



Public Service Commission  
of Canada

Commission de la fonction publique  
du Canada



# Public Service Impartiality: Taking Stock

July 2008

Canada

Public Service Commission of Canada  
300 Laurier Avenue West  
Ottawa, Ontario K1A 0M7

Information: 613-992-9562  
Facsimile: 613-992-9352

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## Work team

*Author:* Megan Furi

Director General

Integration, Coordination and Library:

Peter Edwards

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Richard Fadden  
C.E.S. (Ned) Franks  
Edgar Gallant  
Ian Green  
Joy Illington  
Kenneth Kernaghan  
James Lahey  
The Honourable Hugh Segal  
Office of the Conflict of Interest and Ethics Commissioner  
Scott Serson  
Michel Smith  
Paul Thomas

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*Before 1908 the Canadian public regarded the Civil Service as a partisan body; since that time, and particularly since 1918, the Service has assumed a non-partisan character. It is essential to the success of the public administration that this reputation and tradition of impartiality should be maintained in the eyes both of the public and of the civil servants themselves. The public official of today, appointed for merit by an independent Commission, stands in quite a different light than his predecessor appointed for party services by the party in power.*

*(R. MacGregor Dawson, The Principle of Official Independence, 1922, 93-94.)*

*The government has a special problem, not encountered by employers generally, in recruiting for the public service: the pressure of improper influence on appointments. Such influence can seriously impair the quality of the public service, and the need for special machinery has gained wide public acceptance.*

*(Royal Commission on Government Organization, 1962, 261)*

## **Executive summary**

The federal public service has seen an influx of new employees in the past several years. In 2006-2007 alone, nearly 8,000 people joined the public service on an indeterminate basis. Given these large numbers, it is important to bring attention back to the traditional calling of an impartial public service in order to maintain it for the 21<sup>st</sup> century. The public service operates within a complex system of public administration that is undergoing increasing scrutiny and pressures. Several factors may leave public servants with questions about what constitutes responsible, professional behaviour: high-profile news stories questioning the interaction of the public service with the political world, coupled with increasing demands for accountability and closer and more intense public scrutiny from various sources, including parliamentary committees and the media. Over the last 10 years, several reforms have attempted to address these calls for increased accountability. As a result, there are more codes of conduct and legislation than before to govern the behaviour of elected officials, political advisers and public servants.

The public service plays an indispensable role in ensuring peace, order and good government in Canada. Public servants perform a wide array of tasks to achieve this goal. Whether they are providing advice to ministers, effectively managing a program or providing service directly to Canadians, all public servants must ensure their actions maintain the reality and the perception of an impartial public service. To assist public servants at all levels to better understand the importance of their calling as non-partisan public servants, this paper offers a short background on the evolution of a non-partisan public service, discusses related issues and outlines the roles and responsibilities of those involved in protecting Canada's national institution. The Public Service Commission (PSC) offers this paper to encourage discussion and provide both background information and clarity on these issues.

# 1 Introduction

- 1.1 Non-partisanship is an essential value of the public service. Since 1908, it has been a foundation for the roles and responsibilities of public servants. Despite this fact, increasing scrutiny of and pressures on both the public service and individual public servants have created uncertainty about the appropriate interaction between public servants and elected officials. While various codes and legislation have attempted to define the boundaries and parameters governing the values and ethics of public servants, the subject remains complex.
- 1.2 In 1996, John Tait's study, *A Strong Foundation*, pointed to the need for an ongoing dialogue on values and ethics. The study called for leadership from the top while encouraging dialogue at all levels of the public service.<sup>1</sup>
- 1.3 The 2003 *Public Service Employment Act* (PSEA) emphasizes the values of merit and non-partisanship. The explicit purpose of the Act's provisions on political activities is "to recognize the right of employees to engage in political activities, while maintaining the principle of political impartiality in the public service".<sup>2</sup> Balancing these two fundamental concerns is clearly a subject that merits discussion.
- 1.4 To help public servants fully understand their rights and responsibilities, the PSC offers this discussion paper as a contribution to a dialogue on public service values and ethics. This paper is limited to exploring the non-partisan character of the public service. It provides background information on the evolution of a non-partisan public service and presents for consideration related concepts such as the duty of loyalty of public servants, which requires them to serve the government loyally, regardless of which political party is in power. Finally, the paper offers a summary of the important roles and responsibilities involved in maintaining such a fundamental element of Canadian democracy.

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<sup>1</sup> Task Force on Public Service Values and Ethics, *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics* (Ottawa: 1996).

<sup>2</sup> Section 112 of the *Public Service Employment Act*.

## 2 Context

- 2.1 Between 2004 and 2007, approximately 10% of the permanent public service population entered as new indeterminate hires (16,210 individuals). With so many new employees, it is important that the tradition and calling of an impartial public service be maintained and understood in the light of today's realities.
- 2.2 Impartiality is integral to the calling of a professional public service in Canada's federal government. An impartial public service allows Canadians, regardless of their political views, to expect fair, objective treatment from public servants. It also provides a great measure of stability for a country whose parliamentary system means governments can be long- or short-lived, since large sections of the public service are not replaced following elections. The knowledge and experience of professional public servants are vital to Canada's system of democracy. A permanent public service ensures peaceful and orderly political successions, while maintaining stable operations and uninterrupted services.
- 2.3 The Canadian public service plays an indispensable role in ensuring "peace, order and good government". Despite its clear overall goal of advising on the formulation, execution and implementation of the policies of an elected government, the public service functions in a complex system, and must balance the need for a non-partisan public service with the duty of serving the politically oriented government of the day. Recent high-profile news stories have highlighted this complexity.
- 2.4 Various developments have heightened the visibility of public servants and highlighted the need for them to be more publicly accountable. These developments include demands for direct citizen involvement in government; the use of the Internet; increased attention being paid to lobbying activities; the increasing use of auditors to review government programs and operations; and the growing tendency for parliamentarians to hold public servants to account. This call for increased accountability is often backed by unstated assumptions about the tradition of a non-partisan public service, the complexity of the environment within which public servants function and the roles and responsibilities that must be fulfilled in order to maintain the principle of public service impartiality. If, as the preamble of the *Public Service Employment Act* asserts, Canada is to "continue to benefit from a public service that is based on merit and non-partisanship," there must be an increased focus on ensuring that the politicization of the professional and non-partisan public service is avoided.<sup>3</sup>

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<sup>3</sup> Merit and non-partisanship have been considered core public service values since 1908. The *Public Service Employment Act* (PSEA) explicitly states that all appointments to and within the public service must be based on merit and free from political influence. The PSEA's preamble also points to appointment processes based on the values of fairness, access, transparency and representativeness.



## Clarification of terms

2.5 The topic of impartiality often means words are used interchangeably. To help avoid confusion, the paper uses the following terms:

- **Impartiality** recognizes that, for desired expectations and outcomes, various options deserve consideration in the public policy process. This perspective recognizes that ministers require thoughtful and credible advice covering a range of aspects related to the public interest. It also recognizes that citizens and taxpayers deserve services and policies that place the public interest ahead of the personal and ideological preferences of public servants. In practice, impartiality often requires public servants to refrain from opinions, positions or actions that demonstrate a bias toward or against a particular cause or course of action, including the defence of government policies. In analyzing options, public servants will consider the best evidence-based knowledge. They will base their recommendations on the desired outcomes and implement the decisions lawfully taken by ministers, even if these decisions differ from the advice or recommendations provided. A politically impartial public service supports the government of whichever political party the electorate chooses.
- **Political patronage** refers in general to the awarding of benefits and privileges in exchange for political support. Although the individual public servant may be competent and possess the required merit criteria, political patronage refers to the awarding of benefits *in exchange for* political support. Benefits and privileges can refer to a number of things, including the awarding of contracts, preferential consideration in grants and contributions, and appointments to boards and commissions. In this paper, political patronage generally refers to political influence in hiring and promotions in the public service.
- **Partisanship** is the act of supporting a party, person or cause. In this paper, partisanship refers in general to actions supporting or opposing political parties or biases. Although the primary concern for the public service is “political partisanship”, other types of partisanship should not be dismissed (e.g., support for an interest group or cause that is not attached to a particular political party).
- **Political activities**, as defined in the PSEA, include any activity in support of, within or in opposition to a political party; any activity in support of or in opposition to a candidate; or seeking nomination as, or being, a candidate in an election. The definition of political activities is in effect both before and during an election period and applies to federal, provincial, territorial and municipal elections.
- **Public servant** refers to individuals employed at all levels in the “core public administration” (the departments and agencies for which the Treasury Board is the employer). The definition includes, but is not limited to, administrative assistants, policy analysts, human resources advisors, program analysts, scientists and executives, including deputy ministers. The PSEA definition does not include employees of boards, agencies and tribunals not typically part of the core public administration (e.g., Crown corporations) although such employees are sometimes considered as part of Canada’s public administration.

### 3 Public service impartiality: what it is and why it matters

- 3.1 The federal public service has a 100-year tradition of non-partisanship. Although it has been a central element of the development of Canadian democracy, non-partisanship has not been without its critics. Non-partisanship has been faulted for the difficulty in dealing with poor performance by individual public servants, resulting largely from the security of tenure awarded to the majority of public servants. Further, non-partisan public services have been sometimes called unresponsive to the government of the day. There is also a debate internationally about the degree of alignment required between elected officials and non-partisan public servants.
- 3.2 Despite these criticisms, the introduction of the merit principle in 1908 was seen as an important step in eliminating patronage and in building Canada's professional public service. Prior to 1908, the public service was largely staffed on a partisan basis. As a result, it was seen as inefficient and ineffective because public servants often lacked the necessary qualifications for their positions. Furthermore, the appointment of public servants for partisan reasons was blamed for swelling of the public service ranks.<sup>4</sup>
- 3.3 In Canada's current state of democratic development, relying on partisanship and patronage as the primary vehicle for public service staffing could result in such situations as the following:
- dismissals due to partisan influence or, conversely, public servants currying favour for promotion and assignments ahead of the public interest and quality administration and advice (rewards and discipline could also be subject to partisan considerations);
  - constant suspicion about the legitimacy of purchasing and contracting practices;
  - protracted periods of turmoil during government transitions as large numbers of public servants are replaced;
  - services to the public being influenced by partisan considerations (either delivery is aligned to a political ideology, or service is denied or varied, depending on the partisan history of the citizen);
  - an absence of concern for qualifications in hiring, thereby jeopardizing the integrity of a professional public service;
  - fewer checks and balances, with the principle of good government taking second place to partisan considerations; and
  - elections and, by extension, democracy being greatly influenced by a governing party being able to call on the assistance of a partisan public service during campaigns.

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<sup>4</sup> J.E. Hodgetts et al., *The Biography of an Institution: The Civil Service Commission of Canada, 1908-1967* (Montreal: McGill-Queen's University Press, 1972), 10.

