

Authority and Accountability: Reflections on the Gomery Report

Notes for Remarks to Agency Heads
by
James R. Mitchell

March 2, 2006

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Introduction

I want to begin by thanking Ian Wilson and Jean-Guy Fleury for giving me this opportunity to speak to you today. As some of you know, I've been thinking about accountability and related matters for a long time, and all the more so in recent months.

Like you, I read the second Gomery Report with great interest. I had been hoping to find a suitable opportunity to collect my thoughts on the issues raised by the report, and this forum is just about perfect for that purpose.

I do not intend today to review the second report in its entirety. There is simply too much there to cover in a 30-minute talk. I will say only that:

- some of Justice Gomery's 18 recommendations are sensible and long-overdue (e.g., the recommendations on more resources for Parliamentary committees; and for tighter controls and greater transparency on reserve funds);
- some, such as the idea of a *Code of Conduct for Exempt Staff*, seem sensible and worthy of detailed study;
- and some, such as his proposals for appointing and managing Deputy Ministers, reveal— in my view — a serious misunderstanding of the realities and dynamics of Westminster government.

But I'll let others talk about those issues on other occasions.

Instead, I want to talk today about two issues that are really the focus of the second report, and that I believe are fundamental not only to the workings of our system of Cabinet government but also to effective public management. Those issues are *authority* and *accountability*.

I want to make essentially three points today, based on my examination of what the Gomery Report says about these two fundamental issues:

- 1. My first point is that Gomery has got it wrong on authority and accountability.**
 - He is wrong on the law and he is wrong on theory. It's not just that Deputies should not be accountable in the ways he proposes. they cannot be.
- 2. Second, although he purports to be fixing problems in the way government works (he talks of "a rebalancing of the respective roles of ... Parliament and the executive"), the recommendations in his report would actually *change our system of government in profound ways.***
 - He would *divide* responsibility within the executive between Ministers and officials, and make each accountable, in different ways, to Parliament for different aspects of what is done in government.
 - He would do this by fencing off a much smaller area of responsibility for Ministers and creating, for the first time, a constitutionally independent status for the Public Service.

- This is a fundamental change in our system. Yet the implications – both theoretical and practical– of doing what he recommends are either ignored in the report, or sloughed off as inconsequential.

3. Third, his conclusions and recommendations on these fundamental issues of authority and accountability seem to be based on a managerialist¹ view of government to which few in Ottawa (or elsewhere) would subscribe.

Those are the three propositions around which I will focus my remarks today. There is a lot more worth talking about in the report, and a lot more that could be said about these two issues of authority and accountability, but I want to keep this talk to a reasonable length. There will be time for questions and discussion after I've finished.

The Report

Let's start with the report. In developing his views and coming to the recommendations that he did, Judge Gomery had the benefit of a distinguished panel of academic and other advisors, several of whom are good friends of mine.

His academic advisors wrote 17 papers on the issues addressed in the second report. All are worth reading and some are first class. I commend to you in particular the pieces by David Smith on accountability, Sharon Sutherland on the Clerk of the Privy Council, Jim Hurley on Westminster government and Jacques Bourgault on Deputies.

I mention these background papers, but I want you to be aware that in what follows, I will *not* be talking about the advisors' views on our two issues of authority accountability. Rather, I will be talking about what the judge says in the report.

After all, it's his report and, to borrow a phrase, he's responsible for it – not the advisors².

Gomery's conclusions and recommendations must make sense on their own, and not only by implied reference to complex arguments in the background documents. That is his responsibility to us, the interested readers, and to the citizens of Canada who will be affected by any changes that follow from the report.

After all, it's their government.

Authority and Accountability

When I read the second report, the question in my mind was, "does Gomery intend to fix the current problems in our system of government, or does he want to change the system itself?"

We know – or we think we know – how our system of government works and how it's supposed to work. We all have our views on what went wrong in Sponsorship, and we all have our own ideas on what should be done to fix those problems.

¹ By the term 'managerialist', I mean the view that it is possible to make a clear and lasting distinction within government between policy and administration and on that basis to distinguish clearly between the responsibilities and accountabilities of Ministers and those of officials.

