

THE DECLINE OF MINISTERIAL ACCOUNTABILITY IN CANADA

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## Table of Contents

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<i>Abstract</i> .....	ii
<i>Introduction</i> .....	1
<i>The Westminster System of Democratic Government</i> .....	3
<i>Ministerial Accountability: All the Time, or Only When it is Convenient?</i> .....	9
<i>The Richard Colvin Case</i> .....	18
<i>The Over-Arching Power of the Prime Minister</i> .....	24
<i>Michel Foucault and Governmentality</i> .....	31
<b>Governmentality</b> .....	31
<i>Governmentality and Stephen Harper</i> .....	34
<b>Munir Sheikh and the Long Form Census</b> .....	35
<b>Sebastien Tongeri and Access to Information</b> .....	36
<b>Minister Bev Oda and the Insertion of the Word “Not”</b> .....	38
<i>Foucault, Coercive Power and the Public Service</i> .....	39
<i>The Current State of Power in the Westminster System</i> .....	50
<i>The Future of Westminster</i> .....	51
<i>Bibliography</i> .....	60

## *Abstract*

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Cabinet Ministers in the Canadian Westminster system of democratic government are bound by convention, not law, to be accountable for all actions that take place in their departments. Increasingly, senior public servants are being asked to provide information at Parliamentary Committees on behalf of their Ministers, which breaks the convention of public service anonymity and also provides an excuse for Ministers who do not want to be held to account for issues that arise in their departments. Public servants remain anonymous as they are unelected and therefore are not permitted to make law or policy; they can only implement that which is requested by their Ministers. This paper reviews the experience of Canadian diplomat Richard Colvin, who reported in 2009 to the Parliamentary Accounts Committee (PAC) on the torture of prisoner detainees in Afghanistan. Colvin's allegations were vehemently denied by the Minister of National Defence and the Chief of the Defence Staff, both of whom attacked Colvin's personal character. Using Michel Foucault's theory of governmentality, this paper examines the hierarchical power of the government and the public service, and concludes that most of the decisions that are made in Cabinet are actually ordered by the Prime Minister. The power structure is such that the loyalty of Deputy Ministers is divided, and the power of individual Ministers is greatly overshadowed by the Prime Minister and the partisan staff in the Prime Minister's Office. The paper concludes that Ministerial Accountability is on the decline in Canada, which undermines our system of democracy.

## *Introduction*

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Stephen Harper was elected the twenty-second Prime Minister of Canada in the thirty-ninth general election held on January 23, 2006. The 2006 election resulted in a minority government; the subsequent election in 2008 again resulted in a Conservative minority win. It had been thirteen years between the last Tory government, which saw Brian Mulroney defeated by Jean Chrétien in the 1993 election. When Harper came to power, his goal was to remain in power and he has achieved this through extremely tight control over his caucus and the federal public service (PS). It is well known that the Government of Canada (GoC) has become very risk adverse under Harper. The Prime Minister's Office (PMO) requires all press releases, political speeches, media comments and PS publications to be first vetted through them prior to publication. The Harper government's "command and control" approach is evidence of the risk-adverse nature of government in Canada today.

The inordinate focus on minimizing risk has made it impossible for the public service to be innovative because all public policy must be approved by the PMO prior to public consultation. Senior managers in the PS must bend to the will of the cabinet ministers, who in turn are told what the government's direction will be regarding their ministry. At the same time, the concept of Ministerial Accountability has declined, and responsibility and accountability has been delegated down to the Deputy Minister (DM) and even Assistant Deputy Minister (ADM) levels, but without the corresponding authority. Public servants are being held accountable for things that are beyond their control. It has been many years since a cabinet minister resigned

due to a problem in their department<sup>1</sup>. Under Harper, the Minister is almost never held to account. The preferred approach is to shift the focus of questioning to the senior public servants. This places the PS in an extremely awkward position: on one hand, they are sworn to provide non-partisan policy suggestions developed in the best interests of the citizens of Canada. On the other hand, they are now being called to account for government decisions that were made beyond their control and for which they are now being held responsible and/or being used as a scapegoat to divert any “blame” from government ministers.

A recent example of this is the case of Richard Colvin. Colvin, a former Canadian senior diplomat to Afghanistan, reported to a House of Commons committee that the military handed over detainees to Afghan authorities with the knowledge that they might be tortured. This assertion was vehemently denied by then Chief of the Defence Staff General Rick Hillier, and Defence Minister Peter MacKay. The Conservative members of the committee also dismissed Colvin’s testimony as unsubstantiated and impossible. In the days when the Westminster concept of ministerial accountability was the standard operating procedure, public servants would rarely if ever be called upon to testify; this role remained firmly in the domain of the minister. In the past two decades, there has been a subtle shift from the standard where the minister responds to all allegations as the head of his department to the current practice where senior government officials are now providing that information, saving the minister from an involvement in a potentially scandalous issue and providing the minister an opportunity to claim that he was not aware of what took place.

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<sup>1</sup> A cursory review of the reasons for resignation on the Parliamentary web site reveal that most ministers have resigned due to an ideological disagreement with the ruling government (e.g., Michael Chong resigned in November 2006 as he disagreed with Prime Minister Stephen Harper's motion on Québécois as a nation) or a personal indiscretion (e.g., Maxime Bernier, May of 2008, security breach involving classified government documents left behind at his girlfriend’s residence; Helena Guergis, April 2010, when she became the subject of an inquiry over allegations pertaining to her personal conduct). The vast majority have resigned to accept a political appointment (e.g., Segio Marchi, August 1999, appointed ambassador to the World Trade Organization [which may have been a bid to prevent the former Minister from testifying in the sponsorship scandal] and Benoit Bouchard, June 1993, appointed Canada’s ambassador to France). See: <http://www2.parl.gc.ca/Parlinfo/Compilations/FederalGovernment/MinisterialResignations.aspx?Language=E>

This paper will explore the decline of ministerial accountability, beginning with an overview of the Westminster system's origins and basic tenets, the most significant of which is the convention of ministerial accountability. The concepts of Michel Foucault will be used to help explain why ministerial accountability is in decline in Canada today. Specifically, Foucault's theories on governmentality, surveillance and discipline will be explained and linked to the primary project topic. The case of Richard Colvin will be taken up as the foundational example of a senior public servant being called to account to Parliamentary committee and providing evidence that has been vehemently denied by this elected officials. Although ministerial accountability has been in decline since the early 1970's, it seems to have taken a steep nosedive under the Government of Stephen Harper. The power of the Prime Minister (PM) in the Westminster system has supported this, but the personal need for power and control of the current PM has exasperated the situation. This has had a significant impact on the ability of the PS to function as impartial advisors to their elected officials, as will be explored in this paper. Finally, the future of ministerial accountability in Canada will be examined, concluding that even if Parliament were to codify these conventions in law, it may not have the intended strengthening effect.

## ***The Westminster System of Democratic Government***

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The Westminster system takes its name from that of the physical location of the British government, the Palace of Westminster, which houses the government of the United Kingdom. Westminster is a democratic system comprised of two houses, the Parliament and the Senate, both of which are involved in the passing of legislation. The system is based on political parties;

each party selects a party leader. Members of Parliament (MPs) are elected in a national election. The party that wins a majority of seats forms the government, lead by the Prime Minister (PM), formerly the party leader. In Canada there is also a second, “upper house”, known as the Senate, famously referred to by our first PM, Sir John A. Macdonald, as a house of “sober second thought”. Senators are appointed by the PM and are also organized along party lines.

Westminster was promulgated throughout the Commonwealth and remains in existence (albeit in slightly different flavours) in much of the world today, including Australia, New Zealand, South Africa and in many Caribbean nations. It is a system that evolved in the early 1700’s. Many historians regard Sir Robert Walpole (1696-1745) Britain’s first Prime Minister as the one who “...established the precedent that a minister needed the confidence of Parliament, no less than of the sovereign, to continue in office”<sup>2</sup>. The significance of this will be explained below.

In Canada, the Westminster system is distinguished by two factors: the structure of the government, and the rules and conventions that support it. The head of government is Her Majesty Queen Elizabeth of England, represented in Canada by the Governor General. Parliament is comprised of an Executive branch and a legislative branch; the PM and cabinet have the most power under the Monarch (see figure 1). There is also a Judicial branch, containing the highest court in the land, The Supreme Court of Canada, under which fall the federal courts and courts of appeal, as well as their provincial counterparts.

The functioning of the Canadian Westminster system is governed by constitutional law and accepted convention. While any MP can table proposed legislation, it is most common for the Government to table bills in Parliament for debate,

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<sup>2</sup> Savoie, Donald J., *Breaking the Bargain*. (Toronto: University of Toronto Press, 2003), 30.

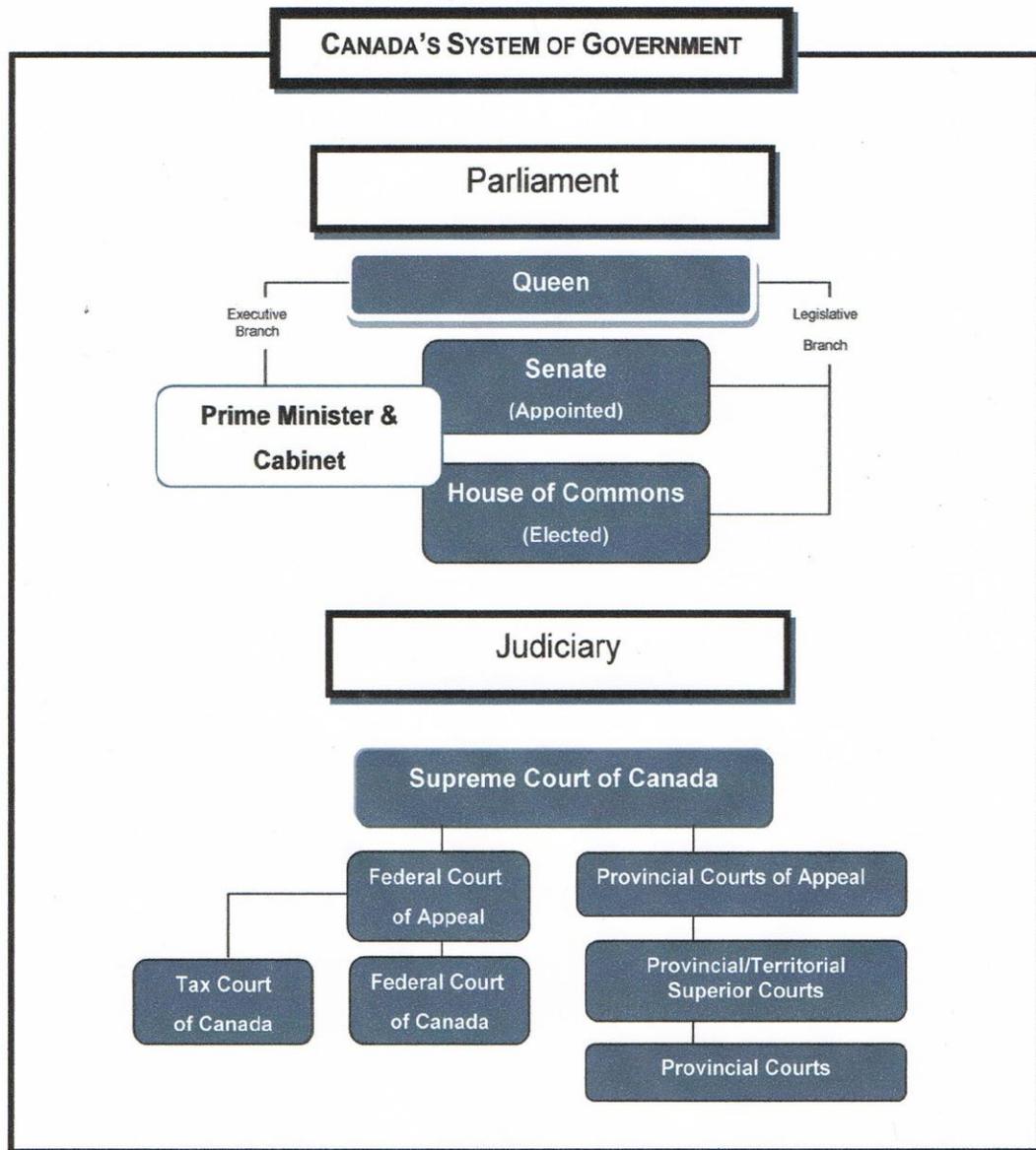


Figure 1: Canada's System of Government

where they pass through first and second reading. The bill is then studied by House of Commons committees, who can recommend changes to the bill or approve it. Once approved,

the bill is subject to a third reading and a vote in the House of Commons. Once the bill is approved in the Commons, it is passed to the Senate who engage in a similar procedure to study and approve the bill. Once passed by the Senate, the bill receives royal assent and becomes law.

Under the law, the ruling party must maintain the confidence of the House. If the Government tables a bill and it is defeated, the PM must seek permission from the Governor General to dissolve Parliament and convene an election. The Governor General may opt to ask the opposition party(ies) to form a government, but this rarely occurs. Confidence motions are raised by the opposition and are generally applicable only to major Government agenda items and to matters of finance, such as the budget. The only exception to this rule in Canada's history occurred on March 25, 2011, when the Government was brought down on a vote of non-confidence. The motion of non-confidence indicated that Parliament had lost the confidence of the House. The unprecedented motion stemmed from a Commons committee finding that the Government failed to provide Parliament with financial information on several initiatives, including the financial implications of tax and justice system reforms, as well as the cost of new fighter jets<sup>3</sup>. The Constitution also requires that Ministers of the Crown be accountable for the operations of the departments and/or Agencies for which they are responsible.

