Defending a Contested Ideal

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The existence of a convention of political neutrality, central to the principle of responsible government... is not seriously disputed.

The Supreme Court of Canada, Osborne decision, 1991

After two decades of virtually uninterrupted Liberal governments, the arrival in power of the Progressive Conservative Party in 1984 marked an important turning point in Canadian politics. The new prime minister, Brian Mulroney, had few good words to say about the public service throughout his campaign, going so far as to promise that, once in office, he would hand out “pink slips and running shoes to bureaucrats.”

Beyond concerns for efficiency and economy, the responsiveness of the public service to the political executive was an important concern of the new government, leading to debates about the appropriate level of political influence over the staffing of the senior ranks of the public service. As a result, in addition to the return of the perennial debate about the need for greater managerial flexibility in staffing, the Mulroney years also saw the emergence of new concerns about the politicization of the public service, concerns that did not disappear after the Liberal government returned to power in 1993. In fact, the debate on the politicization of the public service acquired a new dimension in the 1990s when some of the prohibitions against political activities by public servants were found to be incompatible with the Charter of Rights and Freedoms adopted in 1982, creating concerns that politicization might occur in the lower ranks of the bureaucracy.
This chapter will recount the debates of the last few decades about the principle of the political neutrality of the public service and the events that challenged the traditional norms and policies associated with this principle. We will see that, in the period from 1979 to 2006, there was considerable disagreement about the meaning and value of the political neutrality of the bureaucracy in a liberal democracy and, more importantly, about the appropriate safeguards that should flow from the desire to apply this principle to the staffing of Canada's public service. Throughout these debates and events, the Public Service Commission (PSC) played a key role in defending a strong version of political neutrality, reminding critics of its value to democratic government. But, as legitimate concerns about responsiveness to democratic control and the protection of the fundamental political rights of public servants gained in prominence, the PSC and its traditional conception of political neutrality suffered some setbacks. As it had done when facing other issues in the past, the PSC had to adapt and strive to find a new balance among these competing values, all of which were integral to Canadian democracy.

CONTROLLING A DISTRUSTED BUREAUCRACY: POLITICIZATION FROM THE TOP?

As already noted, the election of the Mulroney government in 1984 represented a historical shift in power for Canada. After decades of Liberal governments that had presided over the development of the welfare state, the arrival of a Progressive Conservative government committed to fiscal restraint and smaller government was somewhat of a worrisome prospect for the federal bureaucracy. The feeling of apprehension was mutual: several ministers and advisers of the incoming government distrusted the public service and saw it as a potential impediment to the implementation of its agenda.

While the new government might have harboured some prejudice about the competence of public servants, the broader issue was their responsiveness to political control. In the government's view, public servants were invested in the status quo and excessively loyal to the
social programs which they had built up over the preceding decades under Liberal leadership and which they were now paid to administer.

As Peter White, a senior adviser in the Prime Minister's Office, put it in a memorandum to the Prime Minister in 1985,

> The Liberal Party, in office for 20 years out of 21 up to 1984, built the public service that we have inherited.... These appointments were made in a conscious and perfectly proper effort to fashion a senior public service that would be compatible with Trudeau's style and approach—the very style and approach that Canadian voters so emphatically rejected in September 1984. It is idle to think that these men and women, who have spent most of their public service careers designing and implementing the Trudeau/Pitfield approach to government, could suddenly become strongly committed to radically altering their own creation.³

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In his note, White went so far as to say that more than half of Mulroney's Cabinet ministers appeared to be “dominated” by the “bureaucrats inherited from the Trudeau years” and that these senior officials were hindering the government's ability to implement the changes desired by the electorate.⁴

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This view of the senior bureaucracy, in which the loyalty and responsiveness of senior officials was believed to be clouded by a combination of self-interest, past loyalties and ideological affinity with previous governments, undoubtedly coloured how the Mulroney government initially approached the issue of staffing the senior public service. Establishing greater political control of the bureaucracy became an important objective, and the government took a number of steps in this regard.

First, there is no doubt that the government looked carefully at the Order-in-Council appointments that were legitimately under its control. For example, Peter White, who served as the Prime Minister's special assistant for Governor-in-Council appointments at the time, explicitly argued that the Prime Minister's Office needed to get involved more intimately in the appointment and supervision of senior officials,
especially deputy ministers, in order to ensure that the public service did not become an obstacle to implementing the government’s agenda. As he put it,

To reassure [Canadians], [the government] must make an early start on gaining control of the bureaucracy by identifying and installing some of our own chief operating officers as outlined above. This should not be done with fanfare and only at long intervals, but routinely and continuously over the government’s mandate. We must also bear in mind that a handful of positions, in the PCO, the PSC, the Treasury Board, DRIE, etc., are the key to effective control of the bureaucracy.

To gain political control of the public service, a new team of senior executives needed to be progressively put in place. The Mulroney government did move forward on this agenda, at least to some extent. About a year after taking office, it had already made forty-five new appointments at the deputy minister level. Within two years, “virtually all the deputy ministers” had been changed and a new senior management team was in place, a level of transfers that Peter Aucoin, in his study of the new public management in this period, called “unprecedented.” However, while these appointments were seen “as a way of quickly establishing political control of the bureaucracy,” they brought few political appointees from outside the public service into the senior executive rank. The difficulty of the work, coupled with a relatively poor compensation package, made it difficult to attract appropriate candidates from the private sector. In the end, the Prime Minister turned largely to experienced public servants to build his new team. As a result, while a measure of personal and ideological affinity might have been sought in making these senior bureaucratic appointments, it certainly did not lead to a major, American-style “politicalization from the outside.”

