

Public Governance and Accountability of Canadian Crown Corporations: Reformation or Transformation?

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Introduction

Changes in public governance and accountability for public administration by way of 'arm's length' agencies have been extensive in recent years. This is the case in Canada as elsewhere. At least three major sets of forces are driving the changes. First, there is the desire on the part of political executives to have increased control over those parts of the state apparatus that have been established at arm's length. These are the non-departmental bodies that stand in contrast to departments that are subject to direct executive-governance by ministers. Second, there have been the demands for increased transparency and 'public' accountability by all organs of the state, extending, of course, to those arm's length agencies that have been wholly or partially exempted from the most exacting processes of transparency and public accountability imposed on the central departments of the government. Third, there has been the articulation of so-called 'best practices' of 'corporate governance' emanating from the broader universe of private-sector management, given that most, if not all, arm's length agencies are governed and managed in ways that bear closer resemblance to the private sector than do ministerial departments. These best practices have gained prominence, paradoxically, as various jurisdictions have sought to address both the wrongdoings and the shortcomings of private corporation managers and boards of directors that have severely damaged the reputations of individual corporations as well as the credibility of regulatory frameworks for protecting the interests of shareholders. In Canadian public administration, it hardly need be said, the so-called 'sponsorship scandal' that has dominated Canadian government and politics in recent years has had a similar effect in bringing about reforms to public governance and accountability, including the Crown corporation sector.

These three sets of forces are not necessarily moving in the same direction, however. Enhanced political control of arm's length agencies, at a certain point, runs up against the best practices of corporate governance insofar as they require that boards of directors have adequate powers to direct, monitor and control the management of their organizations in the statutorily-mandated interests of those organizations. Increased transparency and accountability are also likely to run up against enhanced political control if political executive want increased power without a willingness to be clear about

the exercise of the respective authorities and responsibilities of ministers and boards, or their chief executive officers, and their respective *public* accountabilities.

In this paper I examine these changes as they have affected Canadian Crown corporations. There is the question whether what is changing should be deemed to be reformation or transformation of the regime or both.

Crown Corporations in the Architecture of the Canadian State

The most recent report on the Crown corporation universe by the Treasury Board identifies 43 parent Crown corporations and three wholly own subsidiaries that report as parent corporations for the purposes of the *Financial Administration Act* that governs the general crown corporation regime.¹ A 2007 report differs somewhat in its count of Crown corporations by listing only 35 Crown corporations among the 409 organizations of the “federal public administration” universe. In addition to Crown corporations, there are 20 “departments”, 66 “other portions of the core public administration” (both of which constitute a general category of “core public administration), 28 “separate agencies”, 3 “departmental corporations”, 3 “FAA [Financial Administration Act] Schedule 1.1” organizations, 237 “other federal organizations”, and 17 “special operating agencies”.²

There are numerous factors that account for why these organizations are listed in these categories, and, as the above-noted two counts illustrates, clearly defined organizational-design logic is difficult to discern in many instances. For instance, the Treasury Board Secretariat is a “department”, while the Privy Council Office is not (it is listed under “other portions of the core public administration”). And, then there is the case of the Canada Revenue Agency that is a “separate agency” and thus not listed in the two categories of “core public administration”, although it is under an even more general heading entitled “public service” (which excludes all but these three categories).

Although a great deal of organizational change occurs frequently, historical circumstances and an unwillingness to redesign the system in face of opposition to change from various constituencies loom large as explanations for the motley collection of categories of government agencies (a listing that includes at least some organizations that are beyond arm’s length, e.g. independent foundations such as the Canadian Foundation for Innovation). Canada is not alone in having a state whose parts have been created and designed in *ad hoc* ways. The most recent effort to put a logic around the state architecture – the Lambert Royal Commission on Financial Management and Accountability (1979) – failed to find a solution to the several odds and ends that clutter up the state apparatus but which, in presumably most instances, are necessary to carry out particular state functions.

¹ Canada, Treasury Board of Canada Secretariat, *Annual Report to Parliament on Crown Corporations and Other Corporate Interests of Canada*, 2006. www.tbs-sct.gc.ca/report/CROWN/06/cs-se-PR_e.asp

² Canada, Public Service Human Resources Management Agency, “Population Affiliation Report – Overview”, 2007-0502, www.hrma-agrh.gc.ca/pas-srp/overview-apercu_e.asp

At Arm's Length

For the purposes of this paper, however, the key considerations focus on the respective powers of ministers: individual ministers, the Treasury Board (as the only cabinet committee with statutory authority over public administration), and the Prime Minister and Government (as Governor in Council) vis-à-vis Crown corporations. Crown corporations are deemed to be arm's length organizations in that they operate at some distance from ministers, but not with complete autonomy or independence from them. This means that ministers have some powers to direct and control these government organizations, with 'powers' taken to mean both statutory authority and "responsibilities" (which all too often means several things). What "operating at some distance" means needs to be defined, of course, for it is in this way that the boundaries between the authorities of Crown corporations (their boards of directors and chief executive officers) are drawn in order that what ministers are responsible "for" and thus must account for and be held accountable can be stated with some clarity and precision.

The need for clarity and precision here is important for both governance and accountability purposes: who has the authority and responsibility to do what and who is responsible and accountable to whom and for what must be established. In these regards the longstanding distinction between 'ministerial departments', for which, under our constitutional conventions of Ministerial Responsibility, the responsible minister is deemed to be personally and fully responsible and accountable, and those other government organizations, explicitly designed to operate at arm's length from ministers, for which the practice of Ministerial Responsibility has had to find some accommodation.

