

Does Canada Have a Constitutional Public Service?

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Paper for  
Canadian Association of Programs in Public Administration  
Quebec City, May 16-17.

Draft: Not for Citation

## Abstract

Canada's public service has always been considered a part of our constitutional apparatus, but increasingly what is regarded as the essence of the constitutional public service is merely its form not its substance. We endlessly worry about concepts like neutrality, impartiality, integrity and invoke professionalism as if they were all ends in themselves. However what is missing is the substance of the constitutional public service, which at its core is a partnership with the executive in governing. That is, the fusion of executive policymaking and administration is the key feature of our constitutional public service, yet what we are obsessed with is the separation and finding the border between the two. The problem with accepting the substance of the constitutional role is that it requires accepting that the public service exists to preserve some stability, consistency, and continuity and thus guard the long-term effectiveness of democratic government.

## Introduction:

It has now been 10 years since the far-reaching recommendations of the Gomery Commission were delivered and 20 years since the misdeeds occurred which precipitated that Royal Commission (Gomery, 2006). Yet it is clear that we have made very little progress in terms of the serious flaws associated with our administrative machinery. The Accountability Act has some welcome features, however in large part it missed the reforming spirit of the Gomery Commission. The Harper government and most of the "public service establishment" were content with the status quo (Signatories, 2006). Indeed, it is clear that the Harper government continued to do all the things that exacerbate the problems of public service performance: adding more rules, increasing the power of central agencies over departmental administration: eroding parliamentary oversight. In the 10 years since Gomery we have witnessed even more decline in our democratic institutions including Parliament and the public service. We should all be concerned with the continued erosion of the public service and the ongoing reluctance, and even hostility to any reforms that will increase the constitutionality of the public service and strengthen the value of this institution as a pillar of our democratic order.

Indeed, if anything, there is a growing and, disturbing trend in which the direction of administrative reform in Canada is to pay less attention to the constitutional underpinnings of the operations of our public services and focus on the technical and managerial aspects of public administration. This has reached an apotheosis in the recent reforms laid out in the Blueprint 2020 exercise in which the focus is exclusively managerial and not a single mention made of Parliament or the cabinet. (Canada, 2014) Indeed it continues to propagate a disturbing misunderstanding of what the spirit of the public service should be. What is emerging is a consensus within the public service elite, that is not only uninterested in the constitutionality of the public but are actively hostile towards attempts to give this concept concrete expression. Blueprint 2020 sees our administrative institutions not as fused with the executive and thorough the executive to Parliament, but rather that as an apparatus disconnected from our political institutions that can be reformed solely on the authority of the Clerk of the Privy Council and the deputy community alone.

The development of the managerial public service cannot be dismissed as willful “neo-liberalism” or the product of uniformed consultants and outside advisors who have bamboozled gullible or desperate public servants, or even a bullying Prime Minister indifferent to the point of hostility. While these are part of the problem, this paper will argue that the issue is both more and less complex at the same time and is likely to get even worse under the Trudeau Government. The problem is simply that little consensus exists on what the constitutional status of the public service is and by extension the proper role of public servants themselves within our constitutional order. Indeed, there is a willful blindness to confront the issues and instead focus on a much simpler managerial framework or increasingly deliverology (Berthiaume, 2016)

This confusion is not a result of lack of trying to settle the issue. Donald Savoie’s vigorous championing of the notion of a “constitutional personae” suggests this personae comes various forms of legislation which cement its independent status (Savoie, 2006) Ralph Heintzman’s more resent plea for a charter of public service that sets a strict border between public servants and politicians is another

attempt to bring a more formal status to the independence of the public service and its autonomy (Heintzman, 2013, 2014). Yet even here there remains some confusion over two distinct aspects of the public service particularly in the emphasis that both Savoie and Heintzman give to separation and boards and the formal independence of the public service. While this aspect of the role of public servants has increased clarity of many of their responsibilities and rights, it has done nothing to advance a discussion of the constitutional *role* of the public service. That is, what is the autonomy to be used for. It is this later role that is most in dispute and is the one that is more subject to contention. Yet as we continue to clarify the legal and managerial position of the public service and give these more definition, we have diminished or avoided looking at the constitutional role and this may well prove to be a major problem in the future.