A second approach to gaining greater political control of the bureaucracy was to exert political pressure for certain appointments to be made to positions covered by the Public Service Employment
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Act (PSEA). This task was more worrisome from the Public Service Commission’s point of view. As Jack Manion, a former senior public servant, would later recall, many Progressive Conservative politicians were advocating for a more American approach to staffing, including "by extending political appointments down into the hierarchy." For example, in interviews for this book, a number of former executives who worked for the PSC and for the senior personnel division of the Privy Council Office in the mid-1980s remembered that several new ministers had wanted to appoint their own senior officials at the assistant deputy minister level. The interviewees recounted having had multiple meetings with new ministers and their staff to explain why they could not simply hire the people they wanted. Some senior ministers, such as Deputy Prime Minister Erik Nielsen, who was well known for his aversion to the bureaucracy, were said to have particularly strong feelings about the need for more extensive ministerial input into the selection of senior departmental staff. While appointment requests were not unheard of under previous governments, the distrust of many ministers in the Mulroney government resulted in greater pressures on the PSC to yield to ministerial preferences. In the end, PSC officials were able to resist such pressures by pointing to the PSC’s clear statutory authority in the area of staffing as well as to its institutional independence from the political executive.

A final, more innovative step taken by the Mulroney government to reassert political control over the bureaucracy was the strengthening of ministerial offices through, in particular, the creation of a new chief of staff position in every ministerial office. In fact, for some key ministers and advisers, such as Don Mazankowski and Tom d’Aquino, strengthening the political staff working with ministers seemed to provide the best means to counteract the power of the bureaucracy. While ministerial offices obviously preceded the Mulroney government, they were smaller in size and rarely constituted a significant challenge to the bureaucracy. However, under the new government, ministerial advisers would be expected to play a larger role in the policy-making process and to help ensure that the ministers’ decisions were understood and diligently implemented by their departments. To clearly signal
this new status, the most senior policy adviser was given the title of chief of staff, and the position’s rank (and salary) was elevated to the equivalent of an Assistant Deputy Minister (i.e. EX-04).

From the point of view of staffing and the merit principle, the growth of ministerial offices presented a dual challenge. The first challenge was that ministerial staffers were political appointees who were exempted from the normal requirements associated with the merit system. In this regard, the *Public Service Employment Act* simply stipulated that ministers had the authority to hire their own staff, including their chief of staff; their appointments consequently fell outside the authority of the PSC. However, as Liane Benoit has argued in a study done for the Gomery Commission, while the formal authority of ministerial staffers may be very limited, their access to the minister, their role in the policy process and their ability to speak “on behalf” of ministers in the operations of departments provides them with considerable influence. As a result, ministerial staffers represent a set of actors who can often insert themselves into the operation of the public service without having been elected or selected on the basis of merit. In the long-standing tension between necessary bureaucratic responsiveness and undue politicization, growth in the number and influence of ministerial staffers would pose a danger of tilting the balance in favour of the latter.

The second challenge concerned the priority rights granted to political staffers who wanted to enter the public service after having spent at least three years in a minister’s office. Under the provisions of the PSFA, senior exempt staff, such as chiefs of staff, legislative assistants and policy advisers, had the right to be appointed, in priority, to a position at an equivalent level in the public service. In effect, this meant that these former political appointees could enter the public service, at a fairly senior level, without being subject to the examinations and competitions normally required by the merit system.

The virtues of this kind of system have long been debated. By providing a measure of security to political staffers, it can help attract people of high quality to important but short-lived jobs in politics. And there is no doubt that many former political staffers who have entered the public service in this way have turned out to be outstanding
public servants and served loyally under governments of different partisan stripes. However, the potential for abuse also remains real, and a few instances of abuse can inflict considerable damage on the public trust. In recent years, the “sponsorship scandal,” involving the misuse of public funds for the benefit of the Liberal Party of Canada and a series of advertising firms, certainlly brought this fact into focus. In this case, the abuse of the government program was linked in part to the priority appointment of a minister’s former chief of staff to a director general’s position within the same department. In a matter of weeks, a political staffer who had been involved in the bureaucratic decision-making process for the attribution of funds to outside groups came to directly head the same program as a public servant. While this priority appointment remained a small aspect of the controversy, it was a vivid example of the potential for abuse of the exempt staff provisions of the PSEA, and it was no doubt the reason why the new Conservative government repealed these controversial provisions in December 2006, as had been recommended by the Gomery Commission.

Ultimately, the attempts by the Mulroney government to gain greater political control of the bureaucracy do not seem to have resulted in significant change, the presence of chiefs of staff and the stronger ministerial offices having largely been described as “ineffective” and “unsuccessful.” The desire to make more political appointments to the senior bureaucracy did not yield much result either: there was no influx of outside political appointees into the ranks of deputy ministers and the anecdotal efforts to gain a greater say in the appointment of senior executives below the deputy ministerial rank were quashed by the PSC. After the initial period of distrust, like its predecessors, the Mulroney government turned to the professional bureaucracy to help run the government, and the Prime Minister began to urge his ministers to rely on the professional public service to manage their departments and to focus instead on their own ministerial and political duties. As Paul Tellier, clerk of the Privy Council at the time put it, “The Prime Minister started to realize after six months in power that he needed the public service perhaps more than they needed him.”
From the point of view of merit and the staffing system, this period can nevertheless be seen as characterized by the re-emergence of debates and concerns about the politicization of the public service. While it would be prudent not to exaggerate the importance of the political pressures placed on the staffing process at the time, one former PSC executive believed these pressures to be sufficiently strong to describe this period as “a crucial period for the PSC,” in that it found itself having to fend off unusual pressures and affirm its independence. While the events of the period do not seem to have seriously threatened the integrity of the staffing process or the application of the merit principle, they do remind us of the ongoing need for safeguards against the politicization of the staffing process in a liberal democracy.