- 3.4 On the other hand, today's non-partisan public service makes responsible, democratic government work by
- ensuring objective and evidence-based advice ministers can use in establishing policies and programs for Canadians;
  - providing the information ministers need to fulfill their accountability role to Parliament and Canadians;
  - delivering services in an impartial manner;
  - managing resources and programs effectively;
  - ensuring a legal and constitutional transition when democratic processes result in new administrations; and
  - ensuring that, once professional advice is given, there is a competent and able execution of those decisions, lawfully made.
- 3.5 Having a non-partisan public service means that a deputy head and his or her department or agency serve whatever government democracy gives them. A non-partisan public service means that public servants meet long-term challenges by using non-partisan means to pursue non-partisan objectives in providing policy advice and administering public programs. This non-partisanship ensures that “successive governments can have confidence that the public service will provide the support they need to fulfill their ministerial functions and mandate without regard to political partisanship”.<sup>5</sup> During election periods, it means departmental and agency resources are not used in support of a particular platform.
- 3.6 An effective, non-partisan public service plays an important role in both the public and private sectors. While professional public servants implement policies and programs that serve Canadians, they also advance all other areas of Canadian economy and society. As early as 1911, the private sector recognized the need for an efficient and modern civil service. In the election period that year, prominent businessmen demanded civil service reform and, in particular, a strengthening of the Department of Trade and Commerce to support the growth of business.<sup>6</sup>
- 3.7 The public service continues to be integral to today's society. Its contribution is highlighted in the *Fifteenth Annual Report to the Prime Minister on the Public Service of Canada*. The Report points to international research stating that “good, effective, government is crucial to a well functioning economy and society”. It also notes the research of Thomas Friedman, who states that “one of the most important and enduring competitive advantages that a country can have today is a lean, efficient, honest civil service”.<sup>7</sup>

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<sup>5</sup> *Accountable Government: A Guide for Ministers and Secretaries of State 2007*, p. v ([http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007\\_e.pdf](http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007_e.pdf)).

<sup>6</sup> J.E. Hodgetts et al., *The Biography of an Institution: The Civil Service Commission of Canada, 1908-1967* (Montreal: McGill-Queen's University Press, 1972), 46.

<sup>7</sup> Quoted in Privy Council Office, *Fifteenth Annual Report to the Prime Minister on the Public Service of Canada*, 4. ([http://www.pco-bcp.gc.ca/index.asp?Language=e&Page=information&Sub=publications&Doc=ar-ra/15-2008/table\\_e.htm](http://www.pco-bcp.gc.ca/index.asp?Language=e&Page=information&Sub=publications&Doc=ar-ra/15-2008/table_e.htm)).

## 4 Historical context

### Background

- 4.1 In the early days after Confederation, patronage and administration were closely linked and appointment through patronage was the accepted method.<sup>8</sup> Elected officials relied heavily on local support and promised benefits, including positions in the civil service, in exchange for political support that helped to guarantee electoral victory. As a result, government structure was largely responsive to local pressures and was less concerned with larger country-wide problems.<sup>9</sup>
- 4.2 Several royal commissions and parliamentary committees studied the public service, or the civil service, as it was then known, to address these issues. Their findings consistently pointed to political influence as a significant factor contributing to the inefficiency of the public service. Witnesses appearing before the 1892 Royal Commission to Enquire into Certain Matters Relating to the Civil Service of Canada alleged that politics were behind nearly every appointment to the civil service. Witnesses also blamed political influence for most of the problems in the civil service, including the inability to dismiss incompetent employees, the pressure to keep extra workers and the general disregard for rules forbidding public servants from using political influence to gain promotion.<sup>10</sup>
- 4.3 Such problems were not unique to Canada's public service. Rather, these concerns persisted in public services throughout the British Empire, in which Canada was a province, then a dominion. In 1854, the Report on the Organisation of the Permanent Civil Service, commonly referred to as the Northcote-Trevelyan Report, warned of the negative effects of patronage on the civil service. The Report recommended open and competitive examinations, as well as appointments and promotions based on merit. It also recommended a central Board of Examiners made up of "men holding independent positions" to conduct the examinations.<sup>11</sup> These principles would later form the basis of the recommendations of various studies of the Canadian public service and would provide the foundation for the current system.

### *1908: The Civil Service Amendment Act*

- 4.4 The dominance of political influence was raised in 1908 by a Royal Commission examining the *Civil Service Act* of 1892. The Commission reported the practice of politicians pressuring departments to employ, temporarily, individuals who did not meet the qualifications required for entry to the public service. The Commission concluded that "patronage seems to run more

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<sup>8</sup> R. Macgregor Dawson, "The Canadian Civil Service" *Canadian Journal of Economics and Political Science* Vol 2. no. 3 August 1936, 291.

<sup>9</sup> For a further discussion on the evolution of the public service and the role of patronage in the early days after Confederation, see R. MacGregor Dawson, *The Civil Service of Canada* (London: Oxford University Press, 1929), J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government 1867-1970* (Toronto: University of Toronto Press, 1973); J.E. Hodgetts et al., *The Biography of an Institution: The Civil Service Commission of Canada, 1908-1967* (Montreal: McGill-Queen's University Press, 1972); and David E. Smith, "Patronage in Britain and Canada: An Historical Perspective," *Journal of Canadian Studies*, volume 22, n°2 (1987), 34-54.

<sup>10</sup> R. MacGregor Dawson, *The Civil Service of Canada* (London: Oxford University Press, 1929), 63.

<sup>11</sup> Stafford H. Northcote and C.E. Trevelyan, *Report on the Organisation of the Permanent Civil Service*, (London: 1854).

or less through every department of the public service. It was the universal feeling among the officials who gave evidence before the Commissioners that this patronage evil was the curse of the public service".<sup>12</sup>

- 4.5 The findings of the Royal Commission led to the *Civil Service Amendment Act*, 1908, in which the principle of a merit based public service first appeared in legislation. The Act was, in part, an attempt to reduce political influence on hiring in the public service. The Act established a permanent Civil Service Commission to undertake investigations and report on the operation of the *Civil Service Act*, to exercise supervision over admissions and promotions, and to issue certificates of qualification to successful candidates. Although these measures represented considerable changes in the way appointments and promotions were made, they were limited in their effect. The Act applied only to the "Inside Service" (Ottawa), leaving untouched positions outside the National Capital Region (or those of the "Outside Service"), which represented the bulk of the public service.<sup>13</sup>
- 4.6 Although observers would later comment that the changes of the 1908 Act were limited in preventing patronage appointments, the environment in which the changes were achieved is significant. In 1907, the same year the government of Prime Minister Wilfrid Laurier appointed a Royal Commission to inquire into the civil service, the Conservative Party added to its party platform a promise to eradicate patronage in the civil service. This declaration represented the "first time in Canadian history that a party elevated civil service reform to the front rank of its policy pronouncements".<sup>14</sup>

### *The Civil Service Act, 1918*

- 4.7 Further movement toward reform was made in 1917 when the Union Government, a coalition of pro-conscription Liberals and Conservatives, was formed under Prime Minister Robert Borden. During the December 1917 election campaign, the second plank of Borden's election "manifesto" – second in importance only to winning the war – was civil service reform.<sup>15</sup> Borden's commitment included extending the principle of the 1908 *Civil Service Amendment Act* to the "Outside Service" and abolishing patronage so that appointments to the public service were based solely on merit. According to J.E. Hodgetts, Borden's motivation for change was "undoubtedly ... inspired by the enormous difficulty of administering patronage through the machinery of two parties which had historically been sworn enemies".<sup>16</sup>

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<sup>12</sup> Royal Commission to Enquire into and Report on the Operation of the Civil Service Act and Kindred Legislation, 1908 – *Report of the Commissioners*, 13.

<sup>13</sup> J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government 1867-1970* (Toronto: University of Toronto Press, 1973), 266.

<sup>14</sup> *Ibid.*, 19.

<sup>15</sup> Civil Service Commission of Canada, *Tenth Annual Report for the Year Ending August 31, 1918* (Ottawa: J. De Labroquerie Taché, 1919), 9.

<sup>16</sup> J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government 1867-1970* (Toronto: University of Toronto Press, 1973), 266.

- 4.8 In keeping with its election promise, the Borden government introduced legislation to reform the public service. The *Civil Service Act, 1918* vested appointment authority for many human resources matters, such as recruitment, organization, classification, promotions and transfers, in the Civil Service Commission. The provisions of the 1918 Act resulted in significant progress in eliminating political influence on hiring in the public service. Writing in 1929, R. MacGregor Dawson asserted that patronage never recovered from the “blow” it received from the 1918 Act. Until then, patronage had been the “accepted rule of all Governments” and now “it was to be the exception.”<sup>17</sup>
- 4.9 Later observers also supported this view. According to the 1979 *Report of the Special Committee on the Review of Personnel Management and the Merit Principle* (D’Avignon Committee), by the 1930s, the Civil Service Commission had largely succeeded in eliminating political patronage in the public service.<sup>18</sup> Although numerous studies continued to examine ways to improve the efficiency or effectiveness of the public service, political patronage and influence were no longer a primary concern. Dealing with these considerations became an accepted part of the Public Service Commission’s mandate.

## Political activities of public servants in the early 20th century: “Draconian legislation and underprivileged citizens”<sup>19</sup>

- 4.10 Limiting political influence on the hiring and promotion of public servants was not the only measure that helped build an impartial public service. Controlling the extent to which public servants participated in political activities was also essential. The 1908 and 1918 Acts consequently put limits on the political activities of public servants.

### *Rules under the Acts of 1908 and 1918:*

#### *“The political sterilization of Canada’s federal public servants”<sup>20</sup>*

- 4.11 Section 43 of the *Civil Service Amendment Act, 1908*, prohibited employees from engaging in “partisan work” in connection with a dominion or provincial election. The Act did, however, state that no public servant should be barred from voting. (The termination of the right to vote for certain civil servants in the Province of Canada in 1844 lasted until 1874.<sup>21</sup>) The 1918 Act echoed these provisions but also banned civil servants from contributing, receiving or in any way dealing with any money for any party funds, on penalty of dismissal.

<sup>17</sup> R. MacGregor Dawson, *The Civil Service of Canada* (London: Oxford University Press, 1929), 92.

<sup>18</sup> *Special Committee on the Review of Personnel Management and the Merit Principle* (D’Avignon Committee) (1979), 16. In December 1977, the Government appointed the D’Avignon Committee, made up of a Chair, a government representative and a representative chosen by the unions, to examine and make recommendations on staffing, appointments and training in the public service.

<sup>19</sup> J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government 1867-1970* (Toronto: University of Toronto Press, 1973), 316.

<sup>20</sup> Kenneth Kernaghan, “Politics, policy and public servants: political neutrality revisited” *Canadian Public Administration*, vol. 19, 1976, 446.

<sup>21</sup> J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government 1867-1970* (Toronto: University of Toronto Press, 1973), 314. Hodgetts notes that customs and excise workers lost the right to vote in 1844, most postal workers in 1851, and Crown land agents in 1855. He further notes that public servants of the new Dominion lost their right to vote until 1874.