But, it is not only for the purposes of public accountability that as much clarity as possible is required. The governance of these organizations is also at stake. Clarity in establishing what arm's length is to mean in practice is equally critical for the purposes of good governance, including the effectiveness of the distribution of power that is inherent in the design of arm's length government organizations. This is perhaps most obvious in the use of arm's length organizations for the purposes of quasi-judicial agencies (administrative tribunals and regulatory commissions) where the adjudicative powers and processes of these agencies are meant to exclude ministers, as political executives, from intervention in individual cases under consideration. In some respects, of course, these agencies can even be considered part of the judicial branch of government rather than the executive branch.

For Crown corporations, and other 'executive' organizations (that is excluding quasi-judicial agencies and advisory-only bodies), what is at stake in terms of good governance is not always so clear. This is especially the case where the distancing from ministers may be primarily if not exclusively for administrative purposes, with ministers fully in charge insofar as the executive governance of policies and programs is concerned, such as in the case of the Canada Revenue Agency or Parks Canada. In the case of Crown corporations, the logic is an arm's length relationship to ministers in order to advance the best interests of the corporation according to best judgements of a board of

directors that is assumed to be better qualified and better positioned than ministers (and their senior departmental officials) to govern the corporation and its management in pursuit of its statutory mandate, including the requirement to implement any ministerial directives as provided for by statute.

Ministers are not excluded from governance entirely; indeed they have significant powers. But, the logic of the design is predicated on a statutory distribution of powers that both restricts the executive discretion of ministers and requires them to exercise their powers in prescribed ways. In these respects, the Crown corporation regime distinguishes them from all other executive organizations, especially ministerial departments. Notwithstanding the logic, the regime itself has evolved over time and not always been accompanied with adequate clarity and widely accepted or shared understanding.

Crown Corporations as “Structural Heretics”

When J.E. Hodgetts published his classic study of the organization of the Canadian public service in 1971, he labeled Crown corporations “structural heretics”.³ He did so because, in his expert opinion, the governance and accountability regime did not give ministers sufficient powers to direct, control, and hold Crown corporations accountable; nor, therefore, did it enable Parliament to hold ministers, let alone the boards or CEOs of Crown corporations, accountable. In structural terms, Crown corporations did not conform to the doctrine of Ministerial Responsibility: they were *de jure* structural heretics.

By 1984, amendments to the *Financial Administration Act* addressed Hodgetts’ principal concerns by giving ministers sufficient powers to be able to direct and control Crown corporations and to hold them to account even while respecting the design of an arm’s length relationship between ministers and Crown corporations’ boards and CEOs.⁴ The most important powers in these regards are the powers to issue binding policy directives to boards and to approve their corporate plans and budgets. These are the most important because they give ministers ultimate control over policy direction and the use of public money. As a consequence, democratic control is secured: ministers have final say and can be held responsible and accountable by Parliament. At the same time, in order to respect the arm’s length design, the exercise of these powers is not only constrained in specified ways, such as the requirement that a minister consult the board before issuing a policy directive and the requirement that a directive be tabled in Parliament, it also constitutes an indirect method of executive control, such as the power to approve corporate plans and budgets whereby these governance documents are prepared by the corporation itself with ministers possessing a veto power. The traditional power of the government to appoint (and dismiss) the boards of directors and CEOs of Crown corporations also constitute significant powers, although they are not necessary to secure Ministerial responsibility.

³ J. E. Hodgetts, *The Canadian Public service 1867-1970* (Toronto: University of Toronto Press, 1971), Chapter 7.

⁴ See Allan Tupper and G. Bruce Doern, eds. *Privatization, Public policy and Public Corporations in Canada* (Montreal: Institute for Research on Public Policy, 1988, pp. 33-37.

By 2004, and even before the sponsorship scandal emerged in full force, the regime was once again in contention. In the Canadian government, on-going attention to a number of aspects of corporate governance and accountability in the aftermath of the 1984 reforms did not introduce any major changes. By 2000, scandals of various sorts had rocked the private-sector and ushered in a reform era focused on corporate governance and accountability for private-sector corporations. When the Auditor General reported that year on the governance of Crown corporations, he reported on significant weaknesses in three major areas: boards of directors in regard to capacities and powers; audit committees; and, the capacity of the government to perform its review, control and direction responsibilities.⁵ The identified shortcomings in these areas raise serious questions about the governance and accountability of Crown corporations as they go directly to issues of direction, control and accountability. If weaknesses in these three cornerstones of the FAA Crown corporation regime reach a certain level, then, notwithstanding the FAA, Crown corporations may well become *de facto* structural heretics.

Governance and Accountability: Regimes Matter!

Once the sponsorship scandal broke in full force with the Auditor General's audit of the sponsorship program in November 2003 it appeared that the AG's worst fears about these weaknesses were confirmed: several crown corporations were involved in the maladministration that was the sponsorship scandal. The AG concluded that "the financial and contracting policies of Crown corporations" had been "violated" and that "some officials of Crown corporations were knowing and willing participants" in the transactions that constituted the wrongdoings.⁶

As has been the case with revealed shortcomings in the governance and accountability regimes of the private sector, the sponsorship scandal demonstrated that the weaknesses in the Crown corporation governance and accountability regime could lead to more than poor performance by these government organizations in carrying out their mandates and fulfilling their public policy purposes. They could also lead to maladministration of the variety that constitutes wrongdoing, that is, something well beyond the inevitable errors, mistakes, or even instances of bad judgement with respect to risk management that are the daily fare in large and complex organizations and which require constant attention to correct and from which one should learn. Wrongdoing is something else altogether; it is the corruption of the organization. Continuous attention to the evolving needs and requirements of good public governance and accountability is required to address the possibilities of corruption.

