

Managing the Risk of Fraud: Exploring the Impact of the Accountability Act

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Background of the Accountability Act

There has always been implicit acknowledgement that the Canadian government, like any democratic government, is accountable to the public and must be able to justify its actions and decisions to Canadian citizens. However, the checks and balances in place to ensure that our government is held accountable for its actions and decisions have not always been error-proof. The Sponsorship Scandal was an example that showed that the system of governance and spending of money in Canada can be sorely abused and can go undetected despite sophisticated mechanisms designed to prevent such conduct.

The Sponsorship Scandal first came to light in November 2003 when the Auditor General of Canada, Sheila Fraser, tabled a report to Parliament outlining the mismanagement of funds and irregularities with respect to the Sponsorship Program. The Sponsorship Program was an initiative of the federal government following the 1995 Quebec Referendum to support and encourage national unity in the province of Quebec. In response to the Auditor General's report and the ensuing scandal, the then Prime Minister Paul Martin called the Commission of Inquiry into the Sponsorship Program and Advertising Activities to be headed by Justice John Gomery to investigate the allegations of corruption within the sponsorship program and the federal government.

Justice Gomery's first report was released on November 1, 2005. In this report, one of the major findings was that there has been deliberate action on the part of government officials to avoid compliance with federal legislation, including the *Canada Elections Act*, *Lobbyists Registration Act*, *Access to Information Act* and *Financial Administration Act*, as well as federal contracting policy and the Treasury Board Transfer Payments Policy.

Justice Gomery's final report was released on February 1, 2006, following the election of Stephen Harper as Prime Minister, who had campaigned on the promise of introducing a federal *Accountability Act* which would, in part, address the recommendations made by Justice Gomery in his first report. In Justice Gomery's final report, he defined accountability as "the requirement to explain and accept responsibility for carrying out an assigned mandate in light of agreed upon expectations".¹ He also made numerous recommendations aimed to "restore accountability" by rebalancing the relationship between the Government and Parliament, and by achieving greater transparency in the operation of government.

Following the election of Mr. Harper's government, the proposed *Accountability Act* was introduced on April 11, 2006 and passed by the House of Commons on June 21, 2006. Currently, it is before the Senate where it is being subject to unprecedented scrutiny. At the date of this writing, it is unknown whether, or in what form, the *Act* will eventually pass.

The *Accountability Act* is omnibus legislation that sets out amendments to many statutes that touch on a wide variety of issues including lobbying, election financing, conflicts of interest, government procurement, and access to information. Interestingly, accountability is not defined in the *Accountability Act*. However, the government has made it clear that the purpose of the *Accountability Act* and the associated "Accountability Action Plan" is to restore the trust Canadians have in the federal government.

One area that is addressed in the *Accountability Act* is federal grants, contributions and loans. The *Act* provides for additional scrutiny of federal grants, contributions and loans. As will be discussed below, the *Accountability Act*, amongst other things, significantly increases the range of recipients who will be subject to performance audits under the *Auditor General Act*, increases the powers of the Auditor General in terms of auditing

¹ Gomery Phase II Report, Chapter 1, p. 8, online: <<http://www.gomery.ca/en/>>.

grants and contributions, and requires government departments to conduct reviews of grant and contribution programs every five years.

The legal obligations of the recipients of federal grants and contributions currently fall within a framework of government policy, statutes and common law duties/responsibilities. In this paper, we review the existing legal obligations and describe the changes that non-profit organizations may experience as a result of the *Accountability Act* if and when it comes into force.

Existing legal obligations of grant and contribution recipients

Even in the absence of the *Accountability Act*, there is an existing statutory and common law framework regarding fraud and misrepresentation, which governs all those who receive funds from government bodies. There are also policies and agreements setting out the obligations of recipients of funding from government departments, as well as the obligations on the government departments awaiting grants.

Statutory and common law framework

Section 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, outlines the elements of the offence of fraud. Section 380(1) states:

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed

five thousand dollars.

