Petro-Canada and Crown Corporation Accountability: A Case Study

by

Gerald Farthing

A Practicum Submitted in Partial Fulfillment of the Requirements for the Degree, Master of Natural Resources Management

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ABSTRACT

Governments in Canada have at their command several public policy instruments that they may utilize to pursue broad economic, social, cultural, or other national goals. Indirect policy instruments such as tax policy, expenditures, or regulation may be employed. Alternatively, the government may choose to act in a more direct fashion through the creation of government departments, agencies, and/or Crown-owned or controlled corporations. Increasingly over the last two decades governments at both the federal and provincial levels have chosen to employ the corporate device.

In recent years, however, the activities and expenditures of Crown corporations have come under frequent critical scrutiny and surveillance. The proliferation of Crown corporations, coupled with the scandals over federally-owned Crown corporations in the mid-70s, has generated an unprecedented political and scholarly interest in the corporate device as an instrument of government policy. In fact, a number of critics have gone so far as to suggest that some of the activities and expenditures of some Crown corporations may be ultra vires - if not according to the letter then according to the intent of their enabling legislation.

Indeed, the 1982 Report of the Auditor General went so far as to characterize the Crown corporation sector in Canada as a sub-government structure that is not as accountable as it should be. Moreover, declared the Auditor General, if Parliament does not soon awaken to this phenomenon it may become unable to exercise its fundamental responsibility of overseeing the receipt and expenditures of public funds. Cited as an example, and of particular concern to the Auditor General, was the commitment to Petro-Canada of $1.6 billion by the Department of Energy, Mines and Resources for the acquisition of Petrofina Canada Incorporated without requiring documentation explaining, justifing or providing a post mortem evalution of the transaction. This meant, in the words of the Auditor General,

> [that] the Government of Canada chose to delegate the implementation of a crucial decision concerning the National Energy Program to an entity that is not fully accountable to Parliament.

Public accountability is the working principle of parliamentary government. The objective of public accountability in a parliamentary system of government is to ensure the perpetuation of responsible and representative government. The measure of public accountability in a parliamentary system of government is the degree of openess with which political and economic decisions are taken. Thus, effective accountability demands that the evaluation of all aspects of policies and expenditures begin by Parliament requiring clear identification of tasks and goals, and end by a full

accounting to Parliament for results achieved. Public accountability is only viable in a parliamentary system if Parliament is able to obtain sufficient information on the activities and expenditures of the machinery of government to enable it to discharge its obligation of holding the government "ultimately" accountable.

The question asked by this study is - what does it mean for a Crown corporation such as Petro-Canada to be held accountable for its activities and expenditures?

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Chapter I

THE STUDY PROPOSAL

1.1 INTRODUCTION

The 1980 National Energy Policy (NEP), a complex package of pricing, taxation and incentive measures,[1] believed by the federal government to be "eminently" in the national interest, has three main objectives:[2]

> (i) to establish the basis for Canadians to seize control of their own energy future through security of supply and ultimate independence from the world oil market.
>
> (ii) to offer to Canadians, all Canadians, the real opportunity to participate in the energy industry in general and the petroleum industry in particular, and to share in the benefits of industry expansion.
>
> (iii) to establish a petroleum pricing and revenue-sharing regime that recognizes the requirement of fairness to all Canadians no matter where they live.

These objectives were designed to do three essential things:[3] first, to give the federal government much more of the revenues from oil and gas and increased control over the industry; second, to lower the costs of entry by Canadian

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[1] Pratt, 'Petro-Canada: Tool for Energy Security or Instrument of Economic Development?', in Doern, G. Bruce, (ed.), 1982, p. 101.

[2] 1980 The National Energy Program, p. 2.

[3] Pratt, in Doern, p. 101.

capital into the oil and gas industries; and third, to accelerate petroleum exploration and development in the federally-owned Canada Lands.