The wrongdoing of the sponsorship scandal, however, did not occur because the Crown corporations in question were too far removed from ministers. It was not a matter of the arm's length being stretched to the point where ministers were excluded. On the

⁵ Canada, *Report of the Auditor General*, December 2000, Chapter 18, "Governance of Crown Corporations".

⁶ Canada, *Report of the Auditor General*, November 2003, Chapter 3, "The Sponsorship Program", p. 21.

contrary, too many Crown corporation officials were under the thumb of ministers and their political staff, aided and abetted by those departmental public servants doing their bidding. The wrongdoing occurred, in part, because the boundaries between these corporations and ministers, in place to achieve various public-policy purposes best served by governing and managing these organizations at arm's length from ministers, collapsed under the pressures of politicized intervention in their internal affairs. The boundaries were not respected by either side. The regime's intended distribution of powers between the boards, and their CEOs, and ministers failed to provide the intended checks and balances; ministers, their political staff and departmental officials ran roughshod over them and Crown corporation officials acquiesced or even cooperated willingly.

The sponsorship scandal raised serious questions about the likelihood that government-appointed boards will provide the kind of good public governance required of Crown corporations in the contemporary political environment that, on the one hand, demands enhanced transparency and accountability as well as non-partisanship in the administration of public business, and which, on the other, tempts ministers to use the resources of the state in a highly politicized manner.

The scandal also raises doubts about the capacity of boards appointed in this political manner to achieve the level of quality in skills and experience necessary to perform the oversight and accountability functions of boards in relation to their executive management. The quality and performance of audit committees are the best proxy for assessing this general set of functions and there have been serious concerns raised about this fundamental core requirement of good public governance in Crown corporations.

Finally, the scandal demonstrates that if ministers want to function in a politicized fashion, or perceive that they have no other choice in the current environment, they are not likely to pay other than lip-service to serious review and control from the centre of government – Treasury Board and its secretariat. Ministers also know that, in many, if not most, cases, they can best get what they want through informal means deployed behind closed doors. Creating the capacity to conduct serious review and control at the centre, while necessary for good public governance and accountability, raises the political risk of too much transparency and thus the prospect of too much contention *via* public accountability processes over the respective responsibilities of boards and ministers.

Pre-empting Gomery: Strengthening Public Governance and Accountability?

As in both the private sector and the public sector, a big scandal is invariably a catalyst for reform measures. Following the release of the Auditor General's 2003 audit, reform measures were quick to come from the Martin Liberal government as it attempted to get out in front on the reform agenda and, in so doing, pre-empt the recommendations that were to come from the Gomery commission of inquiry it had established.

First off the mark was a new, albeit interim, process for appointing the chief executive officers and chairs of Crown corporations so that the process will be "open,

professional and merit-based”.⁷ The process included: each board establishing a nominating committee, that could include “eminent persons” not on the board; the use of a private recruitment firm to assist the committee; public advertisements; committee recommendation to its board for the submission of a short list to the minister responsible, who selects from the list; and, parliamentary committee review of the person recommended by the minister to the Governor in Council. The new process was announced in a March, 2004 press release that, among other things, did not explain why some “eminent persons” might be need to be added to a board’s nominating committee (the implication being that it was assumed that some, if not all, boards may not have the expertise to recruit new directors); how the system met the stated criteria of reform of professional and merit-based if the minister got to decide on the short-list; or why a parliamentary committee would be given the power to review a nomination if the process was to professional and merit-based. (And, of course, in the Canadian tradition, begun in the mid-1980s, parliamentary committee review of nominations by ministers for Governor in Council appointments, it must be recalled, does not include the power to veto an appointment.)

This new but interim process was part of a larger effort to reform the Crown corporation regime. That effort came to fruition with the February, 2005 release of a document entitled *Meeting the Expectations of Canadians – Review of the Governance Framework for Canada’s Crown Corporations*.⁸ The subtitle was misleading insofar as this document constituted more than a review; it was a statement of government policy. The review concluded that: the accountability regime required clarification and strengthening; the appointment process for directors, chairs and CEOs had to be more professional, transparent and faster; boards needed to be better equipped to fulfill their stewardship responsibilities; the governance regimes of boards had to keep pace with best practice in the private sector; and, the activities and operations of corporations needed greater transparency (4-5).

A number of new measures were obviously required, including: a split in the positions of CEO and Chair of the Board; audit committees (with required competence); extending the *Access to Information Act* to all corporations; appointing the Auditor general to be the external auditor of all corporations. Three areas were especially important: clarifying accountability; ministerial policy statements; and, once again, the appointment process for chairs and CEOs as well as directors.

1. “Clarifying” Accountability

⁷ Canada, Treasury Board of Canada Secretariat, Release: “President of the Treasury Board Announces New Appointment Process for Top Executives of Crown Corporations”, March 15, 2004. In a few cases, the CEO is appointed by the board of directors.

⁸ Canada, Treasury Board of Canada Secretariat, February 17, 2005. http://www.tbs-sct.gc.ca/report/rev-exa/gfcc-cgse_e.asp.