Moreover, as the particular case of the Mulroney government also reminds us, in a representative democracy, there are always legitimate concerns about the responsiveness of the bureaucracy to the direction of the elected government. Security of tenure, political neutrality, and merit-based appointments are the foundations of a professional public service that can best serve the country’s long-term interests, but care must always be taken to ensure that the implementation of a merit system does not inadvertently result in an unresponsive bureaucracy, unwilling to bend to the elected government’s legitimate preferences. Staffing a professional bureaucracy is thus always a challenging balancing act, and the Mulroney government’s efforts to exert greater control over the senior public service at least serve as a reminder that the desired point of equilibrium between political neutrality and responsiveness remains a matter of debate.

THE POLITICAL RIGHTS OF PUBLIC SERVANTS: POLITICIZATION FROM THE BOTTOM?

While the concerns and behaviour of the Mulroney government brought to the fore the difficult balance between neutrality and responsiveness in the senior ranks of the public service, over the same period, some key court decisions also forced the PSC to deal with concerns about the appropriate balance between the political neutrality of the bureaucracy
and the political rights of public servants in the lower ranks of the public service. It has been a long established principle that, in order to preserve the political neutrality of the public service, it is necessary to curtail the rights of public servants to engage in partisan political activities. As we have seen, the protection of the political neutrality of the public service has been a central function of the PSC since its inception in the early 20th century. However, the exact norms and prohibitions that must flow from this general principle have been a more contentious matter. In the late 1980s and early 1990s, the PSC was forced to change its policies on this central issue.

The ideal of a neutral and professional public service able to independently provide policy advice and implement government policy without political consideration requires that public servants be non-partisan, and be seen as non-partisan by both the government of the day and the citizens who interact with them. If, because of their visible political engagement, public servants were to be known as partisan, their loyalty to the government of the day might be cast in doubt. But, equally problematic, their impartiality in the conduct of their duties might also be questioned by the citizens who are forced to interact with them and who do not share their politics. For example, a businessman with a well-known political affiliation might come to doubt the impartiality and motivation of a tax official making a determination about tax matters if it were well known that the official was extensively involved with a different party. Many public servants hold positions that grant them a measure of discretion in the implementation of the law or in the distribution of public funds and to sow doubts about potential political bias in the exercise of such discretion would undoubtedly be injurious to Canadian democracy and public trust in the public service.

For these reasons, the Public Service Employment Act has long contained provisions constraining the right of public servants to participate in political activities. More specifically, before the PSEA's reform in 2003, section 33 forbade deputy heads and other employees of the public service to "engage in work for or against a candidate" in an election, "engage in work for or against a political party," or "be a candidate." However, the act also made exceptions to this blanket
prohibition. It stipulated clearly that making financial donations to a
candidate or a political party and attending a political meeting were
not prohibited.24 Obviously, public servants also had the right to vote.
Moreover, employees, unlike deputy heads, could also seek nomination
and run for office, but only if they obtained permission from the PSC.
In order to grant such permission, and consequently a leave of absence,
the PSC had to determine that "the usefulness to the Public Service of
the employee in the position the employee then occupies would not be
impaired by reason of that employee having been a candidate."25

Over the years, these provisions had been the object of some
contention, but as the language of rights became more prevalent in
Canadian society, the issue of the political rights of public servants
became more salient in Ottawa. As the Special Committee on the
Review of Personnel Policy and the Merit Principle (the D'Avignon
Committee) observed in 1979,

The views of intervenors on the question of whether public servants
should be free to participate in partisan political activity ran the
gamut. Some clearly believed passionately in their right to unfettered
involvement and declared that no public service legislation would
extinguish that right. At the other extreme was the view that partisan
activity by any public servant was sufficient to cast a shadow on the
political neutrality of the entire public service. Our experience is
that the younger public servants are the most insistent on having the
freedom to participate in the political process.26

Perceiving a growing desire among public servants for political
involvement, the D'Avignon Committee believed that the widespread
prohibition against political activities was "out of step with reality" and
ultimately "unenforceable".27 Consequently, already in the late 1970s,
the committee was recommending that the PSEA be amended to grant
public servants a greater measure of freedom to engage in political
activities.

The scheme proposed by the D'Avignon Committee was inspired
largely by the British system and it followed from the principle, which
would become important in Canadian law as well, that the rights of
employees to participate in politics should vary based on their rank and functions. The committee did not dispute the importance of the political neutrality of the public service or the fact that it enhanced the value of the public service to the government and citizens, but it believed that many public servants, due to the nature of their work, could fully participate in the political process without compromising the bureaucracy's impartiality. As the Supreme Court of Canada would later put it, the consequences of having known partisan ties are hardly the same for a deputy minister and a cafeteria employee.

The higher the level of responsibility, the level of discretion and the potential influence on government decisions, the more important political neutrality becomes. The widespread prohibitions contained in the PSEA, which, for the most part, applied in the same manner to all employee categories and levels, were therefore considered to be excessive.