Petro-Canada's post-NEP corporate planning and expenditures emphasized the government's energy and economic goals as outlined in the National Energy Program.[4] Petro-Canada was to pursue these objectives primarily through acquisitions of integrated private sector oil firms, joint ventures and investments in the frontiers. In addition, new legislation was introduced governing the administration of federal lands which included a 25 percent carried interest for the Crown to be worked by Petro-Canada.

In order to ensure the financial means whereby Petro-Canada would be able to pursue these objectives the Corporation was provided with substantial access to capital funding. For example, the initial authorized capital of the Corporation was $500 million and in 1981 Cabinet agreed to a doubling of Petro-Canada's capital budget to $900 million and a further increase in the 1982 budget to $1.6 billion.[5] Thus the federal government has given the Corporation considerable political and financial support.

However, as the sole shareholder of the Corporation, the government has attempted through the Department of Energy, Mines and Resources to circumscribe any autonomist tenden-

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[4] Ibid., p. 102.

[5] Ibid., p. 102.

cies the Corporation might exhibit that did not dovetail with the policy objectives of the Government. It was the intention of Cabinet to keep the policies of the Corporation to the course charted by federal policy as prescribed in the guidelines of the National Energy Policy.[6] Although Petro-Canada was expected to operate in a commercial environment and be subject to the discipline of a "bottom-line", it would also be required to perform as an instrument of Canadian energy policy - "an agent of Her Majesty" in every sense.[7] As such, Petro-Canada's incorporating legislation gives the Crown a number of checks which it can invoke to either influence, direct or override decisions made by the board of directors of the Corporation. Petro-Canada, at present, appears to be firmly under the control and direction of Cabinet.

The purchase of Petrofina Incorporated by Petro-Canada, however, raises quite a another concern from that of the relationship between the board of directors of the Corporation and the Governor-in-Council. The question is, what does it mean for a Crown corporation such as Petro-Canada to be held accountable in a manner that satisfies the criteria of public accountability as measured by the parliamentary system of government? Ultimately, it is this 'problematical' question with which this study is concerned.

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[6] Ibid., p. 101.

[7] Ibid., p. 91.

1.2 BACKGROUND TO THE PROBLEM STATEMENT

A major objective of the National Energy Program announced in 1980 by the Government of Canada was to increase the opportunity for Canadians to participate in the oil and gas sector of the economy.[8] One of the specific goals enunciated by the government pursuant to this objective was an early increase in the share of the oil and gas sector owned by the Government of Canada to be achieved through the acquisition of several large oil and gas firms.[9] Thus the government established a Canadian Ownership Account financed by special charges on all oil and gas consumption in Canada to be used solely to finance an increase in public ownership in the energy sector.[10]

Thereafter, on April 23, 1981 the government presented a Ways and Means motion to amend the Petroleum Administration Act for the purposes of providing for the 'imposition of Canadian ownership special charges and taxes to finance an increase in the Canadian public ownership of the oil and gas industry in Canada'.[11] Vote 5C of the Supplementary Estimates, (C) 1980-81, provided the authority for 'the share purchase of and property acquisition from Petrofina Canada Inc., by Petro-Canada, (not to exceed 1.7 billion dollars

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[8] The National Energy Program: Update 1982, p. 45.

[9] 1982 Report of the Auditor General, p. 515.

[10] Ibid., p. 515.

[11] Ibid., p. 515.

which includes the interim financing costs).'[12] In an agreement effective as of December 31, 1981 between the Government of Canada and Petro-Canada the Corporation agreed to provide the Minister of Energy, Mines and Resources with "Acknowledgements of Indebtedness" for the funds remitted to Petro-Canada from the Canadian Ownership Account. By the terms of the agreement Petro-Canada would issue common shares, each having a par value of $100,000, on March 31 of each year to extinquish the indebtness of the Corporation to the Minister.[13]

The acquisition of Petrofina Canada Incorporated by Petro-Canada via funds generated by the Canadian Ownership Account caused the Auditor General of Canada to expect that the parties processing and authorizing such an expenditure would have available an evaluation of the entity to be purchased. Specifically, the Auditor General expected that the evaluation would include:[14]

- its value in relation to price;
- alternate strategies considered in acquiring the entity;
- the implications of such a purchase to the effective purchaser (the Government of Canada); and
- the means of financing the purchase.