² Moreover, and as some of you may already know, the advisors do not all agree. Indeed, on the key issue of the accountability of Ministers and Deputies, the weight of opinion in the three volumes actually appears to lie on the 'traditional' view rather than the new one propounded by the judge. But Gomery was asked to give us his conclusions and his recommendations, and that's what we have before us.

But if the result of Gomery's recommendations would be a system of government that is really quite different, something with which we have had no experience, then we need to reflect for a minute on what the new system would mean, how it would work in practice, and whether it would work any better than what we have today.

At several places in his report, the judge says he wants to clarify the respective responsibilities of Ministers and Deputy Ministers. He also talks in many places about "restoring accountability" and about "restoring and strengthening the capacity of Parliament to hold the Government to account" (p. 8).

The Basic Argument

Gomery's argument about authority and accountability has essentially three steps:

1. First, he claims there are large areas of public administration in the main stream of government that belong exclusively to the Public Service (actually, to Deputy Ministers). In his view, these are areas over which Ministers have no authority and for which Ministers are not responsible to Parliament.
 - As a general proposition, this is simply not true, as I will explain shortly.
2. Second, he assumes that if you have a legal responsibility or authority, regardless of where you got it from, you are *ipso facto* accountable to Parliament for the exercise of that legal responsibility or authority.
 - Again, this is simply not true.
3. Third, he argues that if Ministers wish to interfere in the areas for which Deputies are (allegedly) responsible, they should be able to do so only by way of written instructions that must be made accessible to the Auditor General.
 - This is unnecessary and potentially dangerous, as I will explain toward the end of my remarks.

Let's start with the first assumption.

Gomery claims that Deputies are assigned their authorities for management and administration *directly* under the law. From this he draws the conclusion that they must be accountable to Parliament for the exercise of those authorities.

The truth is, Deputies obtain their authorities for management and administration by way of *delegation* from the Treasury Board or from other statutory bodies such as the Public Service Commission.

Indeed, if there is one thing that is established explicitly and conclusively in the *Financial Administration Act*, it is that responsibility for financial and human resources management in the Public Service is assigned first and foremost to *Ministers* – in fact, to a statutory committee of Ministers called the Treasury Board.

- It is the Treasury Board that has the authority under the law, and the Treasury Board that is empowered to *delegate* its authority in those areas to Deputies.

- Read the *FAA* (I'm sure you have already). It's there in black and white in Section 7.

But think also about departmental statutes. Don't forget that every departmental statute starts off by saying,

"There is hereby established a department of the Government of Canada called the Department of [whatever] over which the Minister of [whatever] appointed by commission under the Great Seal shall preside.

"The Minister holds office during pleasure and has the management and direction of the Department."

Remember that – Parliament makes the Minister *legally* responsible for "the management and direction of the department".

This is important, but it's hardly surprising. Because the law is simply expressing what we were taught as children and what we all know in our bones today. The Minister is in charge, and under our constitution, if the Minister is in charge, he or she will have to answer to Parliament for the exercise of that responsibility. That is basic Westminster theory, and it is one of the principles that make this country a democracy.

In practice, of course, it is Deputies and not Ministers who actually manage the departments of government. And that's the way it should be. Ministers have neither the time nor (as a rule) the skills to manage large institutions. And there are many other reasons under our Constitution why a permanent, professional Public Service is essential to good government.

There are of course some exceptions which only serve to prove the rule.

- In a few cases, officials *are* given responsibilities directly under the law – under the *Customs Act*, for example, and the powers assigned to the Superintendent of Bankruptcy or to the Commissioner of Competition under the *Competition Act*.
- And recently all deputy heads were assigned responsibilities for awards and recognition, discipline and some other personnel matters under the amendments to the *FAA*.

But as a general matter, the law is clear. *Parliament has made a statutory committee of Ministers – the Treasury Board – legally responsible for financial and (almost all) human resource management in the Public Service.* And it has given the Treasury Board the power to delegate its authority and its powers in these areas to Deputy Ministers.

- The authority chain is clear – Parliament to Ministers; Ministers to Deputies; Deputies to their subordinate officials.
- That's not simply "the traditional view" – it's the law.