What appears to be difficult to admit for many participants is the fact that the constitutional role of the public service is to be both council and active participant in government as the chief policy advisor to ministers. But within this constitutional role it has been further expected that the public service will provide measured and tempered advice, or if you will “frank and fearless” in the well know cliché. If, as many have lamented, the public service has been increasingly sidelined in its policy advisory role, does it follow that Canada does not have a constitutional public service? (Drummond, 2011 and Cappe, 2011) Furthermore if we have a complete border that is patrolled by various agencies and “watchdogs” are we fundamentally transforming the constitutional role of the public service and the nature of constitutional democracy in Canada. Much of this change will be welcomed both by those wanting some clarity but we should not pretend that it is not a potentially profound and irreversible change and public service may well end up using this independent status in ways different than we had imagined.

Why then do we ignore the issues of the constitutional role of the public service? I think there are two main reasons that I shall explore next. The first is the steady rise and eventual triumph of public management over a more traditional understanding of public administration that was more comfortable with including constitutional requirements. Public management has been on a long march since at

least the time of the Glassco commission and is now the preferred lens through which we view the public service, by both the academic community and by public servants themselves. In a steady stream of reports, including just the more well know, Glassco, Lambert, PS2000, La Releve and Blueprint 2020 are all essentially managerial documents, more or less silent on the constitutional role of the public service and aside from a discussion in PS 2000 the issue of policy capacity is almost non existent in the various reports. This trend is if anything accelerating with the new found enthusiasm for leadership and indeed transformational leadership infused with vision, passion and enthusiasm. All of this is compounded by an engrained view of politicians, outside pundits, and now increasingly, public servants themselves that the problem is the public service itself and the traditional public service must give way to a new public service more responsive to the executive, less hidebound, and less rule and procedure oriented focusing on results above all else. A final point is that we have a complex and almost metaphysical language in which we traditionally discuss issues concerning the constitutional role of the public service which makes it difficult to explain the role of the Crown as a source of all executive power through the Royal Prerogative and the way in which the public service shares the authority of the Crown to claim its constitutional position. (Smith, 1995).

Traditionally the role the public service was to play was to embody a dispassionate ethic, which has come to be called “impartiality” or “neutrality” in our limited constitutional vocabulary. But this dispassionate ethic was not to be synonymous with indifference, only that to fulfill their role in the constitutional order, the public service was expected to bring something different to the policy discussion of which they were a legitimate participant. Yet what they were/are to bring is become something that is increasingly unwelcomed by politicians whose desire to see greater enthusiasm from their partners is well documented in the push towards promiscuous partisanship. (Savoie, 2013 and Aucoin, 2008). The idea that Canada’s senior public service leadership should regard the panaceas offered by politicians at election time with caution means, or should mean, is that public servants view these platforms with less fervor than elected partisan enthusiasts

would like to see. But that was and indeed, and I will argue remains, part of the job that is given to the men and women of the public service by our constitution. They are to be permanent servants of the state, and in a sense guardians of the constitutional order and wary of easy elections slogans and visions. But it is just this that is being challenged by the cabinet, and even more troublingly, by the Clerk of the Privy Council, which would rather they are entrepreneurial, nimble and agile in the delivery of services, and not something like the “gyroscope of the state” which would keep it from spinning out of control, or at least not tilted in the direction of the elected. It was just this which was a key part of effective governments in the past, in that it was what made governments more effective. Indeed, without something to balance government “amateur” enthusiasm, it is easy to see how governance is weakened and not strengthened. The danger is that without a sense of the constitutional role of public servants we are going to see more personal involvement on the part of public servant championing government policy and with greater levels of personal attachment to these policies. This is not what a constitutional public service looks like, and we may all be poorer because of it.