Westminster also has many accepted conventions – operational processes and “rules” that are not codified in law - which form the basis for the function and process of the Government. Of these, the most important is ministerial accountability, which can be divided into two concepts: 1) Collective responsibility, which, in the Parliamentary sense, refers to the requirement for the Prime Minister to seek an election in the event that the House passes a non-

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<sup>3</sup> CBC News, “Canadians to go to the Polls on May 2”, CBC.ca, <http://www.cbc.ca/news/politics/story/2011/03/26/cv-election-writ.html>, 1.

confidence vote. Ministers are expected to collectively support government decisions in public; and 2) Individual responsibility, which dictates that the Minister must resign in the event of a serious error in his department, and that he must be answerable to Parliament for any activities that take place in his department<sup>4</sup>.

Another convention is “cabinet confidence”, which prescribes that members of the cabinet must always support the Government’s policies and programs in public. Cabinet ministers are permitted to argue and debate among themselves behind closed doors, but must show a united front when speaking in public. Cabinet ministers who disregard this convention or otherwise fall into disfavour with the PM, can find themselves removed from their cabinet post and sometimes asked to leave the party to sit as an independent.

The PM and Ministers are permitted to have their own partisan staff, known as “exempt” staff as they are not subject to the same rules and employment conditions as members of the federal public service (PS). The PM’s staff work in the Prime Minister’s Office (PMO), and the ministerial staff work in the Minister’s Office (MO). The role of the staff in both of these offices is to address matters of political consequence to the Government. They are not permitted to give direction to any members of the PS.

The federal public service is a hierarchical organization of departments, agencies and crown corporations. The head of the public service is the Clerk of the Privy Council, supported by PS staff in the Privy Council Office (PCO). All public servants ultimately report to the Clerk. The highest ranking officer in any department is the Deputy Minister (DM), usually followed by one or more Assistant Deputy Ministers (ADMs). Another convention of Westminster is that the

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<sup>4</sup> Kernaghan, Kenneth, “Power, Parliament and public servants in Canada: ministerial accountability re-examined”, *Canadian Public Administration* 5 (3), (1979): 385-6.

PS is anonymous, non-partisan and expected to provide expert advice to the Minister. While these conventions seem straightforward, they are not. There is a great deal of “blurriness” and “fuzziness” around the boundaries of these rules. The government acknowledges the situation by stating the following in a guide for ministers: “Parliament confers power on a Minister through parliamentary statutes that set out the duties and functions for which the Minister is individually responsible. In addition to these enabling statutes, there are ‘unwritten’ conventions or precedents governing the ways in which Ministers fulfill their responsibilities and account for their actions in exercising their statutory authority”<sup>5</sup>. This quote is notable in that it speaks to the “fuzziness” of the unwritten rules that are accepted as defacto standards. It was not always this way: Prior to procedural reforms that took place in 1968, the financial estimates were “...examined by the whole House in Committee of Supply. Senior officials sat in front of their minister in the House and provided him with information and advice on departmental matters. They neither spoke in the House nor answered questions raised by its members”<sup>6</sup>.

Other parts of the system are not without their critics. Dawson and Dawson wrote the following about Canada’s Westminster system in 1971: “The most striking feature of the Canadian form of government is undoubtedly the superficial absurdity of the dual nature of the executive power. In the absence of the queen, the governor general, as her representative, is the official head of the state; but the active and puissant head of the government of the state is the prime minister”<sup>7</sup> (p 167.). This again speaks to the “fuzziness” and “blurriness” of our system, where convention dictates process as much as law does. In this context, the lack of definition refers not to the relationship between ministers and the public service, but the most

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<sup>5</sup> Government of Canada, *Accountable government: A guide for ministers and ministers of state*. (Ottawa, Ontario: Government of Canada, 2008), [http://pm.gc.ca/grfx/docs/guidemin\\_e.pdf](http://pm.gc.ca/grfx/docs/guidemin_e.pdf), 1.

<sup>6</sup> Kernaghan, Kenneth, “Power, Parliament and public servants in Canada: ministerial accountability re-examined”, *Canadian Public Administration* 5 (3), (1979): 391.

<sup>7</sup> Dawson, R. MacGregor, and W. F. Dawson, *Democratic government in Canada*. 4th ed. (Toronto, Ontario: University of Toronto Press, 1971), 167.

executive level of relationship, that between the Prime Minister and the sovereign. The “absurdity” of the situation Dawson refers to was significantly improved with the repatriation of the Constitution in 1982. However, there remains in some parts of society a lingering unease with the notion that an unelected member of a royal family in another country ultimately has a stake in determining the laws of this country. The residual unwritten conventions that remain in our system could simply be remnants of the time when the Westminster system was evolving. It may have been that those charged with evolving the system were uncertain of the manner in which to articulate certain processes, and decided that it was better to allow the process to develop organically than to impose restrictive definitions.

“A Minister of the Crown is responsible, under the system in Great Britain, for the minutest details of the administration in his department; he is politically responsible, but he does not know anything at all about them. When anything goes wrong in his department, he is responsible therefore to Parliament; and if he comes to Parliament and points out that he entrusted the duty to an official in the ordinary course and in good faith, that he had been selected for his capacity, and ability, and integrity, and the moment that man has gone wrong the Minister had investigated the matter to the full and punished that man either by degradation or dismissal, he has done his duty to the public. That is the way matters are dealt with in Great Britain, and it is in that way, it seems to me, that our affairs ought to be carried on in this country”.

- Sir Robert Borden, 1903.

## ***Ministerial Accountability: All the Time, or Only When it is Convenient?***

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There are two schools of thought concerning ministerial accountability: that, as per the convention, the minister should be accountable for everything in his department, whether or not he has personal knowledge of them. The opposing view is that it is not possible for the minister to be aware of all the workings of his department, and as such, he should not be held personally responsible when something goes wrong. The traditional compact held that the minister should be aware, as reflected in the opinion of then-opposition leader, Sir Robert Borden<sup>8</sup>, to the right.

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<sup>8</sup> Dawson, R. MacGregor, and W. F. Dawson, *Democratic government in Canada*. 4th ed. (Toronto, Ontario: University of Toronto Press, 1971), 176.

It has been clear for quite some time that Ministers are accountable for all that transpires in their departments. Borden is convincingly straightforward in his acknowledgement that the Minister cannot possibly know everything, and that ignorance of an event is not an excuse. Borden implies the need for effective management practices and reporting to ensure that if something does go amiss, the Minister can investigate and determine where the processes failed and what can be done to strengthen them. If someone makes an error, the Minister acts to correct the behaviour, and if it is determined that the error is so egregious that the public servant can no longer function in that capacity, he can be demoted or let go. Borden's intent here was not for Ministers to throw their senior public service advisors under the proverbial bus when an error comes to light. Borden assumed that a fair and impartial review of the facts would be conducted, upon which a fair and commensurate punishment would be applied. This is in sharp contrast to more recent examples, such as that of Richard Colvin, which will be addressed in greater detail below. Although Colvin had reams of documentation indicating that he had been briefing up, the Ministers refused to accept that they had been advised.

In *Breaking the Bargain*, respected Canadian academic Donald Savoie writes that the basic operating principle of Westminster is that: "It is ministers, not permanent government officials, who have the final say, because ultimately they are the people accountable to Parliament and the public. The minister is responsible for everything done in the department, and everything done in the department may be the object of parliamentary scrutiny"<sup>9</sup>. As most Canadian school children are taught, the Parliament consists of elected officials; the party that has the highest number forms the government. There is a subtle, but critical nuance hidden in this basic understanding: the ministers are responsible for their departments and accountable to Parliament, but at the end of the day, Parliament cannot force the minister to change a policy or

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<sup>9</sup> Savoie, Donald J., *Breaking the Bargain*. (Toronto: University of Toronto Press, 2003), 3.

program. Only the Government can do that, via decisions made by the Cabinet, led by the Prime Minister.

Many Canadians would be surprised to learn that non-cabinet and opposition MPs have very little political power. Next to the PM and the Cabinet, arguably the most powerful people in Ottawa are members of the PMO and deputy ministers. Hence the bargain which is the topic of Savoie's book: the DMs provide the best possible advice to the Minister, and deliver it in an unbiased and non-partisan manner. Having provided their professional recommendations, the DMs take direction from the Minister, whether they agree with the decision or not. While the public servants officially report to the Clerk of the Privy Council, the practical reality is that the Minister is their boss, as depicted in figure 2. The reporting relationship of the public service is important because it is, by design, a non-political one. Public servants are not elected and cannot make policy or program decisions for the people of Canada; that responsibility falls to the Minister. The "fuzziness" of the triad relationship between the DM, Minister and the Clerk of the PCO may have been an oversight, but "Whether by design or not, the architects of political order and national constitutions have paid little attention to the administrative side of government. In Britain and, by ricochet, in Canada, the matter was resolved by declaring that the civil service had no constitutional personality. Thus the relationship between politicians and career civil servants relies on practice and tradition, not on rules"<sup>10</sup>.

In the wake of the sponsorship scandal, the Harper government introduced the Federal Accountability Act (2006), intended to increase the transparency and accountability of government actions. The Act was partially in response to the Gomery Report, which investigated the sponsorship scandal and made many recommendations for administrative and legal changes in government policies and procedures. Justice Gomery draws a very clear line

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<sup>10</sup> Savoie, Donald J., *Breaking the Bargain*. (Toronto: University of Toronto Press, 2003), 4.

in the sand on the issue of ministerial accountability. He wrote: “*The individual responsibility of the minister requires that he or she be*

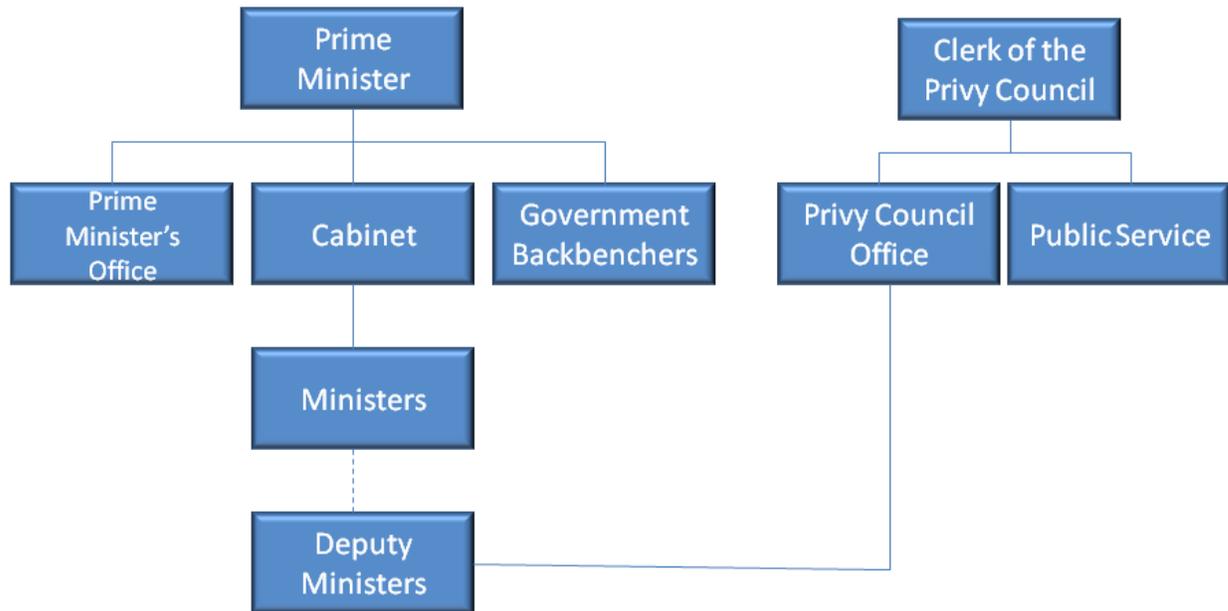


Figure 2: Reporting Relationship of Deputy Ministers

*personally responsible for the activities carried out under his or her authority...the duties described in the minister's acts cover a wide variety of functions, ranging from policy formulation and program development to program implementation and departmental administration.* These functions, whether policy, program or administration, may be devolved upon the minister's senior permanent advisor in the latter's quality as the minister's deputy"<sup>11</sup> (emphasis in original). Gomery also referenced testimony between himself and then Clerk of the Privy Council Alex Himelfarb. Himelfarb stated that regardless of what level of detail the minister chose to involve

<sup>11</sup> Gomery, Justice John H., *Commission of enquiry into the sponsorship program and advertising activities. Who is responsible? Chapter III: Structure, organization and operation of the government of Canada.* (Ottawa, Ontario: Government of Canada, 2005), <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/ffr/default.htm>, 35.

himself in the workings of the department, "...that...does not in any way diminish the accountability of the elected official. It is non-delegatable"<sup>12</sup>.

In his report, Justice Gomery investigated the contention that a minister cannot claim ignorance of a problem in their department, as the minister is charged with ensuring that there is sufficient oversight and risk management to prevent such occurrences. While the responsibility for carrying out the directions in this area remain in the realm of the deputy minister, "If the Minister fails to take these precautions, he or she cannot subsequently take refuge in the claim of being unaware of problems until they arose and became public. In other words, a Minister can be reproached for inaction as much as for positive actions that lead to unfortunate results. Willful ignorance of administrative inadequacies will not suffice to disengage a Minister from responsibility for failures within the department"<sup>13</sup>.

Esteemed academic and former Clerk of the Privy Council Gordon Osbaldeston has experienced the workings of ministerial accountability first hand. In his ground-breaking study of decision making in the federal government, *Keeping Deputy Ministers Accountable*, Osbaldeston provides a very complex relationship diagram early in the book to provide the reader with a visual appreciation of the tangle of communication paths and the various intersections between the key stakeholders with which a DM will be engaged (see figure 3). These include the Prime Minister, the Secretary to Cabinet, Parliament and its committees, (including the all-powerful Public Accounts Committee), the minister, minister(s) of state, Treasury Board, and the Public Service Commission (although the power of the PSC has

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<sup>12</sup> Gomery, Justice John H., *Commission of enquiry into the sponsorship program and advertising activities. Who is responsible? Chapter III: Structure, organization and operation of the government of Canada*. (Ottawa, Ontario: Government of Canada, 2005), <http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/ffr/default.htm>, 36.

