated in 1994-95 to provide funding for public events in return for displaying Government of Canada logos and advertisements. Although implemented at events across Canada, the program was focused on Quebec as an effort to counteract the sovereignty movement by raising the profile of the national government.¹⁰⁵ The Commission issued two reports, the

¹⁰⁴ *Who is Responsible? Phase One Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities*. Public Works and Government Services Canada, 2005, p. xx.

¹⁰⁵ *ibid*, pp 9 – 10.

first of which was a review of who was responsible for the misappropriation of funds. In its findings relevant to public servants, the Commission found:

- insufficient oversight at the very senior levels of the public service which allowed program managers to circumvent proper contracting procedures and reporting lines;
- a veil of secrecy surrounding the administration of the Sponsorship Program and an absence of transparency in the contracting process;
- reluctance, for fear of reprisal, by virtually all public servants to go against the will of a manager who was circumventing established policies and who had access to senior political officials;
- gross overcharging by communications agencies for hours worked and goods and services provided;
- inflated commissions, production costs and other expenses charged by communication agencies and their subcontractors, many of which were related businesses;
- the use of the Sponsorship Program for purposes other than national unity or federal visibility because of a lack of objectives, criteria and guidelines for the Program;
- deliberate actions to avoid compliance with federal legislation and policies, including the *Canada Elections Act*, *Lobbyist Registration Act*, the *Access to Information Act* and *Financial Administration Act*, as well as federal contracting policy and the Treasury Board Transfer Payments Policy;
- a complex web of financial transactions among Public Works and Government Services Canada (PWGSC), Crown Corporations and communication agencies, involving kickbacks and illegal contributions to a political party in the context of the Sponsorship Program;
- the existence of a “culture of entitlement” among political officials and bureaucrats involved with the Sponsorship Program, including the receipt of monetary and non-monetary benefits;
- a pattern of activity whereby a public servant in retirement did extensive business with former recipients of Sponsorship Program contracts; and
- the refusal of Ministers, senior officials in the Prime Minister’s Office and public servants to acknowledge their responsibility for the problems of mismanagement that occurred.¹⁰⁶

In the second of its two reports, the Commission outlined a number of recommendations whose central purpose was to “rebalance the relationship between Parliament and Government and to assign clearer accountability to both

¹⁰⁶ *Who is Responsible? Phase One Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities*. Public Works and Government Services Canada, 2005, pp 5 – 7.

politicians and public servants”¹⁰⁷ – not unlike one of the central conclusions of *A Strong Foundation*.¹⁰⁸

This striving for balance in the relationship between elected and unelected officials, and the related desire to clarify accountabilities, is the recurring but largely unaddressed theme in much of the government’s work on ethics. The government’s ethics regime stems in large part from a need to clarify and manage the relationship between the public service and its elected overseers (and their political staff), but provides little practical advice on how to do so. The *Values and Ethics Code for the Public Service* reminds public servants that “Ministers are responsible for preserving public confidence in the integrity of management and operations within their departments and for maintaining the tradition of political neutrality of the Public Service and its continuing ability to provide professional, candid and frank advice,”¹⁰⁹ and outlines a set of democratic values whose intent is to assist public servants in helping ministers, under law, to serve the public interest. But there is an absence of rules or practical advice about navigating the interface between minister and bureaucracy (*A Strong Foundation* speaks vaguely about “speaking truth to power”¹¹⁰). The

¹⁰⁷ *Restoring Accountability: Phase Two Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities*. Public Works and Government Services, 2006, p. 198.

¹⁰⁸ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996. There are numerous references to the importance of democratic values in *A Strong Foundation*. A key passage in this respect is found on pages 53 and 54: “The first lens through which we can view public service values is the most important of all and the one that provides the foundation for all the rest. It is the lens of what we call the democratic values ... Our core values are shaped by an understanding that authority in a parliamentary democracy rests with elected officeholders who are accountable to Parliament ... Accountability is the partner of authority; it distinguishes legitimate authority from raw power, as it requires all those in authority to render an account of how they exercise their authority, of how well they are doing and of what they are doing to correct problems and make things better. Both ministers and officials must accept the personal consequences when some problem has occurred because they acted inappropriately or failed to act appropriately. The system depends on mutual understanding of the authorities and accountabilities of each ... This relationship between elected officials and public servants is the foundation of public service values.”

¹⁰⁹ *Values and Ethics Code for the Public Service*. Treasury Board of Canada Secretariat, 2003, pp 6 – 7.

¹¹⁰ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 55.

general and perhaps assumed goals of ministers for departments are meanwhile subsumed under successive waves of new government approaches.

Largely as a result of the work of the Gomery Commission, the (previous, Liberal) government set out *A Commitment to Continuous Improvement* as the next step in new public service management approaches, complementing or succeeding modern comptrollership. A similar set of goals as have endured through previous new management approaches were included in *Continuous Improvement* – increased transparency, improved service to Canadians, maintaining a professional public service, horizontal management, and better information management.¹¹¹ Practical realities of navigating the relationship between elected and unelected officials were again overlooked.

As part of its accountability provisions, *Continuous Improvement* made a commitment to ensuring that “high ethical standards continue to guide public service employees.”¹¹² It acknowledged shortcomings in the government’s ethics regime – specifically, the “perception that there are no consequences for misconduct or mismanagement”¹¹³ – and new measures for advancing public service values reflected a more rules-based approach, for example:

- “a quick-action investigative team ... [to] ensure adequate capacity for consistent and rapid investigation and disciplinary action;
- enhanced training ... to ensure cases are dealt with appropriately;
- measures ... to increase awareness of and appropriate follow-through on the Treasury Board *Policy on Losses of Money and Offenses and Other Illegal Acts Against the Crown* to ensure the effective recovery of funds;
- disciplinary guides ... **to ensure clarity about what constitutes misconduct and what are possible consequences**; and,

¹¹¹ *Management in the Government: A Commitment to Continuous Improvement*. Treasury Board Secretariat of Canada, 2005. http://www.tbs-sct.gc.ca/spsm-rgsp/cci-acg/cci-acg_e.asp

¹¹² *Management in the Government: A Commitment to Continuous Improvement*, Treasury Board Secretariat of Canada, 2005. http://www.tbs-sct.gc.ca/spsm-rgsp/cci-acg/cci-acg_e.asp, p. 2.1

¹¹³ *ibid*, p. 2.1

- a more rigorous process ... to prevent re-employment of or contracting with individuals who were terminated from the Public Service.¹¹⁴ (emphasis added)

The program also included a commitment to “a charter of values of public service that sets out the principles and values that should guide federal public-sector employees in all their professional activities” ... and a “code of conduct for the entire federal public sector that translates the proposed Charter into **specific rules of behaviour** that underscore the high sense of professionalism within the Public Sector.”¹¹⁵ (emphasis added)

Most recently, the new Conservative government made accountability a key plank of its election platform. In April 2006, it introduced *Turning a New Leaf*, which outlined a detailed list of commitments, including:

- strengthening the role of the Ethics Commissioner;
- toughening the Lobbyists Registration Act;
- ensuring truth in budgeting;
- cleaning up government procurement;
- providing real protection to whistleblowers ... [including] granting powers to the new **Public Sector Integrity Commissioner**;
- strengthening access to information legislation;
- strengthening auditing and accountability within departments by **clarifying the managerial responsibilities of deputy heads within the framework of ministerial responsibility**, and by bolstering the internal audit function within departments and Crown corporations.¹¹⁶ (emphasis added)

Particularly noteworthy in this context are the provisions for strengthening the role of the ethics commissioner, including the requirement that the individual have judicial or quasi-judicial experience, measures to prevent the Prime Minister from overruling the Commissioner on rulings about violations, and the ability for the public to bring forward information for consideration.

¹¹⁴ *ibid*, p. 2.1

¹¹⁵ *Management in the Government: A Commitment to Continuous Improvement*, Treasury Board Secretariat of Canada, 2005. http://www.tbs-sct.gc.ca/spsm-rgsp/cci-acg/cci-acg_e.asp, p. 2.12

¹¹⁶ *Turning a New Leaf - Federal Accountability Act and Action Plan*. Government of Canada, 2006. http://www.faa-lfi.gc.ca/index_e.asp#2

A companion effort by the Clerk of the Privy Council is emerging – *Public Service Matters*. Although *A Strong Foundation*'s quartet of values have endured, like *Turning a New Leaf*, there are few references to ethics and values (and their cohort of empowering public servants) and more of an emphasis on management initiatives. The key goals of *Public Service Matters* include:

- "Rethink our recruitment model; the Public Service of Canada cannot be a passive recruiter of talent;
- Rethink our development model; to manage for excellence and focus on leadership;
- Rethink the jobs-for-life and one-size-fits-all model; to encourage more interchanges with the private sector, more mid-career and end-of-first-career recruitment; and,
- Rethink the public service brand; focus on excellence, unique careers and the opportunity to make a difference for your country."¹¹⁷

Various commitments, including those in *Public Service Matters* (albeit fuzzy) suggest that there is a current shift or re-focusing towards the rules end of the behaviour-control spectrum. The extent of this shift is yet to be seen. In the meantime, however, and since the inception of the modern ethics regime, the values-based regime has facilitated a relativistic approach that avoids absolute positions on ethical questions and therefore permits a wide spectrum of interpretation as to the merits of a given position. The large number of values is also flexible enough to be re-interpreted as necessary to ensure issues, actions and events can be defined as "good" or "ethical" as need be. As Langford has written, the advocates of a values-based position have been unclear as to "what a value is and how to identify core values" while nevertheless insisting on "a direct connection between values and principles, on the one hand, and behaviour, on the other."¹¹⁸

¹¹⁷ *Public Policy and the Public Service Matter*. Government of Canada, Privy Council Office, 2006. http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Clerk&Sub=ClerksSpeeches&Doc=20060926_ccce_e.htm

¹¹⁸ Langford, John W., "Acting on Values: An Ethical Dead for Public Servants." 2005, p. 5.

Ethics as public relations

These tools to define good and acceptable behaviour are critical to successful public relations in government. A large number of flexibly interpreted values allows for a broad spectrum for defining the ethical. The standard public relations response of “the issue was handled appropriately” is therefore sufficiently reinforced so as to avoid offending the “commonsense approach to moral validity.”¹¹⁹

The ethics regime provides language that facilitates the correspondence between government and public debate – the latter whose terms of reference often centre on concepts or values that are foreign to public service and that increasingly focus on motives rather than results.

Zussman and Jabes, Savoie, Kernaghan, Baron and many others have considered the challenges of public service in the context of a highly politicized environment, susceptible to media scrutiny, prone to absolutes and faced with ever more complex problems. The demand (from the public, from the media) seems to be for a deontological code that prescribes good and bad behaviour in absolute terms. The deontological approach also more readily supports internal communication and standards about ethical behaviour in the public service because its absolutist definitions are more readily explained. The reality is that the public service must be consequentialist, and a government ethics code must provide for flexibility in defining and explaining desired (and therefore “good”) ends. The difference between what the code describes itself to be and how it must practically be applied generates (at least) three important areas of tension.

¹¹⁹ Kernaghan, Kenneth and Langford, John W., *The Responsible Public Servant*. The Institute for Research on Public Policy and The Institute of Public Administration of Canada, 1990, p. 17.

Empowerment

A Strong Foundation identified “new ethical dilemmas associated with a service culture and empowerment” as one of “the most important current issues.”¹²⁰

Since the mid-1990s, public service management trends in Canada have underlined a need to allow public servants to exercise judgment in their work. Modern comptrollership, among other initiatives, speaks of this:

Elected officials and public service managers are expected to make informed choices for the right policies and programs that are delivered through optimal mechanisms and are suited to the needs of Canadians. The modern public service manager lives this reality every day. Modern comptrollership is about ensuring that the current and future generations of federal public service managers are equipped with the requisite skills, competencies and understanding of their roles and responsibilities to function effectively in this environment and that they are well supported by their organizations in terms of the four pillars of modern comptrollership.¹²¹

One of the supports to the enterprise of empowerment is the ethics regime, which “sets forth the values and ethics of public service to guide and support public servants in all their professional activities.”¹²²

While ministerial accountability is central to the federal government ethics code, ethics for ministers are governed by a separate system as those for public servants. And while ministerial accountability is central to the ability of public servants to uphold the family of democratic values outlined in *The Values and Ethics Code for the Public Service*, its practical definition and application are

¹²⁰ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 53.

¹²¹ http://www.tbs-sct.gc.ca/cmo_mfc/Intro2/intro_e.asp

¹²² http://www.hrma-agrh.gc.ca/veo-bve/psve-vefp_e.asp

absent in the government's ethics canon. Prior to and since the publication of *A Strong Foundation*, significant confusion has grown about the meaning of accountability of public servants, particularly in relation to their ministers, and *A Strong Foundation* referenced various incidents and trends that have led to "the doctrine of public service anonymity and ministerial responsibility" being undermined, at least in the minds of many public servants."¹²³

The meaning of public service empowerment may be least understood or acceptable in the context of the relationship between public servants and elected officials and their political staff. Aucoin and Jarvis said that one of three areas where the public service can be faulted for damage to its credibility is the government's failure to "counter various pressures to politicize the administration of public affairs."¹²⁴

A Strong Foundation found that "almost every other issue we examined led back, through some direct or indirect route, to the principles of democratic life in a parliamentary system."¹²⁵ Although *A Strong Foundation* concludes by outlining four families of values, democratic values are central:

"... the concerns of ministers and public servants about ministerial responsibility and the role of public servants touch on the deepest values of public service in a parliamentary democracy – respect for the authority of elected office holders, respect for the Constitution, the rule of law, and the institutions of parliament and the courts. Not surprisingly, if these values are thought to be changing, much else is also in doubt."¹²⁶

¹²³ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 7.

¹²⁴ Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform*, Canada School of Public Service, 2005, pp. 61, 63.

¹²⁵ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 7.

¹²⁶ *ibid*, p. 18.

And, later:

“The first lens through which we can view public service values is the most important of all and the one that provides the foundation for all the rest. It is the lens of what we call the democratic values. We rediscovered that the most important defining factor for the role and values of the public service of Canada is its democratic mission and public trust: helping ministers, under law and the Constitution, to serve the common good. Public service values largely derive from and are shaped by the role of the public service, as a Canadian institution, in supporting Canada’s unique brand of parliamentary democracy. Our core values are shaped by an understanding that authority in a parliamentary democracy rests with elected officeholders who are accountable to Parliament.”¹²⁷

Gomery has more recently expressed concern about confusion surrounding the meaning of ministerial accountability, although he suggested that the notion of accountability in general had eroded and wrote of “... the refusal of ... senior officials ... to acknowledge any responsibility for the mismanagement that had occurred [in the administration of the sponsorship program].”¹²⁸

Understanding the relative roles of officials and ministers and acknowledging the need for support mechanisms for public servants who find themselves at the intersection of partisan politics and public administration are central themes of the government’s ethics regime. This is also a theme the Auditor General has reflected upon, writing in her 2000 report on *Values and Ethics in the Public Service* of the need to:

¹²⁷ *ibid.*, p. 53.