Furthermore, the Auditor General suggested that

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[12] Ibid., p. 515.

[13] Ibid., p. 515.

[14] Ibid., p. 516.

> one would expect a formal plan for, or a report on, a post-evaluation of the assets acquired to ascertain that value for money was received.[15]

Such documentation and evaluation was not, however, forthcoming upon request by the Office of the Auditor General. Senior management in the Department of Energy, Mines and Resources informed the Auditor General that,

> because Petro-Canada was the vehicle used to identify, evaluate, negotiate and recommend the acquisition of Petrofina Canada Inc., the Department was not responsible to ensure that value for money was or had been achieved.[16]

Therefore the Department did not conduct any such analysis and thus had no documentation available for audit. It was the Department's view that because Petro-Canada had made the acquisition it was their responsiblitiy for doing any necessary analysis and evaluation which the Department should not try and second quess.[17] It was explained,

> that this was due to the fact that the agent for this transaction was Petro-Canada and, in keeping with their view of the arm's length nature of relations between departments and Crown corporations, departmental management was not asked to advise on the substance of Petro-Canada's analysis.[18]

In the view of the Auditor General this constituted

> a serious weakness in the management of public funds when departmental and central agency officials have no responsibility to ensure that due regard to economy is demonstrated and value for

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[15] Ibid., p. 516.

[16] Ibid., p. 516.

[17] Ibid., p. 517.

[18] Ibid., p. 517.

> money achieved, in respect of a transaction that has advanced $711 million out of an eventual $1.7 billion to a Crown corporation.[19]

Moreover, the acquisition of Petrofina Canada Incorporated by Petro-Canada was viewed by the Auditor General as an apparent change in orientation by the Corporation that was dramatic.[20]

1.3 THE PROBLEM STATEMENT

The issue raised by the 1982 Report of the Auditor General illustrates the ongoing dilemma inherent to the Crown corporation as an instrument of government policy. The corporate device is intended by enabling legislation to be an instrument of government policy with a significant degree of autonomy and independence from central agencies, Cabinet and Parliament. Nevertheless, as an instrument of government created to fulfill a public policy objective funded by appropriations it must be held "ultimately" accountable to taxpayers and voters. In other words, the means must exist whereby the activities and expenditures of Crown corporations dependent upon public funds are subject to the scrutiny of Parliament.

Earlier in this century the proponents of the semi-autonomous Crown corporation believed that the use of the corporate device could reconcile the tensions between state in-

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[19] Ibid., p. 517.

[20] Ibid., p. 12.

tervention and democratic politics through the combining of the finest features of public and business administration.[21] This theory was based on the assumption that a balance could be struck between managerial autonomy, executive direction, and legislative scrutiny.[22] It is, however, the opinion of many observers that the modern public corporation has contributed to, rather than resolved, the tension between state intervention and responsible government.[23]

The means by which Crown corporations are held accountable for their expenditures and activities will impact upon the utility and advantage of the corporate device as one instrument of many that may be chosen by government to implement public policy. The legal and functional autonomy of the corporate device must nevertheless be reconcilable with the prerequisites of democratic theory and parliamentary government. Public accountability is the essential element of the model of parliamentary government which ensures the perpetuation of responsible and representative government. The problem is to ensure that the device of the Crown corporation does not by design nor neglect exist in either legal or functional terms outside this system of accountability.

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[21] Tupper and Doern, Public Corporations and Public Policy in Canada, 1981, p. 13.

[22] Ibid., p. 13.

[23] Ibid., p. 13.

1.4 HYPOTHESIS OF THE STUDY

The hypothesis of the study is that the process and means whereby Petro-Canada, as a proprietary Crown corporation, is held accountable for its activities and expenditures is adequate as measured by the requirements of the parliamentary system of responsible and representative government. This, the null hypothesis, will be tested by an evaluation of the adequacy of the means by which Petro-Canada was held 'ultimately' accountable for the acquisition of Petrofina Canada Incorporated.