<sup>13</sup> Ibid., 39

declined dramatically now that the human resources delegation of authority is at the deputy head level). In terms of the DMs accountability to Parliament, Osbaldeston offers the following:

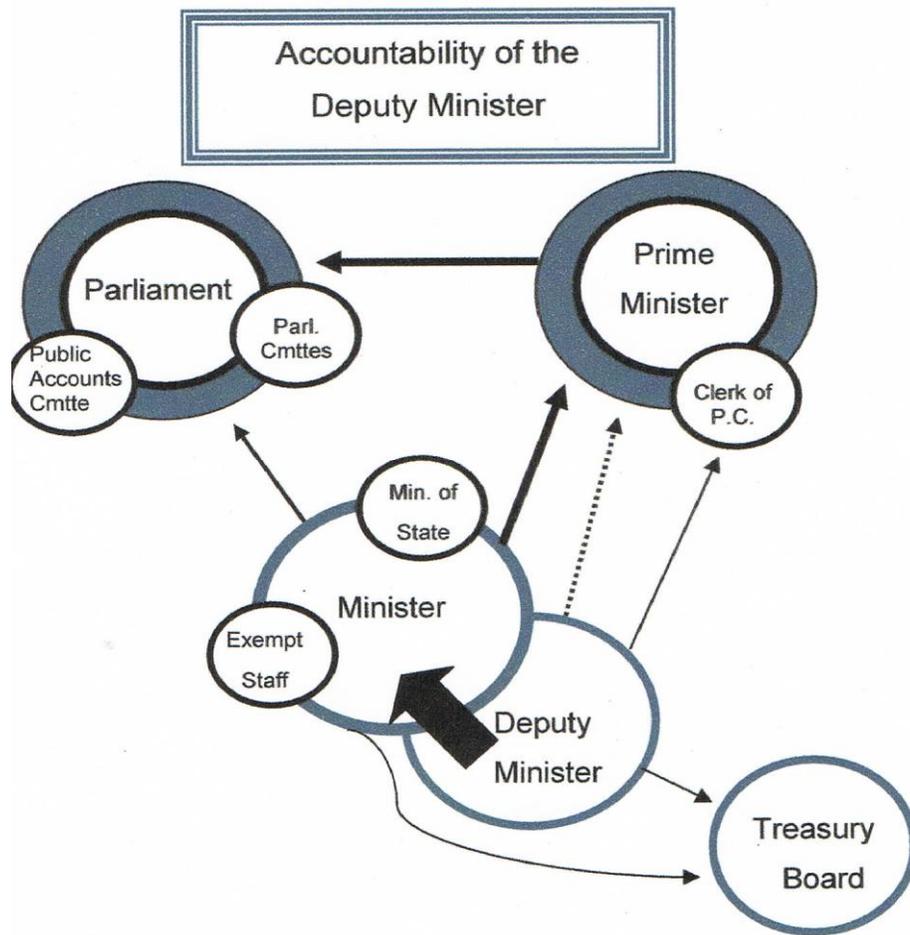


Figure 3: Accountability of the Deputy Minister

Deputy Ministers generally distinguish between their answerability to the Public Accounts Committee and their

answerability to other parliamentary committees. Because of the traditions surrounding the Public Accounts Committee, they believe it is largely their responsibility to explain department management activities on behalf of the minister and to respond to criticisms of department administrative practices. However, deputy ministers noted that in many cases ministers have significant influence on management practices and decisions with respect to contracts, grants or programs. The requirement that deputy ministers support their ministers precluded them from identifying who was responsible for particular decisions. Thus, they thought it was impractical and undesirable to separate the deputy minister's responsibility for administration and management from the minister's responsibility to direct the department. Consequently, deputy ministers believe they attend Public Accounts Committee meetings on behalf of their minister and the Government and not in their own right"<sup>14</sup>.

Osbaldeston's concept that the DM represents the Minister at the Parliamentary Accounts Committee (PAC) is very interesting, as it reflects the traditional Westminster view of government and provides a baseline from which we can measure the deviation since Osbaldeston published this book in 1989. Since that time, no minister has resigned for a scandal within his ministry. Currently, it seems that ministers do not appear before PAC and that increasingly, it is senior public servants at the ADM and Associate Assistance Deputy Minister (AADM) levels who are appearing. Are they really mouthpieces for the minister, and how do they overcome the dilemma identified by Osbaldeston that they are precluded from identifying who made particular decisions? This presents a significant challenge for accountability if one considers that part of being accountable is the ability to identify who was responsible for a particular action. If this is not possible, then by default the minister must be the accountable person. In reality, ministers do not resign if there is a major issue in their department.

New Public Management (NPM) is a management approach that applies private sector principles in a government setting. It gained prominence in the 1980s under the leadership of

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<sup>14</sup> Osbaldeston, Gordon F., *Keeping Deputy Ministers Accountable*, (Toronto, Ontario: McGraw-Hill Ryerson, 1989), 47.

U.S. President Ronald Reagan and British Prime Minister Margaret Thatcher. NPM encourages governments to operate with a business focus as opposed to a bureaucratic one, emphasizing the quality and availability of service to the “consumer”, in this case citizens. Inherent in the theory of NPM is increased attention to financial return on investment. Governments are not seeking to make a profit per se; rather, in NPM, governments should incorporate cost-neutral or cost-recovery strategies in their policy planning. A key pillar in NPM is allowing front line staff to make decisions and address issues at their level. Another important aspect of NPM is that it encourages outsourcing services previously supplied by bureaucrats in areas where it makes economic and policy sense to do so. For example, in Ontario, the administration of driver and vehicle licensing is contracted to a private company who receive a fixed fee for providing this service. These practices were expected to increase efficiencies, liberalize trade and support free market activities. NPM does not come without risk, and governments that use the NPM approach should ensure that they are prepared to handle the increased risk of less control. Bureaucrats who have been empowered to make decisions do sometimes make erroneous ones, as do third party service providers. Depending on the nature and severity of the error, it may or may not be reported up to the DM level, but could become a significant issue if it is of interest to the media.

Of course, not everyone agrees that the minister must be responsible for everything that takes place in his department, even if he is unaware. Academic Kenneth Kernaghan does not believe that it is reasonable to hold ministers accountable in this manner, stating “It is now almost universally accepted that it is unreasonable to hold a minister personally responsible in the form of resignation for the administrative failings of his subordinates. A minister cannot hope to have personal knowledge of more than a small percentage of the administrative actions taken by his officials. Moreover, he must restrict his attention to those administrative matters

which are especially important or politically sensitive”<sup>15</sup>. Donald Kettl is also of the same persuasion: “In any complex job, the leader at the top cannot possibly prescribe the actions of everyone responsible for carrying it out”<sup>16</sup>. Kettl explains that front line workers (e.g., police and teachers) often work alone with no direct supervision, giving them great latitude in how they conduct their business. Administrators at different levels focus on different kinds of problems, leading to information being filtered out as it is escalated<sup>17</sup>). The most important factor influencing this opinion is NPM, which, for reasons articulated above, delegate decision and policy implementation at a frontline worker level.

Kettl states that it is impossible for the head of a bureaucracy to be omniscient about its activities, and that the minister cannot dictate the actions of those at the working level. And yet, it is the responsibility of all public servants to ensure that they are briefing up to the most executive levels. The public service has an obligation in the doctrine of ministerial accountability – the need for the elected official to hear the whole story, however distasteful it may be. Former Assistant Secretary to Cabinet James Mitchell noted: “A colleague of mine said recently that the real integrity deficit in government lies not in wrongdoing by officials, but rather in what too often is not done – that is, in officials not speaking up when it is their duty to do so”<sup>18</sup> (emphasis in original). It is this shadowy convention that forms the basis of the key question asked in this paper: is the concept of ministerial accountability in decline in Canada? If the minister cannot possibly know what the staffs are doing, then how could he/she be held to account for their actions?

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<sup>15</sup> Kernaghan, Kenneth, “Power, Parliament and public servants in Canada: ministerial accountability re-examined”, *Canadian Public Administration* 5 (3), (1979): 386.

<sup>16</sup> Kettl, Donald F., “Public bureaucracies. In *The Oxford handbook of political institutions.*, eds. R. A. W. Rhodes, Sarah A. Binder and Bert A. Rockman, (Oxford, United Kingdom: Oxford University Press, <http://0-lib.myilibrary.com.aupac.lib.athabascau.ca?ID=90581>, 2006), 368.

<sup>17</sup> *Ibid.*, 370.

<sup>18</sup> Mitchell, James R., “Can I really speak truth to power? Practical advice for new executives”, Paper presented at The Induction of New Executives, (Ottawa, Ontario: The Sussex Circle, 2007), <http://www.sussexcircle.com/pdf/028-SpeakTruthtoPower.pdf>, 5.

## *The Richard Colvin Case*

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Richard Colvin is a senior diplomat with the Department of Foreign Affairs and International Trade (DFAIT) currently posted in Washington, D.C. From April 2006 to October 2007, he was posted in Afghanistan as Head of the Political Section. Shortly after his arrival, Colvin "...became aware of procedural concerns regarding the transfer of Afghan detainees by Canadian Military Police ("MPs") to Afghan authorities, and also substantive concerns about the treatment of the detainees following their transfer. Judging these problems regarding Afghan detainees to be serious, imminent and alarming, I made investigations and detailed my findings formally in my reporting from the PRT [Provincial Reconstruction Team]"<sup>19</sup>. In January 2006, Ottawa professor Dr. Amir Attaran obtained, through the Access to Information Act, documentation from the Department of National Defence (DND) that suggested that prisoners captured in Afghanistan were being turned over to Afghan officials who were torturing them. Attaran filed a complaint with the Military Police Complaints Commission (MPCC), a quasi-judicial body that provides civilian oversight of the Canadian Forces military police.

In February 2007, as a result of Attaran's MPCC complaint, then Defence Minister Gordon O'Connor was asked in the House if Afghan detainees were being tortured<sup>20</sup>, and the issue became front page news. From the beginning, the Government denied Canada's involvement and any knowledge that abuses took place. A former government official told the *Toronto Star* that when the story broke in 2007, "Harper's office in Ottawa 'scripted and fed' the precise wording NATO officials in Kabul used to repudiate allegations of abuse 'at a time when it was privately and generally acknowledged in our office that the chances of good treatment at

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<sup>19</sup> Parliament of Canada, *Affidavit of Richard Colvin*, (Ottawa, Ontario: Military Police Complaints Commission, October 5, 2009), [http://fairwhistleblower.ca/files/fair/docs/Colvin\\_Affidavit.pdf](http://fairwhistleblower.ca/files/fair/docs/Colvin_Affidavit.pdf), paragraph 23.

<sup>20</sup> cbc.ca, "Military probes abuse allegations in Afghanistan", <http://www.cbc.ca/canada/toronto/story/2010/06/30/ontario-hst.html>. February 6, 2007, 1.

the hands of Afghan security forces were almost zero”<sup>21</sup>. Initially O’Connor informed the house that the International Committee of the Red Cross was overseeing the prisoner transport and treatment, but had to backtrack when the organization stated that it would never identify to Ottawa evidence of any abuses it may encounter in Afghan prisons<sup>22</sup>. In the August 2007 cabinet shuffle, O’Connor was replaced by Peter MacKay.

The Afghan detainee issue continued to arise in the House and in the media throughout 2008. In March of that year, Chairman of the MPCC, Peter Tinsley, announced that he intended to hold hearings on the issue; he was thwarted by the Government when he attempted to obtain documentation, and much of what he received was heavily redacted<sup>23</sup>. When the MPCC report on Dr. Attaran’s complaint was issued in April 2009, “...the commission found that the majority of the complainant’s allegations were not substantiated, and, indeed, were refuted by the available evidence”<sup>24</sup>. The MPCC continued to attempt to hold its hearings, but the Conservative Government, citing national security concerns, tried to prevent twenty-two witnesses from testifying. The Justice Department argued that the testimony of the twenty-two public servants was not relevant and, even if it was, they wouldn’t be able to publicly testify because it could breach national security<sup>25</sup>. The Government was unsuccessful in preventing the hearings. In October 2009, the MPCC received an affidavit from Colvin alleging that the Government was aware of serious issues in the treatment of detainees since 2006, because he himself had been sending reports to Ottawa expressing concerns. In the affidavit, and in

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<sup>21</sup> Potter, Mitch, “PMO Issues Instructions on Denying Abuse in ‘07”, *The Toronto Star*, <http://www.thestar.com/news/canada/afghanmission/article/729157--pmo-issued-instructions-on-denying-abuse-in-07>, November 22, 2009, 1.

<sup>22</sup> Koring, Paul, “Red Cross contradicts Ottawa on detainees”, *The Globe and Mail*, <http://www.theglobeandmail.com/news/national/article746018.ece>, March 8, 2007, 1.

<sup>23</sup> Martin, Lawrence, *Harperland* (Toronto, Ontario: Viking Press, 2010), 233. Mr. Tinsley’s contract was not renewed or extended in 2009, although he was in the midst of public hearings at the time.

<sup>24</sup> Tinsley, Peter A., “Final Report Following a Public Interest Investigation Pursuant to Section 250.38 of the National Defence Act of a complaint submitted by Dr. Amir Attaran Concerning the Conduct of the Task Force Afghanistan Military Police (Roto 1) at Kandahar Air Field in Kandahar, Afghanistan”, (Ottawa, Ontario: Military Police Complaints Commission, 2009), [http://www.mpcc-cppm.gc.ca/alt\\_format/300/3700/2007-003/2007-003-eng-rev.pdf](http://www.mpcc-cppm.gc.ca/alt_format/300/3700/2007-003/2007-003-eng-rev.pdf), 14.