From this it follows, in law and in constitutional theory, that Deputies are *accountable to Ministers* for the management of their departments:

- To their own Minister individually, pursuant to the departmental statute and the *Interpretation Act*;

- And to Ministers collectively (i.e., the Treasury Board) for the exercise of management authorities that have been delegated to them by the Board.

Deputies cannot be said in general to be accountable, in any formal or legal sense, to Parliament. They are *deputies* to the Minister – not CEO's of their departments.

So Gomery has no foundation in law or theory for what he says about the overall management responsibilities and accountabilities of Deputies.

The Accounting Officer

But in fairness to Gomery, there is obviously something important at issue here. The Commission's hearings did reveal confusion and misunderstanding about accountability. Ministers and senior officials did *not* stand up and take appropriate responsibility for what happened in the Sponsorship affair. Canadians were rightly frustrated and angry about that.

This is where the confusion lies. And in a sense, the Gomery report may help us to see beyond the hair-splitting disputes that in recent years have tended to obscure the issue of accountability rather than clarifying it. Because in practical terms, Deputies have long done precisely what Gomery seems to be seeking.

Gomery is clearly right that Parliament has a significant interest in good public administration. And he rightly observes that, it is Deputies, and not Ministers who in every practical sense are in charge of running departments³.

This is what Parliamentarians understand. And they expect, quite properly, that Deputies will appear before the Public Accounts Committee (and other standing committees) to answer serious questions on their administration of their departments.

That's exactly what happens today.

- Deputies do appear before the PAC and other committees to talk about the administration of their departments.
- They answer questions. They exercise and accept, in a very practical sense, their responsibility for the management of their departments.
- And if things do not go well (e.g., as on Al-Mashat, or the HRDC audit or Sponsorship) then such an appearance can be quite uncomfortable.

So, if all Gomery means in talking about the 'accountability' of Deputies is that they should appear before the Public Accounts Committee to undergo rigorous questioning about the administration of their departments, then it doesn't matter whether that is called 'accountability *before*', or 'accountability *to*' or just 'answerability'.

³ In describing his consultations with Canadians, Gomery says "there was general agreement that, overall, the Deputy Minister is the person responsible for day-to-day management issues in a department, including delivery of programs, and the Minister is responsible for overall policy decisions." (page 36) This is certainly true and entirely consistent with constitutional theory. What is not true is that the Minister's responsibility stops at policy. Indeed, there are many areas where Ministers play an active role in program decisions (on immigration matters, for example), just as Deputies play an active role in policy development.

- It doesn't make any difference, because it's done already. And the more serious and better-informed the questions in committee, the better for all concerned.⁴
- Indeed, almost everything that Gomery recommends in a practical sense about Deputies, Ministers, and the Public Accounts Committee is being done already.⁵

If all he wants to introduce by way of the term 'Accounting Officer' is explicit recognition of current practice, then I see no reason to object.

What is intended, then, if one adds the further requirement that Deputies should be formally *accountable* to the PAC? What is the objective? Is it to get them to take committee appearances seriously? They do already, as all of you know.

If having Deputies appear before the PAC means that Ministers will henceforth be able to stand up in the House and say "not my responsibility" when things go wrong, then there is a problem.⁶

If you want to claim that Deputies have a responsibility in these management areas *in their own right*, one for which Ministers are not accountable to Parliament, then you're looking for something quite different than a rebalancing. You're seeking to *change* our system of government, not fix it.

Gomery's view on authority and accountability is quite explicit. He says:

- "In certain areas of management ... responsibility belongs exclusively to public servants. Accountability for actions taken under these powers also belongs exclusively to public servants". (pp 69-70)
- "Parliament has explicitly and unequivocally assigned broad powers for administration to the Public Service". (pp 71-2)
- "Parliament has established areas of responsibility for administrative action which are the responsibility of public servants, not Ministers". (p. 72)

⁴ Gomery recommends, and I have long supported, the provision of increased staff and resources to Parliamentary Committees. This said, some experienced Parliamentarians have argued that resources are not really the issue, that most committee staffs are quite good but their work is largely ignored by MPs. On this view, while more and better staff would be useful, they would only have an impact if MPs felt they could make a real difference through their committee work and so devoted more time to doing their homework on subjects to be dealt with by the committee.