¹²⁸ “Chapter Eleven: Rebalancing the Relationship Between Parliament and Government.” *Restoring Accountability – Recommendations*, Commission of Inquiry into the Sponsorship Program and Advertising Activities, January 2006, S. 4.11.
http://www.gomery.ca/en/phase2report/recommendations/CISPAA_Report_Chapter11.pdf

“Reinforce leadership for promoting ethical conduct by, for example, clarifying the principle of ministerial responsibility and the responsibilities of officials ...”¹²⁹

The Values and Ethics Code for the Public Service includes a family of democratic values designed to support the public servant in his or her relationships with ministers:

“Democratic Values: *Helping Ministers, under law, to serve the public interest.*

- Public servants shall give honest and impartial advice and make all information relevant to a decision available to Ministers.
- Public servants shall loyally implement ministerial decisions, lawfully taken.
- Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work.”¹³⁰

Relationships between ministers and public servants can impact all other public service values. These relationships can also produce stress on the concept of loyalty, as discussed above, because of the tension between the principle that one “implement ministerial decisions, lawfully taken” and the notion that “Public servants shall act at all times in a manner that will bear the closest public scrutiny; **an obligation that is not fully discharged by simply acting within the law.**” (emphasis added)¹³¹

In attempting to facilitate empowerment of the civil service, *A Strong Foundation* called on public servants to let go of any naiveté they hold about the institution for which they work. Aside from marginalizing as myth Savoie’s “traditional bargain” – that, despite the good intentions of the bargain, anonymity and job

¹²⁹ “Chapter 12 – Values and Ethics in the Public Sector,” *2000 Report of the Auditor General of Canada*, Office of the Auditor General of Canada, October 2000. <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/0012ce.html>

¹³⁰ *Values and Ethics Code for the Public Service*. Treasury Board Secretariat of Canada, 2003, p. 7.

¹³¹ *Values and Ethics Code for the Public Service*. Treasury Board Secretariat of Canada, 2003, p. 9.

security do not really exist nor should they in the public service – *A Strong Foundation* asked public servants to adopt more modern approaches, and offered them tools to assist. “Times have been tough for the public service,” states the introduction to *A Strong Foundation*, “and will remain so.”¹³² It further points for example to the growing complexity of the work environment for officials who provide advice and business intelligence to private business, and to the requests made to the task force for guidance about how service-oriented, market-driven public service organizations can ensure all clients are treated equally. In this and other situations, public servants “do not always feel they have an adequate framework of values, ethics and accountability to make such decisions. They are feeling vulnerable and exposed.”¹³³

Aucoin and Jarvis discuss the effects of a change in the balance to minister-public servant relationships, where political staff are increasingly likely to “intervene in public administration” and politicians demonstrate “a decline in the respect” for a professional and non-partisan public service, a “lack of respect [that] has often pushed public servants to the sidelines in the process of advising ministers, and has had the effect of bringing public servants even further into the vortex of partisan politics.”¹³⁴ They conclude that more public service independence and transparency are essential, and that:

“... the Canadian system of public service accountability that operates within the government and the public service does not have sufficiently effective methods to assure parliamentarians, the media or the public that public servants are held to account for their actions, or are disciplined or sanctioned as necessary.”¹³⁵

¹³² *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*, Canadian Centre for Management Development, 1996, p. x.

¹³³ *ibid*, p. 39.

¹³⁴ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*, Canadian Centre for Management Development, 1996, p. 63.

¹³⁵ Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform*, Canada School of Public Service, 2005, p. 63.

To address this lack of accountability, the authors suggest that “tightening rules has limited value,” and instead recommend “greater independence of the public service, and greater public accountability by deputy ministers” through a more interactive and ongoing process of performance review.¹³⁶

This work reflects the cyclical nature of much of the debate about increasing accountability in the public service. New public management theories underline the importance of letting managers manage and empowering public servants. But the ongoing practical and political imperative to “stay out of trouble” requires the maintenance and enhancement of central controls in order to ensure that decisions are implemented and behaviour is circumscribed – and predictable.

Also posing challenges to empowerment are the growing complexity, diversity and size of the public service itself, which have made it increasingly difficult to predict how an individual civil servant might react in a particular circumstance. No longer a hermetically sealed little village (if it ever really was), the civil service reflects the attitudes, values, strengths and weaknesses of a diverse public, and like a diverse public, not everyone conforms to every law and rule. *A Strong Foundation* wished for a public service that didn’t require a rules-based approach because it was built on those who embodied the ideal of service, and because the possible breakdown of such an approach might be apocalyptic:

“There is a great temptation to think that rules, codes or regulations are the appropriate response to any problem or need. In many cases such a response may be quite wrong, or woefully inadequate. We think such a response would be especially inadequate in the case of public service values and ethics ... [because] we learn about the good not from abstractions but from encountering it in real life, embodied in real persons

¹³⁶ Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform*, Canada School of Public Service, 2005, pp 64, 69.

... [and] when the models falter or when the critical mass withers, no amount of rules or regulation will hold back the tide."¹³⁷

A bureaucracy built with empowered civil servants who embody the ideal of service, aware that there will always be a few bad apples in the barrel, and believing in natural law-like core values of public service, make possible an effective ethical framework that regulates and regularizes the behaviour of the public service. That is the ideal that drives the government's ethics regime and promotes the notion that individual public servants are empowered to use their judgment and make decisions in the course of their work.

But *A Strong Foundation* acknowledges the grave danger of a breakdown in leadership – as well as the increasingly bureaucratized approach to ethics – and implicitly suggests the need for and existence of a top-down management framework and the possibility that the ethics regime is a discourse of senior management rather than a tool of empowerment.

Loyalty

Related to empowerment of the civil service and the centrality of management leadership is the second key area of tension for the modern ethics regime – the public sector value of loyalty.

Loyalty is a key value of the ethics regime. Its operationalization in the public service ethics regime suggests the regime may be as much a mechanism of power as a tool for empowerment. Loyalty is mentioned frequently throughout the constellation of works that comprise the federal government's ethics code. *A Strong Foundation*, for example, states:

¹³⁷ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 51.

“Loyalty to the public interest, as represented and interpreted by the democratically-elected government and expressed in law and the Constitution, is among the most fundamental values of public service, and many other values (such as integrity, equity, fairness, impartiality and so on) are linked to it or draw their strength from it.”¹³⁸

While the “public interest” is broadly and variably defined, loyalty tends to be understood in the singular sense – loyalty to one’s “master,” for example. In the federal context, officials may be working in the public interest, but their reporting structure may be the best or only well-defined framework in their professional lives. Loyalty is not a natural outcome of the compelling nature of service to the public, but a requirement of bureaucratic hierarchy that will break down in its absence.¹³⁹

Loyalty is one of the values said to “emerge spontaneously” when one reflects on ethics in the public service.¹⁴⁰ This and other values become apparent from the reflections of senior public service executives whose job is to develop the framework for effective management of large numbers of public servants at all levels of work. They are held accountable by their Ministers and the Clerk of the Privy Council when policy initiatives go awry, when results do not match commitments, or, at the furthest end of the non-performance spectrum, when laws are broken. Although there is a perceived tendency to blame “lower-level employees for inefficiencies and ‘screw-ups,’”¹⁴¹ the preferred situation is to have a system of accountabilities that regularizes activities and behaviour that might otherwise fall outside of a more codified environment – for example legal or

¹³⁸ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 27.

¹³⁹ See again the reference to page 51 of *A Strong Foundation*, where the authors express caution about the possible effects on “the good” of a breakdown in leadership.

¹⁴⁰ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 53.

¹⁴¹ Thomas, Paul G., *Debating a whistle-blower protection act for employees of the Government of Canada*. Canadian Public Administration/Administration Publique du Canada, Volume 48, No. 2 (Summer/Ete 2005), p. 156.

accounting constructs – and therefore ensures a higher degree of predictability and reliability – in other words, an environment where nobody gets blamed.

Loyalty is a thorny subject in this context because it lies squarely at the intersection between the need to “empower” public servants and the imperative of ensuring they are not engaged in public criticism of their employer. It is a difficult concept, too, because “loyalty” generally infers a sense of indenture to a definable entity, and the concept of loyalty to a depersonalized institution can be difficult to articulate and to instil. Arguably, the public might expect that the concept of loyalty means public servants should be able to criticize the institution when warranted because such freedom ensures the public is receiving the information it requires to make informed decisions and therefore demonstrates loyalty to the public. A public servant appearing before a parliamentary committee, for example, may feel the tension of the value of loyalty if faced with the prospect of telling a “truth” that requires him, overtly or not, to criticize a superior or a policy (especially if the definition of “criticize” is exceedingly broad). Such a public servant is not accountable to Parliament and so the value of loyalty (“Public servants shall loyally implement ministerial decisions, lawfully taken”) may technically trump other democratic values (for example, that “Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work”), which is to be expected and is acceptable in an ethics regime as laid out in *A Strong Foundation*.¹⁴²

A further challenge comes from the relationship between loyalty and accountability. Public servants are charged with loyally implementing ministerial

¹⁴² *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 2. Here, Tait writes, “We are not sufficiently alive to what the philosophers call the hierarchy of values, to the fact that our values conflict not only with their opposites but with each other ... because we are not sufficiently conscious or frank about this, we are sometimes inclined to think that some value or principle is being betrayed when it is only being subordinated or accommodated, in a specific circumstances, to some other value.”

decisions, or “assist[ing] ministers, under law, to serve the public interest”¹⁴³ while they are being pulled into the political vortex¹⁴⁴, and at the same time that mechanisms for holding ministers accountable have either diminished, are being ignored, or are simply evolving into answerability. The value of loyalty may therefore lie at the heart of challenges to traditional notions of accountability and at the problematic of improving and modernizing the government’s accountability framework.

Although loyalty is referenced only once in *The Values and Ethics Code for the Public Service*,¹⁴⁵ material provided by the Government of Canada’s Office of Public Service Values and Ethics seeks to clarify and provide guidance on the application of the duty of loyalty, and provides background information on the growing jurisprudence regarding the concept, with the conclusion that:

- “The duty of loyalty owed by public servants to the Government of Canada encompasses a duty to refrain from public criticism of the Government of Canada.
- Failure to observe the duty of loyalty may justify disciplinary action, including dismissal.
- However, the duty of loyalty is not absolute, and public criticism may be justified in certain circumstances.
- In determining whether any particular public criticism is justified and therefore not subject to disciplinary action, the duty of loyalty must be balanced with other interests such as the public servant’s freedom of expression.
- [There are] situations in which the balancing of these interests is likely to result in an exception being made to the duty loyalty ...”¹⁴⁶

¹⁴³ *Values and Ethics Code for the Public Service*, Treasury Board of Canada Secretariat, 2003, p. 6

¹⁴⁴ Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform*, Canada School of Public Service, 2005, p. 61.

¹⁴⁵ On page 7: “Public servants shall loyally implement ministerial decisions, lawfully taken.”

¹⁴⁶ *Duty of Loyalty*, Public Service Human Resources Management Agency of Canada, Office of Public Service Values and Ethics, 2005, http://www.hrma-agrh.gc.ca/veo-bve/dli-oli_e.asp, p14

Some requirements of the ethics regime are relatively straightforward – particularly around conflict of interest and post-employment measures. Measures to prevent questionable actions or outright malfeasance are quite clearly defined although still rely heavily on individual judgment. The handling of gifts and hospitality, for example, require the recipient to determine whether a gift is “within the normal standards of courtesy, hospitality or protocol,” or “compromise[s] in any way the integrity of the public servant concerned or his or her organization.” The interpretation guide that accompanies the Code is helpful in refining the application of individual judgment and relies heavily on situation ethics, stating that, “each case must be evaluated individually.”¹⁴⁷ Despite its centrality, however, and the strict and legalistic admonition to serve loyally, loyalty is only vaguely defined.

The stress on loyalty may derive from its foundational place in the ethics regime, but there are other possible factors -- it is contrary to more modern definitions of loyalty (i.e. to self), it is challenged by the explosion in information,¹⁴⁸ and its operationalization in the institutional context is exponentially more complicated as the institution grows and the linkages yawn between the management leadership and the rank-and-file. Loyalty is best exercised as a top-down exercise, and so must be re-defined in the context of an organization whose management approaches increasingly espouse a bottom-up approach.

The Auditor-General of Canada concluded in 1995 that, “it must become normal for employees to state their reservations about actions that they consider to be of

¹⁴⁷ *Interpretation Guide to the Values and Ethics Code for the Public Service*, Public Service Human Resources Management Agency, Office of Public Service Values and Ethics, 2004, http://www.hrma-agrh.gc.ca/veo-bve/code/guide/guide_e.asp, p.16

¹⁴⁸ Kernaghan, Kenneth, *Research Paper No. 19: The Ethics Era in Canadian Public Administration*. Canadian Centre for Management Development, 1996, p. 10. Kernaghan writes, “The massive flow of data along the “information highway” will exacerbate the current, and inherent, tension between openness on the one hand and both confidentiality and individual privacy on the other.”

questionable ethics.”¹⁴⁹ These growing pressures on the value of loyalty may themselves have contributed to the development of an ethics regime as a mechanism of centralized control and a tool to inform and check the behaviour of public servants and preserve the stabilizing value of loyalty.

The jurisprudence on loyalty might also be a force behind the establishment of a bureaucratized approach to the ethics regime. In *Haydon No. 1*, the Federal Court held for the applicants because public criticism appeared the last resort after they “endeavoured on several occasions to have their concerns addressed internally without success. As a general rule, public criticism will be justified where reasonable attempts to resolve the matter internally are unsuccessful.”¹⁵⁰ The other challenging aspect of the jurisprudence on loyalty is that its application has been diluted the further one finds oneself from centres of power and decision-making. In *Fraser v. Public Service Staff Relations Board (1985)*, the Supreme Court ruled that “the degree of restraint which must be exercised is relative to the position and visibility of the public servant.”¹⁵¹ With the rules (or at least the concept of loyalty) less and less clear the deeper one travels into the public service, the need for clearer and more consistent application grows in order to maintain stability and predictability.

Ethical issues in government are defined differently from the inside than the outside, a gap the ethics regime seeks to bridge through appropriation (and re-definition) of private sector and public values. Despite the differences in the meaning assigned to various values, many issues or incidents will be seen as ethically wrong from both inside and outside the public service – financial improprieties, for example. Institutional criticism, however, is seen quite

¹⁴⁹ *Report of the Auditor General to the House of Commons for May 1995*. Auditor General of Canada/Minister of Supply and Services, May 1995, p. 23. (Quote from Chapter One, “Ethics and Fraud Awareness in Government.”)

¹⁵⁰ *Duty of Loyalty*. Public Service Human Resources Management Agency of Canada, Office of Public Service Ethics and Values, p. 9. http://www.hrma-agrh.gc.ca/veo-bve/dli-oli_e.asp

¹⁵¹ *ibid*, p. 10.

differently from the inside than from the outside. From the inside, institutional criticism breaches the duty of loyalty. From the outside, institutional criticism can be seen as an act of honesty, bravery, or career suicide, but rarely (maybe never) as ethically wrong. This may be attributable to the manner in which public servants “speaking out” are portrayed in the media (that is, very positively). Tension therefore arises between how to define loyalty in the context of institutional criticism that is at odds with public sector values but consistent with the values or at least the expectations of the public.

The ongoing call for whistle-blower protection for public servants also reveals the stress on loyalty as a central value of the government’s ethics regime.