<sup>25</sup> Tibbetts, Janice, “Tories try to block witnesses at military commission”, *Canwest News Service*, <http://www.canada.com/news/Tories+block+witnesses+military+commission/2055852/story.html>, October 1, 2009, 1.

appearances before the Special Committee on the Canadian Mission in Afghanistan on November 18 and December 16, 2009, Colvin maintained that the Government was being briefed on this issue. During his tenure in Afghanistan, Colvin sent seventy-five<sup>26</sup> reports to Ottawa, six of which contained specific information pertaining to the torture of the detainees. These reports included wording such as "...allies concerns that detainees may 'vanish from sight' after being transferred...[and] noted that 'torture' is rife in Afghan jails, as are 'extrajudicial executions and disappearances'. The report used the word 'torture' repeatedly"<sup>27</sup>. Colvin cited reports by other international organizations who reported the same concerns at the same time. A March 2006 U.S. State Department report does not mince words: "Torture and abuse consisted of pulling out fingernails and toenails, burning with hot oil, sexual abuse and sodomy...Prison conditions remained poor, and prisons were severely overcrowded and unsanitary... Prisoners were reportedly beaten, tortured and denied adequate food"<sup>28</sup>. Colvin made it very clear that he was continually contacting officials in Ottawa:

I specifically intended for KANDH-0029, and other messages on detainees, to be received by four key recipients: a) The policy shop at DFAIT responsible for detainee policy ("IDR") under ADM Colleen Swords; b) The senior military chain of command, both in Ottawa (CEFCOM [Canadian Expeditionary Forces Command] under LGen. Gauthier) and Kandahar (Task Force Afghanistan under BGen. Fraser), who had overall responsibility for management of detainees; c) The officials in National Defence Headquarters specifically responsible for detainees; and d) The officials at KAF specifically Responsible for detainees. To reach all these addressees I used the protocols and mechanisms that the government's confidential communication system, C4, provided to me to communicate to them<sup>29</sup>.

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<sup>26</sup> Government of Canada, *Evidence: Special Committee on the Canadian Mission in Afghanistan*, (Ottawa, Ontario: Parliament of Canada, November 18, 2009), <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4236267&Language=E&Mode=1&Parl=40&Ses=2>

<sup>27</sup> Government of Canada, *Minutes of Proceedings: Further Evidence of Richard Colvin to the Special Committee on Afghanistan*, (Ottawa, Ontario: Parliament of Canada, December 16, 2009), <http://www.cbc.ca/news/pdf/further-evidence-special-committee.pdf>, 2.

<sup>28</sup> *Ibid.*, 2.

<sup>29</sup> Parliament of Canada, *Affidavit of Richard Colvin*, (Ottawa, Ontario: Military Police Complaints Commission, October 5, 2009), [http://fairwhistleblower.ca/files/fair/docs/Colvin\\_Affidavit.pdf](http://fairwhistleblower.ca/files/fair/docs/Colvin_Affidavit.pdf), paragraph 34.

Colvin's testimony was explosive. He accused government officials of trying to silence him, stating:

Senior officials in DFAIT and the Canadian Forces did not welcome our reports or advice. At first, we were mostly ignored. However, by April 2007, we were receiving written messages from the senior Canadian government coordinator for Afghanistan to the effect that we should be quiet and do what we were told and there was a phone message from the DFAIT assistant deputy minister suggesting that in future we should not put things on paper but, instead, use the telephone.

October 2007 was 17 months after the PRT first informed senior officials in the Canadian Forces and DFAIT about the very grave dangers facing our detainees after transfer. In other words, for a year and a half after they knew about the very high risk of torture, they continued to order military police in the field to hand our detainees to the NDS. As far as I know Canada, even today, continues to transfer detainees to the NDS in Kandahar<sup>30</sup>.

The Harper government instantly attempted to deny the allegations. Conservative MP Cheryl Gallant "...dismissed all of the testimony as something that wouldn't be admissible in court and tried to paint Colvin as a Taliban dupe. 'They know how to take and plant false stories, how to push stories out,' she said reading from previous testimony given by a military officer to the Commons defence committee. 'It's called information operations.'"<sup>31</sup>. Then Chief of the Defence Staff General Rick Hillier said Colvin's reports "...said nothing about abuse, nothing about torture or anything else that would have caught my attention or indeed the attention of others. There was no reason based on what was in those reports for anybody to bring it to my attention and after having read that, I'm absolutely confident that was indeed the case"<sup>32</sup>. While Colvin was also personally attacked by Peter MacKay, he has been supported publicly by many former ambassadors, but not by the Secretary of the Cabinet, who is supposed to be the official defender of the public service. And when Colvin gave his testimony to a House committee, he

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<sup>30</sup> Government of Canada, *Evidence: Special Committee on the Canadian Mission in Afghanistan*, (Ottawa, Ontario: Parliament of Canada, November 18, 2009),

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4236267&Language=E&Mode=1&Parl=40&Ses=2>

<sup>31</sup> Woods, Allan, "Canada ignored torture warnings: Diplomat", *The Toronto Star*, <http://www.thestar.com/news/canada/article/727642--canada-ignored-torture-warnings-diplomat?bn=1> November 19, 2009, 1.

<sup>32</sup> CBC News, "Colvin testimony on torture 'ludicrous': Hillier", CBC.ca, <http://www.cbc.ca/news/canada/story/2009/11/25/hillier-detainees.html>, November 25, 2009, 1.

did so alone, instead of being accompanied by the Deputy Minister of Foreign Affairs and International Trade<sup>33</sup> as would be expected in traditional Westminster style.

To counter the government's contention that they addressed the problems as soon as they were informed, Colvin provides numerous examples of the lack of monitoring of the situation by officials charged with this duty<sup>34</sup>. Colvin's December 2009 rebuttal submission provides empirical evidence that contradicts other GoC responses such as: there was no evidence that torture occurred; the suggestion that all detainees were tortured is speculation; the Afghans investigated on behalf of the GoC; the Canadian military had no prisons of their own and had no choice but to hand over detainees; Colvin has no credibility; and, incredibly, "We don't read reports. It was up to DFAIT people / our staff to tell us. Somebody should have grabbed us by the ear and told us detainees were being tortured"<sup>35</sup>.

Since Colvin's testimony, the battle between the Government and the Opposition regarding the release of documentation pertaining to this issue has continued. In early December, 2009, the House of Commons passed a motion requiring the release of unredacted documentation pertaining to this issue<sup>36</sup>. The Government refused, again citing issues of national security, potentially placing the Government in contempt of Parliament. The issue continued to remain at the forefront. On December 30, PM Stephen Harper prorogued Parliament, rationalizing that he needed time to consult with Canadians about the economy. Many speculated that he did so in order to avoid answering more questions on the issue. On March 5, 2010, CBC news reported that Amir Attaran had obtained unredacted copies of documentation pertaining to Canada's role in the detainee issue. Attaran said: "If these

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<sup>33</sup> Axworthy, Thomas S., and Julie Burch, "Crisis in the Ontario and federal public services", *Policy Options*, (March 2010): 24.

<sup>34</sup> Government of Canada, *Minutes of Proceedings: Further Evidence of Richard Colvin to the Special Committee on Afghanistan*, (Ottawa, Ontario: Parliament of Canada, December 16, 2009), <http://www.cbc.ca/news/pdf/further-evidence-special-committee.pdf>, 3.

<sup>35</sup> *Ibid.*, 13.

<sup>36</sup> Whitaker, Reg, "Prime Minister vs. Parliament", *The Toronto Star*, <http://www.thestar.com/comment/article/740361> December 18, 2009, 1.

documents were released [in full], what they will show is that Canada partnered deliberately with the torturers in Afghanistan for the interrogation of detainees... There would be a question of rendition and a question of war crimes on the part of certain Canadian officials. That's what's in these documents, and that's why the government is covering up as hard as it can"<sup>37</sup>. Perhaps as an attempt to quell the demand for a Parliamentary enquiry on this matter, on March 13, 2010, Minister of Justice Ron Nicholson announced the appointment of the Honourable Frank Iacobucci to conduct an independent review of the documents<sup>38</sup>. No timeframe for the completion of this task was provided, nor did Nicholson state whether or not the results of Iacobucci's work would be made public.

Not satisfied, on March 18 the Liberals proposed a motion calling for the Government to allow a committee to review the documentations. Commenting on the matter, NDP MP Jack Harris said "The Prime Minister's refusal to respect the will of Parliament is a serious abuse of power. He is not a king. He answers to the will of Parliament, not the reverse"<sup>39</sup>. In April, Speaker Peter Milliken ruled that the House had the right to ask for these documents, and told all parties that they must come to an agreement as to how they would be reviewed. In June, it was announced that a Memorandum of Understanding on the issue had been completed, although the NDP refused to sign the agreement<sup>40</sup>. As of March, 2011, the issue remains unresolved.

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<sup>37</sup> CBC News, "Canada wanted Afghan prisoners tortured: lawyer", cbc.ca, <http://www.cbc.ca/news/canada/story/2010/03/05/afghan-attaran005.html>, March 5, 2010, 1.

<sup>38</sup> Government of Canada, "Minister of Justice Releases Terms of Reference for Independent Advisor to Review National Security Information", [http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc\\_32486.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32486.html), March 13, 2010, 1.

<sup>39</sup> Leblanc, Daniel, "Opposition asserts supremacy of Parliament in Afghan detainee issue", *The Globe and Mail*, <http://www.theglobeandmail.com/news/politics/opposition-asserts-supremacy-of-parliament-in-afghan-detainee-issue/article1505189/>, March 18, 2010, 1.

<sup>40</sup> Wall, Kerry, Memorandum of Understanding on the Afghan detainee documents, cbc.ca, <http://www.cbc.ca/news/politics/inside-politics-blog/2010/06/memorandum-of-understanding-on-the-afghan-detainee-documents.html>, June 16, 2010, 1.

The experiences of Richard Colvin are a key area of investigation for this project, and as such an inclusion of his side of the story is critical to the development of a sound conclusion on the condition of ministerial responsibility in Canada. Colvin's presentation of balanced, logical, and empirical evidence in his submissions and committee testimony is beyond reproach. He states his facts honestly, and consistently relates facts, actions, and details unemotionally, with linkages to the overarching governance structure and standard operating procedures of the Department of Foreign Affairs. His responses are credible and substantiated by verifiable facts. It appears that the Government has made many attempts to avoid revealing all it knows on this issue. Colvin is just one in a long list of senior public servants who have been left on their own to present evidence to Parliamentary committee without the support of their DM or Minister. Colvin is often referred to in the press as a "whistle-blower", yet he is, by his own admission, providing information to Committee in his role as a public servant. Why is Colvin appearing at all? Why has Peter MacKay not accepted responsibility for this issue? In addition to the erosion of ministerial accountability, there is another factor in play: the power of the Prime Minister.

## ***The Over-Arching Power of the Prime Minister***

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On June 23, 2010, a magnitude 5.0 earthquake occurred in Val-des-Bois, approximately 103 kilometres north east of Ottawa. The earthquake was felt in Ottawa and buildings were quickly evacuated. Within minutes of the occurrence of the earthquake, the Natural Resources Canada (NRCan) web site and emergency hotline phone numbers went down. The media was forced to rely on information reported from the U.S. Geological Survey. The following was the sequence of events leading up to a media briefing:

At 4:15 p.m., the department decided to hold a conference call — hopefully within the hour — to link its earthquake experts with all the reporters at once. Seismologists were standing ready in English and French.

But there was a hitch: a tangled approval process for notifying the media about the conference call. Even though the announcement was 75 words long (not including phone numbers), it needed:

- Approval in principle from an assistant deputy minister — but still subject to approval of “media lines,” a sort of script outlining the department’s central message.
- Approval from the office of minister Christian Paradis.
- Translating the announcement of the conference call.
- Approving the translation.
- Approval from the Privy Council Office.
- Posting the announcement on the Natural Resources website — and immediately pulling it off again, because media lines were not yet approved by the assistant deputy minister.
- Approving the media lines.
- Last-minute copy editing, literally. One minute before the call, someone felt the French copy should list the time as 18 h, not 18h00.
- Finally, at 6:24 p.m., sending out the conference call invitation on a commercial wire service — 24 minutes after the call began.

“So much for sending out the media advisory on time. Went out at 6:24!” wrote a frazzled staffer. “I’m pretty sure the call was done at that point ... yeesh.” (She was correct.)<sup>41</sup>

Fortunately, there was little damage from the earthquake in Ottawa and there were no injuries. However, government workers<sup>42</sup> and the general public did not know what to do, if it was safe to go back inside their homes and office buildings, or even what had happened until

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<sup>41</sup> Spears, Tom, “How an earthquake preparedness plan came tumbling down”, *The Ottawa Citizen*, November 28, 2010, <http://www.ottawacitizen.com/life/earthquake+preparedness+plan+came+tumbling+down/3895197/story.html>, 2-3.

<sup>42</sup> The GoC has updated its Health and Safety regulations to include direction on what to do in the event of an earthquake, information that was not included in the guidelines prior to June 2010. On the day of the earthquake, public servants immediately evacuated their offices, which is contrary to the newly issued guidance. The proper protocol indicates that staff should take refuge under their desks or in reinforced areas such as doorways until the earthquake has stopped. They should then check for any danger in their immediate vicinity, and evacuate the building if it is safe to do so. Staff should not re-enter buildings until they have been inspected by structural engineers and deemed safe by Public Works and Government Services. In my office, nobody took refuge and the safety wardens encouraged people to evacuate immediately, but not everyone did. People also quickly re-entered the building to phone or email friends and family to see if they were OK.

media and Twitter reports were posted on the internet. Given the potential seriousness of this event, why would the GoC not immediately release information on the situation and the federal response? Information was not released because of the protocol for information approvals imposed by the PMO when Stephen Harper took office in 2006. Elected in a minority government, Harper wanted to take no chances with his Government's communications. Prior to any MPs engaging in a speech, announcement, public appearance, or media interview, the details of the event and the script must be approved by the PMO. The PM does not tolerate any off-the-cuff comments or rogue dissenters in his caucus.