⁵ If what you want is a forum where Members of Parliament can inquire vigorously into matters of administration, you've got it already, as Arthur Kroeger and others (including me) have explained on many occasions. If you want a forum for real political accountability, you have the House of Commons. And if you want a forum for management accountability, you have the Treasury Board and the Deputy's relationship with the Clerk. It's all there already.

⁶ Arthur Kroeger points out that, in such a situation, Parliament would in effect acquire the right to instruct officials, just as it currently has the right to instruct Ministers. The consequences for coherent governance of such an innovation should give everyone pause. Even the Public Accounts Committee in its 2005 report recognized that this would simply be unworkable. But officials have to get their authority from somewhere, and if it isn't from Ministers then it must be Parliament.

- “Ministers cannot be held accountable for actions performed by Deputy Ministers under their own powers, any more than Ministers can be held accountable for the actions that independent boards, commissions and corporations take under powers they possess in their own right”. (p. 99)

An Independent Public Service?

This novel view of authority and accountability would separate Ministers from the Public Service. It would encourage Ministers to refuse to accept responsibility for matters for which they are in fact responsible and accountable under the law.

If you want to make Canadians (and Parliamentarians) angry, this is the way to do it.⁷

This proposed separation of the Public Service from the Ministry shows up in other ways in the report. Gomery talks, for example, about “tensions between the duty of the Public Service to serve the Government and its ethical obligation to promote the public interest.” (p. 62)

Now, this too is new doctrine. Not because he assumes that public servants are in the business of pursuing the public interest, but rather because he clearly assumes that they are entitled to an *independent* view of what constitutes the public interest on any given policy matter. For him, there is the government’s view, and there is the Public Service’s view, and sometimes they conflict.

That’s odd. I was always taught that in a democracy, the public interest was something for Ministers (acting with the support of Parliament) to decide, and not for officials. Officials are responsible for advising Ministers on where the public interest lies, but in the end there can be no real conflict because in the end, Ministers decide⁸.

(Recall what Michael Wilson said when questioned about his views on Iraq, shortly after his recent appointment as Ambassador to the U.S. was announced. Very wisely, he said something to this effect: “it doesn’t matter what my views were as a private citizen. Now I’m a public servant. I follow the position of the government”.)

Settling Disagreements

There is one further point I want to mention under the broad heading of accountability.

What happens, under the new Gomery doctrine, when there is a disagreement between Minister and a Deputy over a proposed course of action? That is, when a Minister wishes to do something that falls within what Gomery sees as the Deputy’s domain of responsibility – i.e., administration?

⁷ Think, for example, of the vital role of the Minister as the lightning rod for complaints from the public and other MPs in cases involving poor service from the department, or bureaucratic indifference. or maladministration. On the Gomery view, people would be sent to complain to the officials responsible, because the Minister would not be.

⁸ There is a long-established view, with which I agree, that the permanent Public Service in the Westminster system is in an important sense the custodian of ‘good government’. That is, it has a responsibility not just to provide professional advice and support to the Government of the day, but also to be there ready to provide the same quality of advice and support to future Governments. That continuity role is certainly a matter of public interest. But this is very different from the assumption that there may be active conflict between the Public Service and the Government on where the public interest lies on a particular policy issue.

According to Gomery, “a formal process is needed to resolve disagreements when a Deputy Minister believes that a course of action proposed by a Minister conflicts with his or her statutory responsibilities”. (page 103). What he recommends is

“... a formal process by which a Minister is able to over-rule a proposed course of action in an area of jurisdiction over which the Deputy Minister possesses statutory or delegated powers. The decision of the Minister should be recorded in correspondence to be transmitted by the Deputy Minister concerned to the Comptroller General in the Treasury Board Secretariat, and be available there for examination by the Office of the Auditor General.” (page 105)

I confess I have a hard time seeing how this would work in practice. The ostensible reason is to respect the ultimate policy authority of the Minister. And one might see a kind of parallel with the directive power of the government in relation to Crown corporations, where the goal is to protect the board when it is directed to do something that it would otherwise deem not to be in the best interests of the corporation.

But the relationship between a Minister and Deputy is very different from that of a Minister and a Crown. A Deputy is part of the Minister⁹; a Crown corporation is legally separate.