The Supreme Court of Canada provided a comprehensive definition of the offence of fraud in *R. v. Olan*, [1978] 2 S.C.R. 1175. Dickson J. (as he then was) set out the following principles in respect to the *actus reus* of the offence:

- (i) the offence has two elements: dishonest act and deprivation;
- (ii) the dishonest act is established by proof of deceit, falsehood or "other fraudulent means";
- (iii) the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

These principles were reiterated by the Supreme Court of Canada more recently in *R. v. Théroux*, [1993] 2 S.C.R. 5. McLachlin J. (as she then was) stated that:

... [T]he *actus reus* of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

McLachlin J. also went on to state the following in respect to the *mens rea* of the offence of fraud:

Correspondingly, the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.

According to *Théroux, supra*, the *mens rea* of fraud is to be judged objectively or, in other words, it is not necessary that the Crown prove that the accused thought personally that what he or she did was wrong. The objective standard is that of "reasonable and honest people."

There have been numerous cases over the years of fraud in the context of government contracts, grants or contributions. The case of *R. v. Simon*, [1993] N.B.J. No. 37 (Q.B.) involved an aboriginal man in New Brunswick who wished to commence a Masters degree program. The accused applied to the Department of Indian Affairs for educational assistance. In his application, he declared two of his four children as dependents even though they would not be residing with him while he attended university. According to the eligibility rules, he could not have his dependents factored into the calculation of his assistance unless they resided with him. Six months later, he added his other two children and his wife in an attempt to receive increased financial assistance.

The Crown charged the accused with defrauding the public of more than \$1,000. In dismissing the criminal charges, the Court found that the Crown failed to discharge its burden of proof, which the Court held to be that “the Crown must prove beyond a reasonable doubt that the accused made intentional and false representations which deprived the government of funds” and “prove beyond a reasonable doubt that the accused intended to act dishonestly as defined by objective community standards and by his dishonesty to obtain money from the public that he was not entitled to.” Some of the factors that the Court appeared to rely on were that the policies and practices of the Department of Indian and Northern Affairs were complicated and unclear. Furthermore, the Court suggested that if the accused had been overpaid, the Crown could recover the overpayment through civil remedies.

R. v. Tucker, [1988] N.S.J. No. 33 (S.C., A.D.), was an appeal by an accused in respect to a conviction and sentencing on a charge of fraud, contrary to section 338(1)(a) of the *Criminal Code* (now section 380). The Crown cross-appealed against the sentence imposed. The accused controlled numerous companies across Canada that manufactured pumps and strainers, and decided to set up a plant in Nova Scotia. He applied to a provincial Crown corporation for financing and received \$381,000. The accused also received \$220,075 from the federal Department of Regional Economic Expansion (D.R.E.E.) as part of a regional development incentive program. The Crown alleged that

the accused submitted false invoices for equipment purchases. The accused admitted to doing so, but thought that this was an accepted way of doing things and alleged that an officer of the provincial Crown corporation had told him to falsify the invoices.

The Court dismissed the accused's appeal and allowed the Crown's cross-appeal regarding the accused's sentence, sentencing him to 18 months in prison. The Court relied on *R. v. Olan*, *supra*, and *Veziina and Cote v. The Queen*, [1986] 1 S.C.R. 233, and held that there are two fundamental elements with respect to fraud: dishonesty and deprivation. The Court held that the element of deprivation was satisfied "on proof of detriment, prejudice or risk of prejudice" to the victim; and the fact that the accused had "deliberately and knowingly" submitted fictitious invoices to government bodies was enough to establish dishonest conduct. The Court also stated that actual economic loss was not essential to a finding of fraud.

It is clear from these cases that for a grant or contribution recipient to be convicted of fraud, the Crown must prove "beyond a reasonable doubt" that the recipient intended to act dishonestly and intentionally made false representations in order to deprive the government of funds. Determining whether or not the accused believed that what he or she was doing was wrong must be based on an objective standard, i.e. that of "reasonable and honest people".

As noted in the *Simon* case, *supra*, civil remedies are also available to the Crown to recover squandered money. We were unable to find any decided cases in which the Crown brought an action against a grant recipient for misrepresentation or civil fraud. Misrepresentation is established when it is proven that defendant negligently or fraudulently made a material misrepresentation of fact on which the other party relied to its detriment. Civil fraud is similar: the defendant makes a false representation of fact, with knowledge of its falsity, intending the other party to rely upon it which the other party does, to its detriment. In both causes of action, the injured party is entitled to compensatory and, in some cases, punitive damages.