- 4.12 Neither Act defined partisan work, leaving little statutory guidance on how to determine whether a public servant had violated the Acts. In the *Canadian Public Service, 1867-1970*, J.E. Hodgetts explains that, from the 1920s to the 1960s, a public servant would be dismissed automatically if a member of Parliament rose in the House of Commons and claimed to have personal knowledge of the individual's participation in political partisanship.<sup>22</sup> According to Professor Hodgetts, "the status and rights of civil servants languished in an insecure shadow realm until 1967," when the next major change to public service legislation occurred.<sup>23</sup>

### *The 1967 Public Service Employment Act*

- 4.13 In 1967, legislation was introduced to revamp the rules governing the public service. The *Public Service Employment Act* (PSEA) defined political partisanship as engaging in work for, on behalf, or against a candidate in a federal, provincial or territorial election, or engaging in work for, on behalf of, or against a political party and being a candidate in an election. As the previous legislation had, the 1967 Act banned public servants from engaging in political activities, but it also clarified that public servants did not contravene the Act by attending a political meeting or contributing money to a candidate or political party. Deputy heads remained barred from any activity other than voting.
- 4.14 Unlike the 1918 Act, the 1967 PSEA clearly assigned responsibility to the newly renamed Public Service Commission (PSC) to establish a board to investigate allegations of political partisanship which, if founded, could result in dismissal. Such allegations could only be made by a current or former candidate in an election.
- 4.15 The 1967 legislation created an additional element in the PSC's mandate. The PSC was now responsible for granting leaves of absence without pay for public servants wishing to be candidates in a federal, provincial or territorial election. Public servants could stand as candidates if the PSC was of the opinion that the usefulness to the public service of the employee would not be impaired if the employee became a candidate. A public servant was required to take a leave of absence without pay from the time the permission was granted until the election, or until the individual ceased to be a candidate. If elected, the individual ceased to be a public servant.

### *Political impartiality: 1967-2003*

- 4.16 By 1967, nearly 50 years had passed since the "blow" patronage had received in the 1918 Act. Appointments to the public service now had a long history of being made based on merit, not political persuasion. Public servants were no longer expected to support a political party to secure their position after an election. In fact, employees risked dismissal if they participated in political activities. In short, the culture of a non-partisan public service was firmly implanted with the new generation of public servants.

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<sup>22</sup> J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government 1867-1970* (Toronto: University of Toronto Press, 1973), 316-317.

<sup>23</sup> *Ibid.*, 317.

- 4.17 Evidence to support this statement can be found in the annual reports of the Civil Service Commission. In the decades following 1918, there are few references to political influence in appointments. Confidence in the merit system and the non-partisan nature of the public service was also reflected in the 1979 report of the D’Avignon Committee. The Committee stated that “the likelihood of any return of political patronage [as the basis of the hiring system] is about nil”. The Committee credited the elimination of patronage in large part to the “effective protective mechanisms and involvement of the independent PSC”.<sup>24</sup> Although it noted the limited threat of a return of political patronage, the Committee did acknowledge an ongoing need for legislation to reinforce the merit principle and the need for the PSC to continue to protect merit.<sup>25</sup>
- 4.18 The D’Avignon Committee also argued that a public servant’s right to participate in political activities should be extended beyond the limits imposed in the 1967 Act. Although it was in favour of increased rights, the Committee did acknowledge that certain exceptional circumstances warranted the limitation of these rights when partisan interests would compromise or damage the employee’s effectiveness as a public servant.<sup>26</sup>
- 4.19 While not adopted, the Committee’s recommendation that public servants have the right to participate in the political process was not a radical idea. Rather, it reflected the flavour of its time. The 1960s, 1970s and 1980s saw a movement toward increased rights for citizens. In Canada, the focus on rights resulted in access to information and privacy legislation; an emphasis on equality for women, visible minorities, persons with disabilities and Aboriginal peoples; and the adoption of the *Canadian Charter of Rights and Freedoms* (Charter).

### *Courts and the political rights of public servants*

#### *Fraser v. P.S.S.R.B. [1985] 2 S.C.R. 455*

- 4.20 The *Fraser* case did not specifically deal with political activities. Rather, it examined how a public employee’s duty of loyalty supports the principle of an impartial public service. *Fraser* concerned a public servant, Neil Fraser, who repeatedly and publicly criticized the Government of Canada’s decision to change from the imperial measurement system to the metric system. He was also critical of the government’s intention to proceed with the implementation of the Charter. After numerous warnings and disciplinary action, Mr. Fraser was dismissed from his job.
- 4.21 The Supreme Court held that Mr. Fraser’s attacks violated the duty of loyalty public servants owed to the Government of Canada. The Court stated that “some speech by public servants on public issues is permitted. An absolute prohibition would not be consistent with the deep rooted principles of robust public discussion in a democratic society, with the size of the public service, or with plain common sense. Yet, free speech or expression by the public servant is not an absolute, unqualified value”.

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<sup>24</sup> *Special Committee on the Review of Personnel Management and the Merit Principle* (“D’Avignon Committee”) (1979), 80.

<sup>25</sup> *Ibid.*, 80 and 93.

<sup>26</sup> *Ibid.*, 171.



4.22 The *Fraser* decision was significant because it clarified that the duty of loyalty is owed to the Government of Canada, and not to the political party in power at any one time. The Court noted that this loyalty is essential for the actual and apparent impartiality of the public service and is in the tradition of a public service that emphasizes the characteristics of impartiality, neutrality, fairness and integrity.

***Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69**

4.23 In 1991, the Supreme Court of Canada's decision in *Osborne v. Canada* would effectively change the entire landscape for public servants wishing to participate in political activities.

4.24 In the *Osborne* case, several public servants challenged the prohibition on political activity on the grounds that it violated their freedom of expression and freedom of association under the Charter. The majority of the Supreme Court judges held that the prohibition on political activity was not a reasonable limit (as permitted under section 1 of the Charter) on the freedom of expression. The Court recognized the importance of maintaining the neutrality of the public service but explained that the broad and general language of the PSEA meant that the restrictions applied to "a great number of public servants who in modern government are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations". The Court further stated that impartiality and the appearance of impartiality do not remain constant throughout the public service hierarchy and that the legislation was "over inclusive and went beyond what is necessary to achieve the objective of an impartial and loyal civil service". The Court struck down the provisions governing the political activities of public servants, except those requiring leave to be a candidate and except as they applied to deputy heads.<sup>27</sup>

4.25 The *Osborne* decision recognized the importance of both the political neutrality of the public service and the right of public servants to participate in political activities. The Court stated that the prohibition on political activities should not be absolute and should have regard for such things as the nature of the work performed; the employee's role, level, or importance in the public service hierarchy; and the visibility or nature of the political activity. The Court did, however, make a distinction between ordinary public servants and deputy heads by upholding the rules that applied to deputy heads.

4.26 The decision left the public service facing a legislative void that Parliament would fill only in 2003. In the meantime, although the political activities provisions no longer applied, public servants continued to be bound by their duty of loyalty and their responsibilities to maintain a non-partisan public service. A 1991 statement from the PSC reminded employees of these obligations.

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<sup>27</sup> Specifically, the Court struck down section 33(1)(a) and 33(1)(b) of the PSEA.

## 5 Impartiality today

### The Public Service Employment Act since 2005

- 5.1 In 2003, Parliament passed Bill C-25, the *Public Service Modernization Act*, which overhauled human resources management in the public service. Bill C-25 contained a new *Public Service Employment Act*, which came into force on December 31, 2005. The Act highlights the importance of a merit-based, non-partisan public service, as illustrated by reference to both of these principles in the preamble. The significance of impartiality is further outlined in the arrangement of powers concerning the protection of non-partisanship. While the PSEA encourages the delegation of human resources authorities in the public service, it prohibits the delegation of the authorities relating to political influence in hiring and political activities of public servants. In these areas, the PSC has exclusive jurisdiction.
- 5.2 The PSEA also contains rules governing political activities for public servants. The new regime, in line with the *Osborne* decision, weighs the importance of an impartial public service against the rights of public servants to engage in political activities. The Act states that employees may engage in any political activity, “as long as it does not impair, or is not perceived as impairing, the employee’s ability to perform his or her duties in a politically impartial manner”. The Act also modified the rules concerning candidacy requests from employees. In addition to having authority to grant permission and leaves of absence without pay, the PSC has some discretion as to when a public servant’s leave must begin. (For further details on the Act, see Annex.)
- 5.3 The PSEA recognizes the particular situation of those deputy heads who are subject to it. In the 1991 *Osborne* decision, the Supreme Court acknowledged the difference between deputy heads and other employees by upholding the provisions of the PSEA related to political activity by deputy heads (Conversely, as noted above, the Court struck down the political activities provisions for employees, except for those related to candidacy requests). In a similar way, the PSEA which came into force in 2005 limits the political activity of deputy heads to voting. A new section 127.1, added by the *Federal Accountability Act*, specified further that those persons appointed by the Governor in Council under that section (notably, deputy ministers, deputy heads, associate deputy ministers, associate deputy heads, positions of equivalent rank, and special advisors to ministers), are subject to the political activities provisions of the PSEA. Those deputies appointed under section 127.1, like deputies appointed under departmental acts, can only vote, and others appointed under that section are considered employees for the purposes of part 7. For deputy heads, associates and other chief executive officers who are not subject to the PSEA, in 2007, the Prime Minister issued specific guidelines on their political activities, imposing “a similar prohibition” on any activities other than voting.<sup>28</sup>

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<sup>28</sup>For more details on the Prime Minister's guidance to these and other Governor in Council appointees, see Annex H, “Guidelines for the Political Activities of Public Office Holders” in *Accountable Government: A Guide for Ministers and Secretaries of State 2007*, pages 72-73, [http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007\\_e.pdf](http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007_e.pdf).

## *Related concepts*

- 5.4 In addition to the foundation provided by the PSEA, other concepts support the principle of a non-partisan public service. As the courts have outlined, a duty of loyalty is an important component of the impartiality of the public service. Public servants must understand how their duty of loyalty relates to impartiality. They must also recognize that there are various elements that make up a non-partisan public service. These elements, which are interdependent, govern such factors as the work of the public service and the relationship between public servants and elected officials. Finally, the differing roles and responsibilities of deputy heads, public servants, the PSC and politicians in protecting impartiality must be clear.