1.5 OBJECTIVES OF THE STUDY

1. To discuss the current regime whereby federal Crown corporations are held accountable for their policies and expenditures.
2. To review and discuss the acquisition of Petrofina Canada Incorporated by Petro-Canada with regard to the issue of accountability.
3. To determine whether in fact the means exist whereby Petro-Canada as a proprietary Crown corporation can be held adequately accountable for its activities and expenditures.

1.6 METHODOLOGY

The methodology employed is that of a case study.[24] The results of the study will be used to test the hypothesis.

As a case study the research is concerned with a single case as opposed to a number of cases. Case studies are therefore 'intensive' in contrast to the 'extensive' methodology of the experimental method. The objective of the case study is to capture the particular and the unique rather than to determine relationships existing between a number of examples.

While the limitations inherent to the singularity of the case study are obvious, the advantage may lie in the fact that the purpose of the case study is to capture the particular of the subject from which generalizations of relations may be made that have not yet been experimentally studied. Hence, the case study may provide insights that can be used in further comparative study of the same subject.

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[24] Eckstein, 'Case Study and Theory in Political Science', in Greenstein and Polsby, (eds.), 1975, p. 81.

Chapter II

CROWN CORPORATIONS IN CANADA

2.1 INTRODUCTION

In the most general sense, accountability means a liability to reveal, to explain, and to justify to another what one does and how one discharges responsibilities.[25] Accountability, therefore, has a functional definition only if there are at least two parties involved - the one demanding an account and the other who is being held accountable.

In a formal model building sense, this relationship constitutes an institutionalization of obligations whereby one is held to account by another. Once institutionalized, these obligations constitute a system in which there are both standards and objectives to which the process of accountability must conform. Strictly speaking, in a system it is the power and authority of those demanding an account which will determine how the process of accountability is conducted, to whose satisfaction, and according to what criteria.

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[25] Normanton, 'Public Accountability and Audit: A Reconnaissance', in Smith and Hague, (eds.), 1971, p. 311.

A system of accountability is then the institutionalization of the relationship between those being held accountable and those holding them to account. This relationship becomes, according to these terms, both a matter of process and of means. The process is the nature and extent of obligations determined by established standards and accepted objectives. The means refers to the recourse available to those demanding an account enabling them to ensure that the process functions to their satisfaction.

Thus a system of accountability presumes a number of preconditions. First, if one is to be accountable there must be an external other to whom one is answerable for actions performed or ends pursued. Second, the external other must have the authority and power to command an accounting according to established criteria and requirements. Third, the external other must have information about the the actions performed or the ends pursued by those being held to account which must be both verifiable and subject to examination and investigation. Fourth, the external other to whom an accounting is forthcoming must have recourse to either punish, reward or correct the actions of those being held accountable as deemed necessary given established criteria and requirements.

In a situation where the superior possesses absolute power over the subordinate within clearly defined parameters, and the means to exert that power, the demanding of an ac-

count by the superior is unarguably subject to the dictates, directives and whims of the superior. The acceptability of the process is measured by the degree of control the superior is able to exert over the subordinate as a means of furthering his goals and objectives. The means is the direct subordination of the subordinate to a set of rules and binding obligations established by the superior. Who is accountable to whom, for what, over what specified period of time, together with known rewards or punishments accruing is specifically determined by the superior. Such a system of accountability will most probably be rigid, relatively simple and be as that of a servant to his lord.[26] This system of accountability is not public nor open, but is rather, secrective, absolute and authoritarian. Accountability, in this situation, can be considered to be synonymous with a system of totalitarian control.