In order to bring an action in misrepresentation against a grant recipient, the Crown would have to lead evidence that supports its claim and satisfy the trier of fact “on a balance of probabilities” that the facts alleged in the claim are true. This civil burden of proof is less stringent than the criminal burden of proof “beyond a reasonable doubt”. However, in civil cases where one party alleges that the other party committed misconduct of a criminal or quasi-criminal nature, such as fraud, the Supreme Court of Canada has determined that a higher standard of proof be required. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, the Court relied on the decision in *Bater v. Bater* where Lord Denning stated:

It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.²

Policy framework

As mentioned above, in addition to the statutory and common law provisions with respect to fraudulent conduct by recipients of government grants or contributions (also known as transfer payments), there are a number of policies and agreements in place that provide a framework in regards to the responsibilities of both the federal government and recipients of government funding. Over the years, the policies in regards to transfer payments and internal audits have regularly been revised. Accordingly, it appears that the federal government is committed to an ongoing review and improvement in respect of the administration of government grants and contributions.

² *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.).

In December 2001, an *Accord Between the Government of Canada and the Voluntary Sector* was signed. This accord described the key elements needed to strengthen the relationship between the government and voluntary sector and set out common values, principles and commitments that would shape the future practices of these sectors.

As part of this Accord, a *Code of Good Practice on Funding*³ was drafted to put the Accord into practice. The purpose of the Code is to guide interactions between the Government of Canada and the voluntary sector in regards to funding policies and practices. The Code is based on an acknowledgement by both sides that they are responsible and accountable to Canadians; it is also based on a recognition of the importance to Canadian society of voluntary organizations being and remaining sustainable. The Code is built on funding policies and practices that were in existence at the time and applied to existing and future funding arrangements between federal government departments or agencies and voluntary sector organizations.

The Code defined accountability as “the requirement to explain and accept responsibility for carrying out an assigned mandate in light of agreed-upon expectations.” To this end, the two sectors agreed to fulfil their respective obligation to be accountable in the following way: Voluntary sector organizations, through their boards of directors, are accountable to multiple constituencies, including funders, donors, clients, members, volunteers, staff, government and the general public. When they accept public funds, as with any other funds, they are accountable for how these funds are used. Accountability requirements differ depending on the type, purpose, duration and amount of funding and should be linked to realistic and measurable outcomes.

...

The Government of Canada is accountable to Parliament and the Canadian people for the use of public funds. It is guided by *Results for Canadians* (a management framework for the federal government) and the financial management framework of the Government of Canada. The Office of the Auditor General of Canada also plays an important role in monitoring accountability for the expenditure of public funds.⁴

³ *A Code of Good Practice on Funding*, Voluntary Sector Initiative, October 2002.

⁴ *Ibid*, p. 6.

Accordingly, the voluntary sector committed to do the following, in respect to accountability:

- Ensure sound financial management, including accounting procedures that are in accordance with generally accepted accounting principles;
- Provide effective board governance;
- Adhere to ethical fund-raising practices;
- Ensure that sufficient monitoring, internal management and client and funder accountability systems are in place; and
- Ensure that organizations have the level of financial expertise needed to fulfil all their financial management, recording and reporting obligations.⁵

The Government of Canada also committed to the following in respect of accountability:

- Make application and accountability standards and procedures flexible enough to accommodate a variety of approaches and the limited capacity of smaller organizations, while still ensuring effective protection of, and proper accountability for, public money;
- Take into account monitoring procedures already agreed to by a voluntary sector organization's other funders, as well as any quality assurance system introduced by the organization, when discussing the content, quality and format of federal information needs;
- Agree on well-defined, measurable results and clear roles and responsibilities; and
- Ensure mutual respect for diversity and recognize that different community groups can manage their resources in different ways and still meet the federal government's accountability requirements.⁶

The Government of Canada's Treasury Board also published a *Policy on Transfer Payments*, which has been in place since June 2000. This Policy applies to all "departments" as defined in section 2 of the *Financial Administration Act* and to "any transfers of money, goods, services or assets made from an appropriation to individuals, organizations or other levels of government, without the federal government directly receiving goods or services in return". Such transfers include grants and contributions to the not-for-profit/voluntary sector. The purpose of this Policy is to "ensure sound management of, control over and accountability for transfer payments."⁷

⁵ *Ibid*, p. 12.