### **Background the rise of public management**

The movement towards a strong managerial culture that would embrace the managerial role over the constitutional role began almost 60 years ago the report of the Royal Commission on Government Organization. (Canada, 1962) The Glassco Commission brought in many reforms which have endured: a centralization of administrative power in the Treasury Board, a reduction of the influence of the Civil Service Commission (and thus Parliament), an intellectual division of labour between managers and non-managers, and a decentralized system of financial and personal management centered squarely on operating departments and agencies - in short, a strong cabinet coupled with an even stronger public service. These reforms would in fact sow the seed for a concern in the 1970s that Parliament was losing complete

control of public service. Yet it would prove an irresistible formula for irresistible future reformers to the point that Parliament became an afterthought in the reform of the public service. Yet it is not clear that Parliament ever had any control of the public service or if increasing parliamentary oversight of the public service is even a good idea or consistent with our constitutional principles.

But even the Glassco commission was aware of conflict between the need for better management in the public service and the requirement for political control. This decisive conflict is at the very core of many of recommendations emanating from Glassco and all subsequent reform efforts that simultaneously asked for decentralization and centralization, devolution and central control, and freedom for managers supplemented by central agency guidelines. In other words, from Glassco forward the reformers have attempted to strike a compromise between the demands of management and the need for political control, (that is cabinet control) usually in the form of strengthened central agencies. In the end the rule is that managerial design trumps the cluttered world of democratic politics and constitutional propriety.

Managerial reforms have always focused on the need for the public service to be modernized. Modernization is needed to overcome errors of past reforms, all of which are seen to be the same thing most of which could be characterized by an over-reliance on the traditional concept of negative control. This includes the latest report BluePrint 2020. The problems of the public service then all centered around the proliferation of controls imposed on the Canadian public service, first by the legislature and but then increasingly by the executive and the executive bureaucratic agents. Even though these controls were imposed with the best of intentions including the recent Accountability Act, they come to represent serious fetters on the administrative capacity of the public service, which weakens rather than strengthens the civil service's sense of responsibility. According to the orthodoxy of managerial reform the only thing that had saved the public service was the capacity of the public

service itself, particularly its senior leadership. But no matter how good public servants are they cannot overcome the burden of control, and some version of managerial reform is required, usually this orthodoxy requires the public service to be given more authority and is encouraged to build a results oriented management culture that will replace the old rules based culture.

The source of all the negative control strangling the public service is almost always the same villain --Treasury Board -- which is seen to have a relentless appetite for detailed accounting. It blurs the lines between departments, central agencies, and cabinet and is often regarded by reformers as a source of frustration which discourages departmental managers from accepting responsibility for their plans, and results in public servants regarding them to view this responsibility as being shared with the Treasury Board staff. Up to the present day, a constant lament has been heard. Most recently by former Clerk of the Privy Council, Wayne Wouters, ""Too often Public servants ....see rules is a way of deflecting criticism. 'Hey I loved the rules' it is the ultimate get out of jail card." (Wouters, 2016, 7). The rules permitted senior bureaucrats to escape responsibility by claiming that they shared authority with the central control agencies, particularly Treasury Board. Controls designed to create a system of democratic oversight have had just the opposite effect. Thus there is a need for more discretion lower down, or accept simply accept the continuation of the inefficiencies of overly "democratic" government.

It is now the new orthodoxy to suggest that the freedom/control dilemma is the central tension in modern public administration. This tension can be resolved in a number of ways. In Glassco it was to allowing more autonomy for departmental managers supplemented by democratic/bureaucratic restraint in the form of a reconstituted Treasury Board with additional statutory powers and its own minister. In PS 2000 it was to create a results-oriented, client centered management culture, that would increase productivity by reducing red tape, and unleashing the innovative

capacities of public servants. (PS 2000) In Blueprint 2020 this freedom/control issue is seen in terms of freeing up the industry of the public services As Wayne Wouters noted, "Every rule, every inch of red table, every ounce of oversight could mean hundreds or even thousands of innovations are stifled, of ideas that sit in desk drawers, and or risks that are never taken." (Wouters, 2016. 8). The idea is always to be same having the public service move away from rules and process and operate in a more open, responsible and flexible service oriented way.

Underlying all of this the acceptance of the idea that public servants should work in a managerial, goal-oriented environment coupled with some form of parliamentary or executive control but the less said about this latter issue better. They wanted a more harmonious system of management based on rational objective setting, co-operative agendas and decentralized budget-centered management, and limited overhead control.