Accountability in a democratic system where power is dispersed and shared is, however, more complex. Accountability is not here a direct and uncompromising one-to-one relationship premised upon rigid notions of power, but is a multivariable system of checks and balances. In a democratic society the institutionalized accountability of elected decision-makers and their officials calls for openly declared facts, and the open debate of them by laymen and elected representatives.[27] There is no clear master-servant

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[26] Ibid., p. 312.

relationship whereby decisions are made and objectives pursued in secrecy and without regard for objections from those not considered one's peers. Accountability may, in fact, mean reporting to persons other than one's superiors who have the power to make open and public criticisms. In this sense, accountability can ensure a balance between power and responsibility in that the exercise of power, however conferred, is open, exposed to scrutiny, debated, and restrained.

In the parliamentary system of government, those governing are held accountable by institutional processes meant to ensure the perpetuation of responsible and representative government. Accountability in a parliamentary system is measured according to the degree of openess with which policies and expenditures are initiated by Cabinet and thereafter scrutinized post mortem by Parliament. Whether the degree of accountability achieved is adequate can be determined by comparing the measure of the accountability attained with that desired.

That which is desired is given by the prerequisites common to democratic systems of government. One of the basic values common to all societies with a reasonable claim to be democratic is a

> belief that those in power should have to justify their decisions in a forum which gives their opponents ample opportunity for criticisms.[28]

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[27] Ibid., p. 312.

That is, those in power should have to publicly defend and justify decisions proposed and thereafter enacted. If such is not the case, then the measure of accountability achieved must be judged to be inadequate.

Public accountability is the working principle of the parliamentary system. Hence, effective accountability demands that the evaluation of all aspects of programs and expenditures proposed by Cabinet begin by Parliament requiring clear identification of tasks and goals and end by a full accounting to Parliament for results achieved.[29] The concept 'public accountability', as it has been used above, has two aspects to it - political and financial.

Political accountability means that Cabinet be required to reveal, explain and justify public policy objectives to Parliament. This requirement is premised on the principle of ministerial responsibility. Responsibility for governing the country is vested not in Parliament, but in Ministers of the Crown. The doctrine of ministerial responsibility identifies who has the responsibility for decisions taken - the Minister, and provides a forum in which he is politically accountable - Parliament.[30] In this manner, Cabinet and Ministers of the Crown are required to justify and explain in a public forum decisions taken.

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[28] Birch, The British System of Government, 1983, p. 255.

[29] 1979 Royal Commission on Financial Management and Accountability, p. 369.

[30] Ibid., p. 371.

Public accountability is, however, also a device for the support of that legislative power over taxation and the appropriation of revenues. This, historically, has been the real source of parliamentary influence over policy and administration.[31] Parliamentary control of finance, both in theory and practise as it works in a parliamentary system of government, is premised upon two principles:[32]

> (i) that the executive should have no income which is not granted to it, or otherwise sanctioned by Parliament and,
>
> (ii) that the executive should make no expenditures except those approved by Parliament, in ways approved by Pariament.

Moreover, as Ward points out,

> observance of these principles would be impossible were it not for the existence of a variety of rules, customs, devices and institutions, in all of which principle and practise are impossible to separate, for the practises have meaning only because they are based on principles.[33]

Among these various rules, three of the essential are:[34]

> (i) that the executive must account fully to Parliament for its management of public funds, both receipts and expenditures;
>
> (ii) that an independent auditor, responsible only to Parliament, audits the accounts and his reports are promptly made available to Parliament;

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[31] Normanton, p. 312.

[32] Ward, The Public Purse: A Study in Canadian Democracy, 1962, p. 1.

[33] Ibid., p. 1.

[34] Ibid., p. 2.

> (iii) that Parliament itself audits the accounts of both revenues and expenditures, in almost any way it chooses; parliamentary surveillance, that is, is as loose or rigid, or as selective or comprehensive, as Parliament desires.