The federal government has defined whistle-blowing as “the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations (internal or external) that may be able to take action to stop the wrongdoing.”¹⁵²

In his article “Debating a whistle-blower protection act for employees of the Government of Canada,” Paul G. Thomas describes three sets of factors contributing to greater public-sector whistle-blowing: “a cultural shift in favour of the activity, changes to the composition of the public services, and laws/rules that encourage whistle-blowing.”¹⁵³ As public cynicism towards government has grown, loyalty within the public service has atrophied. A lack of trust in the leadership of government, combined with growing public support for those considered brave enough to step up and speak out against abuses, has increased the attractiveness of the whistle-blower route.

¹⁵² Public Service Human Resources Management Agency of Canada, http://www.hrma-agrh.gc.ca/media/20041008-nr_e.asp.

¹⁵³ Thomas, Paul G., “Debating a whistle-blower protection act for employees of the Government of Canada.” *Canadian Public Administration/Administration Publique du Canada*, Volume 48, No. 2 (Summer/Ete 2005), p. 153.

Thomas points to the development of the ethics framework in government as having contributed to the growing trend to blow the whistle. He writes:

“Under the reform banner of “new public management,” steps have been taken to decentralize decision-making within government, to “empower” public servants to exercise their judgment and to increase their “responsiveness” to clients ... These managerial changes are producing a new public-service culture, important components of which are a citizen-centred approach to the delivery of services, an insistence on results and adherence to higher ethical standards. A whistle-blower law seems to fit with these new cultural norms.”¹⁵⁴

Whistle-blowing as a symptom of challenges facing government ethics further suggests the ethics agenda has been a response to rather than an outcome of a less docile, less respectful and less “loyal” public service, and implemented at least in part to enhance and expand mechanisms of central control.

Avoidance of public criticism of the government is a negative value that is problematic for government ethics generally and for loyalty in particular. Langford has pointed out that there is a premium in government on behaviour that is perceived as “good,” and therefore an avoidance of negative values.¹⁵⁵ While “good” behaviour is expected from public servants, it is often negative values that drive the public service and protect it.

¹⁵⁴ Thomas, Paul G., “Debating a whistle-blower protection act for employees of the Government of Canada.” *Canadian Public Administration/Administration Publique du Canada*, Volume 48, No. 2 (Summer/Ete 2005), p. 156.

¹⁵⁵ Langford, John W., “Acting on Values: An Ethical Dead for Public Servants.” 2005, p. 7.

Transparency

A third area of tension for the ethics regime is transparency, a broad term applied to the government's practices of disclosure. Circumscribed as it is by legislation and convention, transparency is another word for the negative value of secrecy.

Cabinet discussions are considered confidential and protected from public scrutiny for decades. Information of a personal nature, of a commercially confidential nature, important to federal-provincial or other negotiations, critical to national security, or sensitive for a host of other reasons is protected from public release. Legal means can be brought to bear if such information is intentionally or accidentally released. Secrecy, also called "discretion," is described as essential to Savoie's traditional bargain:

"Career servants must channel advice upwards in confidence. Accordingly, the shroud of secrecy that embraces cabinet deliberations applies to the public service as a whole. Since the minister is responsible for departmental policies and actions, this secrecy enables him or her to control the facts of the situation and all public comment. This arrangement serves both ministers and public servants well."¹⁵⁶

Neither secrecy nor discretion is identified as a value in *The Values and Ethics Code for the Public Service*. But in their practical absence, the Code would be operationally impossible. Secrecy, however, is at odds with the values of openness and transparency that the public invariably connects to government accountability and very much at odds with the standard government public relations promise of transparency. It is therefore another area where the meaning-making qualities of the government ethics regime are critically important.

¹⁵⁶ Savoie, Donald J., *Breaking the Bargain: Public Servants, Ministers and Parliament*. University of Toronto Press, 2003, p. 42.

The ethics regime in government is a valuable tool to support public servants in navigating complex situations with conflicting demands and expectations. It is an important support to the maintenance of high ethical standards in government. It is a practice of meaning-making that provides tools to invest particular definition to terms and concepts that are popular in the public relations function of government. It is also a mechanism that assists in ensuring public servants' behaviour and activities are more predictable and conform to expectations and results for which deputy ministers are ultimately accountable.

Secrecy has become an important component of national security in the post-9/11 world, and in its ascent, national security has trumped virtually all other values on the hierarchy. The recent inquiry into the treatment of Maher Arar demonstrated the challenges of accountability on the one hand and secrecy on the other. The many findings of the commission included:

- The RCMP provided American authorities with information ... that did not comply with RCMP policies requiring screening for relevance, reliability and personal information. Some of the information related to Mr. Arar.
- The RCMP provided American authorities with information about Mr. Arar that was inaccurate, portrayed him in an unfairly negative fashion and overstated his importance in the RCMP investigation.
- Following Mr. Arar's return, reports were prepared within government that had the effect of downplaying the mistreatment or torture to which Mr. Arar had been subjected.
- Both before and after Mr. Arar's return to Canada, Canadian officials leaked confidential and sometimes inaccurate information about the case to the media for the purpose of damaging Mr. Arar's reputation or protecting their self-interests or government interests.

- When briefing the Privy Council Office and senior government officials about the investigation regarding Mr. Arar, the RCMP omitted certain key facts that could have reflected adversely on the Force.¹⁵⁷

Arguably, government could not function effectively if it was not permitted to maintain some level of secrecy. But a transparent debate about appropriate levels of discretion is not possible without breaching current protocols on protecting information, as was also seen, for example, with the Arar inquiry. A *Strong Foundation* observed that “the publicness of public organizations requires of them a degree of transparency, accountability and due process above and beyond that of other organizations.”¹⁵⁸ The definition of transparent is managed by those who have access to un-severed information, and who therefore require tools to reassure the media and interested public that they are making decisions about access to information that are appropriate and ethical. The ethics discourse provides depth and formality to this public relations function but cannot erase the tension between the centrality of transparency to an ethical public organization and the necessity of secrecy for government.

Practicing ethics

Public servants are increasingly asked to explain decisions about which they may know very little – decisions in which they may have not participated or whose rationale may not have been readily apparent. For senior officials, admitting they were not part of a decision that was relevant to their department is akin to admitting they have lost control. But the act of explaining a decision can shift the perception of accountability to he or she who is doing the explaining. What’s more, recent developments and trends in ministerial accountability have

¹⁵⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, p. 13, 16.

¹⁵⁸ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 42 – 43.

increased the pressure on public servants to at least be aware but arguably be very sensitized to the political sphere. The ethics regime must therefore continue to be invested with sufficient flexibility to support the democratic values outlined in the Code – and in particular the value of loyally implementing ministerial decisions, lawfully taken.¹⁵⁹

A challenge for the regime is the suggestion that it exists as a toolset for public servants who are faced with difficult choices or ethical quandaries. While the interpretation guide to the Code endeavours to provide a series of case studies that illuminate the application of government values, the question remains whether and to what extent public servants have ready tools to assist them in difficult situations where judgment is required, and more specifically whether they have tools to assist them in navigating what many have identified is the most difficult terrain in the public service – the relationship between elected and unelected officials. In this and other contexts, it is an open question whether the ethics regime provides tools or guidance for public servants who are seeking to provide fearless advice, or who find themselves in a situation where ethical needs go beyond the strict requirements of the law.

Chapter IV

Ethics Meets APEC

The federal ethics regime as it exists today is characterized as revolving around a suite of a priori values that promote the highest possible ethical conduct and performance of the public service. It is also described as a mechanism for assisting public servants to understand their role and to enable ethical judgments. It has been argued above that it is also a tool that assists in explaining government actions in terms that can be understood and accepted by the public and the media, that helps to create winning conditions for public

¹⁵⁹ *Values and Ethics code for the Public Service*. Treasury Board of Canada Secretariat, 2003, p. 7. Here is found the “democratic value” of: “Public servants shall loyally implement ministerial decisions, lawfully taken.”

debate, and that provides a mechanism of control from the centre of government. The 1997 APEC Leaders' Meeting occurred at the time that ethics were (re) assuming a central role in public administration but before their formal codification. It will be argued that this ascension is evident in the government's defence of its actions at the APEC meeting (at the inquiry that occurred after the event) and that the same tensions were manifest there that are now evident in the formalized regime. Whether a *priori* public service values existed and could be drawn on by officials facing difficult decisions in the planning of APEC will also be analyzed.

The APEC conference was planned and executed at the same time that the federal government's modern ethics agenda was being developed and implemented. *A Strong Foundation* was released in 1996; the APEC conference took place in Vancouver in 1997. The RCMP Public Complaints Inquiry review of the 1997 APEC leaders meeting took place from 1998 to 2001, the same time period in which the federal government released a series of studies, reports and manuals on ethics and established an independent office of values and ethics.

The Asia Pacific Economic Cooperation (APEC) is an intergovernmental body that conducts its work through annual meetings between the leaders of the 18 involved "economies,"¹⁶⁰ as well as through a variety of related meetings involving government ministers, business leaders and non-governmental organizations. The participants are described as economies because of the participation of the People's Republic of China, Chinese Taipei, and Hong Kong. The organization is focused exclusively on trade, and so for some, its very existence is amoral. That it was meeting in Canada made it particularly objectionable. W. Wesley Pue in his book "Pepper in our Eyes: The APEC Affair," writes:

¹⁶⁰ Australia, Brunei, Canada, Chile, China, Hong Kong-China, Indonesia, Japan, South Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Philippines, Singapore, Chinese Taipei, Thailand, and the United States.

“The people who attended the APEC summit were no random collection of democrats and dictators, however, just as APEC is no ordinary international organization. Unlike most international bodies, APEC is entirely unidimensional. It focuses exclusively on the promotion of trade, maintaining a studied disregard for ‘ancillary’ matters such as human rights, world peace, labour or environmental standards, the promotion of democratic values, and so on ... The APEC club of “economies” was, however, deliberately created without moral, political, or ethical standards.”¹⁶¹

The nature of the organization prompted much of the protest activity at the 1997 conference. The protestors sought to highlight values of human rights, democracy and free speech, and to protest not only against those economies deemed not to share those values, but against the Canadian government for hosting such morally objectionable figures. They were absolute in their position that Canada should not implicitly condone the acts of foreign dictators by engaging with them in an international forum or by playing host. The Canadian government sought to uphold its responsibilities as a member nation of APEC – including hosting the annual meeting and ensuring the safety of economic leaders visiting Canada – and maintaining consistency with its foreign and economic policies. This required first, respect for the sovereignty of other member APEC economies and second, pursuit of trade relationships with countries whose human rights records were questionable, on the basis that through the economic prosperity engendered by such trade, advancements will be made in human rights and democratic reform. For the protestors, APEC challenged values that were neither flexible nor negotiable. For the government, APEC was one aspect of a pragmatic approach to foreign affairs and trade that conjured a constellation of flexible values, mostly subordinate to the values of prosperity and security.

At the time of the APEC conference, the *Values and Ethics Code for the Public Service* did not yet exist. Controls on behaviour were found primarily in the Conflict of Interest and Post-Employment Code for Public Office Holders. The

¹⁶¹ Pue, W. Wesley, ed., *Pepper in our Eyes: The APEC Affairs*. UBC Press, 2000, pp 4 - 5.

conflicts manifest at APEC suggested the need for tools to navigate the relationship between elected and unelected officials and manage conflicting values. Although still in its infancy at the time of the APEC meeting, the notion that there could be core values and key principles to guide the decisions and actions of public servants was beginning to ascend. The degree to which these core values are reflected in the actions of public servants involved at APEC, and later in the government's defence of its actions at the inquiry into APEC, affirms the tensions found in the ethics regime, described above. APEC was a microcosm of the constellation of challenges that have driven the development of an ethics regime in government but, perhaps out of purpose or need, remain unresolved in the modern ethics regime.

Road to the Public Complaints Commission

APEC member economies host annual meetings on a revolving basis, and the Government of Canada was designated host in 1997. The conference was held from November 19 – 25 and included between 23,000 and 25,000 accredited participants, from delegates and media to hotel staff. Events were held in an urban setting, at sites around Vancouver and at the University of British Columbia, where a leaders' retreat was held at the Museum of Anthropology and Norman Mackenzie House on November 25, 1997.

Temporary government entities were established to plan and execute both the main conference and associated, cross-Canada activities. These entities included specific offices under the auspices of the Department of Foreign Affairs and International Trade (DFAIT) and the RCMP. Organization was undertaken through the APEC Coordinating Office (ACCO), established in 1996 with offices in Vancouver and Ottawa, and then merged into one Vancouver location (where they were co-located with RCMP members) in 1997. Overall accountability was assigned to an Assistant Deputy Minister in DFAIT, who took on the title Senior Official for APEC, and partly delegated to an Executive Director-level official.

ACCO Vancouver's main focus was on logistics, including accommodation, accreditation, transportation, communications, site selection, and conference facility preparations.¹⁶² Because economic leaders are specifically designated host of the leaders' retreats, the Canadian Prime Minister was host and, as with any event involving the Prime Minister, officials from the Prime Minister's Office (PMO) were involved in the planning and organization of the conference, and specifically of the Leaders' Retreat at UBC. The Ottawa duties of ACCO included coordination and liaison with relevant Ministers and with the Prime Minister and his office, as well as work on substantive issues related to the anticipated discussions and decisions at the APEC conference. The Senior Official for APEC was accountable for both substantive and logistical issues.

The RCMP, with support from the Vancouver Police Department, worked with ACCO to provide security for the entire APEC conference, including responsibilities for establishing the security perimeter at UBC, coordinating motorcades and route security, law enforcement, prisoner handling, and coordinating tactical response.

Organization under the RCMP was particularly complex and hierarchical, including a federal security coordinator, a division operations commander, a deputy division operations commander, a planning secretariat, a security steering committee, site commanders, a command centre, and quick response teams. The APEC conference was considered the "largest security event that would be undertaken by policing in the City of Vancouver."¹⁶³

The Government of Canada had principal responsibility for all matters relating to security at UBC. The University of British Columbia had a planning organization

¹⁶² Hughes, Ted: RCMP Act – Part VII Subsection 45.45(14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, p. 5.2.

¹⁶³ Hughes, Ted: RCMP Act – Part VII Subsection 45.45(14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, p. 5.3. (From testimony of Vancouver Police Department Deputy Chief Brian J. McGuinness.)

itself, the focus of which was to negotiate an agreement with the Government of Canada for use of specific properties and related security on the University campus. By written agreement between the Government of Canada and the University, UBC granted the federal government exclusive use of designated properties on the campus.

These complex arrangements obscure accountability, particularly because of the multiple responsibilities spread between elected and unelected officials, political (exempt) staff, and non-government organizations.

Seeds of the issues that later became main points of contention were planted in the planning stages of the APEC meeting. Specifically, interactions between the Prime Minister's staff and, variously, members of the RCMP and officials from UBC, were a key focus of complaints to the RCMP Public Complaints Commission.