⁶ *Ibid*, p. 15.

⁷ Treasury Board, *Policy of Transfer Payments*, 2001, clause 4, online: <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_142/ptp_e.asp>.

The Policy requires that all departments establish policies and procedures to ensure, *inter alia*, that:

a results-based management and accountability framework is prepared which provides for appropriate measuring and reporting of results, as related to the purpose of providing resources through transfers.⁸

The *Policy on Transfer Payments* clearly states that it is government policy to:

make transfer payments to further approved federal government policy and program objectives; ... manage transfer payments in a manner sensitive to risks, complexity, accountability for results and economical use of resources; and ... require repayment of contributions made to a business which are intended to allow it to generate profits or increase the value of the business, unless otherwise approved by Treasury Board.⁹

The Policy also establishes the following requirements in respect to the accountability of the recipient who is receiving the grant or contribution:

7.11.1 A written agreement between the department and a recipient of a grant is required. However, for grants involving lower risks and materiality, the use of application forms for class grants and exchange of correspondence with recipients is acceptable. A potential recipient of a class grant must meet any requirements for eligibility and entitlement set out for the grant program. The recipient of a grant is not required to account for the types of expenditures for which the grant is used.

7.11.2 Where a grant is paid in instalments, the recipient is not required to meet any conditions other than continuing eligibility for and entitlement to the grant.

7.11.3 Since a grant is unconditional, there is no unexpended balance to return unless the grant is of a type that requires continuing eligibility (e.g. a scholarship) and the recipient ceases to be eligible. Amounts paid after the expiry of eligibility or paid on the basis of fraudulent or inaccurate application or in error are subject to recovery action.

7.11.4 Departmental officials may be represented on an advisory committee or board established by a recipient in relation to a grant or contribution provided by the department. Such involvement must not be seen to be exercising control on the committee or board or on the use of the funds. Departmental officials must respect and comply with the Conflict of Interest and Post-Employment Code for Public Office Holders

⁸ *Ibid*, clause 7.1.1.

⁹ *Ibid*, clause 5.

and the Conflict of Interest and Post-Employment Code for the Public Service.

7.11.5 There must be a written agreement between the department and the recipient of a contribution which identifies the conditions of the contribution, the expected results to be achieved, the obligations of the parties involved and the conditions for payment.

7.11.6 Since the payment of a contribution is conditional on performance and achievement, the recipient of a contribution must meet and continue to meet the specific terms and conditions of the agreement prior to a payment being made. The recipient must also account for the use of the funds to meet eligible expenditures and report on the results actually achieved. Finally, the recipient must account for all funds received from all sources for a given project.

7.11.7 Contributions are subject to audit to ensure that all conditions, both financial and non-financial, have been met. The right of the department to undertake an audit must be clearly established in the contribution agreement, whether or not it is exercised.¹⁰

The *Policy on Transfer Payments* is designed to ensure sound management, control and accountability for transfer payments in government programs. Under this Policy, the Treasury Board approves the terms and conditions for all grants and contribution programs. However, each department is responsible for establishing and monitoring their transfer payments, subject to the policies of the Treasury Board. Each department may be subject to internal audits by departmental personnel and also may be subject to external audits by the Auditor General to ensure proper processes are in place.

The degree to which grants and contributions are subject to audit differs. Grants are transfer payments to an individual or organization which are not subject to being accounted for or audited, but for which eligibility and entitlement may be verified or for which the recipient may need to meet certain pre-conditions.¹¹ Contributions, on the other hand, are conditional transfer payments to an individual or organization for a specified purpose pursuant to a contribution agreement that is subject to being accounted

¹⁰ *Ibid*, clauses 7.11.1-7.11.7.