The government expresses concern that the traditional expression of accountability, as also stated in the *Financial Administration Act*, that has Crown corporations “ultimately accountable, *through the appropriate Minister*, to Parliament for the conduct of its affairs,” (10)⁹ has “caused confusion about precisely to whom in government (sic) the corporation is accountable. For example, during the consultation phase of the review some CEOs and chairs voiced their belief that their accountability was to Parliament rather than to their responsible Minister.” (10)

In an effort to clarify matters, the government then states that a simple hierarchy exists: a Crown corporation CEO is accountable to the board of directors; the board is accountable to the minister; and the minister is accountable to Parliament. But, the minister is “accountable” only for “the discharge of his or her responsibilities” under the FAA and a corporation’s own act, “the legislative and regulatory framework applicable to the corporation”, and “the policy instruments of the government, including the provision of broad policy direction to the corporation.”(11) For “all activities of the corporation, including those pertaining to day-to-day operations”, the minister is merely “answerable”, that is, the minister has merely “the duty to inform and explain” but not to “account” which entails “accepting personal consequences for problems that... [he or she] caused or that could have been avoided or corrected if...[he or she] had acted properly.” (11)

By this interpretation, no one, neither minister nor corporation, is “accountable to Parliament” for “all activities of the corporation, including those pertaining to day-to-day operations.” No one, accordingly, can be held by Parliament to be personally responsible or culpable. There is, in other words, an accountability gap or deficit in the government’s new interpretation of what “accountable to Parliament, through a minister” means. The government accepts that “directors and senior executives of Crown corporations may facilitate Parliament’s capacity to scrutinize the activities of Crown corporations and hold the government to account by appearing before parliamentary committees on behalf of the corporation to answer questions when invited,” (12) but all they can be is “answerable”; they cannot be “accountable” to Parliament and Parliament cannot hold them “accountable”.

2. Being “Proactive”: Ministerial Policy Statements

The government concluded that the indirect approach of the 1984 regime, especially the approval of corporate/business plans and the instrument of policy directives, was too passive: “*a more proactive approach* to its relationship with Crown corporations is warranted.” (13)¹⁰ The government therefore decided that ministers should issue “a statement of priorities and accountabilities to Crown corporations”. These statements are not to be legally binding (unlike policy directives) but they are to drive what corporations do, so that what they do is consistent with the government’s priorities, objectives and expectations of the corporations. (12-14) It will “enunciate clearly the public policy goals of the organization as well as its commercial objectives and, if applicable, how they are interrelated.” (14)

⁹ The reference is to Section 88 of the *Financial Administration Act*. Emphasis added.

¹⁰ Emphasis added. The policy directive was also seen as a “tool of last resort” (13).

At the same time, the government says that this instrument “will not provide a vehicle for the responsible Minister to venture into specifics of programming, management of the corporation, or management and distribution of corporate assets.”(14) Precisely why that is deemed to be the case is not clarified, given that an enunciation of “policy goals of the organization” could conceivably be quite specific in its statement. More importantly, there is not an elaboration of why a non-legal device is being used when the distribution of powers and responsibilities between ministers and Crown corporations is statutorily based, in order to institute the arm’s length relationship in the first place. The interpretation of ministerial authority, responsibility and accountability noted above that views the arm’s length relationship as essentially hierarchical suggests that this new instrument will reinforce the understanding as hierarchical in character rather than as a statutory distribution of powers, albeit one in which ministers have the ultimate authority to direct.

3. The Appointments Process: Competence and Cronyism

The new government policy was based on a conclusion that “the appointment process needs to be further refined in order to achieve the correct balance.” (21) The balance was between “ensuring that the governance standards of its Crown corporations meet the highest standards” and having an appointment process that is “competency-based, professional and transparent”, on the one hand, and “the ability of the government to exercise its responsibilities as owner”, on the other. Again, the hierarchical model comes into play. Since the government is the “owner and shareholder”, it should be able to have “an appropriate role in the appointment of directors and chairs”, which turns out to mean the “final determination on the selection criteria and Board profiles” (21) and the appointment of chairs and directors. In brief, the government backtracked from the March 2004 process insofar as board chairs are concerned. On the other hand, it strengthened the role of the board in the appointment of CEOs by reducing the role of the government to a veto power over the preferred candidate who is recommended by the board’s nominating committee (22).

The 2005 policy document on Crown corporations was part of a package of new policy statements from the Martin Liberal government in its efforts to preempt the recommendations expected from the Gomery commission on the sponsorship scandal. The others dealt with more general issues of public governance and accountability.¹¹ In addition to imposing greater sanctions for non-compliance with the FAA, the government sought to tighten management rules and regulations, in order to suggest that the recent spate of scandals was due primarily to poor public management on the part of public servants or lax administrative controls, and to restate what had long been the orthodox Canadian government interpretation of ministerial responsibility, namely, that ministers

¹¹ Canada, Treasury Board of Canada Secretariat, “Management in the Government of Canada: A Commitment to Continuous Improvement,” “Review of the Responsibilities and Accountabilities of Ministers and Senior Officials – Meeting the Expectations of Canadians,” and “The Financial Administration Act: Responding to Non-Compliance – Meeting the Expectations of Canadians,” 2005-10-25.

were accountable to Parliament and public servants were not. The hierarchical model, in other words, was reasserted as a general principle of public accountability.