The Canada-hosted APEC conference came at a time when massive, sometimes violent demonstrations were only just beginning to characterize gatherings of world leaders. Where 2000 people protested at APEC in Vancouver, 40,000 protested at the November 1999 meeting of the World Trade Organization in Seattle; 15,000 protested at the April 2000 meeting of the International Monetary Fund in Washington, D.C.; 30,000 protested at the April 2001 Third Summit of the Americas in Quebec City; and between 50,000 and 80,000 protested at the July 2001 G8 Summit in Genoa, a meeting particularly distinguished by the death of a protestor. And while the Vancouver APEC meeting was held at sites around the city, similar meetings have since been held on islands, cruise ships, and in gated castles. This dynamic of increased protest and increased security for such meetings provided important context to the government's response to the controversy that followed the 1997 conference.

By the time the report into the events at APEC 1997 was finally released (in 2001), the memories of what many suggested were brutal police force had been replaced by the view that the protests had been "quaint:"

"Compared to the violent protests that have rocked recent gatherings of world leaders, the skirmishes between the RCMP and demonstrators at the 1997 APEC summit in Vancouver now seem amateurish and relatively polite, says one of the protestors who filed a complaint against the police.

... The RCMP Public Complaints Commission launched a four-year inquiry into the police force's handling of security for the Asia-Pacific Economic Cooperation Summit after several dozen University of British Columbia students complained of police brutality and political interference ... Among other things, the Mounties were accused of removing protest signs to ensure visiting leaders, such as deposed Indonesian strongman Suharto, weren't embarrassed, pepper-spraying protesters and strip-searching some of the female protesters who were arrested.

The controversy raged for about two years, bringing down one inquiry chairman and a loose-lipped federal cabinet minister, who were forced to resign amid allegations they had prejudiced the outcome. It reached such a fever pitch at one point that some commentators actually doubted whether Prime Minister Jean Chretien could survive the daily opposition pummelling over his role in allegedly instructing police to clamp down on protestors. Yet the events at [APEC] pale in comparison to the open warfare that has since become the backdrop for any gathering of world leaders around the globe."¹⁶⁴

But the APEC meeting generated significant controversy for its time. The appearance of leaders including Chinese President Li Peng and Indonesian President Suharto caused concern, and the week's events were marked by protests both in the city of Vancouver and at the University campus. The most notable of these protests took place at the margins of the leader's retreat at the UBC Museum of Anthropology, which closed the conference on November 25, 1997. Initially, there was little media interest in the events. It was even suggested that the media completely missed the story:

¹⁶⁴ Bryden, Joan: "APEC protest now seems almost quaint: In the annals of recent globalization protests, the police skirmishes between police and demonstrators in 1997 were truly from another era." *The Edmonton Journal*, July 26, 2001.

“What distinguishes the case of the 1997 APEC summit is that, at first, the dogs did not bark at all ... On the periphery, some students clashed with police. It was routine stuff, and the media gave it little attention ... the *Globe and Mail* ... suggested that street protests are rarely taken seriously, that the big guns of the media were trained on the official events, and that reporters assigned to the Prime Minister may have been too ‘cozy’ with their subject.”¹⁶⁵

But the interface of police and protestors had produced photographs, footage and increasing commentary about what some considered to be an undue use of force, particularly in the use of pepper-spray at a road blockade and other locations at the UBC campus. There was also growing speculation about the role of the Prime Minister and his staff in curbing the protest activities, and questions specifically about whether the PM or his staff had directed the police. In the aftermath of the APEC conference, there were public calls for a commission of inquiry into the behaviour of both the police and of elected officials. The government refused to strike an inquiry, deferring instead to the RCMP Public Complaints Commission (the name of which has since been changed to the Commission for Public Complaints Against the RCMP), whose mandate is focused on “civilian review of RCMP members’ conduct in performing their policing duties so as to hold the RCMP accountable to the public.”¹⁶⁶ Opposition parties were critical of the government’s choice of venue, preferring a royal commission because of their belief that government officials had behaved inappropriately and their view that such commissions are unfettered by government.

¹⁶⁵ Milewski, Terry: “Forces of Journalism.” From Pue, W. Wesley, *Pepper in our Eyes: The APEC Affair*. UBC Press, 2000, pp 143 – 144.

¹⁶⁶ Website for the Commission for Public Complaints Against the RCMP, http://www.cpc-cpp.gc.ca/DefaultSite/Home/index_e.aspx?ArticleID=1. This quote is taken from the current information about the Commission that is provided on the web. The name for the Commission has changed since 1997 (when it was the RCMP Public Complaints Commission), but the mandate (or at least this reference) has not.

The Canadian Centre for Management Development describes royal commissions, which are created by order-in-council, as inquiries that are “independent of bureaucratic and political involvement ... [are] means for accomplishing focused analysis that transcends institutional limitations ... [and address] instances in which public pressure surrounding an issue mounts to the point where government decides that special attention is required and elevates the matter...”¹⁶⁷

Royal commissions are specifically mandated by government, and it is government that appoints the chair and other commissioners. The official written mandate of the commission “normally emphasizes the importance of the royal commission and provides general direction regarding the nature of the subject, the scope of the analysis and the major issues to be addressed.”¹⁶⁸

Commissioners are asked “to fulfil a significant mandate,” but to understand that “they are not being invited to make ... decisions on behalf of government, nor is government obliged to authorize their findings or implement their recommendations ... [and that they have] no power to take action beyond the terms of their mandate, which is to make recommendations to the government.”¹⁶⁹

The chair and/or panel are appointed by government for both royal commissions and RCMP Public Complaints Commission hearings – directly, in the case of royal commissions and indirectly in the case of RCMP Public Complaints Commission hearings, whose panels are appointed by the Chair of the Commission, who is turn appointed (for any number of three- to five-year terms) by Cabinet.

¹⁶⁷ *Managing a Royal Commission: A Planning and Organizational Model Derived from the Experience of the Royal Commission on National Passenger Transportation*. Canadian Centre for Management Development, 1994, p. 18.

¹⁶⁸ *ibid*, p. 19.

¹⁶⁹ *ibid*, p. 19

The real and perceived independence of a royal commission, and the criticism of the government's choice of a review through the RCMP Public Complaints Commission, reflect the tensions evident in the empowerment of public servants and in the public service value of loyalty. Royal commissions and RCMP public complaints commissions both utilize public servants who likely have at least a tacit awareness of the government's position on a given issue. In both cases, the questions are either directly or indirectly framed by government. Public servants generate background information for use by the panels, and are sometimes called as witnesses to explain government policies.

The opposition characterized the government's referral of APEC concerns to the RCMP Public Complaints Commission as insufficient and therefore as proof that the Prime Minister had done something wrong that he was seeking to conceal. Protestors suggested the government had acted inappropriately by intervening in security arrangements so as to curb free speech and appease foreign dictators. The focus of debate therefore quickly sharpened on to the questions of whether and who had inappropriately intervened in the RCMP, thereby missing any substantive policy debate about appropriate relative accountabilities and relevant foreign policy. In the context, such debate would have likely appeared irrelevant and meaningless. The possibility for such debate is nevertheless severely curtailed once an issue is referred for external review, after which government will typically avoid engaging in an issue by citing a concern about appearing to try to influence the outcome¹⁷⁰ or undermining the work of the inquiry.¹⁷¹

¹⁷⁰ Just one example of this is the response by Deputy Prime Minister Herb Gray to a Question Period exchange about the APEC inquiry, where he said: "... the commission is being carried out by a very distinguished former judge. It is up to him to run the inquiry, look at all the evidence in context and reach his conclusion." *Hansard*, Monday, October 25, 1999. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332134&>

¹⁷¹ For example, again from Deputy Prime Minister Herb Gray and again from Question Period: "I do not know why the hon. Member and other opposition members want to have a parallel system of inquiry in the House. Are they trying to undermine the APEC inquiry? Why do they want to do that?" *Hansard*, Monday, October 25, 1999. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332134&>

On December 9, 1997, the Chairwoman of the RCMP Public Complaints Commission initiated an investigation into the 52 complaints about events at the APEC meeting. She “subsequently determined that it was in the public interest to institute a hearing into the complaints,”¹⁷² and on February 20, 1998, issued a *Notice of Decision to Institute a hearing and Assignment of Hearing Members*, subject to Subsection 45.44(1) of the Royal Canadian Mounted Police Act, which stated in part:

In the matter of complaints made by members of the public concerning the conduct of members of the Royal Canadian Mounted Police (“RCMP”) ... in the performance of their duties or functions under the Royal Canadian Mounted Police Act (“Act”) relating to events that occurred in British Columbia on November 23 to November 27, 1997 on or near the University of British Columbia (UBC) campus and subsequently at the UBC and Richmond Detachments of the RCMP.

Having determined that it was advisable in the public interest to investigate the complaints set out in the Schedule to this Notice,

Take notice that in respect of these complaints, I have decided, in the public interest, to institute a hearing pursuant to subsection 45.43(1) of the Act, commencing April 14, 1998, to inquire into all matters touching upon these complaints, to hear all evidence relevant thereto, to ensure a full and fair hearing in respect of these complaints and to report at the conclusion of the hearing such findings of fact and recommendations as are warranted, and, without limiting the generality of the foregoing, to inquire into and report on:

- (a) the events that took place during, or in connection with, demonstrations during the Asia Pacific Economic Cooperation (“APEC”) Conference in Vancouver, B.C. between November 23 and 27, 1997 on or near the UBC Campus and subsequently at the UBC and Richmond Detachments of the RCMP;
- (b) whether the conduct of members of the RCMP involved in the events was appropriate to the circumstances;

¹⁷² Heafey, Shirley, *Chair’s Final Report Following a Public Hearing*. Commission for Public Complaints Against the RCMP, March 25, 2002, p. 1.

- (c) whether the conduct of members of the RCMP involved in the events was consistent with respect for the Fundamental Freedoms guaranteed by section 2 of the Canadian Charter of Rights and Freedoms.¹⁷³

The Commission Chair also appointed a panel chair and two panel members, and hearings commenced in Vancouver in October 1998 with the complaints panel having acknowledged they were limited to a review of conduct by RCMP members. Soon after the hearings began, however, allegations surfaced about the behaviour of the panel chair at a casino in Prince Albert, Saskatchewan. The panel chair in turn made allegations of interference on the part of the Commission Chair and then resigned, followed by his two colleague commissioners.

Ted Hughes was appointed sole panel commissioner in December 1998 and conducted hearings into the complaints through 1999 and 2000, issuing his final report to the RCMP Public Complaints Commission in August 2001.

Hughes conducted his review with the commitment that he would go “where the evidence took him,” although he expressed concern about public statements that suggested his mandate did not have limits. In February 2000, he wrote:

“In my view, it is entirely likely that many members of the general public believe that this hearing is intended, at least in part, to inquire into the conduct of the Prime Minister and the political rationale for his alleged actions. Although this is not the case, a useful example of the public discourse that has fostered such a conclusion occurred on September 9, 1998 when the following exchange occurred in the House of Commons between Deborah Grey MP and then Solicitor General Andy Scott:

Miss Deborah Grey (Edmonton North, Ref.): Mr. Speaker, the Prime Minister deliberately ordered police to quash peaceful protesters. Canadians want to know why and what it was he said. Why was the Prime Minister more concerned about the feelings of

¹⁷³ Heafey, Shirley, *Notice of Decision to Institute a Hearing and Assignment of Hearing Members*. February 20, 1998.

a foreign dictator than he was about protecting the rights of our own Canadian citizens?

Hon. Andy Scott (Solicitor General of Canada, Lib.): Mr. Speaker, the public complaints commission is investigating the incidents around the APEC meetings. I think that institution, which has been in existence since 1986, has established a good record and deserved the opportunity to get to the bottom of this. This is how Canadians will find out the answers to the questions.

This is but one example of the type of statements and commentary which have proliferated in the House of Commons and in the media, without apparent regard for the **limits on the jurisdiction of this Commission.**¹⁷⁴ (emphasis added)

There is a tendency in the public relations response of government to characterize the work of external reviewers as being unfettered by government. That was the case with the APEC inquiry, despite opposition attempts to first delegitimize the government's choice of venue for external review, and later question the independence of the panel (although only as first constituted) and its power to compel testimony by the Prime Minister. Among the many problems inherent in this public relations response is the probability that the review is fettered in some way. Although Hughes ultimately did not express any concern about having been or perceived to have been limited in his mandate, he was expressive on the issue of the Prime Minister's requested testimony (the Prime Minister chose not and was not compelled to testify, despite Hughes claims that, though the testimony was not required for his review, it would be useful for the sake of perception.¹⁷⁵)

¹⁷⁴ Hughes, Ted, *Ruling on Applications to Call Additional Government Witness*. RCMP Public Complaints Commission, February 25, 2000, pp 15 – 16.

¹⁷⁵ In an interim ruling on November 10, 2000, Commissioner Hughes wrote that he had not heard any evidence that would justify issuing a summons for the Prime Minister to appear, but that "If the prime minister does not give evidence at this hearing, there may well be a cloud, albeit unjustified, over my report."

In his interim report, Commissioner Hughes shaped the 52 complaints before him into 17 categories of incident or complaint in generally chronological sequence.

These included:

- ... UBC Security Perimeter and Demonstration Area
 - These complaints allege that the RCMP provided demonstration sites too small for the number of protesters and created security zones that were larger than necessary for security purposes so that APEC delegates would be shielded from the sights and sounds of protest.
- ... Undertakings
 - On November 22 and 23 [1997], six protesters were arrested after refusing to leave their tents near the Museum of Anthropology. The area had become part of the security zone. Besides the arrests themselves, issue is taken with the undertakings that the arrested protesters were obliged to sign before they could be released. Those undertakings placed restrictions on the protesters' activities for the duration of the APEC conference.
- ... Removal of Green College signs and Jones Arrests
 - Signs made by Craig Jones were removed by RCMP members from the fence in front of Green College. More signs were removed from Mr. Jones and other residents of Green College when they gathered on the lawn in front of their residence, outside the secure zone just before the motorcades arrived. Mr. Jones was pushed to the ground and arrested.
- ... Confrontation at Noon Rally
 - There were complaints that the RCMP used excessive force, including Oleoresin Capsicum spray (called, interchangeably, OC spray or pepper spray), on the crowd after a security fence came down, that they used it punitively and without warning, and that some who were seeking to be arrested peacefully were pepper sprayed and assaulted by police.
- ... Protesters Moved from Gate 6
 - The complaint is that peaceful protesters at Gate 6 were ordered to clear the road and then pepper sprayed before they had a chance to do so. Some were pepper sprayed as they were leaving. Others were pepper sprayed as they stood watching. Mark Brooks was arrested and pepper sprayed as he was asking for calm.

Decontaminant services following the spray were said to be insufficient and inadequate.¹⁷⁶

This subset represents key areas where allegations of wrong-doing went beyond the practices or personnel of the RCMP to the Government of Canada broadly, and more specifically where there were allegations of political interference that had the effect of curbing the rights of protestors. The complaints represent the intersection of the protestors' absolutist position – that to host foreign “dictators” in Canada was to overlook human rights abuses and therefore implicitly to condone these wrongs – and the government's more pragmatic position – respect for national sovereignty and the pursuit of economic prosperity as the best path to democracy. While the government could explain its position in terms of values – particularly the values of prosperity and security – it was also faced with the more practical demands of the vast organization required in hosting an APEC conference. Those involved in that organization were faced with the need to anticipate and manage a conflict of values.