What they all hope for is a system of decentralized management coupled with effective, but somewhat more general overhead controls. This was their answer to the dual dilemmas of how to further public management. Efficiency is to be enhanced by autonomy, and democracy would be enhanced by overhead controls. It has been a consistent article of faith that they way to make the public service more efficient was increasing its autonomy. However, they all stumble over the best way to make the public service democratically responsibility in the face of the weakness of parliamentary institutions. But even this nod in the direction of democratic institutions has evaporated and is now more or less absent on the reform agenda. The focus is squarely entirely on the management of increasingly autonomous organizations, agencies, and "networks"

Ironically the idea of ministerial responsibility has been seen as a centrifugal force that limited innovation, and any scheme of managerial responsibility that relied solely on ministerial responsibility would do more harm than good according to the

public management orthodoxy because it will produce administrative apoplexy at the center of government and paralysis at "the working extremities and cause frustrating delay and inconvenience to the public." (Canada, 1962, Vol 5, 62)

Thus most reforms over the past 60 years have faith that public servants should have more responsibility, believing them, subject to the dual constraints of management and some form of overhead control from central agencies, fully capable of exercising it in a manner consistent with the norms of Canadian political life. While there is a recognition in most reports that on the one hand, it is contradictory to delegate responsibility and then, on the other, ask for a detailed accounting of how this responsibility was exercised. Yet that is the reality. Gone are the traditional concepts of public administration, focused on the mandarins, and in its place we have had 60 years of demands that the public service itself set objective standards of performance, create long-range plans, make decisions and hold itself accountable to certain standards of financial.

The idea of having managerial bodies that had executive authority was something that was advised against in earlier times, and indeed every-time one of these entities was established it was seen to be a problem for responsible government. The first were independent bodies such as the PSC and later the CNR, both of which were considered irresponsible by those that viewed responsible government as something that would not be possible to avoid. The view was that there was no possibility of a policy and administration divide, but over the past forty years, this is very much the assumption that has animated public management in Canada. The push to separate the two has continued apace, and perhaps has its greatest expression in the now faddish invocation of Lean thinking as a way to bring about greater efficiency. Lean thinking may be many things, some may be good, but it is not about the way in which public servants regard themselves as active co-creators of policy with ministers.

As the above brief summary notes, the role of public management has grown considerably over the past five decades and has come to dominate discussions of what it is that public servants should do with their discretionary authority. There are growing concerns on the part of citizens that their government is not working and that if we continue to hive it off, privatize and disaggregate public services, while simultaneously centralizing political power we are on dander of changing the meaning of responsible government (Aucoin, et al, 2004). While ensuring prudent use of public resources and the centrality of the various clients are important features of public management, they should not supersede the need for public service and for public servants to operate in a clearly and well articulated constitutionally valid relationship with, cabinet ministers, parliament and citizens. In an order of precedence constitutional public service should trump public management, but unfortunately what we see over the last 30 years is a move in which the needs of efficient management, and customer service have trumped all the needs to maintaining the constitutional foundations of public management and efforts to modernize and enhance these constitutional principles.

### **The Language of a Constitutional Public Service**

What then does the triumph of this managerial frame mean for the constitutional public service? It means in some sense that the practices associate with the constitutional public service have been eroded. What is occurring with the above reforms was the view that good management can be seen in a context that does not included constitutional priorities and pieties. It is evident that politicians and their new advisors can quite deliberately undermine the public services when they are in the grip of a overarching vision. The managerial vision, which clearly infects the current Trudeau government, will have little patience for the complexities of the

things it is trying to modernize and reform. Every bit of resistance that is encountered is only reason for more reform. Thus while institutions such as the Public Service Commission were a crucial piece of the puzzle for development of a unified, respected public service and it has help in the creation and development of the constitutional personality of the public service it is consistently regarded by managerial forces as an impediment (Juillet and Rasmussen, 2008). What was once a central feature of building responsible, constitutional public service is almost exclusively seen as an obstacle in the face of –Management.