Gomery's Recommendations: Too Radical, Too Late

The Gomery commission accepted the Auditor General's judgement on the behaviour of various Crown corporation officials in the sponsorship scandal. It concluded that what the government had initiated on the appointments process was inadequate. It concluded that:

The numerous political appointments to crown corporations that have been made over the years have been a smudge on the integrity of the appointment process and have often stood in contradiction to the merit principle. The persons best qualified to appoint or to remove the chief executive of a Crown corporations are this most familiar with the corporation's operations and needs, the Board of Directors. Once named by the Government, the directors themselves are the most appropriate persons to fill any vacancies on the board due to retirement, death or removal.¹²

As with other recommendations in the Gomery commission's second report there is a certain lack of clarity and precision. However, the objective is clear: CEOs should be appointed by their boards and the boards themselves should appoint directors when new directors are required. Ministers, in short, should be removed from the process.¹³

Aside from its radical recommendations respecting appointments, the Gomery commission's report on recommendations came after the Conservative government took office in February 2006 in any event. And, they came after the Conservatives who took office after this election had staked out their own position in the 2005/2006 general election campaign. The Conservative platform attacked the Liberal government for appointing "insiders, in some cases completely unqualified" to Crown corporations. They promised to "establish a Public Appointments Commission to set merit-based requirements for appointments to government boards, commissions and agencies, to ensure that competitions for posts are widely publicized and fairly appointed".¹⁴

Canada's New Government: Reforms that Recycle Old Doctrine

¹² Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) p. 191

¹³ Confusingly, the commission also made a positive reference to the British model of a commissioner to oversee the public appointments made by ministers.

¹⁴ Conservative Party of Canada, "The Federal Accountability Act: Stephen Harper's commitment to Canadians to clean-up government," Ottawa, November 4, 2005, p. 5.

Once in office, the campaign platform became, in a fashion, the *Federal Accountability Act*. In the government's plan, the five-person Public Appointments Commission will: "oversee, monitor, and report on the selection process for Governor in Council appointments for agencies, boards, commissions and Crown corporations; set a code of practice to govern the selection process for Governor in Council appointments; approve the selection process that ministers propose to fill vacancies within their portfolio agencies; monitor selection processes to ensure that they are followed as approved, including audit and review of complaints; and, apprise the Prime Minister of compliance with the code of practice in an annual report to be tabled in Parliament."¹⁵

The legislation to give effect to this part of the plan received royal assent in December 2006. However, prior to that, in May 2006, the Prime Minister's proposed appointee to head the commission was rejected by the House of Commons Standing Committee on Government Operations and Estimates and Prime Minister Harper declined to appoint him or to take further action, even after the act creating the commission became law.¹⁶

Needless to say, there has been no acceptance of Gomery's recommendations respecting the board appointing their CEOs or boards themselves appointing new directors as required. Under the government's model, merit-based staffing of these positions is taken to mean selection processes that weed out the incompetent but still allow ministers to decide who among those deemed qualified are appointed. Partisan considerations are not thereby eliminated. Moreover, with the Public Appointments Commission in limbo, it appears that the appointment process is currently no different than it was under the Liberals at the time of their departure.

Equally significant, the Conservative government has also maintained the Liberal government insistence that a simple hierarchy exists within the state architecture whereby only ministers are accountable to Parliament and, therefore, that all other office holders, including boards of directors, are accountable to ministers, even if they report to Parliament "through a minister". The 2006 and 2007 editions of the government's statement on ministers' authority, responsibilities and accountabilities (for the Harper Conservative government entitled, *Accountable Government: A Guide for Ministers and Secretaries of State*,¹⁷) present the traditional Canadian government position in probably even more simple terms than previously.

This position has been required by the government's decision to claim that its much heralded new 'Accounting Officer' regime for deputy minister accountability is not really new at all. The Accounting Officer regime that states that deputy ministers are accountable for various specified matters of financial management before the Public

¹⁵ Canada, "Federal Accountability Action Plan: Turning a New Leaf," (Ottawa: President of the Treasury Board, 2006), p. 16.

¹⁶ See Lydia Scratch, "Governor in Council Appointments: Recent Changes and Suggestions for Reform," Library of Parliament, Canada, 17 May 2006, pp.10-11.

¹⁷ Ottawa: Privy Council Office, 2006, 2007.

Accounts Committee. It was a central part of the *Federal Accountability Act*, and was proposed by the conservatives in direct response to a perceived weakness in the accountability system as it played out in the sponsorship scandal. Once in office, however, the Conservatives have accepted the old doctrine. The government now claims, accordingly, that the ‘new’ scheme, does not, in fact, constitute any change at all in the structures of ministerial and deputy ministerial responsibility and accountability.

According to the government’s script, the deputy minister (or deputy heads of agencies, but not Crown corporations CEOs) “accounts before” the Public Accounts Committee but their accounts consist of “information or explanation”; they do not consist of a justification or defense of their actions. In short, they merely “answer” before the committee: their accountability, in other words, is not accountability at all, it is answerability. Answerability is what is required of ministers when they do not have the authority or responsibility for a matter, because someone else does, and, therefore they merely “answer” before Parliament.¹⁸ In answering, they are not required to justify or defend anything; they merely report on what happened. As previously noted, however, unless someone else is required to account, there is a gap or deficit in the accountability regime.

As might be expected, the Public Accounts Committee, which had recommended the accounting officer scheme in response to the sponsorship scandal and before the 2006 election, has a different view of things. It has sought to assert its parliamentary view of the new system for deputy ministers accounting before the committee.