¹¹ Treasury Board, Accounting Standard 3.2 – transfer payments.

for and audited.¹² In the past decade or so, more and more funding for the non-profit and voluntary sector is taking the form of contributions.¹³ Such funding arrangements are designed to ensure stricter accountability and monitoring. However, from the recipients' perspective, contributions tend to be more costly in terms of the time and resources devoted to acquiring and managing them, in comparison to grants.

The Accountability Act

The responsibility of departments in respect to establishing and monitoring transfer payments, such as grants and contributions, and the ability of the Auditor General to audit the departments will continue notwithstanding the coming into force of the *Accountability Act*. Under the current *Auditor General Act*, the Auditor General may, with respect to any "recipient corporation", inquire into the use of federal government funds received by the recipient corporation.

Section 7.1 of the current *Auditor General Act* states as follows:

7.1 (1) The Auditor General may, with respect to any recipient corporation, inquire into its use of funds received from Her Majesty in right of Canada and inquire into whether

(a) the corporation has failed to fulfil its obligations under any funding agreement;

(b) money the corporation has received under any funding agreement has been used without due regard to economy and efficiency;

(c) the corporation has failed to establish satisfactory procedures to measure and report on the effectiveness of its activities in relation to the objectives for which it received funding under any funding agreement;

(d) the corporation has failed to faithfully and properly maintain accounts and essential records in relation to any amount it has received under any funding agreement; or

¹² *Ibid.*

¹³ Katherine Scott (2003), *Funding Matters: The Impact of Canada's New Funding Regime on Non-profit and Voluntary Organizations*, Canadian Council on Social Development, p. 15.

(e) money the corporation has received under any funding agreement has been expended without due regard to the environmental effects of those expenditures in the context of sustainable development.¹⁴

(emphasis added)

“Recipient corporations” currently includes “any not-for-profit corporation, or any corporation without share capital, that has, in any five consecutive fiscal years, received a total of \$100,000,000 or more under one or more funding agreements”¹⁵ (emphasis added). It does not include Crown corporations, municipalities, international organizations or corporations that receive half their funding from or are controlled by another level of government.

“Funding agreements” is currently defined as:

An agreement in writing under which the corporation receives funding from Her Majesty in right of Canada, either directly or through an agent or mandatary of Her Majesty, including by way of loan, but does not include a construction contract, a goods contract or a service contract.¹⁶

The *Accountability Act* provides amendments to the *Auditor General Act* that increase the Auditor General’s powers by allowing the Auditor General to “follow the money” in respect of grants, contributions and loans distributed by the federal government. The Auditor General’s powers in regards to making inquiries of recipients of these types of funding will be essentially the same as those currently mandated in the existing *Auditor General Act*, except that the meaning of recipient and funding agreement will be larger in scope. Section 7.1 of the *Auditor General Act* will be revised as follows:

7.1 (1) The Auditor General may, with respect to any recipient, inquire into its use of funds received from Her Majesty in right of Canada and inquire into whether;

(a) the recipient has failed to fulfil its obligations under any funding agreement;

¹⁴ *Auditor General Act*, R.S.C. 1985, c. A-17, s. 7.1.

¹⁵ *Ibid*, s. 2.

¹⁶ *Ibid*, s. 2.

(b) money the recipient has received under any funding agreement has been used without due regard to economy and efficiency;

(c) the recipient has failed to establish satisfactory procedures to measure and report on the effectiveness of its activities in relation to the objectives for which it received funding under any funding agreement;

(d) the recipient has failed to faithfully and properly maintain accounts and essential records in relation to any amount it has received under any funding agreement; or

(e) money the recipient has received under any funding agreement has been expended without due regard to the environmental effects of those expenditures in the context of sustainable development.¹⁷

(emphasis in original)

“Recipient” will now include “an individual, body corporate, partnership or unincorporated organization that has, in any five consecutive fiscal years, received a total of one million dollars or more under one or more funding agreements”¹⁸ (emphasis added). “Funding agreement” is defined essentially the same way, but is in respect of a recipient, not only corporations. It will include “an agreement in writing under which the recipient receives funding from Her Majesty in right of Canada or a Crown corporation, either directly or through an agent or mandatary of Her Majesty, including by way of loan, but excludes contracts for the performance of work, the supply of goods or the rendering of services.”¹⁹

Notwithstanding the Auditor General’s ability to conduct audits of recipients, the departments and Crown corporations will still be primarily responsible for auditing recipients. The Auditor General is expected to exercise the authority to audit recipients only on rare occasions. As stated by the Auditor General when she appeared before the Standing Senate Committee on Legal and Constitutional Affairs on Wednesday, September 27, 2006:

¹⁷ *Accountability Act*, s. 304.