### *A loyal and non-partisan public service: a legal requirement*

- 5.5 The duty of loyalty requires public servants to serve the government loyally, regardless of the party in power. In developing policies and programs, public servants must put the will of the government ahead of their personal beliefs. According to the Court in *Fraser*, “the public interest in both the actual and apparent impartiality of the public service dictates a general requirement of loyalty on the part of the public servant to the Government of Canada, as opposed to the political party in power”.
- 5.6 A duty of loyalty to the employer is not unique to the public service. Under the common law, employees in any public or private organization are required to serve their employer with good faith and fidelity and are not to do anything deliberately to cause harm to the employer’s organization. The duty of loyalty includes an obligation not to act in a manner detrimental to the employer’s reputation, not to put oneself in a position of a conflict of interest, and not to disclose confidential information. Employees violate their duty of loyalty if they engage in public criticism or act in a way that is detrimental to their employer’s legitimate business interests. A similar duty is also found in the *Civil Code of Quebec*.<sup>29</sup>
- 5.7 The courts have considered the concepts of duty of loyalty and public service impartiality. In *Fraser*, the Supreme Court confirmed that public servants have a duty of loyalty to the government of the day and connected the duty of loyalty with the characteristics of impartiality and neutrality.
- 5.8 The connection between political neutrality and the duty of loyalty was raised again in the case of *Haydon v. Canada (Treasury Board)* [2004] FC 749. This case dealt with a Health Canada scientist who spoke out against the Government of Canada’s decision to ban Brazilian beef. Ms. Haydon told a *Globe and Mail* reporter that there was no difference in the levels of risk posed by Brazilian and Canadian beef. She further asserted that the ban on Brazilian beef was “more a political move than a health one for the Canadian government”. The Court found that several factors showed Ms. Haydon had violated her duty of loyalty to the government. For example, she had failed to check her facts or have her concerns addressed internally before speaking to reporters. Furthermore, as she was a scientist, Ms. Haydon’s comments carried significant weight and

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<sup>29</sup> PSC Legal Services *Duty of Loyalty and the Public Service Commission’s Mandate*, February 2008.

“had an adverse impact on the operations of the Government of Canada”. The Court explained that “the objective of the duty of loyalty owed by public servants is to promote an impartial and effective public service, which is essential to the functioning of a democratic society”.

- 5.9 In addition to being recognized by the courts, a duty of loyalty is also a condition of employment. The *Values and Ethics Code for the Public Service* (Code) of 2003 requires, among other obligations, that public servants “loyally implement ministerial decisions, lawfully taken” and that they “perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced”.<sup>30</sup> Upon entry into the public service, individuals are given a copy of the Code and are informed that failure to comply with it can result in dismissal.<sup>31</sup>

### *A responsive and loyal public service*

- 5.10 Part of the concept of public service loyalty is being responsive to the needs of the government of the day. As the Code instructs, public servants must implement ministerial decisions, lawfully taken. This concept means that public servants execute decisions and implement programs, regardless of the philosophy of the party in power, and regardless of their own personal beliefs.
- 5.11 Although public servants are required to implement ministerial decisions, they are not to implement decisions that are illegal or unethical.<sup>32</sup> The courts agree and have set out exceptions to the public servant’s duty of loyalty. These exceptions can include speaking out if the government is engaged in illegal acts or if government policies jeopardize the life, health or safety of Canadians. The courts have noted these exceptions but have not outlined how they would apply in practice. In *Haydon*, the Court said that the purpose of these deviations was to ensure that “duty of loyalty impairs the freedom of expression as little as reasonably possible in order to achieve the objective of an impartial and effective public service”.<sup>33</sup>
- 5.12 The responsiveness of public servants when providing advice and recommendations includes being sensitive to the government’s political agenda. This, however, does not mean that public servants must consider only the government’s political perspective. While it is essential that the public service be aware of the government’s political orientation, public servants must continue to provide objective advice, including that which the minister may not want to hear. A balance must be struck. Credible, frank and honest advice “needs to be tempered by appropriate responsiveness to the directions set by elected government” since it is the government, not the public service, that will face the electorate.<sup>34</sup>

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<sup>30</sup> *Values and Ethics Code for the Public Service*, (Ottawa: Canada Public Service Agency, 2007), 7 and 9.

<sup>31</sup> Under section 54 of the *Public Service Employment Act*, when joining the public service, an individual must take an oath or affirmation of allegiance to faithfully and honestly fulfill his or her duties and to not disclose any matter that comes to his or her knowledge by reason of such employment.

<sup>32</sup> For a further discussion, see Pierre Bernier, “Obéir, oui, tant que ce n’est pas illégal! : en marge du Rapport Gomery, l’obéissance des fonctionnaires” *Le Soleil*, October 27, 2005, A17.

<sup>33</sup> *Haydon v. Canada*.

<sup>34</sup> Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, “What Really Happens in the Australian Public Service: An Alternative View” in *The Australian Journal of Public Administration*, vol. 66, no 3, 369.

- 5.13 Although public servants are to be sensitive to partisan considerations, they are not actively to support or debate policy decisions. While they may be required to explain policy rationale, public servants are not to argue in favour of or against a particular policy. Public servants provide information on policies, while ministers defend these policies before Parliament and are responsible for dealing with partisan questions.<sup>35</sup>
- 5.14 Public servants risk being “overresponsive” (or politicized) if they exceed the limits of their appropriate or legal authority in order to assist or obstruct the diligent execution of a minister’s decision, if they fail to act fairly and objectively, or if they violate political conventions. Debate concerning the balance between loyalty and responsiveness has taken place both in Canada and abroad.<sup>36</sup> In particular, the debate raises questions about the appropriate management of the interaction between elected officials and the public service, and asks about the future ramifications for the public service if the appropriate balance is not maintained.

### *Loyalty: a paradoxical duty*

- 5.15 The principles of impartiality and loyalty are important instruments for protecting the democratic process. Public servants are to be responsive to the needs and direction of their political masters, who have been democratically elected. On the surface, however, the duty of loyalty can appear to contradict a public servant’s obligation to act impartially. Public servants are supposed to be impartially loyal to a body staffed by elected officials. The courts have stated that a public servant’s loyalty is to the Government of Canada, and not to the party in power, but what exactly does that mean?
- 5.16 In Canada, executive power “emanates from the Crown”.<sup>37</sup> Section 9 of the *Constitution Act*, 1867 vests “Executive Government and Authority of and over Canada” in the Queen. Sections 11 and 12 and the constitutional conventions of government in Canada provide for these powers, authorities and functions to be exercised by the governor general on the advice of ministers (literally, members of the Queen’s Privy Council for Canada).<sup>38</sup>
- 5.17 In practice, the governor general must follow the advice that is given legally and formally by ministers, and public servants are bound to implement such legal decisions and to respect the legal authorities of ministers. They are not, however, bound to support political aims outside of that framework; in fact, if they did, they would be subject to allegations of improper political activities.

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<sup>35</sup> Privy Council Office, *Guidance for Deputy Ministers*

[http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=gdm-gsm/gdm-gsm\\_doc\\_e.htm#TOC2\\_6](http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=gdm-gsm/gdm-gsm_doc_e.htm#TOC2_6).

<sup>36</sup> For example see Paul Thomas, “Political-Administrative Interface in Canada’s Public Sector” in *Optimum Online: Journal of Public Sector Management*, vol 38, issue 2, May 2008.

<sup>37</sup> David E. Smith, *The Invisible Crown: The First Principle of Canadian Government*, (Toronto: University of Toronto Press, 1995), 86.

<sup>38</sup> For further discussion on the Cabinet and Privy Council see Peter Hogg, *Constitutional Law of Canada: Student Edition, 2004* (Toronto: Thomson Canada, 2004), 261.

- 5.18 Public servants owe loyalty to the Government of Canada, which is the Crown advised by the responsible ministry of the day. Political actors play the role of the constitutional entity of the Queen's Privy Council for Canada, which advises the Crown, but only for as long as the will of the electorate and the confidence of the House of Commons allow. The Government of Canada survives administrations formed or sustained following elections in Canada. In essence, there is a difference between the uppercase "Government of Canada" mentioned on Web sites and letterheads, and the government of the day as a governing party. One is a legal and constitutional entity, and the other is a political entity. The paradox is that public servants must be non-partisan, while remaining loyal to a legal entity whose powers are exercised by a political body.

## 6 What does a non-partisan public service look like?

- 6.1 This paper has illustrated that two key elements provide the foundation for a non-partisan public service. First, the public service must have a staffing system free from political influence and in which recruitment, hiring, promotions and terminations are based on merit (or, in the case of terminations, a lack thereof). Second, public servants must perform, and be perceived to perform, their duties in an impartial manner. A non-partisan public service can be maintained only if the staffing system is protected from political influence, the merit system has been firmly implanted and the professional commitment to impartiality is widespread.<sup>39</sup>
- 6.2 Because of the complex world of public administration within which public servants function, the building blocks of a non-partisan public service cannot be narrowed down to just two characteristics. Although they constitute the foundation of a non-partisan public service, merit and non-partisanship do not and cannot exist in a vacuum. Several other principles build on this foundation to help support a non-partisan public service.

### A model of political neutrality

- 6.3 Writing in 1976, Kenneth Kernaghan outlined a model of political neutrality in a parliamentary system of government in the following way:
- Politics and policy are separated from administration. Thus, politicians make policy decisions; public servants execute these decisions.
  - Public servants are appointed and promoted on the basis of merit, rather than on the basis of party affiliation or contributions.
  - Public servants do not engage in partisan political activities.
  - Public servants do not publicly express their personal views on government policies or administration.

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<sup>39</sup> James B. Christoph, "Political Rights and Administrative Impartiality in the British Civil Service," in *Canadian Public Administration*, eds. J.E. Hodgetts and D.C. Corbett (Toronto: Macmillan, 1960), 421.

- Public servants provide forthright and objective advice to their political masters in private and in confidence. In return, political executives protect the anonymity of public servants by publicly accepting responsibility for departmental decisions.
- Public servants execute policy decisions loyally and zealously, irrespective of the philosophy and programs of the party in power and regardless of their personal opinions. As a result, public servants enjoy security of tenure during good behaviour and satisfactory performance.<sup>40</sup>

6.4 This list represents the theory – the ideal – of a politically impartial public service and provides a framework for assessing the non-partisanship of the public service. As Kernaghan admits, however, theory and practice often diverge. In reality, this model of political neutrality has rarely been practised in its “pure” form. Although some tenets of the model, such as public service appointments and promotions based on merit, remain more or less an element of Canada’s public service, Kernaghan suggests that “some of the requisite conditions have never been met [...] and others have been altered to keep pace with changing political, social and technological circumstances”.

- Take, for example, the separation of politics and policy. In theory, ministers make policy decisions and public servants implement these decisions. This notion of such a clear separation is extreme and is meant to highlight the roles and responsibilities of the minister and the public service. In reality, administration is more complicated than that. Policy and program ideas come from a variety of sources, such as the public, Parliament and legislation. Public servants provide advice and recommendations on which the minister bases his or her decision. In making these recommendations, public servants consider a wide variety of factors, which may include political sensitivities. Consideration of political sensitivities is one of a public servant’s professional and democratic responsibilities and should not be seen as a political action. Although ministers ultimately make the decisions that public servants implement, politics and policy are not, and may never have been, separate from administration. An impartial public service ensures that policies are implemented regardless of the political views of public servants.<sup>41</sup>

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<sup>40</sup> Kenneth Kernaghan, “Politics, policy and public servants: political neutrality revisited” *Canadian Public Administration* vol 19, N°3 (1976), 433. Dr. Kernaghan’s description of the model of political neutrality has been reproduced in countless documents. (See, for example, *Report on Political Activity, Public Comment and Disclosure by Crown Employees*, Ontario Law Reform Commission, 1986, p. 13, and *The Future Role of a Professional Non-Partisan Public Service in Ontario*, paper prepared for the Panel on the Role of Government in Ontario, June 2003, 11). His model of political neutrality has also been accepted as expert testimony by the courts. See Lorne Sossin, “Speaking truth to power? The search of bureaucratic independence in Canada” *University of Toronto Law Journal*, 2005, 7, fn 12.