To express these views is to subject oneself to the criticism that you are an old foggy out of touch not with it, and so on. Indeed to voice such concerns if you are a public servant exposes you as someone with obstructionist sentiments and is evidence of the inherent conservatism of the public service --as if these were bad things! But here in is the crux of the issue. In a very real sense, cabinet ministers are themselves councilors to the sovereign, and the public services advise to cabinet ministers has an impact on the advice that cabinet gives to the sovereign—that is to Parliament. But within this understanding one of the things that the public service must do is to act as a check upon the power of the ministers, by making them reluctant to embark on a course of action without due consideration to the implications of that action for the nation and particularly on the nation in the future. In this case a constitutional public service should be able to insist or at least guide ministers to taking appropriate actions that will produce presumably better government. Thus, public servants are not only there to ensure that ministers do not do anything that is illegal, but also to help them meet their political objectives. Indeed, the real check on the power to the executive, at least in this interpretation is not the Senate, but the permanent public service, which is appointed at arms length and with its other well documented features of independence can and should use this independent position to help guide ministers.

It was former Prime Minister Harper, ironically, who got closest to this when he noted prior to his election in 2006 that he believed that the public service would provide a check on his government so Canadians would not need to worry about unchecked executive power of a majority government. (Leblanc and Campbell, 2009) He however saw this check as being due to the political bias of the public service and not that it was their constitutional role to do that. But at least he was half right. I suspect the current PM will have little truck with that notion and indeed in a recent response to Green Party Elisabeth May's criticism that the public service was now aligned and "corrupted" with the previous governments policies and senior official should be removed. Trudeau, in his response, got the other half right in noted that bureaucrats are helping his new Liberal government to delivery on his promises. (Raj, 2016). Harper was right of course, that the public service is there as are a check on the executive, indeed is their constitutional duty, and not a partisan conspiracy, and Trudeau was right that they are there to help the government implement its promises. But of course there is little consensus on this matter as there is little consensus on much of our constitutional heritage (Heard, 1999). The public service has, as McGregor Dawson called many years ago "official independence" from ministers just for this purpose, but it appears to be something that fewer and few people want to hear and no one wants to defend. (Dawson, 1922).

What then does it mean to be a constitutional public service? It means in this interpretation that we acknowledge that the defining feature of our form of parliamentary government is that the legislative and executive functions are fused, and the public service itself is itself an institutional expression of this fusion between executive policy making and administration as opposed to the classic separation of them associated with American constitutional and administrative doctrine. This was noted again by MacGregor Dawson when commenting about the

impact of the Glassco reforms, noting that none of the changes brought about the “massive reorganization of the executive and the public service of Canada, altered the fundamental fact that executive and public service in Canada have always in one respect discharged a common function, the enforcement, application and development of the national policies” (Dawson, 1970, 235) Yet would many make a case that there is an actual partnership in “development of national policies” on the one hand, and public management on the other? Indeed when we look at a document such as Blueprint 2020 and the new interest in “deliverology” it is difficult to come to the conclusion that the public service is really about more than the efficient implementation of public policy and not about an attempt to ensure that the public service is a partner with cabinet in forming public policy and that it has its own constitutional role to play.

A key element for the systems effective functioning is that the public service must protect its own integrity in order for it to support the goals of all ministers and all governments. (Du Gay, 2006). Indeed it has a great deal of autonomy though the many agencies that police it including the Public Service Commission, Integrity Commissioners, not to mention various statutes. (Savoie, 2006.) And if we ever have a statutory code it will provide even more independence. But as noted over the past several decades, under the rubric of ‘mandates’, ‘responsiveness’, and ‘delivery’, for instance, political executives have to begin see this element of ‘official independence’ in terms of a political opposition and a result, have sought to tame what they consider to be the excesses of senior official influence on the practices of government (Greenaway 1995).