The application of this doctrine on Ministerial Responsibility as it applies to crown corporations is stated as follows:

The responsible Minister is accountable for the overall effectiveness of non-departmental bodies [including Crown corporations] in his or her portfolio, as opposed to their day-to-day operations. But while their degree of independence from the portfolio Minister may vary, *all non-departmental bodies have a responsibility to answer to parliament.* Heads of non-departmental bodies and their officials appear before parliamentary committees and do so *in accordance with the principles of ministerial responsibility....*¹⁹

and,

Where Ministers do not have direct responsibility for addressing issues raised by Parliament [in respect top a crown corporation], they must nevertheless answer to Parliament (i.e., provide the necessary information and explanations) and ensure that the non-

¹⁸ “Parliamentary accountability requires that only the person to whom responsibility and authority are assigned can take action. *Ministers cannot be accountable for matters over which they have no authority.*” Canada, *Accountable Government*, 2007, p. 21. Emphasis added.

¹⁹ *Ibid.* p. 14. Emphasis added.

departmental body concerned does address those issues, as appropriate.²⁰

How a non-departmental body is to “address those issues” in ways that do not simply repeat the “answers” of ministers, given that these bodies merely “answer” before parliamentary committees, it not clear. The accountability gap or deficit remains.

Linking Accountability to Governance: Arm’s Length as Distributed Governance

But is this gap or deficit also a governance gap or deficit? Who is in charge, if the minister does not have “direct responsibility”? Traditionally, it would not have been deemed to be the minister, except in those extreme circumstances where a policy directive might be issued by the minister, and justified as a last resort, or where a corporation’s corporate or budget plan was not approved until the government was satisfied that appropriate action had been taken by the board or CEO in respect to such “issues”. Under the new regime, with its simple hierarchical model, ministers can issue statements of government policy objectives, priorities and expectations to corporations. As noted, however, they are not legally binding on a board; they merely help to improve communications from ministers to boards. Legally, in other words, boards are still at arm’s length.

The traditional reply to the question ‘who is in charge?’ would have been ‘the board’ or ‘the CEO’. It is still the correct reply. Governance at arm’s length means that the board has authority and responsibility for the public governance of a corporation and its management *in place of* a minister, although subject, of course, to the powers of ministers as set forth in the *Financial Administration Act* and in any constituent act of a particular corporation. It means that a board, in place of a minister, is a governance structure that is expected, first, to set the strategic direction of the corporation, within the framework of its mandate and, as relevant, addressing the government objectives, priorities and expectations; second, to oversee and monitor the management of the corporation by the CEO; and, third, to control the management of the organization, as required, by taking corrective action, as deemed necessary.

The need to have a board perform these governance functions as a matter of good public governance recognizes both that the responsible minister should not undertake these governance functions directly and that the minister cannot delegate these governance functions to his or her deputy minister. The use of a board to perform these governance functions in place of a minister is predicated on the assumption that the public interest in good governance in this instance is best advanced by having a board, and not a minister, perform them. It also acknowledges that they are executive-governance functions, and therefore are functions that should not be delegated to a minister’s deputy minister as a subordinate public servant. Deputy ministers are assigned important management responsibilities for public administration in Canadian, but they are not given executive-governance responsibilities. In the Canadian government, these

²⁰ *Ibid.*, p.21.

executive-governance responsibilities reside with ministers, including the prime minister and the Treasury Board, and the Public Service Commission.

Crown corporations are not structural heretics in any constitutional sense simply because some executive-governance authority and responsibility is assigned to public office-holders other than ministers, so long as ministers ultimately have sufficient authority to secure democratic control over public administration as may be required. Since 1984 that condition has been met in respect to Crown corporations. The fact that ministers may not have exercised the powers that they do possess in an effective or proper manner does not mean that the regime is deficient. Unfortunately, government oversight has left much to be desired. Appointments to secure good governance have left much to be desired. And, given these two major deficiencies, it is not surprising that effective government policy direction has suffered as well.²¹ But, as matters stand, the Canadian regime is still one of “distributed governance”²² where executive-governance authority is not vested exclusively with ministers.

Issues for Reform

Ultimately, what is at issue is whether ministers should seek greater control over Crown corporations, and thus transform them into quasi-departments and thus not at arm’s length, or reform them as Crown corporations so that they can effectively function at arm’s length, with greater autonomy from ministers, more authority over management, and increased accountability before Parliament. The two approaches are obviously in tension, and, indeed, the contemporary pressures on government, in Canada and elsewhere, push in both directions.

Governments everywhere are tempted to take even greater control over government in all its dimensions of public governance and management because the intensity of external political pressures on governments has increased significantly. These pressures emanate from, among other things:

- increased transparency of government resulting from the contemporary electronic communications revolution;
- the greater assertiveness and aggressiveness of the mass media resulting from greater competition;
- the demand for, and expectation of, openness that come with the advent of a recognition of the public’s right of access to government information;
- the creation or expansion of a host of independent audit and review agencies;
- the public exposure of ministers and public servants before parliamentary committees as well as before public consultation or engagement exercises;

²¹ Canada, Report of the Auditor General, December 2000, Chapter 18, “Governance of Crown Corporations”; February 2005, Chapter 7, “Governance of Crown Corporations”.

²² Organization for Economic Co-operation and Development, *Distributed Public Governance: Agencies, Authorities and Other Government Bodies* (Paris: OECD, 2002).