If a government official or a caucus member wanted to say something publically, he or she would have to fill out a Message Event Proposal (MEP) and submit it to central command. This form had sections with such titles as Desired Headline, Strategic Objective, Desired Sound Bite, and the like. It also had areas for supplying details on the speaking backdrop, the ideal event photograph, and even the speaker's wardrobe...Once submitted the MEP was studied by PMO and PCO officials often bouncing back and forth between apparatchiks before getting final approval. Some MEPs required less vetting than others. But the massive centralization caused logjams, delays, and in some cases, cancellation of planned events because the requester never heard back in time.<sup>43</sup>

Only a few Ministers can speak for Harper when he is not in Parliament. These are the people that he trusts, people such as John Baird and Peter MacKay. Harper frequently makes announcements for his Ministers, keeping them in the background in a manner which was rare until he came to power. Harper came into his PM role with a deep-seated distrust of the media, of the bureaucracy, and of the opposition Liberal party. In his revealing book *Harperland*, Lawrence Martin details Harper's hatred of the Liberal party and his equal disdain for the media as two fundamental *raison d'être* for Harper's relentless desire to shut down both entities. The author describes Harper thus: "Harper combined the traits of two Liberal leaders he had watched with aversion. He combined Pierre Trudeau's imperious intellectual strengths with Jean Chrétien's bare-knuckled toughness, but had neither man's charms. He was single

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<sup>43</sup> Martin, Lawrence, *Harperland* (Toronto: Viking Canada, 2010), 58.

mindful and, as anyone who ever worked near Harper could attest, he had a ravenous hunger for control. He was methodical, deliberate, and puritanically disciplined. Gerry Nicholls, who spent several years with Harper at the National Citizens Coalition, described him as ‘an emotionless robot’, the dispassion leavened occasionally by a crisp sense of humour”<sup>44</sup>.

The PM is a powerful position, as it should be. The PM is the most senior elected official in the GoC, and with this role comes unique privileges and responsibilities. It is not unrealistic to expect that a PM would want to choose the brightest and most trusted advisors to support him. Anyone who thinks that PMs can and are non-partisan is deluded. An experienced DM spoke of the PM’s authority as follows: “You have no idea what kind of power the prime minister holds over ministers. He has in his hands the minister’s car, his chauffer, his office, his job, his ego, and so on. I have been in the public service for nearly thirty years...and I can tell you that the grovel count in the great majority of ministers has always been quite high and, if anything, it keeps getting higher as the years go by”<sup>45</sup>. It is in the minister’s best interests to remain in the good graces of the PM, while at the same time, balancing the needs of his constituents and the advice of his senior public service officials.

Deference to the PM notwithstanding, ministers still have a job to do. This job has been made significantly more challenging under Stephen Harper. He has a firm grasp on outward communication as speeches, policy papers and press releases must first be approved through the PMO prior to release. Not only does this severely limit the ability of the cabinet to work semi-autonomously, it also silences all dissenters, as no minister would bother trying to release something not in one hundred percent alignment with the government’s (a.k.a. Harper’s) line. To do so would be political suicide, examples of which abound in *Harperland*:

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<sup>44</sup> Martin, Lawrence, *Harperland* (Toronto: Viking Canada, 2010), 5.

<sup>45</sup> Savoie, Donald J., *Breaking the Bargain*. (Toronto: University of Toronto Press, 2003), 194.

- Former Chief of the Defence Staff Rick Hillier: “In March 2006, Hillier gave a series of interviews to promote the forces and assist recruiting efforts...Defence Minister Gordon O’Connor called the general into his office for a chat. ‘We want to see less of you,’ he told him and proceeded to give him new marching orders. From that day, all Hillier’s press dealings and speaking engagements, as well as those of other senior military officers, had to be approved in advance by Harper’s staff<sup>46</sup>.”
- Environment Canada scientist Mark Tushingham wrote a fictional book on global warming, and was prevented from speaking about it publically by Environment Minister Rona Ambrose’s office<sup>47</sup>.
- Natural Resource Canada scientist Scott Dallimore, co-author of a study published in the journal of *Nature* on flooding in northern Canada 13,000 years ago, was required to obtain approval from the minister’s office before speaking publically about his work<sup>48</sup>.
- A Parks Canada official required approval from the PMO prior to the release of a report on the mating season of the black bear<sup>49</sup>.

Harper’s mandated information review minimizes the requirement for ministers to be accountable to Parliament as a whole and ensures that they are accountable only to the PMO. In doing so, it also betrays the Westminster theory which generally holds that the Clerk of the Privy Council and the Privy Council Office (PCO) are the conduit for information flowing to and from the PM via the PMO. In this arrangement, the PMO can comment but should not overrule

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<sup>46</sup> Martin, Lawrence, *Harperland* (Toronto: Viking Canada, 2010), 53.

<sup>47</sup> *Ibid.*, 57.

<sup>48</sup> Editorial Staff, “Off with the muzzles”, *The Ottawa Citizen*, September 20, 2010, A10.

<sup>49</sup> Martin, Lawrence, *Harperland* (Toronto: Viking Canada, 2010), 59.

the desires of the minister and the measured and non-partisan advice provided to him by the public service. In Harper's world, the clerk and the PCO do not have the final say; the buck stops in the PMO where unelected aides and advisors filter the incoming information and return it with their and Harper's changes indicated. In 2008, two years after releasing his report which included recommendations for changes in the Prime Minister's power to appoint senior public servants and limiting the power of the Clerk of the Privy Council, John Gomery leveled similar criticism against the Harper government. "There's more concentration of power in the Prime Minister's Office than we've ever had before, which is quite remarkable in a minority government. But he's pulled it off...I am disappointed. I find it hard to swallow. It should be remembered that the political staff in the Prime Minister's Office are not elected. They are not subject to any rules of law of which I am aware"<sup>50</sup>.

Harper's attempt at control extends past the boundaries of the Minister:

- Conservative Senate Leader Marjorie LeBreton demanded disciplinary action for University of Ottawa professor Michael Behiels' *Ottawa Citizen* op-ed piece opposing the government's position on Quebec nation status<sup>51</sup>.
- During the 2008 election campaign, the Harper government ordered an "unprecedented clampdown" on Public Works and Government Services, requiring it to vet all procurement to ensure that only contracts for "essential or urgent" goods and services are issued during the election campaign<sup>52</sup>. Almost all travel by senior public servants was cancelled, and they were also told not to deliver any speeches or speak to any industry groups.

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<sup>50</sup> Martin, Lawrence, *Harperland* (Toronto: Viking Canada, 2010), 127.

<sup>51</sup> *Ibid.*, 117.

<sup>52</sup> May, Kathryn, "Public works cracks down on contracts", *The Ottawa Citizen*, September 2, 2008, A1.

Perhaps the most troubling of all Harper's interventions are those that involve senior public servants:

- Linda Keen was fired from her position as president and CEO of the Canadian Nuclear Safety Commission and was demoted. This happened because she refused three ministerial directives to illegally restart a reactor before its safety could be confirmed<sup>53</sup>.
- Paul Kennedy, career public servant and Chair of the RCMP Complaints Commission, was told by the Harper government that his contract would not be renewed two weeks prior to the release of his report into the death of Robert Dziekanski<sup>54</sup>. In the strongly worded report, Kennedy made twenty-three findings and sixteen recommendations that were highly critical of both the actions of the four officers and the follow-up investigation by the RCMP<sup>55</sup>.
- Marc Maynard, Chief Electoral Officer, was publically criticized by Conservative MPs and Stephen Harper when he refused to mandate the removal of burkas and veils to identify voters. This is despite the fact that the Elections Act does not have a specific provision regarding the visual identification of voters<sup>56</sup>.

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<sup>53</sup> MacLeod, Ian, "Demoted chief quits nuclear safety body", *The Ottawa Citizen*, September 24 2008, A3.

<sup>54</sup> Toronto Star Staff, "Tories drop RCMP complaints commissioner", *The Toronto Star*, November 27, 2009. <http://www.thestar.com/news/canada/article/731775--tories-drop-rcmp-complaints-commissioner>, 1.

<sup>55</sup> CBC News, "Report slams RCMP in airport Taser death", CBC.ca, <http://www.cbc.ca/news/canada/british-columbia/story/2009/12/08/bc-kennedy-vancouver-airport-taser-report.html>, 1.

<sup>56</sup> CBC News, "Electoral officer says he won't 'juggle' fundamental rights over veil issue", <http://www.cbc.ca/news/canada/story/2007/09/13/mayrand-veil.html>, 1.

## ***Michel Foucault and Governmentality***

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What prevents ministers from being held accountable, aside from the blurriness of the boundaries of the conventions that govern their actions? Why do senior public servants fear reprisal from their superiors if they are required to appear in front of Parliamentary committees? How does liberalism guide the actions of powerful political leaders, such as Stephen Harper? This section of the essay will provide the theoretical framework that will facilitate the understanding of the questions above.

### ***Governmentality***

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Governmentality is a political theory first articulated by French philosopher and historian Michel Foucault (1926-1984). Governmentality addresses the manner in which a government governs, or, as Foucault notes, the “conduct of conduct”<sup>57</sup>. Governmentality takes its roots from the origins of eighteenth century liberalism, in concepts espousing that the state can improve the lives of the people by means of introducing private sector practices to government. Foucault wrote that during the eighteenth century, there was a fundamental shift in the role of government, where “In contrast to sovereignty, government has as its purpose not the act of government itself, but the welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health, etc.”<sup>58</sup>. Modern neoliberalism refers to a political approach that uses the terminology, language, and processes common in the private sector. In neoliberalism, the government re-allocates the risk of providing services and programs to the

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<sup>57</sup> Dean, Mitchell, *Governmentality: Power and Rule in Modern Society* (Chippenham, Wilshire, UK: Sage Publications Ltd., 2010), 17.

<sup>58</sup> Foucault, Michel, “Governmentality,” in *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991), 100.

private sector. In this way, the state can control costs as well as standards of service delivery, thus reducing the overall cost of the services by means of a reduction in the taxation of the citizens of the state. This was the basis of the New Public Management (NPM) movement that reached its height in the 1980s under the leadership of U.S. President Ronald Reagan and British Prime Minister Margaret Thatcher. These practices were expected to increase efficiencies, liberalize trade and support free market activities. By doing so, the state infuses its governance with the best on offer from the private sector.

In Foucaultian governmentality, it is the role of the state to look after the safety and security of the populace. When governmentality is combined with neoliberalism, the dominant approach to the management of the population is one in which the state is but one of many forces acting on the economy and social structure of the realm. In this manner, "...neoliberalism is seen to...bring government *indirectly* into projects of social improvement, while rejecting all forms of *direct* State control..."<sup>59</sup> (emphasis in original). It is a tricky balance and certainly not an exact science, which is why governments routinely make minor adjustments to the type and level of influence they impart. In the same manner that automobile drivers constantly make small adjustments to the steering wheel's alignment during a journey, the need for a government to constantly monitor and adjust public policy happens almost invisibly. This is the "invisible hand" as articulated by Foucault and described by Miller and Rose as "government from a distance"<sup>60</sup>. As Alan Hunt and Gary Wickham have insightfully explained, this arises from "The fact that techniques of law as governance are always either being challenged or awaiting challenge, the fact of the politics of law, is part of the perpetual cycle 'attempt at control –

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<sup>59</sup> Hay, James, "The (Neo)Liberalization of The Domestic Sphere and The New Architecture of Community," in *Foucault, Cultural Studies and Governmentality*, eds. Jack Z. Bratich, Jeremy Packer and Cameron McCarthy (Albany, New York: State University of New York, 2003), 165.

<sup>60</sup> Miller, Peter, and Rose, Nikolas, "Governing Economic Life," *Economy and Society* 19 (1) (1990): 9.

incompleteness (failure) – attempt at control’ which has been identified”<sup>61</sup>. By doing so, the State acts as a controlling and adjusting force on the laws and norms of the society, changing them when necessary and responding to criticism if the demand is great enough.

The key to understanding this force is the comprehension that the State does not always act directly upon the population to introduce these adjustments; rather, the State makes small changes to economic policy, or tweaks eligibility guidelines to social programs, or adjusts legislation to reflect the change in direction. Government, as reasoned by Foucault, “... will act either directly through large-scale campaigns, or indirectly through techniques that will make possible, without the full awareness of the people, the stimulation of birth rates, the directing of the flow of population into certain regions or activities, etc.”<sup>62</sup>.

The state is constantly trying to evolve itself to both shape desires of the population and present a better reflection of the desires of the population, while at the same time, ensuring that the best interests of the people are protected to enable the best possible quality of life. For Foucault, “the population is the subject of needs, of aspirations, but it is also the object in the hands of the government, aware, *vis-a-vis* the government, of what it wants, but ignorant of what is being done to it.”<sup>63</sup> Ironically, this leads to an environment where the governance is almost always in flux, and constantly in the cycle of controlling, fixing, and readjusting. This aspect of governance is “...characterized by an eternal optimism that a domain or society could be administered better or more effectively...”<sup>64</sup>. This could also be one reason why there is such a high level of distrust in the political system in general and politicians in particular, as they appear to be constantly changing their minds. Citizens generally accept the regulatory

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<sup>61</sup> Hunt, Allan and Wickham, Gary, *Foucault and Law* (London: Pluto Press, 1994), 105.

<sup>62</sup> Foucault, Michel, “Governmentality,” in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon and Peter Miller (Chicago: University of Chicago Press, 1991), 100.

<sup>63</sup> *Ibid*, 100.

<sup>64</sup> Miller, Peter, and Rose, Nikolas, “Governing Economic Life,” *Economy and Society* 19 (1) (1990): 4.

mechanisms imposed by the State, as there are many social benefits realized, for example, the provision of health care, education, transportation infrastructure, etc. The reality is that the State and the elected officials are responding to the evolutionary changes in society and to outside forces in an attempt to improve the overall living conditions.