Yet this fear of public service power has never been proven and if anything senior official have no interest in such a takeover or indeed of obfuscation or opposition. Indeed senior officials have, at least in the past, enjoyed a great deal of influence on policy formulation in the past based on their own official role without

needing to bolster these with 'the discomforts and insecurities of public political responsibility. They can afford to leave ultimate power and its penalties to the politicians'. (Parker, 1993, 142–143). Senior public servants have had a very wide scope of action that grew as government grew and this included policy formulation and its implementation. The comingling of administration and policy making meant that there was nothing that was beyond the responsibility of the deputy minister. While the ministers must be the final authority in terms of decision-making, and responsible to parliament, and the public service cannot, as it is not a separate constitutional person, but rather is one that exists in conjunction with the minister. While the public service has independent legal status, it has not independent constitutional personality. Or at least it should not have an independent constitutional personality.

Governments come to office interested in change and part of this is desire for radical change comes from the fact that governments feel they must have avoided the resistance that they see from the public service. Thus we have the emphasis on “deliverology” and assorted reforms. The aims of administrative reform in Canada have as noted above for the most part been aimed on of an intensive managerialism based upon a separation between policy and operations rather than its fusion. In Canada we have replaced the mandarins with managers ... there primarily to deliver policy rather than to formulate it or to police constitutional propriety, and are increasingly paid high-level corporate salaries in exchange for being in the line of fire for public blame when things go wrong' (Hood and Lodge 2006, 363). At the same time, politicians now view the democratic mandate of election as a trump card in government, this provided them with an increasingly robust critique of the senior officials. The new government should not have to tolerate the old constitutional proprieties including paying too close an attention to senior officials. The new Government should not have to tolerate inertia or obstruction – as the role of

institutionalized counsel came to be seen – from hidebound, conservative bureaucrats, and instead should be able to surround themselves with enthusiastic, committed champions of their policies, whose primary function and responsibility was to deliver the government’s agenda, efficiently, effectively and with maximum public impact. Now in Canada any independence of the public service would be described a form of usurpation.

In addition while public servants have been forced into a managerial role, with their hands tied by politically driven rules, most recently the Accountability Act, they continue to be seen as inefficient, not innovative and uncreative, especially as compared to the private market. This shift was in large part due to the growing political dominance of a view that private sector business methods and practices should provide the model for both the style and substance of public service reform. This theme, which has been a recurring refrain in Conservative political critiques of public bureaucracy for the best part of a century (Greenaway 1998), was pursued with remarkable vigor by the Diefenbaker inspired Glassco Commission and has more or less continued unabated in Canada up to the latest Trudeau government

We can begin to see this transformation in the language that is used, when official pronouncement regarding the public service are made and by the weak constitutional underpinnings that we use to explain what this role is. The new public service is less an active partner in executive government and is instead surrounded by a few bland and passive ideas such as it is “neutral” and “impartial”, but its focus is clearly managerial. These are indeed invoked by many officials, including Prime Minister Harper when on his final day in office that in his letter to the public service, in which after listing off many government priorities that has been accomplished he noted that: “We have accomplished all of these this because of our partnership with, and the hard work dedication and integrity of you: Canada’s public servants” Yet it is clear that in his understanding this is a partnership in

which one partner has all the legitimate democratic authority and unassailable mandate and the other partner is expected to deliver these priorities in a “neutral” and professional manner. In this version of a partnership, the public service becomes increasingly an organization subject to organization reform initiatives, but its constitutional element is increasingly lost, limited and never to be spoken of. Thus we get the rather rote recitations of “neutrality” and “impartiality” and professionalism and integrity. What these invocations lack is a sense of what neutrality and impartiality are for and why integrity and professionalism matter. This has been a gradual transformation but one that has the potential to diminish the role of the public service in Canada even more. If we wish to keep the public service constitutional, it is really about ensuring that the public service and the government are seen to be united as partners in making public policy but each with distinct roles. This is different than embracing some form of “promiscuous partisanship” (Aucoin, 2008), and or even worse relegated to the starring role in Deliverology....