<sup>41</sup> See, for example, Donald Savoie, “Intrastate Federalism and the Civil Service,” in *Continuity and Change in Canadian Politics: Essays in Honour of David E. Smith*, eds. Hans. J. Michelmann and Cristine de Clercy, (Toronto: University of Toronto Press, 2006), 68.

- This model of political neutrality also asserts that the public service is expected to be both loyal and responsive to the government of the day. As noted above, the idea of responsiveness and loyalty is complex. The public service must ensure that it provides fair and honest advice to ministers, while also implementing decisions of the minister and the government of the day, even when such directions contradict policy advice given to the minister.
- In other cases, practice diverges significantly from the ideal model. The model states that public servants should refrain from engaging in partisan politics. The courts, however, have stated that provisions banning all public servants from participating in the democratic process contravene the *Canadian Charter of Rights and Freedoms*. As a result, the PSEA allows public servants to engage in political activities. Despite this, the spirit of the model remains intact. Public servants are permitted to engage in political activities, as long as such involvement does not impair, or is not perceived as impairing, their ability to perform their duties in a politically impartial manner. To ensure that impartiality is maintained, Parliament made the PSC responsible for ensuring that the recognition of these rights does not impair the impartiality of the public service.
- Another example of the divergence between the model and the current trend in public administration is the principle of the anonymous public servant. The principle states that public servants act in the name of the minister and it is the minister who takes credit when things go right or accepts responsibility when things go wrong.<sup>42</sup> This arrangement supports ministerial responsibility by allowing ministers to retain democratic control over decisions.<sup>43</sup> Despite this, several factors have led to more visibility of public servants. For example, increased parliamentary surveillance of the public service through the Estimates process and more widespread auditing has reduced the anonymity of public servants.<sup>44</sup> The access to information regime is also significant because it provides access to departmental and agency documents, previously unavailable, which may reveal the decision-making and administrative actions of public servants. E-mail has also affected the concept of public service anonymity. As one observer has asked, “Can (career) officials be in any sense anonymous and faceless when every one of them has an e-mail address listed on their departmental Internet home page?”<sup>45</sup> Regardless of how the visibility of public servants has increased, the more visible public servants are, the more vulnerable they become to partisan political attacks. If public servants are attacked publicly by one party and praised by another, this could undermine public service impartiality.<sup>46</sup> This issue is further complicated when one considers the statutory authorities and responsibilities given to deputy heads.<sup>47</sup>

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<sup>42</sup> For further information, see Privy Council Office, *Responsibility in the Constitution* (Ottawa: 1993), chapter 6; Peter Hogg, *Constitutional Law of Canada: Student Edition* (Scarborough: Thomson-Carswell, 2004), 263.

<sup>43</sup> Peter Aucoin, Jennifer Smith and Geoff Dinsdal, *Responsible Government: Clarifying Essentials, Dispelling Myths and Exploring Change* (Ottawa: Canadian Centre for Management Development, 2004), 47.

<sup>44</sup> Paul Thomas, “Parliament and the Public Service” in *The Handbook of Canadian Public Administration*, ed. Christopher Dunn (Toronto: Oxford University Press, 2002), 346-347.

<sup>45</sup> As quoted in Donald Savoie, *Breaking the Bargain: Public Servants, Ministers, and Parliament* (Toronto: University of Toronto Press, 2003), 43.

<sup>46</sup> *Ibid.*, 213.

<sup>47</sup> Examples of these responsibilities include those powers assigned under the PSEA or the *Financial Administration Act*.



## Other considerations

### *Complexities of the public service*

- 6.5 While the model discussed above outlines some of the broad elements of a non-partisan public service, other complexities of the public service world must be considered. For example, the public service is not monolithic. While a primary role of many public servants is to provide advice and execute policy decisions, not every public servant has this responsibility. Examples include the following:
- investigators across the country check to prevent fraud from occurring when payments are made to Canadians through employment insurance and income security programs;
  - environmental scientists work to protect the health of Canadians and their environment;
  - skilled labourers and technicians build and maintain parks and buildings;
  - librarians and archivists protect and provide access to Canada's culture, heritage and history; and
  - community health nurses work in isolated communities to provide front-line health care that would not otherwise be available.
- 6.6 A large number of public servants work for independent boards and agencies or bodies that support Parliament, and are therefore not subject to ministerial direction.
- 6.7 Whatever their daily responsibilities and primary functions, all public servants must refrain from allowing policy and operational decisions to be driven by political considerations.

### *Governor-in-Council appointments*

- 6.8 Although the model of political neutrality rightly notes the link between merit-based appointments and a non-partisan public service, it focuses on the professional public service (approximately 180,000 public servants) appointed under the PSEA. In addition, there are approximately 500 full-time and 1,900 part-time appointments that the Governor in Council (GiC) makes.<sup>48</sup> These appointments include the heads of Crown corporations, and members of numerous boards, advisory bodies and commissions.
- 6.9 A 2004 report from the Public Policy Forum noted that some observers felt that GiC appointments are based on political considerations, rather than on the skills and ability of the candidate. In particular, the report asserted that the perception that candidates are appointed based on patronage weakens the legitimacy of the public sector.<sup>49</sup>

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<sup>48</sup> GiC appointments are made by the Governor General on the advice of the Queen's Privy Council of Canada (Cabinet). In addition to the appointments mentioned above, the GiC also appoints deputy heads, including deputy ministers. Although these appointments are made on the recommendation of the prime minister, traditionally the vast majority of appointees have come from the professional public service, where they were initially appointed on the basis of merit under the PSEA.

<sup>49</sup> Public Policy Forum, *Governor-in-Council Appointments; Best Practices and Recommendations for Reform* (Ottawa: February 2004), 9, [http://www.ppforum.ca/common/assets/publications/en/gov\\_apt\\_reform.pdf](http://www.ppforum.ca/common/assets/publications/en/gov_apt_reform.pdf).

## *Ministerial staff*

- 6.10 Another issue that relates to an impartial public service involves the movement of staff between the public service and a minister's office.
- 6.11 Over the course of the 20<sup>th</sup> century, the knowledge and experience gained by individuals who worked in a minister's office was recognized through the introduction of the priority appointment. This meant that those who had worked for a specified period of time were entitled to be appointed without competition to positions in the public service for which they were qualified. Extending this priority to ministerial staff emphasized the value of the experience gained in this type of environment. Many ministerial aides eventually made their way to the public service, where they were able to share their knowledge and expertise.<sup>50</sup>
- 6.12 While individuals can move from a minister's office to the public service, public servants have also had the ability to move from the public service to a minister's office. The public service has had a long tradition of allowing public servants to work in a minister's office. The 1882 *Civil Service Act* allowed for any member of the civil service to be appointed to work with the minister.<sup>51</sup> Such moves allow an individual to gain valuable insight into the challenges facing the government and into the policy development process. Upon return to the public service, individuals with this experience bring a specialized knowledge that benefits the public service.
- 6.13 In order to allow public servants to move between the public service and a minister's office, Treasury Board policy allows public servants to take an unpaid leave of absence from work for employment as staff in the office of a minister or a member of Parliament. This policy allows a public servant to work in a political job in a partisan environment and then to return to work as a non-partisan public servant.
- 6.14 Until December 2006, individuals could move from a minister's office to the public service through a priority entitlement if they had acquired three years of service. This priority right was repealed in the *Federal Accountability Act*, which came into force December 12, 2006. Now, individuals who have worked in a minister's office for three years may apply to internally advertised jobs in the public service during the one-year period following their departure from the minister's office. Although the ability to apply to internal jobs in the public service is not available to all Canadians, the opportunity awarded to individuals who have worked in a minister's office has been severely restricted.
- 6.15 In its *Audit of the Movement between the Federal Public Service and Ministers' Offices*, in 2007, the PSC examined the risk to public service impartiality when public servants moved between the public service and political jobs. The audit identified inappropriate patterns of movement between ministers' offices and the public service. Although this movement involved a relatively small number of people, the inappropriate actions created the appearance of a lack of political impartiality, and did not respect the value of non-partisanship.

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<sup>50</sup> For further information on ministerial staff, see Liane E. Benoit, "Ministerial Staff: the Life and Times of Parliament's Statutory Orphans" in Commission of Inquiry Into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Parliament, Ministers and Deputy Ministers*, Research Volume One (Ottawa: 2006).

<sup>51</sup> See section 46 of the *Civil Service Act*, 1882.

- 6.16 In its audit, the PSC recommended the development of a policy governing the movement of public servants between the public service and ministers' offices to ensure that these moves uphold the principle of political impartiality and are effectively monitored. The PSC continues to believe that such a policy is necessary to maintain a non-partisan public service.

### *Other types of partisanship and opposition to a candidate or party*

- 6.17 While the model of political neutrality states that public servants should not engage in partisan political activities, little consideration is given to the participation of public servants in “non-partisan” political activities. For example, what attention should be given to public servants who participate in activities in support of or in opposition to organizations that seek to influence government policies, such as environmental organizations or groups concerned about the level of taxes paid in Canada?
- 6.18 Along the same lines, the PSEA does not discuss how limited public servants should be in opposing a candidate or political party. For example, if a public servant is a member of a community organization that opposes a political party based on the party's position on a particular issue, to what extent may he or she voice opposition? Can a public servant speak on behalf of an organization that supports the gun registry, for example, because the organization feels it helps to prevent violence against women? Is this considered an activity that opposes a candidate or party that seeks to eliminate the gun registry? These are questions the public service of the 21<sup>st</sup> century will have to answer.

## **7 A constitutional identity of the public service?**

### **Independence is a loaded word**

- 7.1 Writing on independence and public administration in 1922, R. MacGregor Dawson examined the independence of various aspects of Canada's public administration, including civil servants. Dawson explored bureaucratic independence by highlighting the importance of appointment by merit and the need for permanency in tenure in building an independent and impartial public service. Dawson argued the need for an independent public service to protect against political corruption and to ensure confidence in the public service.<sup>52</sup>
- 7.2 To Dawson, protecting the public service from political corruption meant that the appointment mechanisms in the public service needed to be sufficiently independent of political officials to ensure that public servants were appointed based on qualifications, not on political allegiances. Such an arrangement, Dawson argued, improved the tone of the civil service. He stated that the abolition of patronage left “some likelihood or even assurance, which was formerly lacking, that the civil servant will be impartial and will perform his duties conscientiously under any government. He may be expected to resent and to refuse to comply with any suggestion from his political superiors that he should use his official position for dishonest purposes or for hoodwinking the public with falsified reports”. Because the civil servant was chosen independently, the allegiance was to the State.<sup>53</sup>

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<sup>52</sup> R. MacGregor Dawson, *The Principle of Official Independence*, (Toronto: S.B. Gundy, 1922), 104-105.