Empowerment and loyalty

It was well known the APEC meeting would generate significant protest, and this was a subject of planning and coordination from early in the process. In his interim report on the APEC issue, Commissioner Hughes reflected on UBC's desire to “allow dissenting opinions to be openly expressed and to ensure that protestors would have the opportunity to see and be seen by the visiting leaders.”¹⁷⁷ Public service officials at the same time were working to ensure that all 18 APEC economies were present at the meeting, consistent with the wishes of the Prime Minister and the Foreign Affairs Minister. This required officials to exercise judgment regarding the security and dignity of the President of

¹⁷⁶ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001. chpt. 3. pp. 1 – 3.

¹⁷⁷ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, chpt. 9.1.

Indonesia, to weigh these considerations against the rights of demonstrators, and to apply their judgment to considerations about the size of the security perimeter for the leaders' meeting. In his findings, Commissioner Hughes noted (and accepted) testimony by officials that "there is always an interest taken by the Prime Minister's Office in security issues ... The Prime Minister is the host. He takes an interest in the security arrangements put in place for them. And even though the RCMP is responsible, in the last analysis, for security decisions, the Prime Minister's Office takes an interest in what those decisions are, obviously ... And perhaps the most sensitive issue of all ... is the interface between the rights of individuals to express their views to assemble freely, and to demonstrate, and so forth; with the need for protecting leaders, or ensuring that the sites where meeting take place and where business is done, that those sites are preserved, the dignity of that site is preserved, and the work is done."¹⁷⁸ It was well established, therefore, that officials involved in the planning of the meeting were aware of the expectations of elected officials, of the sensitivities of their planning, and of the critical issues – human rights among them – that would potentially be at play.

Importantly, the Commissioner did not ultimately agree that the Canadian government had acted inappropriately with respect to their work to ensure the attendance of the President of Indonesia. While complications arose with respect to differences of opinion between officials working on a security perimeter and political staff working on an event perimeter, Commissioner Hughes further found that "the Canadian government did not signal to the RCMP, either overtly or subtly, that they ought to perform as they did in order to curtail demonstrations and stamp out visible dissent."¹⁷⁹ Some event planners wished to achieve a "retreat-like setting" for the meeting, the physical requirements for which did not correspond to the security needs for the meeting.

¹⁷⁸ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, chpt. 9.1.

¹⁷⁹ *ibid.*, chpt. 9.7.

In his interim report, Commissioner Hughes also found “that the RCMP did not act inappropriately, or inconsistently with the Charter.”¹⁸⁰

In the testimony and evidence before the APEC inquiry, it was evident that of the range of public service values, democratic and ethical values (not yet codified but later characterized as a priori) were most at issue – specifically the manner in which elected representatives were supported by public servants charged with being “as loyal in implementation as they [were] fearless in their advice”¹⁸¹ and the extent to which public service actions could bear closest scrutiny, beyond simply acting within the law.¹⁸²

Allegations of improper political interference in the operations of the RCMP at APEC related to the suspicion that the Government of Canada had “appeased” the President of Indonesia at the expense of the Charter rights of Canadians. Complainants at the inquiry suggested that the Government of Canada had undertaken considerable effort to reassure the government of Indonesia that its President would be secure and would not be embarrassed in Canada.

Most of the complaints before the commission related to this allegation – that as a result of this appeasement, security perimeters were too vast, demonstration areas were too constrained, protesters were removed without cause, and protest signs were removed unlawfully. Media coverage of the APEC inquiry largely focused on these issues. News footage of the RCMP pepper-spraying “peaceful” protestors was played repeatedly to the point of being iconic and there were suggestions that the Prime Minister or his staff ordered the officer to pepper-

¹⁸⁰ *ibid*, chpt. 13.4.2.

¹⁸¹ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 54.

¹⁸² *Values and Ethics Code for the Public Service*, Treasury Board of Canada Secretariat, 2003, p. 9.

spray the protestors. These allegations became a political issue, as noted in this example from Question Period in September 1998:

“Mr. Preston Manning (Leader of the Opposition, Ref.): ‘... Surely it is the responsibility of the Prime Minister to stand up for human rights, at least at home, and not to fluff the pillow for some foreign dictator.

What Canadians do not understand is why the Prime Minister went to such extraordinary lengths for a foreign dictator who is reviled in his own country, even suppressing the rights of Canadians in order to protect him simply from embarrassment.

The next time the government invites a brutal dictator to Canada, does the Prime Minister intend to conduct himself in the same way?’

Right Hon. Jean Chrétien (Prime Minister, Lib.): ‘Mr. Speaker, the APEC meeting rules were established to protect the security of all the leaders. The rules apply to all leaders: the President of the United States, the Prime Minister of Australia, the Prime Minister of Malaysia, the Prime Minister of Japan.

We had a system to make sure that they could come to the APEC meeting, a very important meeting, and deliberate in a peaceful atmosphere. The exact same rules applied to everyone.’

Mr. Preston Manning (Leader of the Opposition, Ref.): Mr. Speaker, Canadians are still waiting to hear precisely what was the Prime Minister’s role in authorizing the special treatment of Suharto and the attack on the Canadian students.

The public complaints inquiry will not tell us that because, according to the RCMP Act, that inquiry only investigates the conduct of RCMP officers and not their political masters.

Who will be investigating the role of the Prime Minister in this whole affair? Will the Prime Minister cooperate fully?’

Right Hon. Jean Chrétien (Prime Minister, Lib.): ‘Mr. Speaker, I have nothing to hide. There is an inquiry and in fact it has asked two members of my staff to appear. They have volunteered to be there. The sherpa responsible for the conference will appear also.

The commission will decide who it wants to hear. It will do its work. Let it do its work.¹⁸³

Some of the complainants to the RCMP Complaints Commission cited personal experience or knowledge of the alleged political interference, as shown in this example of testimony:

“The police officer told me that it was on orders from the Prime Minister’s Office that there should be no signs and no people along this stretch of the roadway [at UBC]. And the other thing that the officers told me was that if I continued to put up signs that they would arrest me. And when I asked on what charge, one officer said to me “we’ll make something up.”¹⁸⁴

Similar allegations were made outside of the Inquiry proper. One complainant filed a civil suit in BC Supreme Court against the RCMP as well as the Prime Minister’s Office for violating his constitutional right to peaceful protest during the APEC forum and leaders’ summit.¹⁸⁵

Economic leaders are specifically designated host of the leaders’ retreats. As such, the Prime Minister of Canada hosted the leaders’ retreat at UBC on November 25, 1997 and, as with any such event, officials from the PMO were involved in the planning and organization. As was indicated through testimony at the subsequent hearings, there were meetings, conference calls and site visits in the course of this planning. In the aftermath of the conference, the Government of Canada was initially relatively transparent about its role in planning and preparations for APEC, and tried to normalize the role of the PMO in such an event. The Prime Minister was the host, and as such was principally accountable for the safety and security of his colleague leaders – it was entirely appropriate for his staff to be involved in consultations with ACCO and in site visits.

¹⁸³ *Hansard*. Wednesday, September 23, 1998.
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332803&>

¹⁸⁴ Milewski, Terry, “Forces of Journalism.” From Pue, W. Wesley, *Pepper in our Eyes: The APEC Affair*. UBC Press, 2000. p 145.

¹⁸⁵ <http://www.bccla.org/pressreleases/97jonessues.html>

The Government's key argument was that actions of police and PMO officials were defensible on the grounds that they had to create a circle of privacy and security if the leaders' retreat was to take place with decorum and security, but that they were not led by a desire to save President Suharto from embarrassment.¹⁸⁶ But this was an inadequate public relations response in the face of the values discourse of the protestors, as suggested by the following transcript:

"The Prime Minister's Office confirms that its officials did want the protest areas moved back. But the PMO has not answered the question, why? People like Craig Jones tried and failed to make a visible protest at APEC. Jones was arrested when he refused to remove signs from the motorcade route saying "free speech" and "democracy."

Milewski: The RCMP declines to comment on this now, but claimed at the time that the signs were a security risk.

Sgt. Russ Grabb, RCMP Spokesman: A decision was made to ensure that all motorcade routes were safe from placards or signs that could have been used to have been thrown in front of a motorcycle officer or onto the windshield of a motorcade vehicle.

Milewski: In that case, says Jones, then how come the Mounties never even looked at his backpack lying on the ground?

... **Milewski:** ... for now, as long as both the RCMP and the Prime Minister's Office refuse to comment, several unanswered questions remain: if the security plan was good enough for the RCMP, why was it not good enough for the Prime Minister's Office? Did the Prime Minister offer any assurances to visiting leaders that demonstrators would be kept out of sight? And if he didn't, why were they kept out of sight?"¹⁸⁷

¹⁸⁶ See, for example, "PM still denies having hand in APEC security. But with emergence of PCO memo, Chrétien may be called as witness at Vancouver inquiry." *The Globe and Mail*, February 10, 1999; (1999, July 9). "New APEC documents foretell testimony of federal officials." *CBC News*, July 9, 1999. <http://www.cbc.ca/story/canada/national/1999/07/09/apec990709.html>; and "PM aide denies interference in APEC protests." *CBC News*, August 26, 1999. <http://www.cbc.ca/story/canada/national/1999/08/26/apec990826.html>. Here, the former Chief of Staff to the Prime Minister is quoted from the stand saying there was no intention to curtail demonstrators, only to balance their rights with the rights of visiting world leaders: "In these meetings, I think that you must reconcile two things: the personal security and dignity of the event, with the freedom of expression."

¹⁸⁷ "Charter Free Zone" *CBC News, The National*, December 18, 1997

Efforts to normalize the role of the Prime Minister as host of an international gathering and therefore legitimately involved in all of the details of its organization exposed the Prime Minister in a discourse on accountability and allegations about Charter rights violations and police interference. An effective defence could only be drawn from that same values discourse—maintaining that the Prime Minister had never given orders to the RCMP (that would be inappropriate, or unethical) and underlining the values of economic prosperity and national security. The input of PMO officials also needed contextualization through the subtle suggestion that the weight of said officials' comments and recommendations may have been misunderstood or inflated by virtue of the offices they held in relation to those they were dealing with in the planning, a theme reflected in testimony by the Prime Minister's former director of operations:

Yet Chrétien did micro-manage such issues as choosing the souvenir pins the leaders would be given. So why not micro-manage the rest of the conference, wondered the Reform Party's Jim Abbott. "Mr. Carle would try and have us believe that he wasn't involved in major issues," he said.

Carle's oft-repeated line this week has been that he made observations and expressed concerns. But never issued any direct orders to the Mounties.¹⁸⁸

In the absence of a code of ethics for public servants, the debate at APEC did reinforce the notion that certain public service values emerge spontaneously. "Values" and "ethics" were used to shield against scrutiny and criticism. While not acquiescing to claims of interference in the RCMP, the government could define its accountability in terms of the values of safety and national security.

In his final report, the panel Chair accepted that Indonesian officials had threatened to boycott APEC 1997 if they did not receive reassurances that their

¹⁸⁸ "Former Chretien aide says he never ordered APEC pepper spraying," CBC News, August 24, 1999. <http://www.cbc.ca/news/story/1999/08/24/apec990824.html>

President's dignity would be preserved, and that such a boycott would be problematic for the credibility of the conference. The argument turned on the meaning of "embarrassment":

"On the one hand, Complainants' counsel were firmly of the view that, because of a desire to appease the Indonesians and ensure President Suharto's attendance at the APEC conference, the Canadian government made a commitment that no signs of protest would occur in his presence. Complainants' counsel submitted that the documentary evidence discussed below goes a considerable distance toward establishing the accuracy of this interpretation of the Indonesian position, and that Canada made such a commitment. In furtherance of that commitment, counsel alleges that the federal government gave politically motivated orders to the RCMP to "crack down" on the protesters.

On the other hand, senior Canadian government officials who were responsible for securing President Suharto's attendance testified that when the Indonesians spoke of avoiding the "embarrassment" or "humiliation" of their President, and the need to protect his "dignity," they simply meant that no demonstration should be permitted in close proximity to him, so as to avoid possible physical assault."¹⁸⁹

The latter argument was ultimately accepted:

"Without question, the Canadian government was eager to have leaders of all 18 APEC economies, including President Suharto, attend the APEC conference. To that end, far more time and effort went into encouraging the attendance of President Suharto than was directed to any other leader. That is not objectionable. In my view, the federal government acted appropriately in all of its contacts and approaches to the many Indonesian officials with whom they dealt on this issue. The Canadian government did not signal to the RCMP, either overtly or subtly, that they ought to perform as they did in order to curtail demonstrations and stamp out visible dissent."¹⁹⁰

¹⁸⁹ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, p 9.2.

¹⁹⁰ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, p. 9.23.

The gap that has emerged in the current ethics regime between the need to act in strict accordance with the law and the need to anticipate scrutiny and act in a manner that is not fully discharged simply by acting within the law was evident at APEC.

In defending arrangements made to accommodate APEC activities at the University of British Columbia campus and what some felt were undue restrictions on protest activities there, the Government of Canada pointed to the Licence Agreement between itself (through the Minister of International Trade) and UBC. This agreement was the subject of concern from complainants and was explored before the RCMP public complaints commission.¹⁹¹ The Agreement included the following provisions:

... UBC has agreed, subject to the provisions of this Agreement, to licence to the Minister certain buildings and their surrounding areas ...

... The Parties acknowledge the importance of careful and prudent planning with respect to the provision of security for the Event. Principal responsibility for all matters relating to security shall belong to the Minister. The Minister shall have the exclusive right to control access to the Properties and every person entering security perimeters shall be subject to compliance with accreditation systems to be designed and administered by the Minister.

... The parties undertake not to impede any lawful protest and the exercise of free speech outside the Properties and other designated areas, as determined by the RCMP in conjunction with UBC.¹⁹²

The Government drew from Supreme Court of Canada jurisprudence that it interpreted as limiting the expression of opinion on government property and therefore providing a legal basis for its actions. In the *Committee for the*

¹⁹¹ See, for example, "Federal officials pressured UBC over security, documents show: Material made available under a freedom-of-information request indicates Ottawa made early attempts to clamp down on protesters who were eventually arrested during APEC." *Vancouver Sun*, January 16, 1998 and "University's APEC protest site was reduced by PMO." *Vancouver Sun*, December 11, 1997.

¹⁹² Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, pp 6.2 – 6.3.

Commonwealth of Canada v. Canada, the Court suggested that freedom of expression does not encompass the right to use any and all government property for the purpose of disseminating one's views on public matters, and that conduct will fall outside the protection of s. 2(b) of the Charter if expression takes a form that is inconsistent with the functions of the place where the communications are made.¹⁹³

Hughes found that the federal government's role in the removal of protesters from near the UBC Museum of Anthropology (which had been temporarily declared Government of Canada property) was improper, however, as was its involvement in decisions about the size of the demonstration area at the UBC law school:¹⁹⁴

Section 2(b) of the *Charter of Rights and Freedoms* guarantees everyone freedom of expression in Canada. However, some limitations on that freedom are permitted and clear, during the events at issue here, free speech was curtailed in some instances. The question is whether those limits on free speech were permissible under the *Charter*. Section 1 of the Charter says that the Charter guarantees the rights and freedoms set out in it subject only to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The extent of these justifiable limits in various situations has been considered in many judicial decisions.

The Supreme Court of Canada considered the government's ability to limit expressive behaviour on government property in *The Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R 139. In that case some people who had been prohibited from promoting a political cause at an airport asked the court to declare that their freedom of expression had been denied.