As a remedy, the D'Avignon Committee recommended in 1979 that the public service be divided into three groups for the purpose of determining employees' rights to political participation. A first group, comprising senior executives and senior managers, would be denied the right to participate actively in the political process, but such individuals would be allowed to make financial donations, attend political meetings and vote. A second group, which would include employees who performed duties that could be tainted by their political engagement, such as those involved in personnel administration or the awarding of contracts and grants, would see their right to political involvement made conditional on the PSC's approval. Finally, a third group, comprising all remaining occupational categories, would be granted "full freedom of political action," including the automatic right to seek nominations and run for office.

At the time, the PSC strongly opposed such reforms. In its opinion, the expansion of the political rights of public servants would necessarily threaten the principle of political neutrality of the public service. In interview, Edgar Gallant, PSC president at the time, recalled that he did not see eye to eye with most deputy ministers on this issue and that resisting these proposals was very important to him. He held a strong view that public servants were professionals who should not engage, or be seen to be engaged, in electoral politics and partisan
activities. In protecting the professional reputation of the public service, the perception of neutrality was as important as neutrality itself. To allow greater, more visible political participation by employees in its lower ranks would run the risk of breeding distrust in the entire public service.

While it seemed to be part of a minority that was resisting an expansion of political rights for public servants, the PSC was not alone. Indeed, Gallant’s adherence to a strong version of political neutrality was later echoed by Supreme Court Justice William Stevenson, who issued a dissenting opinion in a landmark court case on the subject:

The [PSEA] could distinguish between various levels of employees, but, in my view, the case against partisan activities is a strong one. Once allegiances are known, the principles of neutrality, impartiality and integrity are endangered. There is a danger within the service that those seeking appointments and promotions will feel some incentive to cut their cloth to the known partisan interests of those who have influence over appointments and promotions. Visible partisanship by civil servants displays a lack of neutrality, and a betrayal of that convention of neutrality. The public perception of neutrality is thus severely impaired, if not destroyed. I must say that to permit overt partisan political activity is to come perilously close to abandoning the principle of neutrality.  

It was this kind of strong version of political neutrality that underpinned the PSC’s opposition to changes to the PSEA.

However, while it was able to block these reforms in the late 1970s, the PSC would be unable to prevent changes from being made to the law in the years that followed. Two court cases proved particularly significant in redefining the substance of political rights for public servants between 1985 and 1992: the Fraser decision of 1985 and the Osborne decision of 1991.

The Fraser case involved a challenge by a Revenue Canada employee who was fired after expressing strong public criticism of government policies on the adoption of the metric system and on the constitutional entrenchment of a charter of rights and freedoms. In newspapers and on
radio shows, Neil Fraser, the regional head of the Business Tax Division in Kingston, had repeatedly criticized the Trudeau government's policies and the government itself, going so far as to compare the government to the dictatorial government of Poland and to the regime of Nazi Germany. He even wrote to the Leader of the Government in the British House of Commons, criticizing the Canadian government and pleading with the British government not to grant Canada's request to adopt a new constitution. After several warnings, Fraser was dismissed from the public service. He then appealed to the Public Service Staff Relations Board and ultimately to the Supreme Court of Canada, arguing that the government was placing undue constraints on his freedom of speech in order to allegedly preserve the public service's impartiality and effectiveness.

In the end, the Supreme Court upheld Fraser's dismissal. As the Chief Justice put it, while not a constitutional case per se, the Fraser case turned on the issue of the proper legal balance between (i) the right of an individual, as a member of the Canadian democratic community, to speak freely and without inhibition on important public issues and (ii) the duty of an individual, qua federal public servant, to fulfill properly his or her functions as an employee of the Government of Canada.

In rendering its decision in the case, the court provided some guidance on how such balance should be approached. It made it clear that, while the curtailment of public servants' freedom of speech was warranted by the objective of maintaining an impartial and loyal public service, public servants could not be "silent members of society" and had "some freedom to criticize the Government." In the court's view, it was also incumbent upon civil servants to ensure that the substance, context and form of their public criticism were such that it would not impair their ability to perform their job as loyal and impartial government employees. In Neil Fraser's case, the adjudicator quite reasonably inferred that the extensive and vitriolic nature of his criticism of major government policies had indeed impaired his ability to perform his duties.
In itself, the Fraser case did not represent a major blow to the political rights provisions of the PSEA, which remained intact. But it was nevertheless significant for two reasons. First, it confirmed the need to strike a new balance between preserving the impartiality of the public service and protecting the political rights of civil servants. While Fraser himself had clearly gone beyond the permissible limits, it was by no means clear that the PSC's stronger version of political neutrality struck the proper balance. As a former official of the PSC recalled in an interview, "The Fraser decision encouraged people seeking changes to the status quo, including union officials and some of their political allies in Parliament." Second, in its reasons, the Supreme Court clearly endorsed the view that "the degree of restraint which must be exercised [on the right of political expression] is relative to the position and visibility of the civil servant." In this way, the court indirectly endorsed the general logic previously expressed by the D'Avignon Committee, a view that clashed with the broader prohibitions favoured by the PSC. It was a clear signal that a new balance, one that acknowledged the political rights of civil servants to a greater extent, would need to be found in the coming years.