However, it would be a problem if only politicians held this view, but in fact public servants now like to see themselves as members of an independent managerial organization that just needs freedom to innovate. A recent former clerk of the Privy Council Wayne Wouters note at the Public Policy Forum, that: “Innovation is the essence of good government. It allows government to adapt, to improve and do develop new policies, products or services to deliver better results and create value for citizens.” Innovation is now the essence of good government. As James Q. Wilson noted years ago innovation is not inevitably good, there are at least as many bad changes as good. And government agencies are especially vulnerable to bad changes because, absent a market that would impose a fitness test on any organization change, a changed public bureaucracy can persist in doing the wrong thing for years. ( Wilson, 1989, 227.). Yet why is it that this sort of statement

from Wayne Wouters so prevalent and goes fundamentally unchallenged. Indeed, if anything the role of the public service would be to remind government of the dangers of innovation, or rushing forward with ill considered plans, untested assumptions, vague goals, and unmeasured outcomes and so on.

Traditionally, it has been the assumption, long held and often spoken of in many after dinner speeches, that the public service is there really to serve the government of the day, is neutral, and independent and so on. Yet these tired nostrums are no longer reasonable assurances that we have a public service that is in some sense part of our constitutional arrangements and playing its appropriate role. Over 10 years ago Donald Savoie lamented that we fail to recognize what is right before our face; that is that the public service of Canada has a constitutional personality. While the public service was expert and permanent the political executive temporary and amateur, together they formed an individual unit. While the public service is appointed, independent, neutral and non-partisan, it nonetheless is given vast amounts of discretion and is regularly relied on to make decision in the public interest, under numerous regulation frameworks and other delegated legislative authority.

Given this position the public services should greet the incoming Trudeau governments new enthusiasm with caution if not outright skepticism and not applause. As servants of the state if you will, they are fulfilling an important role in doing this. As has been well documented elsewhere, this is one of the reasons that the public service must be open to all, that is must be representatives, and outside of party control, and why having so many partisan advisors and such an enormous and powerful PMO are such bad ideas. In the past the mandarins were given an opportunity to do take on a role of internal critic and this was considered an essential ingredient in the governments ability to achieving its objectives. . A balance between “energy and equilibrium” as Aberbach and Putnam called it was something

that would lead to more effective government in the future. (Aberbach and Putnam, 1981)

If we then must look back to recover what is important this is a very difficult task as the pressure to look forward are enormous. Government do not own the constitutional public service and should not behave like they do. At best they are trustees and indeed joint trustees. The constitution of Canada is of course vague and does not provide an exact framework for all aspects of structure and operations of government, but in bring true to the spirit of our constitutional inherence it reminds us to maintain these institutions for the benefit of future generations, not simply provide reform after reform, which obscures and even denigrates this later role.

Yet the problem with the emphasis on managerialism is not only its anti constitutionalism but also its anti-bureaucraticism. It is the anti bureaucracy which is equally troubling for the future of the institution of public service which needs to re engaged with the substance of bureaucracy --if not its Weberian form. The office of public servant is a vocation in Weber's view and should be a focus of ethical commitment and duty, and it is something superior to other ties, of family, class political party and even conscience. The bureaucrat is to be focused on procedure, committed to the purpose of his or her office, and to have no personal moral reservations. The ethos of being a public servant, in an important resource in bolstering the constitutional position of the public service is because it protects the "public" administration of our collective life from private moral enthusiasm. This separation of the two has been an important feature of liberal government and may well be a condition necessary not only for its emergence, but also its continued survival. It is the public service adherence to the norms of bureaucracy which provides for things like the formal equality of all citizens, procedural fairness in

treatment of citizens, and so. Citizen service is more than just timeliness and getting positive reviews or twitter likes.

Indeed, a constitutional public servant should ensure that they are able to overcome their own positions and political views so as to execute what is required of even if it is opposed by their own conscience. To quote Max Weber:

An official who receives a directive which he considers wrong can and is supposed to object to it. If his superior insists on its execution it is his duty, even his honour to carry it out as if it corresponded to his innermost convictions and to demonstrate in this fashion that his sense of duty stands above his personal preference. This is the ethos of the office. (Girth and Mills,1958, 330)

Weber goes on to suggest that without this ethic of self-discipline, the whole apparatus of the state would disintegrate and would harm all the benefits we get from it.