The Supreme Court stated that the government, as owner of public property, does not have the same right that an owner of private property has, to restrict expressive behaviour on that property. Section 2(b) might not apply to all expression on all government property, but generally,

¹⁹³ *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R 139.

¹⁹⁴ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001,p. 30.6.

government property must be available as a forum for public expression unless there are reasons that justify denying access for that purpose.¹⁹⁵

In countering the allegations of political interference, a straightforward recital of “facts” did not produce winning conditions for debate. The focus necessarily shifted to the values the government was seeking to protect –values of dignity, accountability, and national and international security. Rather than political interference in security operations, the issue was characterized as the full discharge of political accountability for the life and dignity of international political leaders. The language of values and ethics can imbue terms and concepts with a meaning that mirrors the values of others and helps soften or eliminate what otherwise might be polarizing views. Navigating the space between the right and the legal thing to do, however, proved then as now to be more challenging.

A key complication in the APEC context that foreshadowed an enduring shortcoming of the government’s ethics regime was the role and accountability of the political (or exempt) staff of ministers. In finding that the federal government’s actions were improper in removing protesters from near the UBC Museum of Anthropology, Commissioner Hughes singled out the Prime Minister’s Director of Operations for criticism. This individual had been described in testimony as autocratic, and his dealings with ACCO and UBC staff were closely analyzed. From the many notes and minutes of APEC staff, it was determined that references to the “PM” were in fact references to the “PMO,” and specifically to the Director of Operations.

In his interim report, Commissioner Hughes reviewed the evidence around the role of the PMO. He outlined the manner in which the PMO had proposed the location of a security line at UBC and subsequently dismissed any contention that it was based on security concerns. The president of UBC had written to the

¹⁹⁵ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, p. 7.5.

PM to express concerns about the placement of the security perimeter and received a response from PMO officials that referenced security concerns. Hughes was equally critical of both the process for this response and its content. And he analyzed the interaction between government officials (including RCMP) and PMO staff, finding that while in some cases officials were prepared to act in a manner that would "bear the closest public scrutiny,"¹⁹⁶ this was not consistently the case. This is seen in selected excerpts from his Interim Report.

On the letter from PMO officials to the UBC President:

"In my view, the reference to security concerns and the suggestion that no agreement had been reached were dishonest. [ACCO's] Mr. Vanderloo, a very decent man with a distinguished background of government service, was singled out to perform [PMO official] Mr. Carle's unpleasant work for him and obviously succumbed to the power wielded by Mr. Carle.

I also believe that [RCMP] Supt. May should have declined to become involved in the drafting of the letter when his participation was requested. Police had no responsibility for helping Mr. Carle prepare his response to President Piper.

Lastly, Mr. Carle's placement of his signature on the letter was unworthy of him and surely was a betrayal of the confidence placed in him when he was entrusted with a level of authority that allowed him to respond, without consultation, to President Piper's letter addressed to Prime Minister Chrétien."¹⁹⁷

On the role of PMO officials in suggesting placement of the security perimeter at UBC:

"I do not believe that Mr. Carle's purpose in acting as he did in respect of the security perimeter or event perimeter, the demonstration area and the noise-free zone was to shield President Suharto from the sights and sounds of peaceful protest in order to live up to assurances allegedly given by the Canadian government to ensure his presence at the APEC conference.

¹⁹⁶ *Values and Ethics Code for the Public Service*. Treasury Board of Canada Secretariat, 2003, p.9.

¹⁹⁷ RCMP Act - Part VII Subsection 45.45(14) COMMISSION INTERIM REPORT, S.9.5.2.4

I reject the suggestion that the government improperly interfered with the RCMP by directing, ordering, influencing or pressuring the RCMP for that purpose.

I do believe, however, that Mr. Carle's actions were motivated by a drive to shield the 18 leaders from the sights and sounds of peaceful protest so that Canada could produce the "retreat-like" atmosphere for the leaders' meeting which had become traditional for the last day of the annual APEC conference. The evidence I have reviewed supports that view and leads, in my opinion, to no other rational conclusion."¹⁹⁸

"Mr. Carle wished to create a "retreat-like" atmosphere for the leaders' meeting. He vehemently opposed the location of the [RCMP/UBC agreement] line which, in accordance with the Licence Agreement, was established by UBC and the RCMP to meet both the RCMP's security concerns and UBC's concern that the protesters be able to see, and be seen by, the APEC leaders. I am satisfied that Mr. Carle demanded that the size of the "demonstration area" be reduced in order to accomplish his own agenda and I reject his explanation that the reduction was necessary to ensure the safety of the protesters."¹⁹⁹

"After UBC expressed its disapproval of Mr. Carle's demands, President Piper and [PMO official] Mr. Pelletier ultimately reached a compromise. Nevertheless, [RCMP] Supt. Thompsett and [UBC official] Mr. Brown each took it upon himself to move the location of the fence closer to the [RCMP/UBC] line. In the result, despite Mr. Carle's efforts, the law school fence ended up just nine feet closer to the building than the [RCMP/UBC] line, and not at the 41-foot mark that Mr. Carle had tried to achieve. The nine foot adjustment was a minimal change indeed given the already considerable distance between the demonstration area and the road where the motorcades were to pass.

Although he was put in a difficult position by Mr. Carle's authoritarian approach to the issue, and although UBC did agree to reduce the size of the protest area, [RCMP] Supt. Thompsett sought to honour the prior agreement with UBC and, in so doing, he acted to the benefit of protesters. At the end of the day of course, Mr. Carle did not get his way."²⁰⁰

¹⁹⁸ *ibid*, S.9.5.4

¹⁹⁹ RCMP Act - Part VII Subsection 45.45(14) COMMISSION INTERIM REPORT, S.13.3.1

²⁰⁰ RCMP Act - Part VII Subsection 45.45(14) COMMISSION INTERIM REPORT, S.13.3.2

"Had UBC and the RCMP passively accepted Mr. Carle's proposed fence location, that fence would have been located 43 feet closer to the law school building than was necessary to meet security concerns.

Mr. Carle's proposed fence location may well have been inconsistent with the *Charter*. The presence of protesters at the Thompsett/Pavlich line clearly would not have prevented the APEC leaders from successfully conducting their meeting, nor would it have been a security risk. In fact, by frustrating the protesters further, an unworkably small demonstration area might have increased the security challenges the RCMP had to meet that day. What Supt. Thompsett understood and Mr. Carle did not, was that giving protesters the maximum possible opportunity to protest safely would minimize the risk of an adverse reaction from them. In this case, had President Piper not written to the Prime Minister, and had Supt. Thompsett and Mr. Brown not separately intervened to close the gap between the fence line they judged to be acceptable and the one chosen by Mr. Carle, the protesters would have been confined to a very small area indeed as a result of federal government interference, through the Prime Minister's Office, in an RCMP security operation.

But for others coming to the rescue, Mr. Carle's actions would have had the same level of success, to the detriment of the protesters, that resulted from the improper interference in RCMP security operations at the Museum of Anthropology in the days leading up to the leaders' meeting.²⁰¹

30.4. Improper Federal Government Involvement

The federal government's role in the removal of the tents from the grounds of the Museum of Anthropology on November 22 was one of two instances of its improper involvement in the RCMP security operation. I am satisfied that it was because of the government's intervention that the tents were removed that evening. Were it not for that involvement, the contrary view of Site Commander Thompsett would have prevailed. As it happened, his view did not carry the day because of the acquiescence of other RCMP personnel, principally Supt. May, who had succumbed to government influence and intrusion in an area where such influence and intrusion were inappropriate.

The other instance of improper and inappropriate federal government involvement in the RCMP's provision of security services was with respect to the size of the demonstration area adjacent to the law school. In that case, the government's efforts did not prevail due to the intervention of others, including Site Commander Thompsett, on behalf of the protesters.

²⁰¹ RCMP Act - Part VII Subsection 45.45(14) COMMISSION INTERIM REPORT, S.13.3.4

Had those interveners not prevailed, the security challenges the RCMP faced on November 25 may well have been increased.²⁰²

Various commentators in and for government have explored the problematic of the expanding role of the political staff of ministers, and their tendency to “intervene in public administration.”²⁰³ This has contributed to the blurring of boundaries between ministers and public servants,²⁰⁴ a situation already exacerbated by the varying, conflicting and numerous definitions of ministerial accountability and an ethics regime that provides conflicting advice for navigating these crucial relationships. As Hughes suggests, the role of the Prime Minister’s staff at APEC is symptomatic of the confusion around ministerial accountability and the problems created as a result.

As ministers have become more and more involved in departmental operations and as the numbers of their political staff have grown, the scope of their accountability for these actions has decreased. The agony of navigating the relationship between public servants and ministers has grown, and the practical difficulties of this relationship were evident at APEC and revealed by the inquiry. The *a priori* public service value of loyalty was evident through the APEC episode, existing as it did without the benefit of a formalized code to maintain it.

“Loyalty to the public interest, as represented and interpreted by the democratically elected government and expressed in law and the Constitution, is among the most fundamental values of public servants,”²⁰⁵ according to *A Strong Foundation*. Public servants seeking guidance on the meaning and practical application of this value will find it referenced only once in the *Values and Ethics*

²⁰² RCMP Act - Part VII Subsection 45.45(14) COMMISSION INTERIM REPORT, S.13.3.4

²⁰³ Aucoin, Peter and Jarvis, Mark D., *Modernizing Government Accountability: A Framework for Reform..* Canada School of Public Service, 2005, p. 63.

²⁰⁴ Savoie, Donald J., “Searching for accountability in a government without boundaries,” *Canadian Public Administration* 47, no. 1 (Spring 2004), pp 1 – 26.

²⁰⁵ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 27.

Code for the Public Service, where it admonishes public servants to, “loyally implement ministerial decisions, lawfully taken.”²⁰⁶

The interrelation of empowerment and loyalty is implicit in the challenges faced by public servants who were responsible for the organization of the 1997 APEC meeting in Vancouver. These officials were aware of the political imperatives attached to the meeting and were required to exercise their judgment in important decisions about potentially controversial issues – including the placement of security or event perimeters – while weighing the requirements of elected officials. The commissioner found that while no laws had been broken in the course of this work, there was inappropriate interference by political officials. In the context of both the judgment required to navigate the relationship between public and elected official, and in the context of loyally implementing ministerial decisions, lawfully taken, there is little advice provided by the ethics regime for public servants. Supplementary information to the Code, specifically material provided on the Treasury Board Secretariat website, provides a legalistic approach to the meaning of loyalty that is consistent with the Code in its focus on the strict question of the legality of questionable actions or decisions. In citing *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, (“*Fraser*”), for example, TBS provides the following advice:

Public criticism motivated by a general disagreement over policy rather than revealing instances of illegality or threat to life, health or safety may not meet the qualifications in *Fraser*, and may be subject to disciplinary action.²⁰⁷

In instances where there is clearly no threat to life, health or safety – and APEC would qualify as such – advice for public servants on how to navigate a clash of absolute values, beyond the imperative of loyalty, is clearly lacking.

²⁰⁶ *Values and Ethics Code for the Public Service*, Treasury Board of Canada Secretariat, 2003, p. 7.

²⁰⁷ http://www.hrma-agrh.gc.ca/veo-bve/dli-oli_e.asp

A key intersection between the analysis of what happened at APEC and the government's ethics discourse can be found in that grey area between what is strictly legal and what is not. The panel Chair reflected on this in his report for the RCMP Public Complaints Commission when he wrote:

“However, conduct that does not amount to a breach of statute or common law could still constitute a failure to meet reasonable standards that ought to apply to an effective and efficient security operation, whether the conduct results from incompetence, poor planning, a lack of ordinary judgment, or an absence of common sense.”²⁰⁸

Of the a priori values that are said to emerge spontaneously on reflection of the public service, there was little to guide officials whose judgment was called on in anticipating and managing the clash in values at APEC, and who were faced with managing relationships between elected and unelected officials and political staff.

Transparency

Popular analysis of the APEC inquiry has generally focused on underdog protestors fighting a Machiavellian government that refused to acknowledge either the legitimacy of human rights protests or the inappropriateness of the use of force.

Another stream of analysis has focused on government's perceived ability to hide the truth or deceive the media and the public. Here, the focus has been to try to reveal a secret government agenda run out of the Prime Minister's Office and the government's ability to keep its actions hidden. A key demand of the complainants at the APEC inquiry was for the Prime Minister to appear himself and respond to these allegations.

²⁰⁸ Hughes, Ted: RCMP Act – Part VII Subsection 45.45 (14) *COMMISSION INTERIM REPORT*. Commission for Public Complaints Against the RCMP, 2001, p.7.1.2.

As discussed above, the Government of Canada initially tried to be transparent about its role in the planning and preparations for APEC, and in particular to normalize the role of the PMO in such an event. The Prime Minister took accountability as the host of the event, responsible for the safety and security of his colleague leaders. As such, it was argued that it was entirely appropriate for his staff to be involved in consultations with ACCO and in visits to proposed sites for APEC events.

The government sought during the initial period of the controversy to reassure the public and the House of Commons that the APEC conference had been a resounding success from a security point of view. This was the largest protective-security operation ever undertaken in North America. The security of 18 world leaders – five of whom were at level-five security risk – was preserved. There were no injuries sustained amongst the protesters, with the exception of one individual who suffered respiratory problems. Preparations for security had been undertaken for over a year prior to the conference, and required cooperation amongst several police departments as well as municipal and provincial authorities and federal agencies. The placement of the security perimeter at UBC was determined in consultation with university officials and others, and the perimeter fence was erected to allow students to demonstrate peacefully while at the same time providing for the security of the attending dignitaries.

However, the defence was constrained in its efforts at full disclosure by the imperative of confidentiality – so many of the facts the government relied upon for its actions were of a nature deemed too sensitive to be released publicly without harming national security and/or the right to privacy.

Another issue related to transparency was the allegation that the Government of Canada was not producing all of the documents relevant to the inquiry, and the related suspicion that there was, therefore, a conspiracy or cover-up.

Here again, the government consistently answered allegations by pointing to the independence of the inquiry, and sometimes questioning the ethics of those who questioned the veracity of such an assertion:

“Mr. Jay Hill (Prince George – Peace River, Ref.): ‘Mr. Speaker, it is absolutely absurd that the government allows the situation to continue. The fact is the solicitor general violated his oath of office by talking about an ongoing sensitive police investigation. He violated the trust of Canadians by compromising the APEC inquiry.’

The Prime Minister is willing to let his cabinet minister get away with anything simply to avoid the embarrassment of having to fire him. Why does the Prime Minister lack the ethics to fire the solicitor general?’

Hon. Herb Gray (Deputy Prime Minister, Lib.): ‘Mr. Speaker, why is the hon. Member showing a lack of ethics by making these unwarranted insinuations and innuendoes? He is showing questions about his own ethics in asking this ridiculous question.’²⁰⁹

In the context of the initial calls for a Royal Commission, a perception about the lack of independence of an RCMP inquiry persisted. The government argued that the inquiry was free to go where the evidence led, while the Opposition continued to complain that the inquiry was bound by the RCMP Act.²¹⁰ The Commission Chair took the government’s position to heart, frequently repeating that he would go where the evidence took him, and seemingly rejecting any attempts to restrict the scope of his hearings.²¹¹

²⁰⁹ *Hansard*, November 20, 1998.