## ***Governmentality and Stephen Harper***

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The State acts constantly to make small adjustments in an attempt to improve the living conditions of the population. As Foucault has written, this notion of the “caring” state traces its origin back to the concept of pastoral power in medieval Christianity. Pastoral power refers to the Church’s ability to ensure individual salvation in the next life. Pastoral power in the government setting addresses the responsibility of the state to guide the economy and social policies to create the best possible environment for the prosperity and overall well-being of the citizenry. While most PMs have governed under the assumption that they and their cabinet know what is best for the population, Stephen Harper has elevated this to an entirely different plane. The concern with Stephen Harper’s leadership is that he appears to believe that he knows what is best for Canadians, and will do whatever it takes to impose his vision, even if this means breaking the rules. Harper has introduced a culture of fear in Government, through his unprecedented control of information flow and autocratic leadership style. Ministers and public servants alike are now extremely risk adverse, lest they fall victim to the type of treatment experienced by Richard Colvin. Harper is able to justify mis-truths, allegations, blame and embarrassment of anyone who threatens his vision of what is good for Canada. His moral compass seems to have become skewed since his idealistic days as President of the National Citizen Coalition, and organization that bills itself as: “...Canada’s largest non-partisan organization for the defence and promotion of free enterprise, free speech and government that

is accountable to its taxpayers”<sup>65</sup>. Harper’s integrity seems to have faded significantly in the intervening years since his halcyon days of involvement with this organization. There can be no doubt that his micro-managing, paternalistic, over-involved leadership style has a negative effect on ministerial accountability; how can it not? Three recent examples are particularly troubling: the resignation of Chief Statistician Munir Sheikh, the actions of Ministerial aide Sebastian Togneri, and the “not” issue involving International Cooperation Minister Bev Oda.

### ***Munir Sheikh and the Long Form Census***

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In the summer of 2010, the Government determined that some questions on the mandatory long form census constituted an invasion of privacy, although it was unable to prove that there was a significant public concern on this matter. To correct this perceived injustice, the Harper government announced that it would make completion of the long form voluntary. One of the strengths of Statistics Canada has always been that it operates autonomously from the political sphere, although it reports to Parliament through a minister<sup>66</sup>. This is in keeping with the fundamentals of Westminster. Chief Statistician Munir Sheikh resigned in protest, fearing that the removal of the mandatory form and its voluntary replacement would seriously skew the results. Statistics derived from the census form the basis of funding for a myriad of services and special interest groups, as well as influencing the creation and adjustment of federal policies and programs.

The removal of the mandatory long form census is reminiscent of a similar movement in the U.K. In 1981, the Thatcher government removed questions from the British census (such as whether or not one is employed, retired or a housewife) on the basis that they were too

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<sup>65</sup> National Citizen’s Coalition, [http://nationalcitizens.ca/about\\_us.html](http://nationalcitizens.ca/about_us.html), 1.

<sup>66</sup> Thompson, Debra, “The politics of the census: Lessons from abroad”, *Canadian Public Policy* 36 (3) (September 2010): 377.

personal<sup>67</sup>. Perhaps Harper's actions on the census were another example of control of information from the Government to the people. Removing quantitative data would not only assist in silencing opposition from special interest groups, it could also be viewed as an attempt to circumvent the opposition who have traditionally used empirical evidence to support their criticism of government. Without this evidence, the opposition will be hard pressed to challenge the Government through factual arguments.

### *Sebastien Tongeri and Access to Information*

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Another worrisome example of Harper's desire to control the information flow is evidenced in the actions of Sebastien Togneri, an aide to then Public Works Minister Christian Paradis. The issue of the authority of exempt ministerial staff rose to the forefront when "...bureaucrats were set to release a report on the performance of the government's real estate portfolio to the Canadian Press when Sebastien Togneri, an aide to then Public Works Minister Christian Paradis, e-mailed public servants asking them to block the release. The department eventually turned over a redacted version of the report, nearly three months after the legal deadline to do so"<sup>68</sup>. Not only did Paradis not fire Togneri, he claimed that he knew nothing about Togneri's actions and "...lauded him as an employee with 'exemplary parliamentary skills'"<sup>69</sup>. Based on documented examples of Harper's intense desire to control the dissemination of information, there must have been some aspect of that report that the PMO did not want made public, and that it was a request from the PMO that triggered Togneri to stop its release. This incident highlights the blurred boundaries that currently exist in the Westminster model of government. In the Westminster system, ministerial staffers are not permitted to give direction to public servants; only the Minister has this authority.

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<sup>67</sup> Thompson, Debra, "The politics of the census: Lessons from abroad", *Canadian Public Policy* 36 (3) (September 2010): 379.

<sup>68</sup> May, Kathryn, "Code of conduct sought for 'amoral' political aides", *The Ottawa Citizen*, February 16, 2010, A1.

<sup>69</sup> *Ibid.*, A12.

Togneri eventually resigned as a result of his actions. He was called to testify before the Commons Ethics Committee about this incident, and indicated that this instance was the only time that he had interfered with the release of information by public servants. However, email obtained by the Canadian Press contradicts that testimony. These emails detail that Togneri requested the removal of information from an ATIP request pertaining to the visit of U.S. President Obama to Canada<sup>70</sup>. The emails further indicated that two other members of Paradis' staff also gave direction to members of the public service regarding the release of ATIP material. Togneri's appearance before committee did not go well, and in response, the Government determined that Conservative exempt staff would no longer appear before any Commons committees, citing the need to uphold the values of ministerial accountability.<sup>71</sup> Government House Leader Jay Hill stated: "We ministers are answerable to Parliament and its committees. It is ministers who decide policy and ministers who must defend it before the House and ultimately before the people of Canada"<sup>72</sup>. Hill added:

The tyranny of the opposition majority has turned its attention to the men and women who make up our political staff. Men and women who did not sign up to be tried by a committee – to be humiliated and intimidated by members of Parliament. When they accepted their jobs, they never imagined that one of the skills required was to stand up to the interrogation of a bitterly partisan parliamentary committee. They could not have expected, in our Westminster

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<sup>70</sup> Ditchburn, Jennifer, "Tory staffer didn't work alone in vetting ATI requests", The Globe and Mail, <http://www.theglobeandmail.com/news/politics/tory-staffer-didnt-work-alone-in-vetting-ati-requests/article1742112/>, October 4, 2010, 1.

<sup>71</sup> Galloway, Gloria, "Tories shield staffers from 'hostile committees and tyrannical chairmen'", The Globe and Mail, May 25, 2010, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/tories-shield-staffers-from-hostile-committees-and-tyrannical-chairmen/article1580017/>, 1.

<sup>72</sup> Ibid., 1.

parliamentary system of responsible government, that hostile committees and tyrannical chairmen would deny them the protection of the rules and their minister<sup>73</sup>.

The action preventing exempt staff from appearing before committee is astounding when one considers the treatment of senior members of the public service who have been subjected to similar treatment. Jay Hill's defence of the Westminster system would be admirable were it not for the fact that it serves the purposes of the Harper Government in this instance. By refusing to allow ministerial staffers to appear, the Government is preventing the telling of the truth to Parliament. Exempt staff are openly partisan and may be understandably reluctant to turn on their minister, which is all the more reason why they should be called to account when there is a question of inappropriate actions by a minister's office. The chances are arguably high that exempt staffs are infringing on Westminster by giving direction to public servants, and the public has a right to know if this is taking place. Public servants are not permitted to go public with this information, making the need for compulsory testimony on the part of exempt staff all the more important.

### ***Minister Bev Oda and the Insertion of the Word "Not"***

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In 2009, International Cooperation Minister Bev Oda testified to a parliamentary committee that she was unaware of who altered documentation that was written and approved by senior public servants at the Canadian International Development Agency (CIDA). At issue was the insertion of the handwritten word "not" in the following sentence: "Recommendation: That you

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<sup>73</sup> Galloway, Gloria, "Tories shield staffers from 'hostile committees and tyrannical chairmen'", The Globe and Mail, May 25, 2010, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/tories-shield-staffers-from-hostile-committees-and-tyrannical-chairmen/article1580017/>, 1.

sign below to indicate you <not> approve a contribution of \$7,098,758 over four years for the above program”<sup>74</sup>. On February 14, 2011, Oda rose in the house to reveal that the word “not” was inserted at her direction<sup>75</sup>. In Parliament on February 15, 2011, “...Harper repeatedly came to the defence of the international cooperation minister, ignoring calls for her resignation and making it clear he intends to ride out the political storm over her actions...he stress[ed] that the minister was within her rights to overrule public servants who recommended \$7 million in funds for a faith group [sic] based aid group, KAIROS”<sup>76</sup>. Oda did not speak on her own behalf, leaving the explanation of her actions to the PM. An editorial in *The Ottawa Citizen* called for Oda’s removal as Minister: “She and other government officials have made the point it is within her right to overrule public servants, which is true. But the government has an obligation to explain why. And, no matter what its decisions are, it is wrong to mislead the public about them and doctor documents to appear to change recommendations of senior public servants. House Speaker Peter Milliken states that such actions would make any reasonable person ‘doubt the integrity of certain decision-making processes’. Oda’s removal is necessary”<sup>77</sup>. The only plausible reason that Harper has not asked for Oda’s resignation is because he requested the change to the documentation, and is now protecting her. After all, Harper knows best.

## ***Foucault, Coercive Power and the Public Service***

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In explaining the evolution of punishment, Michel Foucault identified two types: 1) preventative, which acts as a deterrent by making public the punishment of offenders; and 2) corrective, which works to change the behaviour of the body and soul<sup>78</sup>. Prevention of bad

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<sup>74</sup> Kennedy, Mark, “Harper stands by minister”, *The Ottawa Citizen*, February 16, 2011, 2011, A1.

<sup>75</sup> Ibid., A1.

<sup>76</sup> Ibid., A1.

<sup>77</sup> Editorial Staff, “We are not amused”, *The Ottawa Citizen*, February 16, 2011, A12.

<sup>78</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 127-8.

behavior in the public service is achieved by making examples of others who dare to speak up. If ministers were truly held to account for their actions, they would resign when a serious issue of maladministration in their department came to light. As it stands today, Ministers can explain away the issue by blaming their senior managers. A change in the framework of Westminster occurred when new mandates for the Parliamentary standing committees were conferred in 1986, which "...enable[ed] standing committee to scrutinize and report freely upon all policy, programmes and statues of departments within the ambit, without waiting for the traditional specific subject reference from the House of Commons"<sup>79</sup>. The result was that some committees contacted public servants directly to request their appearance, not going through the minister's office first to seek permission. The Public Accounts Committee (PAC) revised their mandate as follows: "Under the doctrine of ministerial responsibility a minister is answerable to Parliament for policy while public servants are responsible for administration of programs. It is not the intention of the Public Accounts Committee to determine the rights and wrongs of *policy* but rather to ensure that *programs* are implemented with due regard for economy, efficiency and effectiveness. The Committee will hold officials accountable for their administrative responsibilities *and for the accuracy and completeness of the advice that they give to ministers*"<sup>80</sup> (emphasis in original). Another change to the structure of Westminster occurred in 2006, when the Federal Accountability Act created the role of Accountability Officer. The stated role of the Accounting Officer is to speak to the organization, management, and administration of the department on behalf of the minister.

Both of these changes should be of great concern to senior public servants. Senior public servants are chosen for their ability to manage, and also for their ability to distill disparate policy information and processes into succinct recommendations for their DMs. Often the

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<sup>79</sup> Sutherland, Sharron L., "Responsible government and ministerial accountability: Every reform is its own problem", *Canadian Journal of Political Science* 24 (1) (1991): 110.

<sup>80</sup> *Ibid.*, 112.

advice they provide is determined as much by gut feeling and experience as it is by empirical evidence. It is therefore very difficult for the public servant to defend the “accuracy and completeness of advice they give to ministers” when a component of it is based on professional judgment. Knowing that they can be called to account before the PAC, senior officials must remain mindful that they too, can be discredited in a public forum through no fault of their own. This is the preventative aspect of punishment that Foucault refers to: making examples of other senior officials in order to prevent the entire group from providing honest, unbiased advice. Senior public servants who are summoned to appear before committees are fearful of the outcome, as those whose “...actions have satisfied administrative standards nonetheless find themselves in a kind of double jeopardy in representative forums where they lack legal standing, where criteria are unclear, where retrospective applications of what seems to be a telling argument is normal rhetorical procedure, and where they cannot present their own case at any length, have no counsel, no right of appeal and no right to compensation. They can find themselves rather brusquely divested of the means to protect their reputations and therefore their livelihoods”<sup>81</sup>. James R. Mitchell has observed that “Officials have been badgered, insulted and too often treated as though they were the subjects of a hostile inquiry into wrongdoing rather than as responsible, senior participants in the constitutionally fundamental relationship between Ministers and the House”<sup>82</sup>.

If this sounds similar to the rationale the Harper government made when it decided that it would no longer allow exempt staff to appear before committee, it should. The situations are virtually identical, yet in one instance the employee is protected by the minister, and in the other,

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<sup>81</sup> Sutherland, Sharron L., “Responsible government and ministerial accountability: Every reform is its own problem”, *Canadian Journal of Political Science* 24 (1) (1991): 118.

<sup>82</sup> Mitchell, James R., “*Transparency, oversight and accountability: Notes for remarks at the PPF symposium*”, Paper presented at Public Policy Forum Symposium, February 14, 2007, <http://www.sussexcircle.com/pdf/039-TransparencyOversight.pdf>, 3.

he or she is not. The employee is only protected when it serves the political interests of the Government to do so, as was previously discussed regarding ministerial staffer Sebastien Tongeri. Richard Colvin has received no such protection or shielding.