The second court decision, which altered the definition of the political rights of public servants more fundamentally, was handed down by the Supreme Court in 1991 in the Osborne case. The decision actually involved a series of cases relating to public servants whose right to participate in various political activities had been denied by the PSC. Osborne and Millar, two of the respondents in the case, had been elected as delegates to the 1984 Liberal party leadership convention, but they were then forced to resign as delegates after being advised by their department that they would suffer disciplinary actions if they failed to do so. Other respondents wanted to work, on their own time, for various candidates in the 1984 election campaign. One wanted simply to stuff envelopes from her home or the campaign office of the party she supported. Another employee, who felt strongly about the place of women in Canadian society, wanted to speak publicly in her community about which party she believed had the best electoral platform for advancing the status of women. In all cases, the central
issue was whether the freedom of expression guaranteed by Section 2 of
the Charter of Rights and Freedoms was unduly restricted by Section 33
of the PSEA. The courts considered the cases together. Having lost their
trial in first instance, the public servants won their appeal in the Federal
Court of Appeal in 1988. Seeking to protect the integrity of the PSEA,
the PSC then appealed the decision to the Supreme Court.

The Supreme Court’s Osborne decision dealt a significant blow
to the political rights provisions of the Public Service Employment
Act, invalidating subsections 33(1)(a) and (b). These two subsections
prohibited public servants from engaging in “work for or against” a
candidate or a political party, prohibitions that the PSC had strongly
defended over the years. In its reasons, the Supreme Court again
emphasized the importance of striking an appropriate balance between
the freedom of expression of civil servants and the legitimate constraints
placed upon this freedom for the sake of protecting the political
neutrality of the public service. It specifically found the prohibitions
on working for or against a party or a candidate to be excessively broad.
While the legitimacy of Parliament’s objective—ensuring an impartial
public service—was never disputed, the means of doing so were found
to fail the “minimal impairment” and “proportionality” tests imposed
by the charter. The prohibitions of the PSEA went beyond what was
necessary to preserve the political neutrality of the bureaucracy, thereby
unnecessarily trampling a fundamental freedom of civil servants.

Again, in reaching its decision, the Supreme Court argued for
a more differentiated set of prohibitions, based on the level and type
of jobs. Pointing out that “a great number of public servants who in
modern government are employed in carrying out clerical, technical
or industrial duties that are completely divorced from the exercise
of any discretion that could be in any manner affected by political
considerations,” the court stated that “the need for impartiality and
indeed the appearance thereof does not remain constant throughout
the civil service hierarchy.”39 It thus built upon the Fraser decision,
similarly lending indirect support for the D’Avignon Committee’s
original proposal to adopt the British approach to the regulation of civil
servants’ political rights.
In the end, the Osborne decision left the PSC in a difficult position. While the provisions forbidding public servants to seek nomination and run for office, except with the explicit permission of the PSC, were left intact, other limits on political participation were not as clear. Refusing to read new provisions into the act, the Supreme Court had simply struck out the unconstitutional provisions, explicitly inviting Parliament to redraft the impugned provisions and amend the PSEA. But such parliamentary guidance would not be forthcoming, certainly not in the near future, and the commission needed to clarify the nature of the constraints remaining on public servants.

A few weeks after the Osborne decision was made public in June 1991, the PSC issued a statement announcing its new position. Signed by the three commissioners, the commission’s statement said that while the statutory prohibition against working for or against a candidate or a political party no longer had any force, at the same time, employees should be aware that the principle of a politically neutral Public Service remains intact. Therefore, in engaging in political activities, they should exercise judgment and consider their specific circumstances, particularly with due regard to the loyalty they owe to the Government and to their obligation to act, and be seen to act, impartially when dealing with the public.81

With respect to their right to criticize the government in public, employees were simply referred to the 1985 Fraser decision.

The exact meaning of this statement of policy is unclear and it certainly provided little guidance on what was actually permissible and what was not. More of an exhortation to act responsibly than a statement of rules, it no doubt reflected the absence of a clear legal foundation to regulate the political behaviour of civil servants. Following the Osborne decision, with the exception of the prohibition on running for office, the commission seemed to have little legal recourse to prevent other forms of partisan engagement by public servants. As a former official of the commission put it, “The PSC, TBS and deputy heads are not in a position to do much when an employee engages in political activity which is not acceptable.”82
A few years later, at the time of the 1993 general election, the Treasury Board Secretariat issued a set of principles and guidelines, drafted in close collaboration with the Public Service Commission.13 The Guidelines on Employee Rights and Responsibilities during an Election remained equally vague. After informing employees that they could engage in “activities of a political nature,” the guidelines exhorted them to remain loyal to their employer, the Government of Canada, and exercise some restraint in their political involvement so as to avoid jeopardizing the tradition of the public service as a politically neutral institution. Employees were encouraged to consult senior management if they had doubts about the political activities that they were contemplating. Again, with respect to the public criticism of government, employees were simply reminded that the Fraser decision had held that a balance had to be struck between an employee’s freedom of expression and the public interest in preserving an impartial public service.42 The exact nature of that balance, and how it could be struck, was not explained.