- a proliferation of interest and advocacy groups as well as partisan and independent think tanks; and, more generally,
- a less deferential citizenry, with fewer party-partisans, that demands greater public transparency and accountability.

These pressures are clearly not unique to Canada. They are international phenomena. Not all governments are affected exactly the same way, of course, since they have different institutional arrangements and political practices, even in the family of Westminster systems. In Canada, these pressures have produced what I have elsewhere called the New Public Governance²³ and which encompass the following developments:

- the concentration of power under the prime minister and her or his court of a handful of a few select ministers, political aides, and public servants;
- the enhanced number, roles and influence of political staff;
- the increased personal attention by the prime minister to the appointment of senior public servants where the prime minister has the power to appoint;
- the increased pressure on the public service to provide a pro-government spin on government communications; and,
- the increased expectation that public servants demonstrate enthusiasm for the government's agenda.

In this context it should come as no surprise that the government would not seek to extend its control over crown corporations, and other non-departmental government agencies. Governments are unwilling to give up control over appointments, especially to boards of directors, because they can use the power to reward fellow partisans, as in patronage appointments, which is also a type of control, and because they can expect those so appointed, as partisan cronies, not only to follow general government directions but also to be open to informal communications of a kind that enables ministers to get done what they want done without having to be fully transparent.

All of this has long been accepted as part of the relationship between Crown corporation boards and ministers. In an era of enhanced expectations about transparency, however, "informal communications" can too easily be, and/or be viewed as, communications between partisans, especially where it appears that the partisan interests of the governing party have been advanced by a corporation's activities. To some extent, of course, the Martin Liberal government itself has acknowledged this concern and risk by seeking to have government intentions made public, by way of formal statements of objectives, priorities and expectations. It also accounts, in part, why the Martin Liberal government would adopt a process whereby CEOs would be appointed by their boards,

²³ Peter Aucoin, "After New Public Governance goes awry in Canada: Changing the way government works or simply changing the guard?", *Public Sector* (Institute of Public Administration of New Zealand), Vol. 29 (2), 2006, 3-6. Also see "The Staffing and Evaluation of Canadian Deputy Ministers in Comparative Westminster Perspective," Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Research Studies*, (Ottawa: Public Works and Government services, 2006), Vol. 1, pp. 97-336.

subject only to a government veto. The other part of the explanation lies in the fact that good corporate governance practice requires that the CEO be appointed by the board, subject to the board's strategic direction, oversight and control, and fully accountable to it.

Government appointment of directors, however, is not a good recipe for good public governance of Crown corporations or for good public accountability for crown corporations. Establishing mechanisms and procedures to eliminate the patently unqualified, such as expected of the yet-to-be-formed Public Appointments Commission (or various kinds of screening committees used in several provincial governments), does address one problem that invariably comes with unfettered patronage appointments, namely, the incompetents who are thereby appointed to public office. But it does not address the problem of the appointment of partisans, however qualified, because they are partisans of the governing party. The appointment of fellow partisans by ministers, even where ministers select from a list of candidates deemed qualified by a non-partisan process, can become a form of cronyism that is equally corruptive of good governance if it increases the risk that these partisan directors place the partisan interests of the governing party above the corporation's best interests that they are required to promote as directors. The British experience with its reforms in the form of the Commissioner of Public Appointments indicates that, while great progress can be made in raising the quality of appointees and ensuring a minimum level of competence with a more rigorous process, the risk of partisanship is not removed when ministers still get to select who to appoint from a list.²⁴

Partisan appointments of this second type, that is, the appointment of qualified partisans, are defended on the ground that they enable a government to appoint those sympathetic to its policy agenda and that a government should have the right to expect directors to be sympathetic to its agenda. Ministers have ultimate responsibility for these organizations. This assumes, however, either that ministers are unable or unwilling to communicate their objectives to boards *via* the instruments already at their disposal or that boards cannot be trusted to direct their corporations in ways that meet the expectations of the government as enunciated *via* these instruments. As a consequence or one or both of these assumptions, it follows that a board must be politicized, or at least be subject to a possible politicization, in order to allow the government to pursue its agenda. The implication is that the very idea of a board operating at arm's length is suspect as a good organization design for public governance of Crown corporations. It is suspect because it is assumed that its *formal structure* of an arm's length relationship between boards and ministers is inadequate; it must be breached by an *informal practice* of appointing partisan directors.

The politicization of boards, even with qualified directors, constitutes a political risk of partisan corruption, of the sort evidenced in the sponsorship scandal. The best way to eliminate or minimize this risk is to adopt an independent staffing process, such as was

²⁴ Peter Aucoin and Elizabeth Goodyear-Grant, "Designing a merit-based process for appointing boards of ABCs: Lessons from the Nova Scotia reform experience," *Canadian Public Administration*, Vol 45 (3), Fall 2002, pp. 301-327.

developed for the professional public service almost a century ago. An independent staffing process for the appointment of directors would require the removal of the appointment power from ministers in favour of appointments by an independent body, such as the Public Service Commission or a Public Appointments Commission (if it stands independent of ministers), or by each board itself, as was recommended by Gomery. If each board were to appoint its own new directors, as required by vacancies, there could be added a veto power for ministers, as was established as government policy by the Martin Liberal government in the case of boards appointing their own CEO.