¹⁸ *Ibid*, ss. 302, 312.

¹⁹ *Ibid*, ss. 302, 312.

It is the management's job in departments and Crown corporations to ensure that grants, contributions and loans provided to individuals or institutions outside the federal government achieve their intended purposes. They do this by establishing the systems and procedures needed to ensure that these funds are used appropriately, including, where necessary, auditing the recipients of those funds.

Our role as the government's external auditor is to determine whether those systems and procedures are in place and how well they are working. We then report to Parliament on the adequacy of the systems, and we provide recommendations where improvement is needed.

We do not believe that it is our role to routinely audit recipients of grants and contributions. As previously note, this is the responsibility of the managers of those programs. Therefore, I would expect that we would rarely exercise this option. Since I expect to "follow the dollar" only in very rare and unusual circumstances, we are not seeking any additional funding to carry out this expanded mandate.²⁰

It is also important to note that the *Accountability Act* also includes increased requirements for federal government departments to conduct reviews of grant and contribution programs. Section 42.1(1) of the *Accountability Act* requires departments to conduct a review every five years of the relevance and effectiveness of each ongoing program of grants or contributions made to one or more recipients.²¹ Also, the Government has announced its commitment to disclose awards of grants and contributions over \$25,000 by posting information on grants and contributions awarded in the previous fiscal year quarter on the Privy Council Office website.²²

Through its Accountability Action Plan, the government has also established an independent blue ribbon panel that is to "examine thoroughly administrative practices and barriers to our grants and contributions programs"²³ and to "provide advice on how to

²⁰ Senate (2006), *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 10, testimony of the Auditor General, p. 10:7-10:8.

²¹ Section 42.1(1) of the *Accountability Act* states: "Subject to and except as otherwise provided in any directives issued by the Treasury Board, every department shall conduct a review every five years of the relevance and effectiveness of each ongoing program for which it is responsible."

²² Privy Council Office Overview, June 1, 2006, online: <http://www.pco-bcp.gc.ca/dg/Grants_Overview.asp?Language=E>.

²³ Treasury Board Press Release, August 4, 2006, online: <http://www.tbs-sct.gc.ca/media/nr-cp/2006/08-04_e.asp>.

strengthen accountability for the funds spent on the grants and contributions programs.”²⁴ The Panel is also tasked with examining “ways of reducing administrative barriers to access and the management of these funds.”²⁵ The Panel, comprised of Frances Larkin, President and CEO of the United Way of Greater Toronto, Ian Clark, President and CEO of Council of Ontario Universities, and Marc Tellier, President and CEO of Yellow Pages Group, is scheduled to report to the President of the Treasury Board in December 2006. The Panel’s recommendations will be considered in developing a new policy on transfer payments.

Existing legal obligations of government bodies

The Public Service of Canada is governed by a legislative framework that sets out the formal rules for the administration and management of government. Currently, the *Financial Administration Act*, R.S.C. 1985, c. F-11, is the cornerstone of the legal framework for general financial management and accountability of public service organizations and Crown corporations. The *Financial Administration Act* sets out criminal offences for public office holders that have engaged in certain behaviours connected with the collection or management of public funds.

The *Financial Administration Act* criminal offences are set out in sections 80 and 81. With the exception of one offence in respect to the failure to report a breach of the *Financial Administration Act*, associated regulations or any revenue law, the offences prescribed in the *Financial Administration Act* are also set out in the *Criminal Code*. Despite the long standing existence of these provisions, the Attorney General’s Federal Prosecution Services has never referred any charges for prosecution under the *Financial Administration Act* by law enforcement officers.²⁶ Government officials and employees that have been suspected of fraud or mismanagement of government funds have been prosecuted pursuant to provisions of the *Criminal Code*.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Treasury Board (2005), *The Financial Administration Act: Responding to Non-Compliance, Meeting the Expectations of Canadians*, online: <http://www.tbs-sct.gc.ca/report/rev-exa/faa-lgfp/faa-lgfp_e.asp>.