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332862&>

²¹⁰ See for example: *Hansard*, Wednesday, September 23, 1998.

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332803&>

²¹¹ See, for example, “Hughes won’t reject putting PM on stand: But he rules that testimony must show a potential witness has something to add to the APEC inquiry.” *The Vancouver Sun*, March 6, 1999 and

However, the Chair's independence and impartiality were questioned by the complainants after he refused, in February 2000, to call the Prime Minister as a witness. The disagreement over whether the PM should be called to testify was another area of difficulty for the Government of Canada, particularly after the panel Chair ruled that, although it was not strictly necessary for him to appear, he should do so to avoid a possible cloud over the PCC report.

"... I simply cannot see that the voluminous evidence adduced to date points to or suggests that the Prime Minister may have given improper orders or directions to RCMP members respecting security at the APEC Conference. As the testimony thus far does not indicate that any such orders or direction were given by the Prime Minister, a summons ought not to be issued for the purpose of sanctioning what, at this point, would be little more than an exploratory excursion. The simple fact of the matter is that the evidence produced to date regarding the alleged involvement of the Prime Minister in the RCMP's security operations does not indicate that his testimony is 'requisite to the full investigation and consideration' of the matters currently before me.

... I agree with Commission counsel that '... there is no evidence that the Prime Minister had any direct involvement in the establishment of either the 'event perimeter or the security zone at UBC' and that, accordingly, a basis does not exist for calling him to testify in respect of this issue After full consideration of [the 'Indonesian issue' and the 'law school fence issue'], ... I have concluded that the evidence in respect of these two issues does not justify issuing the requested summons. Having reached that conclusion, I have had little difficulty in concluding that the other grounds advanced by the applicants do not support the issuance of a summons.

... Nevertheless ... my ruling ... may, rightly or wrongly, foster a public perception of injustice and ... if the Prime Minister does not give evidence at this hearing, there may well be a "cloud," albeit unjustified, over my Report. Surely it is desirable that such a result should be avoided and, therefore, I wish to extend, through counsel to the government of Canada, an invitation to the Prime Minister to appear before this Commission should he share my view that it would be in the public interest for him to do so ... I believe that his participation could go a considerable distance

"APEC probe can reach PMO: Hughes: The Inquiry Chairman also wants the government to help the complainants with their legal fees in claims against the RCMP." *The Vancouver Sun*, February 6, 1999.

towards avoiding any “cloud” over my final Report, removing any public perception of injustice, and enhancing public confidence in this process and in public inquiries generally.”²¹²

On February 28, 2000, counsel for the government of Canada provided a three-page written decline to the invitation that appears to strain any legal basis for its position, instead pointing only to POGG (peace, order and good government), precedent, and personal knowledge:

“... You will appreciate the seriousness with which the government must view a decision for a Prime Minister to testify before an inquiry. It is incumbent upon the Prime Minister to make his decision based upon the public interest as it relates to the roles and responsibilities of the office of Prime Minister and based upon your finding that his testimony is not necessary ... It would be especially damaging to the office of the Prime Minister and the proper functioning of the government were the appearance of a Prime Minister before an inquiry to be seen as a precedent that could lead to other litigation calculated to disrupt the good governance of the country.

... As you will be aware, the appearance of a sitting Prime Minister before a commission is an extremely rare and weight matter having only happened twice in our history ... The rarity of a Prime Minister’s appearing before a commission is the result of both the serious implications of such an appearance and the very high threshold that must be met to justify requesting a Prime Minister to testify.

... the test must be whether a Prime Minister has probative evidence to give based on his personal knowledge about which no other person could testify and which is necessary to resolve the matter. In this case, not only is that test not met, you have found that there is simply no evidence pointing to the involvement of the Prime Minister.”²¹³

Hughes identifies a critical element of transparency and accountability – perception. And whether it is true or not that officials do or should have something to offer to public debate, the perception generally is that non-

²¹² Hughes, Ted, *Ruling on Applications to Call Additional Government Witness*. RCMP Public Complaints Commission, February 25, 2000, pp 12 – 13, 14, 18.

²¹³ Whitehall, Ivan, *Letter to Hon. E.N. (Ted) Hughes, Q.C., Designated Member of the RCMP Public Complaints Commission*. February 28, 2000, pp 2, 3.

participation is proof that someone has something to hide. Meeting an arbitrary standard of transparency without exposure to criticism and without contravening non-disclosure requirements is a challenge.

The government arguably never made a compelling case that it was providing full disclosure at the APEC inquiry, and the missing link may have been the lack of testimony by the Prime Minister. This was likely complicated by the degree to which information was seen to be withheld by the government for a variety of reasons provided for in the *Access to Information and Privacy Act*. But there were innovations in language used by the government that allowed for the separation of fact from description, similar to the meditation on language found in *A Strong Foundation*.²¹⁴ The language of values and ethics imbued key terms that were useful in describing the government's actions and helped to frame public relations that anticipated the win-lose scenario of adversarial public debate.

In the evolution of the federal government's response to complaints over the course of the public hearings, it is possible to see ethics and values emerge in the language of the defence and in the manner in which the government managed the debate away from the specifics and into more general descriptions that correlated to public expectations. While thought to be a more straightforward ethical consideration, this innovation of language was also seen in the management of alleged conflicts of interest at APEC.

Conflict of Interest

By the time of APEC in 1997, guidance on how to avoid conflicts of interest had existed in government for several years. This guidance was and continues to be

²¹⁴ *A Strong Foundation* speaks of public servants embracing the “new language” of “client” and “customer” on page 33. The specifics differ but the technique is the same – to take values that might otherwise pose a challenge or be contrary to public service but that resonates with the public and imbue them with particular contextual meaning.

primarily oriented towards avoiding situations where one might benefit financially from a decision for which one is accountable or in which one participates. The APEC inquiry resulted in a series of alleged conflicts of interest that were more subtle, and worth exploring for their impact on expanding the notion of such conflict. There were allegations of conflict on the part of the Solicitor General, who was overheard on an airplane allegedly discussing the potential outcome of the inquiry; alleged remarks by the first panel Chair to the effect that “the RCMP would take the fall for APEC,”²¹⁵ and allegations of conflict on the part of the lead commission counsel, because of his attendance at a Liberal Party fundraising dinner. Two further incidents of note are explored below – one concerning the question of funding for complainants’ counsel and the second concerning CBC coverage of the APEC allegations.

Conflict of interest has become a catch-all allegation, easily made but difficult to disprove. The discussion of two specific allegations here is not meant to suggest they were or were not without substance.

In the spring of 1998, complainants applied to the RCMP Public Complaints Commission panel for funding for counsel. As the original panel began its work, the question of funding, which had by then also been canvassed before the courts, quickly became a public issue. The government’s initial response was technical and legal – that the PCC panel did not have authority to pay legal costs of complainants. This decision was confirmed by the Federal Court in July 1998.²¹⁶

However, the many government-funded lawyers representing government defendants at the Inquiry – including lawyers for individual RCMP members, for members of the executive, and representing Government of Canada interests

²¹⁵ *Hansard*, Friday, October 23, 1998.
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332847&>

²¹⁶ Pue, W. Wesley, ed., *Pepper in Our Eyes: The APEC Affair*. UBC Press, 1999, pp 169 – 170.

more broadly – provided a stark contrast to the primarily student complainants who appeared to lack the means to retain legal representation.²¹⁷

Pue has described this situation:

In all of the APEC-related proceedings, the PMO and the RCMP – two mighty institutions if ever there were such – enjoy virtually unlimited resources. The government's pockets are deep, and its legal juggernaut confronts a diverse group of more-or-less impoverished complainants ... After a series of highly embarrassing events, including the resignation of the Solicitor General and then of the entire RCMP Public Complaints Commission panel that first began hearings ... the government of Canada at last agreed to provide some public funding to complainants before the PCC.²¹⁸

In the fall of 1998, the student complainants reinforced their call for government funding by beginning to abandon the inquiry. On October 13, Joseph Arvay, a lawyer for one complainant, indicated to the Commission panel that he could no longer afford to attend the hearing in the absence of government funding. His client had already provided evidence before the Commission.

On October 14, Cameron Ward, a lawyer for five complainants and approximately 22 witnesses, likewise indicated to the Commission panel that he could no longer afford to attend the hearing in the absence of government funding, and he and his clients then walked out of the hearing room. Mr. Ward subsequently confirmed by letter to the Commission that his clients had not withdrawn their complaints, nor had he withdrawn as their counsel at the hearings.²¹⁹

²¹⁷ See, for example, "Feds add to law team at APEC protest probe: Another three lawyers have been hired to help represent Jean Chretien and the government." *The Vancouver Sun*, October 16, 1998.

²¹⁸ Pue, W. Wesley, ed., *Pepper in our Eyes: The APEC Affair*. UBC Press, 2000. p. 23.

²¹⁹ See, for example, "Protesters threaten to quit APEC public inquiry." *Vancouver Sun*, September 29, 1998.

In the face of this, the Commission panel members confirmed their intent to continue to investigate all of the complaints, and continued to call witnesses. The Government of Canada continued to resist calls for funding for complainant counsel, but pointed to the \$650,000 additional funds that were provided to the Commission in August 1998 for the APEC hearings.²²⁰ Government representatives also pointed out that they were cooperating fully with the Commission, were providing all requested and relevant documents, that the report – by this non-adversarial, fact-finding body – would be made public, and that never before had government provided such funding for a PCC hearing. Throughout this time, the Prime Minister, the Deputy Prime Minister and the Solicitor General continued to express confidence in the process, and they called on critics to stop trying to undermine it with rhetoric and pre-judgment.²²¹

Although the government may have been on firm legal ground in denying funding (at least according to the Federal Court of Canada), it became increasingly clear through the fall of 1998 that withholding funding for complainants' counsel was untenable because of the continuing press and Opposition attention.²²² The PCC panel itself had intervened on the issue, writing to the Solicitor General twice to request funding. In their second letter, on October 6, 1998, the panel wrote:

“In the eyes of the public, the scope and importance of this hearing has risen so much that public confidence in our findings and recommendations may require separately funded legal representation for the complainants.

²²⁰ See, for example, “No money for APEC protesters, Ottawa says. Lawyers, opposition condemn federal government’s “outrageous decision” not to foot students’ legal bills.” *The Globe and Mail*, October 17, 1998.

²²¹ There are very many citations for this, too many to include. Some examples, however, come from Hansard of October 23, 1998 (at about the same time the first panel was dissolving, amid allegations of bias), and Hansard of November 19, 1998 (at about the same time the Solicitor General was about to resign amid allegations of bias).

²²² See, for example, “Editorial: Why they need a lawyer.” *The Globe and Mail*, October 20, 1998.

There are important fundamental issues about who we are as Canadians at stake in this hearing.”²²³

On October 16, in response to the second appeal for funding, the Solicitor General responded to the panel in writing:

“... the PCC was established in 1998 by Parliament to represent the public interest in relation to complaints by the public against the RCMP. Since then, the PCC has distinguished itself by treating members of the public appearing before it with respect and fairness as well as dealing effectively with complaints brought before it. As a result, the PCC enjoys a well deserved international reputation among countries that have set up similar civilian oversight bodies.

The government believes the Panel’s work is important and has expressed public support for the process on a number of occasions. It also believes that the Panel, with the assistance of Commission Counsel, has the necessary authority and means to carry out its mandate with integrity ... Finally, the government is of the view that the Panel can address all the complaints before it in an open and thorough manner without the need for the government to provide funding for legal counsel to complainants ...”²²⁴

According to Morin’s account, it is the funding issue that led to the resignation of the original PCC panel (although this reason was not clear at the time, and Morin’s resignation, followed by his fellow panel-members, was attributed by the media to Morin’s alleged bias):

“... Ms. Heafey met with the panel over dinner and expressed her displeasure with the amount and type of media exposure that the issue of student funding had received. She stated that she “was under a lot of pressure in Ottawa.” This and other comments left the impression that she had been in contact with the Solicitor General or officials from his department.

²²³ Morin, Gerald M., QC: “Personal Reflections on the Ill-Fated First APEC Inquiry.” From Pue, W. Wesley: *Pepper in our Eyes: The APEC Affairs*. UBC Press, 2000, p. 163.

²²⁴ *Solicitor General Andy Scott Responds to RCMP Public Complaints Commission Letter on Funding*. Government of Canada/Solicitor General of Canada News Release, October 16, 1998.

For the first time, I felt that **the independence of the panel was being threatened**. The panel had chosen to revive the issue of government funding for the student participation. Our responsibility was to ensure, as best we could, that the process was fair and that the final report would be seen as the result of that fair process. Now the chair ... was saying that she (or perhaps others) did not approve of the panel's handling of the funding issue."²²⁵ (emphasis added)

"It was with great regret that I resigned from the panel. I had been privileged to serve with Ms. Starr and Mr. Wright, both of whom I hold in the highest regard. Our ability to continue with the hearings ended with the directive to read the statement ... upon Ms. Heafey's instructions. At that point, all pretence of allowing an independent panel to control its process and fulfil its mandate ended. Subtle influence had given way to express instruction. The mere attempt to control the panel in this manner was sufficient to undermine the entire process and lead to our resignations."²²⁶

The Opposition at the time accused the government of a breach of ethics in its refusal to provide funding for the complainants' legal representation:

"Mr. Gilles Duceppe (Laurier—Sainte-Marie, BQ): 'Mr. Speaker, does the Prime Minister realize that he is in a conflict of interest situation, because not only he is one of those accused, but he is also denying those who complained legal representation?'

Right Hon. Jean Chrétien (Prime Minister, Lib.): 'Mr. Speaker, the commission is examining the incidents. Complaints were filed against the RCMP in Vancouver and the commission of inquiry is studying the problem, as it is required to do by law.'

There are no accused in all this; the students have been accused of absolutely nothing. According to the students, a few police officers were a bit heavy-handed and the commission will determine whether or not that was the case.'²²⁷

²²⁵ Morin, Gerald M., QC: "Personal Reflections on the Ill-Fated First APEC Inquiry." From Pue, W. Wesley, *Pepper in our Eyes: The APEC Affairs*. UBC Press, 2000, p. 163.

²²⁶ *ibid*, p. 167

²²⁷ *Hansard*, Tuesday, October 20, 1998.

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2332844&Language=E&Mode=1&Parl=36&Ses=1#LINK109>

When the new panel Chair was appointed, he made funding for complainants' counsel one of his first orders of business:

"Before deciding [whether had the power to order the complaints' legal costs to be paid from the PCC's budget], [Hughes] wrote to Lawrence MacAulay ... in February 1999, recommending that the government pick up the complainants' tab. MacAulay agreed to pay the legal fees incurred after Hughes's appointment for those complainants who had been directly involved in the confrontation with the police officers."²²⁸

In the end, the Government of Canada acceded to the request for funding, albeit with some limitations.²²⁹ The issue illustrates the problem of shifting centres of power and the importance of consistency. Once engaged in a debate using the terms of an ethics discourse, it is difficult to disengage for convenience. From a strictly legal viewpoint, the Government was not required to pay for counsel. But in a debate about the right thing to do, the strictly legal defence fell short.