<sup>53</sup> *Ibid.* 89.

- 7.3 With merit governing the appointment of public servants and employees' tenure of office largely secure,<sup>54</sup> a present-day discussion of an independent public service differs from that of Dawson in the 1920s. Today's discussion focuses more on the relationship between the public service and elected officials than on the need for appointments based on merit – although merit is still an element – and permanency of employment. Although the parameters around the independence discussion may have shifted, the discussion continues. Today's discussion is now centred on the independence of the public service from elected officials for decision-making. Several questions in this discussion, such as the consequences for accountability, remained unanswered.
- 7.4 Paul Thomas notes that the public service must be independent enough to be non-partisan, provide objective advice, and impartially administer programs. The public service must also be responsive to the government of the day. The duties and responsibilities of the public service include supporting the government of the day. Public servants must be sufficiently independent to identify when they are being pressured to act in an inappropriately partisan way. Although implementing the decisions taken by the minister may further the partisan interests of the governing party, if the decisions are taken legally, the public service must implement them. The public service must not respect requests from the government if they are asked to violate the law or the values of the public service. As Paul Thomas explains, a public servant's exclusive and only loyalty is not to the politicians they serve. "Yes they have to be loyal up to a point, but they have to be independent enough to uphold the values of the public service".<sup>55</sup> Fundamentally, the question is the degree of alignment required to manage interactions between the political level and the public service, which must remain non-partisan.

### *Already independent?*

- 7.5 Lorne Sossin asserts that "the case has yet to be made that bureaucratic independence is necessary, workable, and compatible with our constitutional and democratic systems," but adds that the "building blocks" for such independence have already been established.<sup>56</sup> Donald Savoie takes this argument a step further by making the case that the Canadian public service has a constitutional personality distinct from that of the government of the day. In support of this position, he notes the statutory duties public servants must observe. He points to the powers assigned under the *Interpretation Act*, the *Financial Administration Act*, the *Public Service Employment Act*, the *Official Languages Act* and other legislation. According to Savoie,

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<sup>54</sup> While the tenure of many public servants is secure, some positions are staffed on a temporary basis. Temporary employment has always been a part of the public service and such arrangements represent valuable staffing options to meet short term human resources needs quickly. For this reason, merit does not need to be applied when hiring an individual on a casual basis. Individuals hired on a casual basis are not considered employees of the public service and cannot work more than 90 days in any one department or agency in any calendar year. For further discussion on casual and temporary hiring in the public service, see the *PSC Annual Report 2006-2007* and *PSC Statistical Study, To what extent do casuals become employed under the Public Service Employment Act?*, [http://www.psc-cfp.gc.ca/centres/publications\\_e.htm](http://www.psc-cfp.gc.ca/centres/publications_e.htm).

<sup>55</sup> Cynthia Münster, "Federal government should totally revamp how its human resources are managed" *The Hill Times*, Monday, March 3, 2008, page 30.

<sup>56</sup> Lorne Sossin, "Speaking truth to power? The search of bureaucratic independence in Canada" *University of Toronto Law Journal*, 2005, 6.

these legislated tasks make it clear that deputy ministers are responsible for such things as public service financial management systems and the regularity, efficiency and effectiveness of the public service. He says that this arrangement reinforces the argument that public servants “have a direct responsibility as servants of the state and not simply the government of the day”.<sup>57</sup>

### *The accounting officer model: recognition of autonomy?*

- 7.6 Recognition of deputy heads as accounting officers may be one way of maintaining some degree of independence between the public service and elected officials. As accounting officers, deputy heads are to be accountable before the appropriate committees of Parliament for certain specified aspects of administration.
- 7.7 The *Federal Accountability Act* established the role of deputy head as an accounting officer.<sup>58</sup> To some observers, this role appeared to be separate from the minister’s political accountability and made deputy heads personally responsible for specified aspects of the management of their departments or agencies.<sup>59</sup> This interpretation was in line with the recommendations of the House of Commons Standing Committee on Public Accounts. Following the Committee’s inquiry into the sponsorship program, it recommended a system similar to that of the United Kingdom, in which deputy heads would be held personally responsible for all delegated or directly held powers.<sup>60</sup>
- 7.8 Despite this recommendation, Prime Minister Stephen Harper explained that this was not how the accounting office role was to be interpreted. In response to concerns raised over this issue, he said that these responsibilities are to be exercised within the framework of ministerial responsibility and accountability to Parliament, a principle that remains unchanged. He further stated that although accounting officers are accountable *before* parliamentary committees, they would not be accountable *to* Parliament, and ministers alone are accountable to Parliament.<sup>61</sup> The Privy Council Office has stated that a deputy head’s accountability cannot be exercised without reference to the responsibility of his or her minister.<sup>62</sup> The debate continued in 2007,

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<sup>57</sup> Donald Savoie, “The Canadian Public Service has a Personality” in *Canadian Public Administration*, vol. 49 (2006), 273.

<sup>58</sup> Section 16(4)(2) of the *Federal Accountability Act* also stated that accounting officers are accountable for

- (a) measures taken to organize the resources of the department to deliver programs in compliance with government policies and procedures;
- (b) measures taken to maintain effective systems of internal control in the department;
- (c) the signing of the accounts that are required to be kept for the preparation of the Public Accounts; and
- (d) the performance of other specific duties assigned under any Act in relation to the administration of the department.

<sup>59</sup> See for example, Kathryn May, “MPs gird for epic power struggle” *Ottawa Citizen*, March 26, 2007, p. A1 and Dr. Ned Franks’ testimony before the House of Commons Standing Committee on Public Accounts, March 21, 2007.

<sup>60</sup> See House of Commons Standing Committee on Public Accounts, *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability*, Tenth Report, 1<sup>st</sup> Session, 38<sup>th</sup> Parliament, May 2005 and *Considering the Government Response to the Tenth Report of the 1<sup>st</sup> Session of the 38<sup>th</sup> Parliament*, Fourth Report, 1<sup>st</sup> Session, 39<sup>th</sup> Parliament.

<sup>61</sup> See March 3, 2006 “Letter to the Prime Minister” and December 14, 2006, “Response from the Prime Minister” at *Prime Minister responds to eminent Canadians on Gomery recommendations*, <http://www.pm.gc.ca/eng/media.asp?id=1473>.

<sup>62</sup> Privy Council Office, *Responsibility in the Constitution*, (Ottawa: 1993), chapter 6.

when the Public Accounts Committee established a protocol for the appearance of accounting officers before the Committee. The Committee report, which was concurred in by the House on May 15, 2007, acknowledged that the accountability of accounting officers exists within the context of ministerial responsibility, but adds that the “accountability of accounting officers flows from the statutory and delegated powers that they hold in their own right”.<sup>63</sup> The Government issued its own guidelines for accounting officers appearing before parliamentary committees.<sup>64</sup>

## How much independence?

- 7.9 The history of public administration in Canada includes many examples of the depoliticization of various decisions (for example, through delegation). This delegation has often been carried out for reasons of efficiency. For example, in 1912, Sir George Murray recommended that deputy heads be given complete responsibility for the administration of their departments so that ministers would have sufficient time to consider policy.<sup>65</sup>
- 7.10 At other times, the reason for delegation has been specifically to remove a decision from political considerations. For example, the *Customs and Excise Offshore Application Act* (section 4) and the *Canadian Security Intelligence Service Act* (section 7) provide specific authorities directly to deputy ministers. More broadly, legislation relating to employment in the public service removed appointments from political consideration in 1908.
- 7.11 In this context, it is possible to argue for some independence for the public service to help protect and maintain the non-partisan character of the public service. However, the democratic foundation of Canada’s parliamentary system of government must continue to be a prime concern.
- 7.12 Although ideas about the relationship between the public service and elected officials are evolving, Canada’s parliamentary system continues to be based on the Westminster model. Under this model, ministers, and not public servants, are accountable to Parliament and to the public. In most cases, the public service is accountable to Parliament and to the public, through the minister. In practice, this means that, with the authority of the minister, the deputy head exercises the powers of the minister.

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<sup>63</sup> House of Commons Standing Committee on Public Accounts, *Protocol for the Appearance of Accounting Officers as Witnesses before the Standing Committee on Public Accounts*, Thirteenth Report, March 27, 2007, 8. <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10466&Lang=1&SourceId=214260>.

<sup>64</sup> Privy Council Office, *Accounting Officers – Guidance on Roles, Responsibilities and Appearances Before Parliamentary Committees* (Ottawa: 2007), [http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ao-adc/2007/account-guideonrole2007\\_e.pdf](http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ao-adc/2007/account-guideonrole2007_e.pdf). For further detail on this subject and the different interpretations of the responsibilities of accounting officers, see James Ross Hurley, “Responsibility, Accountability and the Role of Deputy Ministers in the Government of Canada,” and C.E.S. Franks, “The Respective Responsibilities and Accountabilities of Ministers and Public Servants: A Study of the British Accounting Officer System and its Relevance for Canada,” in *Commission of Inquiry into the Sponsorship Program and Advertising Activities, Restoring Accountability, Research Studies Volume, Three* (Ottawa: 2006), 115-231.

<sup>65</sup> Sir George Murray, *Report on the Organization of the Public Service of Canada* (Ottawa: 1910).

- 7.13 In this sense, actions taken by a deputy minister are considered to be the same as if the minister took them. This is confirmed by the *Carltona* doctrine, based on a judicial decision<sup>66</sup> that recognized that an action taken by an official is legally the same as an action taken by the official's minister. This doctrine is also recognized under the *Interpretation Act*, which gives deputy heads the power to act for their ministers (section 24(2)).
- 7.14 Although some observers argue that it is not possible for the minister to be aware of every detail of his or her department or agency,<sup>67</sup> ensuring that the actions of a deputy head are considered to be the same as the actions of his or her minister is necessary.<sup>68</sup> Guaranteeing that the actions of a deputy head are considered the same as those of his or her minister establishes a democratic chain of accountability between the public service and the public. With respect to departments and agencies and their programs, Parliament has vested authorities and the concomitant accountabilities in ministers. For a very small number of authorities of a general administrative or managerial nature, Parliament has vested authorities in deputy heads. (The authorities for learning, training, development and discipline that are granted to deputy heads under section 12 of the *Financial Administration Act* are an example of these authorities.)
- 7.15 There is another case in which accountability to Parliament does not rest with the minister. In some cases, such as with the PSC, the Office of the Auditor General of Canada and the Public Service Staffing Tribunal, the accountability relationship exists directly with Parliament. Combining these two ideas, the PSEA gives an example of authorities vested in a body, the PSC. Parliament allows the PSC to delegate authorities to deputy heads, while stating explicitly that deputy heads are accountable to the PSC, which, in turn, is accountable to Parliament.<sup>69</sup>
- 7.16 In short, unless Parliament states otherwise, accountability to Parliament and the public is through a minister. For this reason, holding a deputy minister accountable outside of the authority of a minister of a democratically elected government means that the link to the Canadian people is broken.