This ambiguous situation, where the principle of political neutrality continued to be deemed important but failed to be supported by clear statutory provisions, did not sit easily with the PSC. Internally, the commission, which was already wishing for more detailed statutory provisions in the 1980s, discussed the rationale and potential outline of a new law that would enshrine the principle of political neutrality. In an internal document developed to consider new legislative measures, it argued,

The integrity of the Public Service is at some risk: the TBS, deputy heads and employees themselves do not know with sufficient certainty where they stand…. The PSC’s role as guardian of the non-partisanship of the Public Service had stood for years. Ever since Osborne, Milla’s as leadership role has become blurred. Yet federal, provincial and territorial general elections and by-elections are held on an on-going basis and employees and managers continue to look to the PSC (as well as TBS, now) for advice with respect to candidacy as well as other political activity. The PSC stands to gain from its role being clarified.44
A new law could bring the necessary clarity. In particular, in considering the potential content of such legislation, the commission's staff was proposing that the new legislation create a restricted class of employees and specify the activities that would be permitted, and those that would not, for this class of persons. Then, those employees who did not fall into that restricted class would enjoy broad freedom to engage in all activities, with the potential exception of some specified activities that would be universally prohibited. The restricted class would include the entire executive group, employees having substantial management duties or input in policy formulation as well as those exercising significant discretion in implementing government programs, such as making decisions on giving grants, imposing penalties or negotiating contracts. Unfortunately, in the wake of the Osborne judgment, there seemed to be little interest among politicians in tackling this issue in Parliament.

In fact, the only attempt to amend the political provisions of the PSEA in the early 1990s was an attempt to further weaken the law by striking out the only part of Section 33 that was left unscathed by the Osborne decision: the prohibition on seeking nomination and running for office. In the early 1990s, concerns about electoral participation and democratic practices led the Mulroney government to establish a Royal Commission on Electoral Reform and Party Financing, also known as the Lortie Commission. The Lortie Commission tabled its report at the end of 1991, making a wide range of recommendations to reform the electoral process, and, somewhat surprisingly, it recommended that all federal employees be granted an automatic right to a leave of absence to seek nomination and to be a candidate in a federal election.

The Lortie Commission's rationale for the proposed changes rested largely on perceived contradictions in the current federal policy on the political activities of civil servants. It pointed out that, under the existing system, the government could always appoint individuals from outside the public service, even people who had obvious partisan ties, to deputy minister positions. Moreover, the priority rights granted to ministerial staffers under the PSEA meant that a number of people with very recent, high-level partisan ties were entering the higher
echelons of the public service on a regular basis. It was also a common practice for some senior civil servants to join ministerial offices for a while, before returning to their public service jobs, in order to provide ministers with needed expertise in policy and public administration. All these movements in personnel, the Lortie Commission pointed out, amounted to an acknowledgment by the federal government that professional public servants can have partisan, political experience and still adhere to the norms of a neutral and non-partisan bureaucracy once they are appointed, or return, to a public service job. If we believe that partisan political activities, even recent ones, are compatible with maintaining a neutral public service in the higher ranks of the public service, the Lortie Commission asked, why would it not be the same throughout the entire public service? This view also seemed supported by the fact that several provinces already considered a leave of absence to run for election to be the right of public servants, as opposed to a privilege to be granted on a case-by-case basis.

When it considered the Royal Commission's recommendation, the Special Committee of the House of Commons on Electoral Reform initially looked favourably upon the recommendation and considered it as part of a package of legislative changes. Needless to say, the PSC took a different view. Its president at the time, Robert Giroux, mounted a strong defence against the proposal. Giroux and his two commissioners wrote to Jim Hawke, chairman of the Special Committee, to express their "serious concerns with respect to the proposal," arguing that it could have "serious and potentially far-reaching effects on the political neutrality of the Public Service." The commission also submitted a brief to the parliamentary committee arguing strongly against the amendment.

In these documents, the PSC pointed out that the impartiality of the public service had been considered by the courts as an important constitutional convention, even "an essential prerequisite of responsible government." It also reminded the parliamentarians that the Mulroney government itself, in the context of its administrative reform initiative called "Public Service 2000," had recently reiterated its commitment to the "scrupulously non-partisan character" of the public service, stating...
that this non-partisan character was needed for it "to be professional and effective in supporting the Government of the day and providing service to Canadians." By granting all public servants the automatic right to run for office, Parliament would threaten this desired political neutrality and could impair the usefulness of the bureaucracy.

In defence of this viewpoint, the commission relied on two key arguments. First, it pointed out that the Supreme Court, in the Fraser and Osborne decisions, had explicitly stated that, despite the need to allow civil servants a greater degree of political expression, political neutrality remained an important constitutional principle and that some balance had to be struck between these two competing objectives. Moreover, the court clearly thought that a public servant's level in the hierarchy, and his or her public visibility, degree of discretion in distributing sanctions or benefits and degree of influence on government policy were all factors that should be considered before permitting the public servant to fully engage in political activities. By granting an automatic right to seek nominations and run for office to all public servants, and taking away the Public Service Commission's discretion, the proposed legislative measures would clearly run counter to this approach. In the commission's words, it would "run contrary to the spirit of the Supreme Court judgment."

Without an authority like the PSC to judge each case on its particular merits, no proper balance could be struck.