Additionally, the allegation of conflict of interest was damaging to the consistency of the government's overall defence. The government could not on the one hand continue to refer to the independence of the PCC inquiry while on the other hand retaining so clear a role in authoring its outcome. Funding for complainants' counsel was essential if the overall argument about values was to be maintained. Nor could the government point to the esteem and alleged independence of the panel Chair without demonstrating that he had some reciprocal power over the Government.

Another incident of alleged conflict of interest was a well-publicized dispute between the Prime Minister's Director of Communications and the CBC. In October 1998, the Prime Minister's Director of Communications lodged an official

²²⁸ Busby, Karen, "Raising the Dough: Funding for Lawyers at Public Inquiries." From Pue, W. Wesley, *Pepper in our Eyes: The APEC Affair*. UBC Press, 2000, p. 174.

²²⁹ See, for example, "Ottawa to pay legal bill in APEC flip-flop. After rejecting the idea twice, government agrees to aid protesters." *The Globe and Mail*, February 16, 1999.

complaint with the CBC ombudsman alleging bias on the part of a CBC-TV reporter:

"I am writing to lodge an official complaint against the reporting by the CBC of the security surrounding last year's APEC Summit and of the RCMP Public Complaints Commission hearings on the matter.

Specifically, through articles in the Vancouver Sun and The Province in recent days, we have learned that CBC News, through lead journalist Terry Milewski, may from the beginning have had a specific and one-sided agenda on this issue. It appears Mr. Milewski has set out from the beginning to side with complainants, that he has **secretly conspired** with a complainant on legal strategies, and that he has sought to portray the government, in his own words, as "the Forces of Darkness."

... What we are dealing with is a concerted campaign to, in the words of Mr. Milewski, "milk" the APEC issue, and promote a one-sided account, while working secretly with an interested party in the matter.

... This is a serious and deeply disturbing matter. Canadians have a right to expect honest, fair and balanced reporting from the CBC. These revelations indicate that as far as APEC is concerned, the CBC has provided anything but. And that in its biased pursuits it may well have violated journalistic integrity and betrayed the confidence of Canadians."²³⁰

Three days later, a 10-page "interim response" from senior executives at the CBC essentially rejected all of the PMO's allegations, adding:

"... let me conclude by emphasizing the difficult reality of covering this story – a reality which has proven frustrating for both Terry Milewski and the senior editors of CBC News. That is the sustained unwillingness, in spite of numerous appeals, of either the RCMP or the Prime Minister's Office to answer questions or comment on any details concerning these critical events.

We recognize, of course, that both the RCMP and the PMO have the absolute right to refuse to speak and to cite the Public Inquiry as the proper place for these answers to emerge. But that is a judgment call on your part. It is also possible to argue that there is an inherent and

²³⁰ Release, Office of the Prime Minister, October 16, 1998.

overriding reason to satisfy the public's need to hear from its leaders now, since the details and the rationale behind what transpired at APEC and the events leading up to it are – for whatever reasons – in the public domain at this moment.²³¹

Despite this ruling from the CBC Ombudsman, the CBC reporter was pulled from the story and the PMO acted on the invitation of the authors of the CBC's interim response to elevate the complaint to the Corporation Ombudsman. A report was prepared and released by Marcel Pepin in March 1999, exonerating the reporter, who later wrote that Pepin's report, "demolished the complaint with such finality that the PMO immediately dropped the matter."²³²

The CBC-TV had been a main generator of the media about the APEC affair, both in the immediate aftermath of the 1997 conference and throughout the hearings up until the PMO complaint. While there continued to be considerable media interest even after the CBC changed reporters, the more significant allegations of political interference evaporated. This demonstrated the power of the conflict of interest allegation and the challenge of replying, which requires one to prove a negative and underscores the potential public relations usefulness of the values discourse.

There are three general conclusions that can be drawn in the context of the APEC inquiry:

1. That public service values are created and can be used both as a mechanism to control and predict the activities of public servants and as a public relations tool to describe and rationalize the actions of public servants. They are necessary implements in the face of the growing

²³¹ CBC/Radio-Canada, letter to Mr. Peter Donolo, October 19, 1998

²³² Milewski, Terry: "Forces of Journalism." From Pue, W. Wesley, *Pepper in our Eyes: The APEC Affair*. UBC Press, 2000, p. 156.

exposure of public servants to scrutiny and criticism, and of the changing cosmology of the public service.

2. That the discourse developed by the federal government to describe and defend its actions at the APEC 1997 conference was suggestive both of the developing discourse on public service values and of the tensions inherent in the practical application of an ethics regime that has failed to address key areas of concern.
3. That (at least) one drawback of the values discourse is the tendency for all involved to appropriate terms and personalize values.

The government clearly had difficulty post-APEC responding to the question of whether it was appropriate to shield world leaders from the sights and sounds of protest. It was a question built on what for the protestors were non-negotiable values, including free speech and human rights. Perhaps the only effective response was to engage in a values discourse, and government did so by highlighting values of economic prosperity and national security. These devices facilitated a level playing field for debate, but at a level of moral absolutes that overshadowed what were in reality very pragmatic concerns on the part of government. In the process, it became clear there was an absence of practical guidance for public servants seeking to understand their role. At the same time, elevating the debate to moral absolutes made more substantive debate about public policy difficult or impossible – for example, debate about Canada's policy of economic engagement as a means to advancing democratic reforms. First, there is little interest in substantive policy debate because it does not produce winners and losers. Second, such debate becomes or appears irrelevant in the face of the seemingly far more critical issues of alleged government malfeasance.

CHAPTER V

Conclusion

Reference to an ethics code for public servants may be evocative of a rigorous and rules-based constraint to behaviour. But such a rules-based constraint facilitates the assignation of right and wrong and may not be advisable in the current context of adversarial partisan politics, where those who can be convincingly accused of wrong become scores in a game. Others may think of the ethics code as a roadmap to doing the right thing or making the right decision. This too may miss the mark, for though the ethics regime no doubt provides tools for legal, informed and compassionate decision-making, its meta-context of the complex relationship between elected and unelected officials poses considerable challenges to doing what's "right" and "good" by exposing their already subjective definitions to even more varied subjects.

The federal discourse on values and ethics evolved during an era that has been described by former Clerk of the Privy Council and federal cabinet minister Marcel Massé as "post-modern," in part because of what he saw as the growing need for government to engage the public when formulating policy.²³³ Other academics and commentators have similarly reflected on the changing state of Canada's governments through the late 1980s and early 1990s, pointing to, among other things, the failure of the Meech Lake Accord as a signal that demands on and expectations of governments were changing dramatically and that more elaborate mechanisms for engaging the public were required²³⁴ -- that

²³³ Masse, Marcel, *Partners in the Management of Canada: The Changing Roles of Government and the Public Service*. The 1993 John L. Manion Lecture, Canadian Centre for Management Development, 1993, p. 9.

²³⁴ See Pierre, Jon, "Public Consultation and Citizen Participation: Dilemmas of Policy Advice," in B. Guy Peters and Donald J. Savoie, eds., *Taking Stock: Assessing Public Sector Reforms*. McGill-Queen's University Press, 1998; and Desveaux, James A., Lindquist, Evert A., and Toner, Glen, "Organizing for Policy Innovation in Public Bureaucracy," in *Canadian Journal of Political Science* 27, no. 3 (September 1994). And for an examination of this more broadly, across both the federal and provincial levels of government, see Lindquist, Evert, ed., *Government Restructuring and Career Public Services*. The Institute of Public Administration of Canada, 2000.

government must become less insular and place more value on the input and opinions of the public. Government has suggested the fundamental changes required in this “post-modern” era have in part been achieved through the development of an ethics regime, when it might also be true that the ethics regime has assisted in preserving the status quo.

A Strong Foundation provides advice about accommodating alternative values:

“... values discourse in the public service ... has not been sufficiently clear and forthright about conflicts between values. We are inclined to think that values conflicts arise only between our values and their opposites. We are not sufficiently alive to what the philosophers call the hierarchy of values, to the fact that our values conflict not only with their opposites but with each other ... because we are not sufficiently conscious or frank about this, we are sometimes inclined to think that some value or principle is being betrayed when it is only being subordinated or accommodated, in a specific circumstance, to some other important value.”²³⁵

A Strong Foundation contemplated the tension between “old” public service values (like equity, democracy and the public interest) with new “values of the marketplace implied in the language of ‘customer’ or ‘client,’” and cautioned public servants to be aware of how these concepts could fundamentally change assumptions about public service. The report asked public servants to think carefully about the relationship of the new values to the old. And it identified a path to embracing these new values – not by “jettisoning the old, but because the new concepts and language gave [public servants] a means to express, renew and update values they had always held. The private sector terms were a verbal device that helped public servants to rediscover their values.” This only worked, though, if public servants did not “take the new language literally,” but instead saw it “as a metaphor.”²³⁶

²³⁵ *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*. Canadian Centre for Management Development, 1996, p. 2.

²³⁶ *ibid*, p. 32, 33.

These verbal devices are key to the practice of ethics in government by providing a framework by which new or problematic concepts can be embraced.

Changes in public expectations of government have corresponded to changes in the “cosmology” of the public service that have diminished long-standing adherence to the principle of public servants as permanent employees.²³⁷ Equally of note has been the changing state of government institutions themselves, including the evolving roles of the federal cabinet and the Prime Minister’s Office. Among other things, these changes have amounted to an increase in the public exposure of civil servants. The discourse on values and ethics frequently points to these changes and their effects as the forces behind the development of a modern values and ethics code.

The code has been described as means by which public servants can better understand their role and better discharge their duties, particularly in these changing circumstances. But is the practical advice required to meet these goals evident in the discourse?

The federal ethics regime is a tool to support empowered public servants serve with the highest standards, but it is also a mechanism of control exercised by increasingly powerful central agencies. Fundamental inconsistencies within the regime itself suggest these dual purposes, particularly the premise of *a priori* values that contradicts with a more fluid and relativistic practice whose language is highly contextual. The ethics regime is described by government as an exercise to identify existing values that unify the public service, when in practice it can be seen as the creation of shared values in an effort to establish a cohesive culture for a vast and diverse organization that fundamentally lacks a uniform identity.

²³⁷ Paquet, Gilles and Pigeon, Lise, “In Search of a New Covenant,” in Evert Lindquist, ed., *Government Restructuring and Career Public Services*. The Institute of Public Administration of Canada, 2000, p. 476.

The clues to the alter ego of the ethics regime can be found in the grey areas discussed above – the space between the legal and the perception of legality, the lack of accountability of exempt staff, and conflict of interest. These grey areas place stress and tension on some of the central tenets of the ethics regime. Empowerment and loyalty are under tension from their meta-context of the relationship between public servants and elected officials. Although the federal ethics canon frequently refers to and meditates on this relationship, and other public administration materials similarly provide analysis, there is no practical advice available on how to resolve disagreements between elected and unelected officials or generally how to navigate the terrain. What practical advice exists is oriented to very specific situations, for example the responsibilities of public servants when they appear before parliamentary committees. To what if any extent public servants are accountable to ministers remains vaguely outlined, brought into relief periodically when wrongdoing is exposed for which politicians are called upon to answer and further complicated by exempt staff. The situation is exacerbated by the formalized code, which both calls upon public servants to loyally implement ministerial decisions lawfully taken but also to act in a way that will bear the closest scrutiny, beyond considerations of strict legality. If public servants receive direction from ministers that is strictly legal but ethically grey, there is little recourse. That the challenges of identifying clear accountabilities in the relationships between elected and unelected officials are shared by those on both sides of the ledger only exacerbates this situation.

Looking at the example of the APEC debate, where the RCMP commissioner found there was inappropriate (but not illegal) interventions by “government,” could the officials involved have relied on a priori public service values for guidance in how to deal with the demands of political staff? It is more than likely that there were much pragmatic considerations at hand, including which battles to pick.

The example of the APEC debate also demonstrates how public service values can be used to frame difficult questions and therefore to control or influence debate.

The analysis suggests that the ethics agenda can be operationalized in a manner that is counter-intuitive to public expectations – not as a tool to ensure propriety in government (although that can be an outcome of the construct) but as a tool to legitimize government activities. Despite its attractiveness and growing entrenchment in public service, “the claim for the importance of values as a foundation for building good ethical behaviour among public servants cannot be sustained.”²³⁸ That is not to say, however, that good ethical behaviour among public servants does not or can not exist.

The federal values and ethics code is a handmaid rather than a master. It was developed as a response to important changes within and without the federal public service but as a counterweight rather than a remedy. While it is generally referred to and studied as a discipline that is distinct from although related to other activities of public servants, it is a discursive tool whose intent is to inject new meaning into difficult concepts and issues facing the public service.

The ethics regime has evolved not only out of a need to codify rules of behaviour that are consistent with independent, core government values and correspond to the public’s expectation for the behaviour of public servants, but also out of the need to establish values that correspond to societal values and can assist in describing the government’s activities. These assist in preserving the government’s credibility by demonstrating internal moral consistency and a standard by which actions, policies and statements can be described as “good” and “right.”

²³⁸ Langford, John W.: *Acting on Values: An Ethical Dead End for Public Servants*, p. 2

Expectations on government have grown in recent decades, and the bar has been set unreasonably low for error and unreasonably high for accountability. There are incidents of likely intentional malfeasance in government, as with all organizations. These incidents must be caught, corrected, and disciplined. The ethics regime in the federal government is not the best mechanism for constraining intentionally corrupt, immoral or unscrupulous behaviour. An adequate system of rules and laws is the best mechanism of constraint for those who will intentionally seek inappropriate gain. But there are also mistakes and misjudgements in government. Errors are often the source of political controversy, and there is little appetite for discussion of “what went wrong” beyond identifying “who did wrong.”

In both the case of intentional malfeasance and error or misjudgement, there is an inclination to paper over the issue, to produce a report or briefing that clarifies the situation and suggest that everyone acted appropriately. Depending on the media or opposition reaction, a tipping point of accountability may be reached where someone must be offered up to admit their mistake. Criminal investigations may sometimes be initiated. Politics and government happens now in an increasingly adversarial environment. There are constant complaints about the lack of accountability by government, but the cost of being accountable is often misaligned with the error – the opposition or media are now only truly said to have won a debate if someone resigns in disgrace.

The combination of a decline in anonymity in the public service and an increase in the demand for “the whole truth,”²³⁹ has put considerable strain on the bureaucracy. For a large, diverse and complex public service, the little space left to manoeuvre has been expanded through use of the ethics discourse. But the notion that the ethics regime provides concrete tools to assist public servants in

²³⁹ Which is out of reach. See Bok, Sissela, *Lying: Moral Choice in Public and Private Life*. Vintage Books Edition, December 1989.

understanding their role and determining an appropriate path may not be helpful to those whom it governs.

There are many means by which the judgment and insight of public servants can be deepened and sharpened – through training, mentoring, and above all experience. The ethics regime can provide parameters to behaviour and provoke important questions about correct courses of action. Importantly, it can provide a mechanism and relevant language for explaining and justifying actions *ex post*. But the APEC case study suggests that, contrary to what is suggested by the federal government ethics regime, the regime does not necessarily provide decision-making tools that can be drawn upon in the “heat of the moment,” a possibility that calls into question the possibility that public service values are *a priori* and further leaves open the question of whether or to what extent the ethics code and its supporting regime impact the conduct of public servants.

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