The scope of the *Financial Administration Act* offences is relatively narrow. The types of conduct the *Financial Administration Act* prohibits does not reflect the range of management duties and obligations currently being carried out within the government. Section 126 of the *Criminal Code*, a general provision that creates an offence for disobeying any federal statute, is intended to cover any offence that may not be included under the *Financial Administration Act*.

Under the current regime, the authority to prosecute under the *Criminal Code* is given to the provincial Attorneys General. Provincial Crown Prosecutors work closely with the law enforcement agencies operating in the same jurisdiction and will develop ongoing working relationships with police officers. Those working relationships, along with the familiarity of provincial prosecutors and police officers with the *Criminal Code* and its workings, are factors in establishing the preference to work with the *Criminal Code* rather than the *Financial Administration Act*. Under the *Financial Administration Act*, prosecutions would normally be handled by federal Crown Attorneys.

The Accountability Act

The *Accountability Act* will add a new offence provision to the *Financial Administration Act* that will make it an indictable offence for an employee who deals with public money to defraud the Crown of any money, securities, property or service.²⁷ The wording of the new offence provision is very similar to section 380 of the *Criminal Code*, which is a prohibition against fraud. This amendment will increase the maximum penalty for fraud against the Crown under the *Financial Administration Act* from a \$5,000 fine and five years' imprisonment, to a fine equal in value to the money or other goods taken and 14 years' imprisonment.

Similar offences will be added to the *Financial Administration Act* which will apply to directors, officers, and employees of Crown corporations.²⁸ In addition, anyone found guilty of fraud under the new provisions will be ineligible to be an employee of that

²⁷ *Supra* note 17, s. 261.

²⁸ *Ibid*, s 269(1).

corporation.²⁹ Further amendments to the *Financial Administration Act* will ensure that these provisions apply to several Crown corporations that are currently exempt from certain sections of the *Financial Administration Act* including the Bank of Canada, Canada Pension Plan Investment Board, Canada Council for the Arts, Canadian Broadcasting Corporation, International Development Research Centre, National Arts Centre Corporation, Telefilm Canada, Canadian Race Relations Foundation and Public Sector Pension Investment Board.³⁰

Under the new provisions, offenders will be prosecuted by a new Director of Public Prosecutions (“DPP”).³¹ In addition to prosecuting existing offences under the *Financial Administration Act*, the DPP will be also be responsible for prosecuting the new offences to be added. The nature of these offences, and the penalties on conviction, are essentially the same as those under section 380(1) of the *Criminal Code*.³²

The Treasury Board has also approved a new *Policy for Internal Audit*³³ which was released on April 1, 2006 and is to be implemented on a phased-in basis through April 2009, in conjunction with the *Accountability Act*. There are also provisions in the *Accountability Act* that increase the responsibilities of deputy ministers and deputy heads by designating them accounting officers for their department. As accounting officers, they will be accountable before the appropriate committee of Parliament to answer questions related to their responsibilities. Their responsibilities will include, *inter alia*, “organiz[ing] the resources of the department to deliver departmental programs in compliance with government policies and procedures”; “maintain[ing] effective systems of internal control in the department”; and “signing of the accounts that are required to be kept”.³⁴ The deputy heads or chief executive officers of departments will be required to establish audit committees for their departments.³⁵

²⁹ *Ibid*, s. 269(2).

³⁰ *Ibid*, ss. 244, 262 and 295.

³¹ *Supra note 17*, s. 121.

³² See page 3 of this paper.

³³ Treasury Board (2006), *Policy for Internal Audit*, online: <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ia-vi/ia-vi-PR_e.asp?printable=True>.

³⁴ *Supra note 17*, s. 261.

³⁵ *Ibid*, s. 261.