Second, the commission argued that there was no convincing evidence that the Section 33 provisions created a significant barrier for public servants who wanted to run for office. In fact, these permissions were seldom denied. From 1967 to 1992, the PSC granted 230 permissions out of 256 requests, an approval rate of ninety percent. Moreover, none of the twenty-eight employees who, over that period of twenty-five years, saw their application denied challenged the commission's decision in court. In sum, the commission's discretion both allowed it to prevent cases where excessive political engagement by a public servant could have compromised the neutrality, or perception of neutrality, of the bureaucracy and allowed the vast majority of those who wanted to run for office to do so in perfect legality. From the point of view of encouraging electoral participation, Section 33 of the PSFA hardly seemed to be a significant barrier.
It is not clear whether the commission’s position would have ultimately prevailed, as there appeared to be a fair degree of consensus across parties on most of the proposed reforms. But the dissolution of Parliament put a stop to the legislative process and, consequently, Section 33 of the PSEA was left untouched. A few years later, in the fall of 1998, Jean Chrétien’s Liberal government considered reintroducing the same legislative proposal. In its internal debates, the PSC reached the same conclusion as in 1992 and intended to strongly oppose the move, inside the public service but also in a more public way, using its independence as an agent of Parliament. As an internal memo stated at the time:

> [Privy Council Office] officials need to be informed that the Commission would not support a move to reduce the Commission’s authority in this area. The Commission reserves the right to make this view known to any parliamentary committee that may subsequently study this matter.\(^5\)

In the end, again, the PSEA was not amended, the provisions on running for office were left untouched and another attempt at undercutting the commission’s remaining authority was pushed back.

Changes in the political rights provisions of the PSEA were finally made in 2003, when Parliament adopted the *Public Service Modernization Act* (PSMA) in an effort to overhaul the entire human resources system of the federal public service. Since the PSMA represented such a comprehensive legislative change, it presented an obvious opportunity to clarify the government’s policy on the political rights of civil servants. However, it is interesting to note that the approach adopted at this time varied significantly from the one considered by Parliament in 1991 and 1998. Largely driven by the senior public service, in the context of a major initiative focused on improving the public service as opposed to a specific measure to improve electoral participation, the 2003 legislative reform did not seek to introduce an automatic right to a leave of absence to run for office, but rather to inscribe directly in law the state of policy resulting from the Supreme Court decisions of the previous decades.
and to restore the ability of the Public Service Commission to enforce this policy.

Part 7 of the new PSEA explicitly recognizes, for the first time, the need to reconcile the right of employees to engage in political activities with the need to preserve the political neutrality of the public service, and it allows employees to engage in such activities as long as they do not impair their ability to do their job in a politically impartial manner. Employees who wish to seek a party's nomination and run for office must obtain the Public Service Commission's approval, and, for the first time, this obligation extends to participation in municipal elections. These measures apply to all employees of the federal public service, with the exception of deputy heads, who are explicitly prohibited from participating in any political activity with the exception of voting. This new wording concerning deputy heads appears to further limit the scope of their political participation since, under the older version of the statute, they were also allowed to make donations to political parties and individual candidates. Finally, the new PSEA clearly established the Public Service Commission's authority to investigate any allegation that an employee has violated these provisions on the political activities of public servants. The PSC can even investigate alleged violations of the ban on political activities by deputy heads, reporting its conclusion to the Governor-in-Council, provided that the allegation is made by a person who is or has been a candidate in an election.

By restoring some of the PSC's authority to limit the political activities of civil servants while taking into account the new legal landscape brought about by the Osborne decision, the new legislative measures tried to strike a new balance between the competing objectives of neutrality, political participation and freedom of expression. But they were found lacking by some observers and stakeholders. For example, Gordon Robertson, former clerk of the Privy Council, thought that they were "completely in conflict with the principle of neutrality" and he expressed great concern about their impact. Similarly, Donald Savoie, a noted scholar of public administration, argued that the new act should have simply outlawed political involvement by all senior managers: "Every single executive or manager in the public service
should have no interest whatsoever in partisan politics," he said. "If they do, then they should do the honourable thing and leave the public service." In contrast to these advocates of greater restrictions, Nycole Turmel, president of the Public Service Alliance of Canada, argued that the new provisions would amount to taking back "the right of federal government workers to engage freely in political activities."

However, despite these criticisms, the new provisions on the political activities of civil servants attracted relatively limited attention in the overall debate about the Public Service Modernization Act, which focused to a greater extent on changes to the definition of merit and on labour relations. As a result of the work of the parliamentary committee that studied the bill, its original version was amended to provide somewhat more flexibility for the PSC to grant leaves of varied lengths for employees seeking to become candidates in elections. Other amendments resulted in the strengthened authority of the commission to investigate allegations of breaches of the political activities provisions. But, on the whole, these amendments subscribed to the overall approach that now characterized the federal government's policy on the political activities of public servants, and the proposed measures were adopted with little change or resistance.

As a result, by the end of 2003, Parliament had brought back a measure of clarity on how the federal public service should approach the difficult balance between the political impartiality of the bureaucracy and the rights of public servants to participate in the democratic process. While the new law clearly represented a shift in policy from the position historically preferred by Public Service Commission, it nevertheless continued to rely on the commission, as an independent authority, to guard the fundamental principle of the political neutrality of the public service.

**CONCLUSION: BALANCING NEUTRALITY, RESPONSIVENESS AND POLITICAL RIGHTS**

Between 1979 and 2006, as its political and legal context changed, the PSC had to find ways to continue to protect the fundamental
value of the political neutrality of the public service while ensuring an appropriate level of responsiveness to political leadership and respect for the fundamental rights of civil servants. As the events recounted in this chapter have illustrated, finding a new balance among these competing values and objectives was not easy. There is no doubt that events, especially court decisions, pushed the commission to rethink its definition of political neutrality, and how to best preserve it, to a greater extent than it would have done otherwise. Ultimately, a new compromise between the political rights of civil servants and their neutrality in service of the state, originally resisted by the PSC, came to redefine Canadian policy on the political activities of civil servants.