The power of deterrence is obvious and public. The use of corrective punishment is more subtle, and as such more insidious, seeking to break the will of those subjected to it. Foucault describes the environment in which the punishment takes place: “The agent of punishment must exercise total power, which no third party can disturb; the individual to be corrected must be entirely enveloped in the power that is being exercised over him. Secrecy is imperative, and so too is autonomy, at least in relation to this technique of punishment: it must have its own functioning, its own rules, its own techniques, its own knowledge; it must fix its own norms, decide its own results”<sup>83</sup>.

The application of coercive/corrective power over senior public servants meets this description in four ways. First, in the Harper Government, the envelopment of power is total, meeting Foucault’s description. In describing the power of the PM, Donald Savoie writes: “It’s prime ministers who shape policy, pick the issues and make the decisions, all by bypassing the collective decision-making of cabinet, which has become little more than a ‘focus group’”<sup>84</sup>. As was previously evidenced, Harper is controlling the information flow from the Government. Public servants who dare to challenge the “sanctioned” version of the facts are abandoned by their Ministers, as is the case with Richard Colvin.

Second, Foucault stresses the need for secrecy and autonomy in the workings of coercive power, which are both evident in the current Government’s treatment of senior public

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<sup>83</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 129.

<sup>84</sup> May, Kathryn, “Time to stop prime ministers from ruling like kings, expert says”, *The Ottawa Citizen*, May 5, 2008, A1.

servants. Public servants are caught in the blurring of the boundaries of Westminster, in that some are now public figures who are still considered to be anonymous. The ability for a person to be at once anonymous and a public figure doesn't compute, yet this is what has happened. For Colvin, appearing before a House of Commons Committee should not attract a great deal of public concern; however, Colvin was asserting that the Government lied about what it knew and when it knew it regarding the detaining and torture of Afghani prisoners.

The Westminster system works to the advantage of power in this aspect, as it is supposed to ensure the autonomy of the public service. Several high profile public servants have been fired under the Harper administration for breaking their anonymity (at the request of Parliament) and providing information that the Prime Minister didn't want public. The power of the Prime Minister is supreme, and punishment meted out to public servants often happens in secret, and without recourse. This has been revealed in the Auditor General's December, 2009, report on the activities of former Integrity Commissioner Christiane Ouimet, who was charged with investigating complaints of reprisals levied by public servants. In her three years on the job, Ouimet investigated only five of the 228 complaints submitted to her office, a statistic that seems extremely implausible. On the surface it would seem that Ouimet was incompetent. She received a severance package in excess of half a million dollars and signed a gag order preventing her from speaking about her activities while in office. If she was incompetent, why would the Harper Government not want these details to be made public? The way it appears now, one could argue that perhaps the reason Ouimet did not investigate complaints was because she was pressured not to do so by the PMO. This is a question to which there will never be a definitive answer, only speculation. The secrecy surrounding Ouimet's departure and her non-disclosure agreement align with Foucault's premise that the best way to exert power over someone is to do so in secret.

The third way the coercive power is at work in the public service is through fear. Making examples of senior bureaucrats such as Ouimet, Colvin, and Linda Keen make those still employed by the Crown very risk-adverse and unwilling to stick out their neck in fear of having their head chopped off. Foucault stated: “The agent of punishment must exercise total power, which no third party can disturb; the individual to be corrected must be entirely enveloped in the power that is being exercised over him”<sup>85</sup> and this is exactly the situation senior public servants, and Ministers, now find themselves in. Stephen Harper is the agent who can exercise this total power, and he cannot be overruled by any third party. Foucault describes an ideal disciplinary layout: “The perfect disciplinary apparatus would make it possible for a single gaze to see everything constantly. A central point would be both the source of light illuminating everything, and a locus of convergence for everything that must be known: a perfect eye that nothing would escape and a centre towards which all gazes would be turned”<sup>86</sup>.

Finally, Foucault wrote: “Secrecy is imperative, and so too is autonomy, at least in relation to this technique of punishment: it must have its own functioning, its own rules, its own techniques, its own knowledge; it must fix its own norms, decide its own results”<sup>87</sup>. The federal public service of Canada is a unique construct, and it certainly has its own method of functioning, rules, and norms. It is because it is one of a kind that it can be subject to the absolute power and control that Foucault describes. As such, the singular instance of the federal public service provides the opportunity for a specific type of discipline posited by Foucault: “Discipline sometimes requires *enclosure*, the specification of a place heterogeneous to all others and closed in upon itself. It is the protected place of disciplinary monotony”<sup>88</sup> (emphasis in original). There are no hundreds or thousands of similar organizations, all of whom

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<sup>85</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 129.

<sup>86</sup> Ibid., 173.

<sup>87</sup> Ibid., 179.

<sup>88</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 142.

may be facing the same power and control issues. There is no opportunity for these organizations to band together and protest. There is one federal public service, and the senior ranks of it are not unionized. They serve at the pleasure of the Crown, and as most are not independently wealthy, they must stay in the Crown's good graces in order to remain employed. While many may want to protest, or go public, they do not as this would be a career-ending move, one which could see them black-balled in Ottawa's government circles and left with no visible means of support.

The public service is also subject to discipline by its hierarchical and stove-piped nature, which Foucault calls partitioning. In what follows, his writing seems to provide an instruction model for setting up such an environment: "Each individual has his own place; and each place is individual. Avoid distributions in groups; break up collective dispositions; analyze confused, massive or transient pluralities. Disciplinary space tends to be divided into as many sections as there are bodies or elements to be distributed. One must eliminate the effects of imprecise distributions, the uncontrolled disappearance of individuals, their diffuse circulation, their unusable and dangerous coagulation..."<sup>89</sup>. Each public servant has his own small cubicle; those senior enough are rewarded with one next to a window. The senior management cadre is assigned closed offices, but only those with the most senior positions are assigned offices with windows. Thus, most public servants work in an environment devoid of natural light. In the following passage Foucault is describing the architecture of the *École Militaire*, although it could easily describe a modern bureaucratic setting: "...the rooms were distributed along a corridor like a series of small cells; at regular intervals, an officer's quarters were situated...the pupils were confined to their cells throughout the night; and [the architect] Pâris insisted that 'a window be placed on the corridor wall of each room from chest-level to within one or two feet of the ceiling. Not only is it pleasant to have such windows, but one would venture to say that it is

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<sup>89</sup>) Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 143.

useful, in several respects, not to mention disciplinary reasons that may determine this arrangement<sup>90</sup>. There are some cubicle forms that have walls containing glass panels that face the corridor, so the modicum of privacy expected by the worker is eroded as their efforts can be seen by all who pass. It is not unusual for workers in this type of configuration to paper over the window, much in the same manner as storefronts cover their windows with newspaper when undergoing renovation.

Each public servant has his own place, and for someone to move places requires the intervention of a great deal of paperwork and coordination, as well as cost. People are walled off from each other, prevented from engaging in natural conversational patterns by miles of padded, six foot partitions. When conversations do take place, all within earshot are engaged, whether they want to be or not. It is difficult to have any private conversation, which could be viewed as a method of discipline: the thinking is that it would not be a good idea for people to have original thoughts. There are designated gathering areas, and one has to come out of one's space in order to physically mingle with the others. Entrance to government buildings is controlled by access cards and ubiquitous, prominently displayed identification. Even within the same floor, some spaces may be barred to those not having the proper level of access. The physical space acts as a disciplinary measure of control.

Foucault describes another manner of discipline that applies to the public service: that of rank. "Discipline is an art of rank, a technique for the transformation of arrangements. It individualizes bodies by a location that does not give them a fixed position, but distributes them and circulates them in a network of relations"<sup>91</sup>. In the federal public service, one's rank is the single most important identification of one's power. Those closer to the top of the hierarchy

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<sup>90</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 173.

<sup>91</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 146.

have more power. While this is intuitive, it helps in the understanding of why senior bureaucrats are often caught in the fuzziness of the boundaries of Westminster: an Assistant Deputy Minister (ADM) or Deputy Minister (DM) are the most senior in any department, but they are junior when compared to the Minister, and insignificant compared to the ultimate power wielded by the Prime Minister. An ADM or DM has the authority to direct the actions of thousands of workers with the stroke of a pen; yet, they must sign off only on direction that is sanctioned by the Minister. One of the most well known of human frailties is ambition. In order to achieve a higher rank, one must demonstrate ability, political astuteness, and a great deal of savvy. Bureaucrats in the executive group advance when they please their masters, and they can only do this when they propose ideas that are not incongruent with those of the Government of the day. Westminster forces ambitious public servants to please their superiors if they want to be rewarded with a promotion. Speaking truth to power is not always wise if one wishes to advance. As former Human Resources and Social Development (HRDC) ADM David Good noted, "...it is the rare minister who will propose an administrative change to a deputy minister, it is the rare minister who will accept administrative advice from the deputy that might significantly undermine or thwart a favoured policy or project"<sup>92</sup>. The bureaucratic structure therefore imposes discipline by linking advancement with support of Government, which may not always be in the best interests of the citizenry. This view is also supported by academic Kenneth Kernaghan, who wrote: "The minister's efforts to refute or defuse the allegations are vigorously supported by their senior officials whose duty it is to keep their minister out of trouble. The reputation and career prospects of public servants tend to prosper or suffer along with those of their minister"<sup>93</sup>.

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<sup>92</sup> Good, David A., *The Politics of Public Management: The HRDC Audit of Grants and Contributions* (Toronto: University of Toronto Press, 2003), 199.

<sup>93</sup> Kernaghan, Kenneth, "Power, Parliament and public servants in Canada: ministerial accountability re-examined", *Canadian Public Administration* 5 (3), (1979): 388.

Yet another form of discipline identified by Foucault is that of the time-table: “It’s three great methods – establish rhythms, impose particular occupations, regulate the cycle of repetition – were soon found in schools, workshops and hospitals”<sup>94</sup>. The modern public service has perfected the art of repetition, and aligned the level of it to rank. Those at the lowest ranks perform the most monotonous, cyclical tasks such as filing, processing invoices, printing meeting materials, and organizing the schedules of their superiors. At the managerial and executive levels, there is a never ending calendar of reports, status updates, financial forecasts and dashboards. At the highest level, the schedule for the annual presentation of the budget and the following Parliamentary approvals follows the full twelve month fiscal year calendar. The continued functionality of government depends on these repetitive tasks and actions. People can and do become slaves to the reports and the “busy work” of government. Foucault considers this a form of discipline as it forces attention to the mundane and stifles creativity. There is no time for innovation when one is constantly trying to meet deadlines for myriad reports and policy papers.

Buried in the red tape is yet another, closely linked form of discipline described by Foucault: that of writing. “The examination leaves behind it a whole meticulous archive constituted in terms of bodies and days. The examination that places individuals in the field of surveillance also situates them in a network of writing; it engages them in a whole mass of documents that capture and fix them...A ‘power of writing’ was constituted as an essential part in the mechanisms of discipline”<sup>95</sup>. The documentation of anything in government is a double-edged sword. On one hand it creates a necessary record and audit trail of what was decided, by whom, and the rationale behind it. On the other hand, the act of putting pen to paper makes

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<sup>94</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 149.

<sup>95</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 189.

documents potentially public unless they are specifically classified as government secrets, thus enabling anyone who knows what they are looking for to request said documentation under the Access to Information and Privacy Act (ATIP). For Ministers and Stephen Harper, ATIP is a four-letter word. ATIP provides an inroad for anyone wishing to criticize the government to obtain government-generated documentation that will provide the ammunition to do so. It is also a reason why there are so many draft versions of documents in government, documents that will never be deemed to be final as they would then become ATIP-able. It is quite possible that Sebastien Tongeri was instructed to remove documentation from an ATIP request that the PMO considered too sensitive for public consumption. Documenting policy and decisions in government can also erode the anonymity of public servants as they are required to list themselves as authors on most documents. If these documents are ATIP-ed and/or referenced in a Commons Committee, the author is revealed. The identity of the workers is linked to the documentation and this allows for greater surveillance in a Foucaultian sense.

Closely coupled with repetition is the need to maximize time. In the public service, discipline is applied through the increasing pressure to “do more with less”. Yet, there is a constant increase in tasks and deliverables added to the list of things that must be done, and the requisite addition of resources (or lack thereof) is inevitably incongruent with the demands. Foucault explains it as follows: “Discipline...arranged a positive economy; it poses the principle of a theoretically ever-growing use of time: exhaustion rather than use; it is a question of extracting, from time, ever more available moments and, from each moment, ever more useful forces”<sup>96</sup>. Public servants are not very well respected by the general public; they tend to rank alongside used car salesmen and politicians in terms of trustworthiness. Granted, the unionized environment protects the lazy and unmotivated, and the increasing pressure to deliver “work”

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<sup>96</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 154.

makes it challenging for managers to address poor performers. But, as Osbaldeston observers in *Keeping Deputy Ministers Accountable*, many deputies work sixteen hour days, a punishing schedule for anyone who desires a modicum of work/life balance. The expectations placed upon many public servants are immense, and while paid a decent wage, it is not, as Osbaldeston notes, what would be earned in the private sector.

## ***The Current State of Power in the Westminster System***

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While the passage from Foucault below is lengthy, it summarizes the current state of discipline, surveillance and power in our Westminster system perfectly:

Hierarchized, continuous and functional surveillance may not be one of the great technical 'inventions' of the eighteenth century, but its insidious extension owed its importance to the mechanisms of power that it brought with it. By means of such surveillance, disciplinary power became an 'integrated' system, linked from the inside to the economy and to the aims of the mechanism in which it was practised. It was also organized as a multiple, automatic and anonymous power; for although surveillance rests on individuals, its [sic] functioning is that of a network of relations from top to bottom, but also to a certain extent from bottom to top and laterally; this network 'holds' the whole together and traverses it in its entirety with effects of power that derive from one another: supervisors, perpetually supervised. The power in the hierarchized surveillance of the disciplines is not possessed as a thing, or transferred as a property; it functions like a piece of machinery. And, although it is true that its pyramidal organization gives it a 'head', it is the apparatus as a whole that produces 'power' and distributes individuals in this permanent and continuous field. This enables the disciplinary power to be both absolutely indiscreet, since it is everywhere and always alert, since by its very principle it leaves no zone of shade and constantly supervises the very individuals who are entrusted with the task of supervising; and absolutely 'discreet', for it functions permanently and largely in silence. Discipline makes possible the operation of a relational power that sustains itself by its own mechanism and which, for the spectacle of public events, substitutes the uninterrupted play of calculated gazes<sup>97</sup>.