Of course, one can imagine cases where a Minister wished to do something that a Deputy felt was not permitted under the *FAA* or some other statute or a policy of the Treasury Board.

- Here the Deputy’s duty is clear – he gives his best advice, and if the Minister insists, he explains to the Minister that it can’t be done that way, and instead tries to figure out a way in which what the Minister wants can be done in accordance with law and policy.
- If this still isn’t possible, the Deputy calls the Clerk or the Secretary of the Treasury Board or the Comptroller General for advice. No ministerial ‘over-ride’ is required or even possible (because, after all, the Minister can’t oblige someone to break the law).

Where matters become more difficult is in terms of the rather vague concepts of “economy and efficiency”, management objectives that Gomery sees as falling clearly under the purview of the Deputy.

- You know the kind of case – a Deputy wishes to close a regional office to save money; a Minister objects. Or a Minister wishes to open an office and the Deputy thinks it inadvisable or unnecessary or too costly.

These kinds of problems arise all the time. And how are they resolved? The Deputy gives his best advice and in the end, it is the Minister (perhaps with the approval of Treasury Board) who decides, because it is the Minister who is ultimately in charge and it is the Minister who will have to answer for the decision.

If the Deputy believes that what the Minister is proposing runs truly counter to the best interests of the elected government, he informs the Clerk, the person who represents the

⁹ And also, in a sense, part of the Prime Minister, on whose advice the Deputy was appointed. The Deputy’s role as an instrument of the Prime Minister’s unifying role within the Ministry is largely ignored in the report.

interests and perspective of the Prime Minister. And in the end, the Prime Minister decides.¹⁰

I am aware, of course, that the new Government has committed to introducing this kind of written over-ride in its new “Federal Accountability Act”. My worry is that, far from putting too much power in the hands of Ministers, this would put too much weight on the side of the Deputy. But we’ll see what emerges when Parliament resumes.

Bottom Line

Let me try to sum up what I’ve been saying.

- 1) Gomery is mistaken about the concepts of authority and accountability in Westminster government. As a result, he makes recommendations that would deny the principle that Ministers are responsible to Parliament for everything done in and by their departments. On almost any matter outside the realm of broad policy, the Minister would be able to stand up and say “I am not responsible – ask the Deputy”.
- 2) The only things for which Ministers would be responsible, on this new doctrine, are explicit matters of policy, and occasional over-rides of what the Deputy had otherwise decided was in the best interests of propriety and ‘value for money’.
- 3) Thus on the Gomery view, a considerable part of what goes on in government (and most of what has to do with spending and programs) is really about what officials are empowered to decide, pursuant to authorities allegedly given directly by Parliament to Deputy Ministers. This view has no foundation in law or theory.
- 4) Gomery wants to make Deputies accountable before the Public Accounts Committee not because he wants to strengthen accountability, but because he wants to make it clear that it is the officials who are responsible; that it is they and not Ministers who have the authority, and they who are to blame when things go wrong¹¹.
- 5) Gomery also assumes that public servants ought to have and pursue their own view of the public interest. They are, in his view, independent actors under the Constitution.

None of this is correct. And as I have said before, just because people are ‘reluctant to accept their responsibilities’, doesn’t mean they’re not responsible.

Deputies *are* indeed accountable for management, but they’re not legally accountable to Parliament, they’re accountable to Ministers, and Ministers are accountable to Parliament. That’s our system of government.

But in the end, this issue is really not about accountability – it’s about responsibility; it’s about who’s in charge.

¹⁰ That is to say, the most senior elected person in the government exercises his authority over another.

¹¹ We’ve all heard this before but it is worth repeating. There is a profound difference between carrying responsibility and carrying the blame. To say the Minister is responsible is to say he or she is in charge and is there to be held accountable by Parliament for fixing what has gone wrong. Blame is something different, to be meted out politically by Parliament and the public if the Minister appears to have made personal errors or judgment or action; and to be assigned within the chain of bureaucratic authority by officials when their subordinates have personally erred.

I believe that Ministers, and not officials, should be in charge. I also believe that Ministers should be accountable to the elected representatives of the people for the exercise of the authorities they have been given under the law.

That's called democracy.

Thank you.