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<sup>66</sup> *Carltona v. Commissioners of Works*, [1943] 2 All ER 560.

<sup>67</sup> For a discussion on this, see, for example, Peter Aucoin, Jennifer Smith and Geoff Dinsdal, *Responsible Government: Clarifying Essentials, Dispelling Myths and Exploring Change* (Ottawa: Canadian Centre for Management Development, 2004), 31-32.

<sup>68</sup> In May 1909, then Leader of the Opposition, Robert Borden argued that "A Minister of the Crown is responsible, under the system in Great Britain, for the minute details of the administration in his department; he is *politically responsible*, but he does not know anything at all about them." R. MacGregor Dawson, *The Government of Canada*, 4<sup>th</sup> ed., revised by Norman Ward, (Toronto: University of Toronto Press, 1963), 190-191.

<sup>69</sup> See the preamble of the PSEA, which states, "those to whom this appointment authority is delegated must exercise it within a framework that ensures that they are accountable for its proper use to the Commission, which in turn is accountable to Parliament."

7.17 It is for this reason that the degree of independence of the public service must be considered. If too much independence is granted, there is a risk that decisions could be made outside of Canada’s democratic framework. The potential result could mean that the lines of decision making would not be clear and accountability would be frustrated. As a former prime minister has asserted:

Some academics and theorists have even recommended that a kind of wall be established between politicians and public servants, as though it were desirable or even possible for the two not to talk to each other. They don’t think that the clerk of the Privy Council should be both the prime minister’s chief bureaucratic adviser and the head of the civil service, for instance, nor do they want deputy ministers to be responsible to the ministers for the administration of their departments. In reality, the result would be that the elected government would not be in charge of running anything.<sup>70</sup>

## 8 Protecting a non-partisan public service: roles and responsibilities

8.1 Protecting public service impartiality is more complex than simply preventing political interference in hiring. Although the public service serves the Crown impartially, many of the policies and programs executed by public servants are scrutinized through partisan lenses. In short, “the adversarial nature of politics affects the public service, even though officials assiduously distance themselves from politics.”<sup>71</sup>

### Deputy heads and senior managers

8.2 Deputy heads play a significant role in protecting the impartiality of the public service. They are appointed by the Cabinet through an Order in Council, on the advice of the prime minister. Deputy heads are usually chosen from within the ranks of the public service, but their appointments are not treated as examples of political patronage. This point is reinforced when one considers that when the government changes, unlike the case in the United States, the deputy head usually retains his or her position.<sup>72</sup> To further protect the perception of the impartiality of deputy heads, the PSEA prohibits their participation in political activities, other than voting.

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<sup>70</sup> Jean Chrétien, *My Years as Prime Minister*, (Toronto: Random House of Canada, 2007) 38-39.

<sup>71</sup> Donald Savoie, “Intrastate Federalism and the Civil Service,” in *Continuity and Change in Canadian Politics: Essays in Honour of David E. Smith*, eds. Hans. J. Michelmann and Cristine de Clercy, (Toronto: University of Toronto Press, 2006), 74.

<sup>72</sup> Peter Hogg, *Constitutional Law of Canada: Student Edition* (Scarborough: Thomson Carswell, 2004), 263.



- 8.3 A deputy head acts as the senior manager of a public service department or agency. Although the authority to make appointments is isolated from political influence, in nearly all other areas, a deputy head is “sandwiched between the neutral civil service and the partisan political ministers”.<sup>73</sup> The role of the deputy head can be compared to the role of the Privy Council Office. As described by a former clerk of the Privy Council, Gordon Robertson, “the Privy Council Office is non-partisan, operationally oriented yet politically sensitive”.<sup>74</sup> The deputy head must serve loyally and impartially while, at the same time, being responsive to the political needs of the government of the day. Deputy heads must also ensure that their employees act in the same fashion.
- 8.4 The leadership of deputy heads is essential in protecting the non-partisan nature of the public service. Deputy heads can ensure that their leadership supports an impartial public service by making public service values and ethics, particularly impartiality, a part of the day-to-day reality of their work and the work of their department or agency. By making impartiality a priority, a deputy head supports an effective and efficient public service. By ensuring that their actions reflect the importance of non-partisanship, deputy heads promote this value throughout their organization. By protecting the principle of an impartial public service, deputy heads help to foster public confidence in the public service.
- 8.5 Under the PSEA, deputy heads have specific responsibilities for safeguarding public service impartiality. With respect to appointments and promotions, deputy heads must ensure that staffing activity in their organizations is free from political influence. If a deputy suspects political influence in staffing, he or she must report it to the PSC. Deputy heads must also provide advice and guidance to employees about engaging in political activities, and work with the PSC to increase employees’ understanding of their roles and responsibilities in relation to political activities.
- 8.6 Additionally, deputy heads must ensure that appropriate boundaries are kept between public servants and ministers, members of Parliament and their staff.<sup>75</sup> *Accountable Government: A Guide for Ministers and Secretaries of State* reminds ministers that their staff must respect the non-partisan role of public servants. While ministers are to be responsible for informing their staff of the limits regarding interaction with the public service, deputy heads must be vigilant in protecting their staff from any improper action by an elected official or the staff of an elected official. As much as practical, relations between the public service and elected officials and the staff should be conducted through the deputy head. If the deputy head is aware that the parameters protecting his or her employees are being breached, he or she should investigate and take any necessary action to protect the non-partisan, neutral character of the public service.

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<sup>73</sup> Donald Savoie, “Intrastate Federalism and the Civil Service,” in *Continuity and Change in Canadian Politics: Essays in Honour of David E. Smith*, eds. Hans. J. Michelmann and Cristine DeClercy, (Toronto: University of Toronto Press, 2006), 71.

<sup>74</sup> *The Responsibilities of the Privy Council Office*, (Ottawa: 1993), 85.

<sup>75</sup> *Accountable Government: A Guide for Ministers and Secretaries of State 2007*, 38, ([http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007\\_e.pdf](http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007_e.pdf)).

## Employees

- 8.7 As this paper has stated, impartiality is part of the calling of a professional public servant. To preserve the real and perceived non-partisanship of the public service, public servants are expected to serve the Crown (as represented by the government of the day) loyally and impartially, regardless of the party in power. (The concept of the perceived non-partisanship of the public service is not immediately obvious and serves to highlight the complexities of the issue.) This means that public servants, at all levels, execute their daily functions in a way that best serves the Crown. For some observers, impartiality means the prudent management of administration. For others, it is impartial service delivery to Canadians. For others still, impartiality involves advice that is based on a range of aspects and considerations and that may include information that the minister or the government of the day does not want to hear. In these instances, public servants must remember that they have a responsibility to provide information on policies and programs, but are not expected to, nor should they debate the merits of policy decisions made by the government.
- 8.8 Public servants must also remember that their loyalty is to the government of the day and the minister, not the political party. This means political parties and elected officials other than the minister must be treated in the same way. For example, while public servants can provide factual briefings to parliamentary caucuses, they must ensure that the same offer is made to other caucuses. Public servants should not act in a partisan manner during these briefings and should not answer questions of a political nature. Such questions must be addressed to the minister.<sup>76</sup>
- 8.9 Public servants also fulfill their obligation to maintain an impartial public service by refraining, outside the context allowed by the PSEA, from participation in political activities that may jeopardize the perception of non-partisanship or cause people to doubt their loyalty. This should not be taken to mean that public servants cannot participate in political activities. On this subject, the PSEA is clear. Public servants have the right to participate in political activities as long as the activities do not impair, or are not perceived as impairing, the impartiality of the public service. This approach is consistent with the rulings of the Supreme Court, discussed above, which provide that public servants' constitutional right to freedom of expression should only be circumscribed to the extent necessary to allow them to carry out their duties in an impartial way.
- 8.10 When deciding whether to participate in political activities, public servants must consider a variety of factors, such as the nature of the election, the nature of their duties, and the level and visibility of their position.<sup>77</sup> Public servants risk an allegation of improper political activity being made against them if they do not properly assess how the duties of their job could be perceived by others.

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<sup>76</sup> *Accountable Government: A Guide for Ministers and Secretaries of State 2007*, ([http://www.pm.gc.ca/grfx/docs/guidemin\\_e.pdf](http://www.pm.gc.ca/grfx/docs/guidemin_e.pdf)).

<sup>77</sup> These are the same factors the PSEA instructs the PSC to consider when deciding whether seeking nomination as, or being, a candidate will impair or be perceived as impairing an employee's ability to perform his or her duties in a politically impartial manner (subsections 114(6) and 115(3)).

- 8.11 The participation in political activities of certain categories of employees, such as those in the Executive group, is more likely to impair or be perceived to impair their ability to act impartially than is the case for employees in less high-profile roles. Making the reverse argument—that certain classifications or groups of employees should be free to participate in any political activity—is more complex.
- 8.12 Consider the case of an administrative assistant in a deputy head's office. While employees in such positions are rarely involved in or contribute to policy decisions, presumably they are in close contact with the staff of the minister's office. Because of this contact, participation in political activities could conceivably be seen to affect the execution of administrative duties, which may include the scheduling of meetings and ensuring the movement of documents through the deputy head's office. Although the assistant's control over such tasks may, in reality, be limited, the perception of the influence the assistant may have in day-to-day contact with the minister's staff is what matters.
- 8.13 In administering candidacy requests, the PSC has also noted that in the case of certain jobs in particular, Canadians must be assured that the public servants' duties are carried out in an impartial manner. Examples include public servants who
- have peace officer status;<sup>78</sup>
  - assess and make recommendations on the awarding of grants and contributions;
  - work in the area of economic development;
  - deal with sensitive files, such as income tax; or
  - work in regulatory positions.
- 8.14 When deciding whether to engage in political activities, public servants should be aware of these factors. While a public servant should consult with his or her deputy head and may also seek guidance from the PSC, the person must remember that the final decision remains his or her own.

## The Public Service Commission

- 8.15 Since its creation, the PSC has been a central institutional factor in eliminating political patronage and creating a non-partisan, neutral and professional public service. Over the past 100 years, one of the primary goals of the PSC has been to see that appointments to and within the public service are based on merit and are free from political influence. Its oversight of candidacy requests and political activities of public servants also protects impartiality.
- 8.16 The PSEA gives the PSC the responsibility to safeguard the impartiality of the public service. To fulfill this role, the PSC has created mechanisms and policy frameworks that ensure appointments will be insulated from political influence. In cases where political influence is suspected, only the PSC may conduct the investigation.

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<sup>78</sup>For details, see the PSC's 2006-2007 *Annual Report*, 23-24.