We can expect more. We have already seen the introduction of senior officials into the Trudeau government who have prior policy commitments and enthusiasms that are seen as sympathetic to the government. This can easily undermine the traditional obligations of the public service as a constitutional branch of government different from the elected cabinet. The same concern is voiced regarding the use of special advisors which if history is a guide will continue to be used and increase. While public servants can help bring about change and implement policies they must always hold back some form of commitment. They must be able to distinguish themselves from politicians and if they can't distinguish themselves from the politicians they support then we have lost the constitutional public service. Ironically most of the things that are occurring are making this more likely. The emphasis on leadership and enthusiasm for policy is undermining the virtues of the constitutional public service.

The constitutional public service then is supported to be unresponsive, as John Rohr has argued (Rohr, 1986). We want a public service that is somewhat isolated from politics and electoral process and the pressures of outside interests.

We have done a number of things, beginning with the creation of the public service commission to create the space for public servants to fulfill their role. In nothing more, the constitutional public service exists to provide some stability, continuing in the face of all the demands and pressures for changes, and the increasing pace of change. Public servants should not be continually on the look out for change and innovation, to be nimble and agile, but rather they need to recognize and remind politicians that every important change to our social arrangements represents both losses as well as opportunity for gains. Rather than being the soulless automatons, their opposition to enthusiasm can be seen as part of a long-term strategy and a part of Canada's constitutional public service. Indeed, I would argue that this will make a much stronger contribution to the long term survival and effectiveness of the Government of Canada than all the applause for Stephen Dion in the world. The idea is not for the public service to jump out front and join the lead singer of the band, but to be the bass player in the band, and have a steady and effective beat, the rock stars then can do their thing in the knowledge that if they fall off the stage, the band can continue to play on.

### **Final Thoughts**

In summary, the Canadian system of representative government requires both public servants and politicians to act as custodians of the constitutional values it embodies. It is for this reason that we should not frame the role of public servants solely in terms of efficient management, performance, responsiveness results and now leadership and innovation. Improving the quality of government in Canada is important, but must be done with an awareness of some of the constitutional limits that are incumbent upon the public service. Increasingly the language of reform is framed exclusively in terms which portray the public service as unresponsive, resistant to change, and not modern enough. But the public service might have good

reason for accepting these charges. Rarely do we consider the constitutional role assigned to the public service and public servants and the constraints these places on its ability to appear more efficient.

While it is part a tradition in US public administration theory that public servants have the right to resist political leaders (Frederickson, 1971), the same cannot be said in Canada. While this is a radical notion for some, it is consistent with the idea that the public service should be a check, or at least a break on the abuses of political power. And, while this “resistance” should be done within the confines of neutrality and anonymity, it is indeed what the purpose of “neutrality” or at least one of the purposes. Indeed, if we accept the necessity of the concept of official independence as articulated by R. Macgregor Dawson 80 years ago, and the commonplace view that public servants are given wide stretches of discretionary authority to ensure the efficient administration they can use this discretion for ensuring that basic constitutional principles are being upheld and reflected in their actions.

But this is not the same thing as public servants being unwilling or unable to provide ministers with negative, but nevertheless, essential advice, something that earlier generations of public servants had always been prepared and unafraid to do and who had a duty to do (Wardhaugh, 2010). In this spirit Canadian academics have rarely if ever gone so far as their American colleagues in claiming that public servants are “legitimate actors in the governance process” or even “the last best hope of a constitutional and democratic republic” (Walmsley and Wolf, 1996, 21, 27). But like their bureaucratic colleagues to the south, the logic of our constitutional arrangements does suggest that public servants are fully empowered to raise questions with the elected, to try and persuade them that a change of course is a good thing for the country, and that to use their discretion in ways that permits them to limit the abuse of power by our elected officials are all well within the definition of the constitutional public service. (Spicer and Terry, 1993) There is however a tradition of reform and skepticism about our political institutions and who is best able to exercise influence in the name of the public interest. Thus the recent concerns about the health of parliamentary democracy and the concerns

about the government being held in contempt of parliament, and proroguing parliament and reforms to the electoral system provide an opening for the discussion to the role the public service can and should play in the democratic life of the nation. The controversy surrounding the parliamentary budget officer, the scandal around the public sector integrity officer and so on all cry out for some grand narrative in which the public service in its constitutional role play a significant part.

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