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<sup>97</sup> Foucault, Michel, *Discipline and punish: The birth of the prison* [Surveiller et Punir: Naissance de la prison], Trans. Alan Sheridan, Second ed., (New York, New York: Vintage Books, 1995), 176-177.

Discipline is considered an “integrated” power, one that is linked to the economy, which is also true of the government. In keeping with Foucault’s theory of governmentality, monitoring and acting as the “invisible hand” to guide the economy is one of the primary responsibilities of a government. The description of a “network of relations from top to bottom” is exactly the power structure that Stephen Harper has enhanced in newly productive ways to ensure that he and the PMO control the outflow of all information. In describing the power structure as “machinery”, Foucault has used the same terminology favoured by political observers to describe the process of government, the “machinery of government”. In this context, machinery refers to the processes and actions which keep the wheels of government turning; an infinite series “cogs and wheels” that are inter-related at the macro level, become siloed once instilled in the architecture of a single department. For Foucault, the “machinery” is a less obvious but nonetheless very effective series of pressures and possible negative outcomes, which guide the behaviour of those in the “apparatus as a whole”. This power operates secretly, yet is “everywhere and always alert” in the same manner as Foucault’s governmentality is “always already there” and constantly making minute course corrections based on various influential forces.

## ***The Future of Westminster***

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The events leading up to the commencement of the 2011 election campaign have illuminated the issues pertaining to the integrity of Parliament and ministerial accountability. Sadly, it is not an issue that is well understood by the majority of Canadians, and therefore one that will probably not rate as a leading concern in this election<sup>98</sup>. Distrust of Parliament in

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<sup>98</sup> I was polled by telephone on March 26<sup>th</sup>, the day the writ was dropped. When asked what my primary concern was, I was asked to select from a list of issues comprised of: the economy, health care, jobs, support for seniors, the military’s involvement overseas, and “other”. I responded “other” and indicated that my concern was “the integrity of

general and politicians in particular has led to a culture of voter apathy and public dispassion regarding the political system. Carleton University political science professor Jonathan Malloy captured this malaise in a recent opinion article:

But who cares? Conservatives have rightly pointed out that public reaction on this rule-bending has been modest, and largely confined to huffy professors and committed partisans. The issues are complex and arcane, revolving around principles rather than money and corruption, unlike a certain gigantic Liberal scandal of a few years ago. Even the majority of my own students aren't terribly engaged. Discussing the Bev Oda "not" memo in my public administration class evoked more blank stares than I anticipated. And when the Speaker made his front-page ruling on parliamentary privilege, only a third of the students in my Canadian politics lecture the next day had heard about the story<sup>99</sup>.

Assuming that the issue gains traction at some point, there are several approaches that could be introduced to strengthen ministerial accountability. The Constitution has, by omission, placed senior public servants in a precarious position as there is no rule of law on the accountability of the public servant as compared to that of his minister. The obvious suggestion to fixing this situation is to grant public servants constitutional recognition of their responsibilities. Should a public servant speak for the minister? If so, this would create a substantial gap in the Canadian democratic system as it would allow an unelected official to speak for the government in power. There are very few innovative notions pertaining to the reformation of Westminster as a means to increasing ministerial accountability. For the sake of brevity, key findings of the Gomery enquiry will be reviewed, as most of the popular ideas regarding reform are contained therein.

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Parliament". The fact that this is not even on the list suggests that it will be of little significance to the outcome of this election.

<sup>99</sup> Malloy, Jonathan, "Why you should care how Parliament operates", *The Ottawa Citizen*, March 16, 2011, A13.

In Phase II of his report, Justice John Gomery made nineteen recommendations to restore accountability in the federal government. Gomery wrote that “Rebalancing the relationship between Parliament and the Government would enable the House of Commons to hold the Government, individual Ministers and their departments to account and to review more effectively the Government’s proposed spending plans”<sup>100</sup>. Included in his recommendations<sup>101</sup> were the following:

- Recommendation 2: “The Government should adopt legislation to entrench into law a Public Service Charter.” Currently, there is no law that stipulates that public servants should not carry out unlawful directions provided by a minister. This would strengthen the position of public servants and provide them with a legal reason to refuse to carry out a directive. It would also, hopefully, prevent public servants from enduring reprisals for acting within the confines of the law. Given the power of the prime minister over the minister, it is highly likely that more subversive pressure would be placed on the “rogue” public servant. While he would not be directly punished, he may be passed over for promotion, assigned “special projects” (which is public service code for meaningless work assigned to someone who has displeased a superior), or transferred to another department as a means to dispose of the problem. This change would also rely on the independence and strength of the Public Sector Integrity Commissioner, a position most recently staffed by Christiane Ouimet. As previously discussed, it is possible that Ouimet was ineffective in her position as a result of the power of the current PM.

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<sup>100</sup> Gomery, Justice John H. 2006. *Commission of enquiry into the sponsorship program and advertising activities. Restoring Accountability, Phase II, Part 4: Conclusions and Recommendations, Chapter XI: Rebalancing the Relationship Between Parliament and Government*. Government of Canada, 2006, [http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase2report/recommendations/cispaa\\_report\\_chapter11.pdf](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase2report/recommendations/cispaa_report_chapter11.pdf), 199.

<sup>101</sup> Ibid., 199-204. All recommendations listed here originated in this text.

- Recommendation 4: “In order to clear up the confusion over the respective responsibilities and accountabilities of Ministers and public servants, the Government should modify its policies and publications to explicitly acknowledge and declare that Deputy Ministers and senior public servants who have statutory responsibility are accountable in their own right for their statutory and delegated responsibilities before the Public Accounts Committee”. This would mean that, contrary to the current situation where DMs provide only factual information, DMs would be able to express their personal opinion as long as it did not breach ministerial confidentiality. The practical application for this recommendation would be much the same as in recommendation two, above: reasons other than performance would be conjured to explain a change in the official’s duties and/or assignments.
- Recommendation 5: “The Government should establish a formal process by which a Minister is able to overrule a Deputy Minister’s objection to a proposed course of action in an area of jurisdiction over which the Deputy Minister possesses statutory or delegated powers. The decision of the Minister should be recorded in correspondence to be transmitted by the Deputy Minister concerned to the Comptroller General in the Treasury Board Secretariat, and be available there for examination by the Office of the Auditor General”. This change would prevent a DM from accepting accountability for an action that he disagreed with, but once again, unless carefully monitored, the DM could easily be subject to intense pressure to accept the direction given to him.
- Recommendation 6: “The Government should adopt as a policy that Deputy Ministers and senior public servants are appointed to their positions for a minimum of three years, with the expectation that a standard appointment would normally have a duration of at

least five years.” This is a valid and compelling recommendation, one that has been made numerous times in the past<sup>102</sup>. Some observers take this recommendation even farther: Peter Aucoin believes that DMs should be accountable for life<sup>103</sup>. It takes many months for a new DM to get up to speed on the issues pertinent to a department, and appointments often last two years or less. This leads to a lack of continuity in the leadership and direction of the department, and reduces the amount of time that a DM has to implement policy or administrative change. Most importantly, it allows the incumbent to divest himself of any responsibility for maladministration that may have occurred under the watch of a predecessor.

- Recommendation 12: “The Government of Canada should adopt an open and competitive process for the selection of Deputy Ministers, similar to the model used in Alberta”. The DM is caught in a triad of accountability: to the PM, to the Clerk of the Privy Council, and to his minister. Currently a DM is appointed, usually on the recommendation of the Clerk, directly by the PM. When issues of loyalty or partisanship arise, one can only imagine the stress a DM may face, trying to decide if he should adhere to the wishes of his Minister, to whom he has a dotted line reporting relationship, or to that of the PM, who has the power to fire him. The Alberta model involves a much more transparent and competitive process to select DMs, and implementing a similar model at the federal level could reduce the level of pressure felt by DMs in difficult situations. This recommendation has very little chance of implementation. First, the PM would not relinquish power in this area, as it is in his best interest to secure the loyalty of

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<sup>102</sup> See, for example, the Fourth Report of the Prime Minister’s Advisory Committee on the Public Service (2010); The Seventeenth Annual Report to the Prime Minister on the Public Service of Canada (2010); The Tenth Report of the Standing Committee on Public Accounts (2009); and Gordon Osbaldeston, *Keeping Deputy Ministers Accountable* (1989).

<sup>103</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Issue 4 - Evidence - Afternoon Meeting*, 39th Parliament, First Session sess., [http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/lega-e/04evb-e.htm?Language=E&Parl=39&Ses=1&comm\\_id=11](http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/lega-e/04evb-e.htm?Language=E&Parl=39&Ses=1&comm_id=11), 2006, 1.

the deputies. Second, in the private sector, it is inconceivable that the Chief Executive Officer of a corporation would surrender the power to name members of his executive team. As long as New Public Management concepts remain in place, removal of this senior executive power will not come to fruition.

- Recommendation 16: “The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.” This would be a huge step in the advancement of ministerial accountability, as far too often meeting minutes are not taken, records of decision are not documented, and information management is, at best, an afterthought. Even when documentation is created, depending on how it is filed, it may be lost forever<sup>104</sup>. Adding the requirement to adhere to a strict regimen of documentation to the performance agreements of senior public servants would improve the attention that is paid to this issue.

As demonstrated by Gomery, there are some well-intentioned recommendations for improving ministerial accountability in the Canadian Westminster system of government. There are also some highly compelling reasons as to why they may not work in reality. What then, is the future of ministerial accountability in Canada?

The Westminster system, like governmentality, law and society, is constantly evolving.

Westminster is acted upon by the various stakeholders and forces that act within and upon it,

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<sup>104</sup> If the person preparing the documentation stores the document on their hard drive and subsequently changes jobs within the government, that document is, for all intents and purposes, gone. This is a significant problem in departments that lack electronic information management tools. Even where such tools exist, staffs are often not properly trained on their use. Mis-use of document management tools may result in documents being filed in the incorrect category, meaning that they would not be returned in a search in the proper category. The end results is the same: mis-filing is the same as missing in practical terms.

e.g.: Parliament, the governing party, the Prime Minister, House of Commons Committees, the public, and the opposition. A single action or decision may not stand out on its own, but when considered as part of a cumulative set of forces, its influence becomes evident. This is part of the perpetual cycle of governmentality, where the state engages in a continuous attempt at control – incompleteness (failure) – attempt at control cycle<sup>105</sup>. The last significant changes that impacted the structure of Westminster occurred in 1986, when Parliamentary committees were granted extended mandates and ability to call witnesses, and in 2006, when the Federal Accountability Act created the role of Accountability Officer. These changes have created an environment where ministerial accountability has very little relevance, as the minister can delegate responsibility to senior public service advisors and hide behind that action if something goes amiss. This new convention explains why Richard Colvin, a senior civil servant acting as an Accounting Officer, could be called to testify before the Special Committee on Afghanistan. Earlier description of the manner in which Accounting Officers are sometimes treated in such circumstances completely aligns with the rough ride faced by Colvin. It also explains why Defence Minister Peter MacKay and Chief of the Defence Staff General Rick Hillier made many efforts to publically distance themselves from any knowledge or insight into the information that was provided by Colvin, denying that they knew of what Colvin testified. Colvin was portrayed as a liar for speaking truth to power, a situation that denigrates and undermines the concept of Westminster. Public servants cannot express political opinion or speculate on why certain events evolved. They must speak only to the facts at hand. The fact is that MacKay's refusal to accept his accountability in this case is evidence of the current decline of ministerial accountability in Canada.

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<sup>105</sup> See Alan Hunt & Gary Wickham(1994) *Foucault and Law: Towards a Sociology of Law as Governance*. London: Pluto Press.

If the rules pertaining to the convention of ministerial accountability, the impartiality, and anonymity of the PS were clearly defined, the lines of accountability would arguably be much more evident. The blurriness of the current operating environment exists because conventions upon which Canada's Westminster system are based are not codified in law. This may be a result of the challenge related to capturing murky and subjective concepts and judgment calls in law. It is not enough to set a standard, similar to that in criminal law, by which the actions of most reasonable persons in a similar situation is deemed to be the acceptable code of conduct. While public servants are supposed to remain anonymous and unbiased in their advice, this paper has demonstrated that there are other pressures and controls which may interfere with the execution of this standard. Those pressure and controls exist as a result of the executive level structure of Westminster, not an area that lends itself to easy reform. It is hard to imagine any prime minister relinquishing some of his power in the interests of improving ministerial accountability, because Governments are inherently partisan. While it is the role of the Government to enact legislation that will improve the condition of all citizens, the drivers behind the type and flavor of the legislation is driven to a certain degree by political ideology. As long as this situation exists (and how can it not, in a true democracy?), there will always be pressure for public servants to consider political consequences when providing advice.

Stephen Harper has used the blurriness of the conventions of Westminster to his full advantage, pawning off responsibility to unelected public servants while refusing to provide complete information to Parliament. What does this mean for the future of accountable government? Assuming that Canada experiences several more years of minority government with Harper at the helm, one can only speculate that the degree to which Ministers are held accountable will continue to erode. When the underlying goal of the Government is to be re-elected, any method to shift blame away from elected officials is a godsend. Coupled with growing voter apathy and overall public disinterest, Ministers could easily change the fabric of the Canadian Parliamentary system to the point where public servants are expected to take

responsibility as a matter of course. This could be part of the continuing evolution of Westminster, the result of many small adjustments and changes ultimately resulting in the slow decay of a critical element of our democracy. Shame on us all if this comes to pass.

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