The new policy for internal audit also provides for strong internal auditing across government by allocating responsibilities between deputy heads and the Comptroller General. The Comptroller General³⁶ is to monitor internal audit across government and ensure “horizontal audits” of high-risk areas that address government-wide, sectoral or thematic issues affecting several departments and agencies.³⁷ Also, audit committees are to be formed of members outside the public service to help bolster auditor independence.³⁸

Possible impacts of the *Accountability Act* on grant and contribution recipients

It is possible that as a result of the *Accountability Act*, the increased accountability on the part of deputy ministers and deputy heads may result in increased obligations on the part of the recipients, but the extent to which this will translate into increased reporting obligations, etc. for recipients of funding will become clear only with the implementation of the policies and any regulations that are enacted under the *Accountability Act*.

As the non-profit and voluntary sector is well aware, in the past decade or two the sources and mechanisms of government funding and the relationship between government and the non-profit and voluntary sector has changed. In the era of fiscal constraints in the 1990s, governments cut direct financial support to many non-profit and voluntary organizations that they have funded for decades.³⁹ Unfortunately, many of the changes that have occurred in respect of government funding have threatened “the future of a diverse range of social, health, cultural, recreational, environmental, and other not-for-profit services” in Canada.⁴⁰ In addition, governments have implemented mechanisms to ensure the most effective use of dollars by, *inter alia*, “monitoring

³⁶ On December 12, 2003, the Comptroller General of Canada was re-established within the Treasury Board Secretariat as a key element in strengthening government-wide comptrollership and oversight, particularly the areas of financial management and audit. The Comptroller General oversees government spending, provide leadership across the public service to the financial management and internal audit communities, and ensure standards are set and observed, Treasury Board (2006), *TBS – Organization Office of the Comptroller General*, online: < <http://pm.gc.ca/eng/accountability.asp>>.

³⁷ *Supra* note 33.

³⁸ *Ibid*, clause 4.2.2.

³⁹ *Supra* note 13, Summary Report, p. 8.

contracts closely and requiring organizations to demonstrate that they have used the funds for the purposes intended and achieved the expected results.”⁴¹ As a result, the intensity of reporting requirements has increased, and there are concerns about how much work is required from organizations that do not have the administrative capacity to deal with all the paperwork.

These changes have had significant impact on the non-profit and voluntary sector. While the changes in funding strategies were intended to increase accountability, self-sufficiency and competition in the voluntary sector, there may be, understandably, a concern that the Accountability Action Plan and *Accountability Act*, along with the new *Policy on Internal Audit* and new *Policy on Transfer Payment*, may result in even more checks and balances (and thus more paperwork and administrative burden) on grant and contribution recipients.

As mentioned above, the Accountability Action Plan and the provisions of the *Accountability Act* do increase the ability of the Auditor General to audit grant and contribution programs, which may result in increased obligations on the part of recipients, but the instances where the Auditor General will conduct external audits on funding recipients should be rare⁴². The departments will continue to be responsible for auditing programs.

It is possible that the mandatory five year reviews may require additional obligations on grant/contribution recipients, but detail regarding these new obligations will only come clear once the regulations are enacted and the new *Policy on Transfer Payments* is finalized. One source of reassurance for the non-profit sector is the Auditor General’s 2006 Status Report to the House of Commons in which she acknowledged that one main issue of recipients of grants and contributions is that they are feeling overburdened as a result of having to produce a multitude of documents. For instance, some organizations have grants or contributions from several government departments or different levels of

⁴⁰ *Ibid*, Executive Summary, p. xiii.

⁴¹ *Ibid*, Summary Report, p. 8.

government, and are required to respond to each one individually. To address this, the Auditor General indicated during her testimony before the Senate Committee that there is a desire to simplify the system and to move to “risk-based accountability” and to “a results-focused process”.⁴³

Accordingly, although it is possible that the changes in policy and the *Accountability Act* and Action Plan will result in a continuation of the increasing burden that the voluntary sector has experienced in the past decade, given the comments by the Auditor General, there appears to be some desire to decrease that burden. At this time, there is not enough information in the *Accountability Act* or the Action Plan regarding the practical impacts on the voluntary sector. It is likely that the impacts of the *Accountability Act* will not be made clear until regulations are enacted.

D. Lynne Watt
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⁴² *Supra* note 20, testimony of the Auditor General, p. 10:7-10:8.

⁴³ *Ibid*, testimony of the Auditor General, p. 10:15.

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