While blatant politicization at the top was resisted, this period saw developments in this regard that became worrisome for some observers of public administration. While ministerial offices were somewhat reduced in size as a result of the Mulroney years, they were now permanent and important fixtures of Canadian government, entrenching a cohort of potentially influential staffers at the higher levels of the Canadian government who were exempt from the merit system and whose role in government decision-making and operations was not always well defined. Also of concern was the appointment of political staffers through the use of priority rights under the PSEA, but that pathway into the public service was closed in 2006.

However, while these developments could be regarded in some ways as setbacks, this chapter has also shown how the PSC contributed to ensuring that the fundamental value of political neutrality was not simply sacrificed on the altars of political responsiveness and participation over this period. It repeatedly reminded the courts of the fundamental importance of preserving a politically neutral public service, and it succeeded in pushing back attempts to automatically grant leaves of absence to public servants wishing to run for office. The commission also saw its role in preserving the political neutrality of the bureaucracy reaffirmed with the 2003 legislative reform, in particular with the entrenchment of new and clearer provisions in the Public Service Employment Act. In fact, as we have seen, these legislative changes even extended somewhat the coverage of the restrictions on political activities.
Clearly, then, the struggle over political neutrality in this period cannot be seen as a simple story of politicization. In fact, not only did political neutrality remain part of the set of fundamental principles meant to be protected by the staffing system, but it was even clearly and explicitly recognized by the Supreme Court as a constitutional convention, most notably in the Osborne decision. It is worth remembering that, in this case, the court stated that “the existence of a convention of political neutrality, central to the principle of responsible government ... is not seriously disputed” and that “while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and the constitutional system.”

In sum, despite the transformations and setbacks over this period, the value of a politically neutral public service remained an important part of the Canadian model of public administration, and the Public Service Commission remained a central actor in promoting and protecting this fundamental principle.

ENDNOTES

2 Donald J. Savoie (1994), Thatcher, Reagan, Mulroney: In Search of a New Bureaucracy, University of Toronto Press, Toronto, 94.
5 The memorandum is fully reproduced in appendix of Newman (2005), Secret Mulroney Tapes, 456.
6 The number comes from a “patronage tally” done by the government at the time and reprinted in an Appendix to Newman’s Secret Mulroney Tapes, 450.
7 Peter Ancoin (1995), The New Public Management: Canada in Comparative Perspective, Montreal, [RPP], 59.
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Peter Aucoin (1995), The New Public Management: Canada in Comparative Perspective, Montreal, IRPP.


The relevant provisions are contained in Article 39 of the Public Service Employment Act, 1985.


Ibid.

Obviously, the danger of politicization is not simply a matter of the number of employees who are appointed to the senior public service in this way. On this score, the number of ministerial staffers choosing to enter the public service through this method has always remained relatively small. Liane Benoît calculated that only about 8% of the exempt staff, or 26 persons per year on average, entered the public service in this way between 1998 and 2005. See (2006), “Ministerial Staff,” 219.

For a detailed account of these events, see Gilles Toupin (2006), Le déshonneur des libéraux: Le scandale des commandites, Montréal, VLB éditeur.

The employee in question, Pierre Tremblay, resigned his position in November 2001.

The Federal Accountability Act repealed the Minister’s staff priority provision of the Public Service Employment Act, effective December 2006. It should be noted that, while the exempt staff priority provision of the PSEA was repealed in 2006, public servants may still take a leave of absence from their job to work in a minister’s office and benefit from a “leave of absence priority” to return to their job or an equivalent position if their job has been filled on an indeterminate basis, when they leave the minister’s office. But, in these cases, the returning public servant’s initial appointment to the public service has at least already been authorized by the PSC under the normal procedures associated with the merit system.


Interview with a former senior official of the PSC.


Ibid.


Ibid, par. 49.

Ibid, par. 1.

Ibid, par. 31 and 36.

Ibid, par. 50.

Interview with a former senior official of the PSC.


Interview with a former senior official of the PSC.

Interview with a former senior official of the PSC.


Royal Commission on Electoral Reform and Party Financing (1991), *Reforming Electoral Democracy*, volume 1, Ottawa, Minister of Supply
and Services Canada, 80–83. It can be noted that the royal commission actually proposed that federal employees receive an automatic leave of absence to run in federal elections only and that the parliamentary committee that studied its report and proposed changes did not extend these recommendations to provincial elections. For provincial elections, the PSC would have continued to weigh the consequences of granting such a leave for the impartiality of the public service. In its representation to the parliamentary committee that studied these recommendations, the PSC made the point that this distinction between federal and provincial elections seemed largely unfounded.

47 Ibid., 81.
48 Ibid.
49 Letter from Robert Giroux to Jim Hawke, chairperson of the Special Committee of the House of Commons on Electoral Reform, dated April 9, 1992.
50 Public Service Commission of Canada (1992), Brief to the Special Committee of the House of Commons on Electoral Reform, Ottawa, 2.
51 Ibid.
52 Ibid, 5.
53 Ibid, 3.
54 Ibid, 4.
55 Memorandum from Judith Moses, executive director, Policy, Research and Communication, to the Secretary General of the Commission, entitled “Political Activities of the Public Servants,” dated November 4, 1998, 4.
56 All of these provisions are contained in sections 111 to 119 of the new Public Service Employment Act, 2003.
58 Ibid.
60 See the speeches by Lucienne Robillard (president of the Treasury Board) and Paul Forseth, MP for New Westminster-Coquitlam-Burnaby (Canadian Alliance), in Debates of the House of Commons (Hansard), No. 107, 37th Parliament, 2nd session, May 28, 2003, for a description of the amendments adopted in response to the parliamentary committee’s work.