- 8.17 Part of the PSC's oversight responsibilities include approving candidacy requests from public servants. Under the PSEA, public servants may only seek nomination as, or be, candidates in a federal, provincial, territorial or municipal election if they have obtained permission from the PSC. The PSC may grant permission to be a candidate only if it is satisfied that the employee's ability to perform his or her duties in a politically impartial manner will not be impaired or be perceived to be impaired. The PSC also has the power to make permission conditional on an employee taking a leave of absence without pay while seeking nomination or before the election period. In the case of federal, provincial and territorial elections, public servants must take a leave of absence without pay during the election period and cease to be employed in the public service if they are elected. In the case of municipal elections, the PSC has the discretion to require public servants to take a leave of absence without pay during the election period. If a public servant is elected, the PSC may require the employee to take a leave of absence without pay while holding municipal office or require that the employee cease to be an employee of the public service.
- 8.18 The PSC is also responsible for investigating any allegations of improper political activity made against a public servant or a deputy head. If the PSC concludes that the allegation is substantiated, it may dismiss the employee or take any corrective action that it considers appropriate. While the PSEA has only been in force for a short time, the PSC has already begun to define proper and improper political activity.
- 8.19 In addition, the PSC provides guidance and direction on the regime governing the political activities of public servants. The PSC actively monitors both hiring activities in the public service and the political activities of public servants through various mechanisms, including reports from departments, review of media coverage and allegations. It reports its findings annually to Parliament so that Parliament and Canadians will continue to have confidence in the integrity of the public service.

## Ministers

- 8.20 Ministers play an important role in protecting political impartiality. The *Values and Ethics Code for the Public Service* explicitly states that "Ministers are responsible for ... maintaining the tradition of political neutrality of the Public Service and its continuing ability to provide professional, candid and frank advice".<sup>79</sup> Since 2002, prime ministers have instructed ministers publicly to respect the non-partisanship of the public service by refraining from engaging public servants in work that is outside their appropriate role.<sup>80</sup>
- 8.21 Ministers are expected to respect the non-partisan role of public servants. Under no circumstances should they ask public servants to participate in partisan activities. As noted above, ministers must also be sure that their staff members respect the tradition of a non-partisan public service. Ministers' staff do not have the authority to give direction to public servants and must not seek to engage public servants in work that is outside their proper role.<sup>81</sup>

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<sup>79</sup> *Values and Ethics Code for the Public Service*, (Ottawa: Canada Public Service Agency, 2007), 6-7.

<sup>80</sup> See editions of the *Guide for Ministers*, issued by Prime Ministers since 2002.

<sup>81</sup> For more information, see *Accountable Government: A Guide for Ministers and Secretaries of State 2007*, ([http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007\\_e.pdf](http://www.pco-bcp.gc.ca/docs/information/Publications/guidemin/ag-gr/2007/accountable-guide2007_e.pdf)).

## Members of Parliament and senators

- 8.22 Members of Parliament (MPs) and senators also have a responsibility in protecting the non-partisan nature of the public service. For example, when involving public servants in public events, it is important for MPs and senators to be sensitive to the fact that a public servant's appearance with a parliamentarian could be perceived as political activity. If an allegation of improper political activity is made, the public servant may be subject to investigation by the PSC. To help alleviate any potential risks to public service impartiality, invitations to public servants to appear at events with parliamentarians are normally extended through the deputy head.
- 8.23 Parliamentarians can also help protect public service impartiality by being mindful of the role of public servants appearing before parliamentary committees. Although debate continues on the practical ways in which public servants and deputy heads, in particular, are accountable and answerable to Parliament, it should be clear that the role of public servants is to explain policy, and not to defend it. Public servants have no role in defending the policy decisions made by the government or in debating matters of political controversy. Involving public servants in political debate would risk politicizing the professional, non-partisan public service.

## Other bodies protecting public service integrity

- 8.24 Although the mandate of the PSC has changed over the course of the last 100 years, its primary responsibility has always been to protect merit and non-partisanship in the public service. In the past 10 years or so, with the increasing attention and emphasis on accountability, other actors, such as the Public Sector Integrity Commissioner and the Conflict of Interest and Ethics Commissioner, have become involved in overseeing other areas of the public service. Such bodies are important partners in ensuring the integrity of the public service so that Canadians continue to have confidence in the public service.
- ***Conflict of Interest and Ethics Commissioner*** – The Conflict of Interest and Ethics Commissioner oversees conflict of interest rules for nearly all Governor in Council appointees, including deputy ministers. Conflict of interest rules deal primarily with furthering one's own private interest, usually financial, and do not specifically deal with the non-partisanship of the public service.
  - ***Public Sector Integrity Commissioner*** – The Public Sector Integrity Commissioner provides assistance to public servants wishing to disclose wrongdoing in the public service (usually referred to as “whistle-blowing”).<sup>82</sup> The Commissioner enhances confidence in public institutions by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings. As noted in the preamble to the *Public Servants Disclosure Protection Act*, the federal public administration is an important

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<sup>82</sup> According to the *Public Servants Disclosure Protection Act*, in relation to the role of the Public Sector Integrity Commissioner, the public sector includes departments and agencies, Crown Corporations, the Royal Canadian Mounted Police and other organizations of the public sector of Canada. It does not apply to the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment, which have their own mechanisms to deal with whistle-blowing (see section 2).

national institution and is a key part of the essential framework of Canada's parliamentary democracy. It is in the public interest to maintain and enhance public confidence in the integrity of public servants.

## 9 Looking ahead

- 9.1 Since 1908, Parliament, governments and the public service have taken care to build a merit-based, non-partisan public service. The introduction of the merit principle 100 hundred years ago ensured that public servants were appointed as a result of their qualifications, rather than their political alliances. Before then, "partisan loyalty was the overriding quality sought of appointees".<sup>83</sup> Merit helped to solidify the concept of the non-partisan, professional public servant and, along with the continued oversight activities of the PSC, has virtually eliminated political influence in hiring.<sup>84</sup>
- 9.2 This paper has provided a brief discussion on the evolution of impartiality in the public service. It highlights the significance of the public service to Canadian society and notes the importance of having a public service that fulfils its mandate in a non-partisan way. In addition, it has raised questions and issues for discussion and consideration. For example, it argues that the public service must reflect on how to maintain its impartiality as the complexity of public administration increases. Further, it asks how the public service determines the appropriate balance between its duty of loyalty and the need to be responsive to the government of the day. In considering how best to achieve this balance, a primary consideration must be the preservation of the non-partisan character of the public service. Finally, it outlines the roles and responsibilities of all stakeholders in protecting public service impartiality.
- 9.3 This paper is meant be part of a dialogue for raising awareness about the issues the 21<sup>st</sup> century public service will need to address. Careful thought and reflection will help to ensure that the government has the professional, impartial and permanent public service that it needs for the future.
- 9.4 Public servants will need to consider the effect of impartiality on their daily tasks. In particular, public servants should ensure that impartiality is a primary element when
  - working across organizational boundaries;
  - interacting with various groups, including the general public, interest groups and business concerning policies and programs; and
  - delivering services and products to the public.
- 9.5 Overall, impartiality must remain an essential element in the ongoing evolution of Canada's public service.

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<sup>83</sup> David E. Smith, *The Invisible Crown: The First Principle of Canadian Government*, (Toronto: University of Toronto Press, 1995), 88.

<sup>84</sup> The PSC's *2006-2007 Annual Report* confirmed that the PSC continues to find little direct political influence in the staffing system (see page 42).

# Annex

## Political impartiality and the Public Service Employment Act

### *Non-partisanship in the Public Service Employment Act*

Parliament has emphasized the importance of an impartial public service by highlighting non-partisanship in both the preamble of the *Public Service Employment Act* (PSEA) and in section 30 of the Act. The preamble recognizes that “Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded”. In section 30, Parliament set out that “appointments to or from within the public service shall be made on the basis of merit and must be free from political influence”.

Although the Act encourages the delegation of staffing authority, it does not allow the delegation of the PSC’s powers concerning political activities and the protection of political impartiality. For example, only the PSC can grant permission for candidacy requests. Additionally, if the PSC has reason to believe that an appointment or proposed appointment is not free from political influence, only the Commission may investigate the process. If the allegation is founded, the PSC can revoke the appointment or take any corrective action that it considers appropriate.

### *Part 7: Political activities*

Part 7 of the Act provides the framework for political activities. The Act limits the political activity of deputy heads to voting but allows all other public servants to participate in political activities outside the performance of their duties as public servants as long as the activities do not impair, or are not perceived as impairing, their ability to perform their duties in a politically impartial manner.

The Act defines political activities as follows:

- carrying on any activity in support of, within or in opposition to a political party;
- carrying on any activity in support of or in opposition to a candidate before or during an election period; or
- seeking nomination as or being a candidate in an election before or during the election period.

In guidance set out on its Web site, the PSC explains that “political activities” include a wide range of activities, including speaking at a political meeting, fundraising for a political party, working for a political candidate or wearing a campaign button.

Traditionally, the political activities governed by the PSEA were at the federal, provincial and territorial levels. With the coming into force of the current PSEA, the political activities regime was expanded to include municipal elections and the activities in the above definition. Parliament did this because of the growing number of links between municipal policy issues and the responsibilities of federal, provincial and territorial governments.

## *Part 7: Candidacy requests*

In protecting political impartiality, the PSC reviews candidacy requests from public servants. The Act is explicit: to seek nomination as or to be a candidate in an election, an employee must obtain permission from the PSC. The PSC reviews each permission request on a case-by-case basis, taking into consideration factors such as:

- the nature of the election, including the level (federal, provincial, territorial or municipal) and, in the case of municipal elections, the presence or absence of political parties;
- the nature of the employee's duties (for example, the type of responsibilities involved in the position, such as regulatory duties or the provision of policy advice); and
- the level and visibility of the employee's position (for example, the level in the organizational hierarchy, and the internal and external profiles of the position in relation to the duties performed).

## *Part 7: Allegations of improper political activity*

The PSEA makes the PSC responsible for investigating any allegation that an employee has failed to comply with the Act and, if the PSC concludes that the allegation is substantiated, it “may dismiss the employee or may take any corrective action it considers appropriate”.

Anyone may make allegations of improper political activity by public servants: the PSC, another public servant, a manager, a deputy head, a politician or a member of the public. In the case of deputy heads, the PSEA states that allegations may only be made to the PSC by a person who is or has been a candidate in an election. If the allegation is substantiated, the PSC reports its conclusion to the Governor in Council, which may dismiss the deputy head.

## *The PSC's approach to protecting impartiality*

In the preamble to the PSEA, Parliament specified that the values of merit and non-partisanship are to be independently safeguarded. To that end, the PSC has assumed the responsibility of monitoring the political impartiality of the public service. To fulfill its responsibilities and to manage the risks to non-partisanship, the PSC relies on information from various sources. In addition to confirming that appointments are based on merit and that public servants are not violating the political activities provisions of the PSEA, the PSC monitors and audits situations that may pose a risk to political impartiality (e.g., *Audit of the Movement of Public Servants between the Federal Public Service and Ministers' Offices*). The PSC also asks departments and agencies to report on their efforts to protect political impartiality.



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