An independent appointment process would not mean that partisans of the governing party could not be appointed to corporation boards. It would merely mean that ministers would not appoint them. Moreover, independent staffing of boards could be done in a number of ways; it would not necessarily be restricted to competitions to appoint the most qualified candidate for every vacancy, as is the norm in public-service staffing. There are numerous methods by which appointments could be made that meet the best standards of good corporate practice, including various diversity and representational requirements, as well as the practical need for timely appointments using cost-efficient procedures. In addition to the reforms adopted by the Martin Liberal government and the proposed reforms of the Harper Conservative government, reforms in various jurisdictions, including Britain, New Zealand, and some Canadian provinces, as well as numerous best practice guides in several jurisdictions all point in the direction of diminished discretion of ministers in the appointment process. Independent appointments could very well constitute the next step in reforms.

Independently appointed boards would reinforce the policy of having boards appoint (and dismiss), and hold to account, their own CEO, as is the current practice with a handful of Canadian Crown corporation boards and as is the case in New Zealand for crown companies, including state-owned enterprises.²⁵ A major review of non-department bodies in Australia in 2003 recommended strongly that executive-governance boards only be used when they can be given sufficient governance powers, and the appointment, dismissal and oversight of the CEO was the signaled out as the litmus test in this regard.²⁶ If the governance of management, including strategic direction, oversight and control, is to be effective, a board needs to have full powers over its CEO and the CEO must be fully accountable to the board.

²⁵ For the New Zealand regime, see New Zealand, Crown Company Monitoring Advisory Unit, *Protecting and Enhancing Shareholder Value*, 2002 (www.ccmaw.govt.nz) and Ron Hamilton, "Corporate Governance in Government-Owned Companies in New Zealand: A Stock-Take," *The Asia Pacific Journal of Public Administration*, Vol. 27 (2), December 2005, 239-262.

²⁶ Commonwealth of Australia, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig Report after its author, John Uhrig), Canberra, 2003. For what can only be a mysterious political reason, Uhrig did not recommend that boards appoint their CEOs despite using the strongest possible language that such a power was an imperative of good corporate governance! Stephen Bartos says Uhrig was "firmly warned off", "The Uhrig Report: Damp Squid or Ticking Timebomb?," *Australian Journal of Public Administration*, Vol 64 (1), March 2005, 95-99. Also see Meredith Edwards, "Corporate Governance in the Public sector from Theory to Practice," *Public Administration Today*, Issue 9, October-December 2006, pp. 5-11; and, Cosmo Howard and Robyn Seth-Purdie, "Governance Issues for Public Sector Boards," *Australian Journal of Public Administration*, Vol. 64 (3), September 2005, pp. 56-68.

Having the CEO appointed (and dismissed) by, and accountable to, the government (in the Canadian case: the Responsible Minister and Prime Minister) is a recipe for bad governance, as practice in Canada and elsewhere has demonstrated. As the evidence everywhere confirms, it cannot but result in confusion, rather than clarity, over roles and responsibilities. Further, it diminishes not only the role of the board but also its incentive to perform its duties. Finally, it is likely to diminish the prospect of attracting quality directors. In short, as the logic of the Uhrig report on the Australian situation suggests, if ministers want to direct and control Crown corporations by exercising executive management over CEOs, they should rethink the use of the corporate-board organizational design.

With its CEO fully accountable to her or his board, there is still the need for a public accounting of the management of Crown corporations. Boards do report through a minister to Parliament, as noted, and their CEOs, as well as their chairs, do appear before parliamentary committees. While boards, through their chair, must account publicly before these committees for the performance of their corporation, the accounting of the CEO would be best organized under the Accounting Officer scheme that applies to deputy ministers of departments and deputy heads of agencies. Although CEOs will have some differences in the authorities and responsibilities (as do deputy ministers and deputy heads), a public accounting before the Public Accounts Committee would serve to assist boards in holding their CEO to account, in the same way that ministers are better able to hold their deputies to account as a result of their appearing before the Public Accounts Committee on matters of financial management. As with ministers, boards focus, at best, on strategic direction, oversight and control. They do not engage directly in day-to-day management; that is the role and responsibility of the CEO and her or his management team.²⁷

Conclusion

The use of the corporate-governance model for the public governance and accountability of Crown corporations assumes that boards, and their management, operate at arm's length so that these boards may substitute for ministers, at least in part, in respect to executive-governance. The model puts ministers at some distance but obviously does not remove them altogether. Rather, the Crown corporation regime specifies the powers and instruments of ministers and prescribes how they are to be used. At present, there are competing pressures pushing governments in different directions with respect to these organizations – to transform them by enhancing ministerial control; to reform them by diminishing ministerial powers.

Although it perhaps should be expected that the paradox of these competing forces will not soon abate, the likelihood of finding an appropriate balance in the near future is diminished by the continuing uncertainty about our basic constitutional system

²⁷ This assumes that the positions of board chair and CEO are not held by the same person. This has not been the norm in Canada, and the *Federal Accountability Act* has eliminated it in the few cases where it still was the case.

of Ministerial Responsibility as applied to both the professional public service and arm's length non-departmental agencies, including Crown corporations.²⁸

²⁸ Peter Aucoin and Mark D. Jarvis, *Modernizing Government Accountability: A Framework for Reform* (Ottawa: Canada School of Public Service, 2005). Although this book was published before the 2006 *Federal Accountability Act*, its arguments remain relevant since the Harper Conservative government's interpretation of Ministerial Responsibility, as outlined in its previously cited guidance documents, asserts that essentially nothing has changed.