Thus the second aspect of public accountability, financial accountability, is Parliament's power to review expenditure and revenue gathering measures initiated by Cabinet. The principles of responsible and representative government safequards Parliament's right to exercise a post facto check on the manner in which monies had been spent for the purposes approved by (but not proposed by) Parliament. In the parliamentary system of government the last word on the spending process belongs to Parliament's officer, the Auditor General, and hence ultimately to Parliament itself.[35]

That the Governor-in-Council should be accountable a posteria to Parliament for the expenditures of funds voted to it is a commonplace of liberal parliamentary doctrine.[36] Financial accountability has traditionally been concerned with what might be called 'certification of expenditures' - that is to say with the judgement of past performance of government expenditures with regard to economy and financial regularity.[37] However, with the multiple tasks now facing the will and endurance of the National Government (supported by a multitudinous number of programmes requiring appropria-

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[35] Ibid., p. 6.

[36] Johnson, 'Financial Accountability to Parliament', in Smith and Hague, (eds.), 1971, p. 283.

[37] Ibid., p. 283.

tions from general revenues) the question must be asked as to how much more effort should be devoted to 'efficiency' or 'management' audits as opposed to the more familiar checks of 'regularity'.[38]

The rigors of financial accountability are distinquished from most other forms of public accountability by the presence of a specific organization to do the ground-work, namely the Auditor General of Canada. Therefore,

> it is natural that financial accountability should be seen as something basically outside the area of political argument on the floor of the House of Commons.[39]

While the conceptual and functional separation of the processes of public accountability are not held to be complete nor absolute, they do point to the differing means by which those in power can be held accountable to those they represent.

2.2 THE THEORY OF THE PUBLIC CORPORATION

Corporations, whether public or private, are a form of legalized property dependent upon the state for existence and as corporate bodies exist only insofar as the state grants legal status to these bodies as artifical persons.[40]

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[38] Normanton, p. 335.

[39] Ibid., p. 283.

[40] Prakash, The Theory and Working of State Corporations, 1971, p. 2. (see the Canada Business Corporations Act, sections 15 (1)).

All corporations, private or public, carry with them an element of autonomy in that within the limits set by the law of the land (and its own constitution) the power of the corporation is supreme.[41] Public corporations, however, unlike private corporations are the embodiment of an express wish on the part of the state to create an instrument of public policy.[42] As such, in legal and functional terms, the public corporation is in theory and practise located somewhere midway between a pure public authority and a commercial company as defined by private law.[43]

The public corporation has in the twentieth century become an important instrument of government policy in a number of countries and a variety of fields.[44] Friedmann identifies two major motives which may account for the wide-spread proliferation of public corporations.[45] The first is one of practical necessity. In developing countries, for example, there is an almost indispensible need for the state to intervene in the interests of the general development of the country in projects which private capital

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[41] Ibid., p. 3.

[42] (see the Financial Administration Act, Part VIII, section 66 (1)).

[43] Friedmann, 'A Theory of Public Industrial Enterprise', in Hanson, (ed.), 1954, p. 540.

[44] (see Friedmann, 1954; Musolf, 1959; Robson, 1960; Prakash, 1971; Sharkansky, 1979).

[45] Friedmann, p. 542.

is either unwilling or unable to launch.[46] In free enterprise countries, characterized by the "welfare state" and "mixed" economies, the ever increasing number of state functions and the growing technical complexity of many of these functions demands a form of public enterprise that is unencumbered by departmental regulation and hierarchy.[47] In the Soviet Union, and other centrally planned economies, sheer practical and managerial necessity has forced a move to decentralization of the administration of the socialized industries in favour of the relatively autonomous public corporation that would be both more efficient and comprehensible as a cost accounting unit.[48]

The second major motive is that of political philosophy. Modern moderate socialist thought has used the device of the public corporation as a compromise between the older ideas of socialism and newer necessities of economic management. Political and economic theorists advocating the public ownership of resources and industry have become as concerned with the technicalities and instrumentalities of socialization as with its principles.[49]

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[46] Friedmann, p. 543.

[47] see Sharkansky, Whither the state?: Politics and Public Enterprise in Three Countries, 1979.

[48] Hazard, 'The Public Corporation in the U.S.S.R.' in Friedmann, (ed.), 1954, p. 376.

[49] Friedmann, p. 544.

Concerns such as these were instrumental in the formulation of the nationalization laws which socialized many basic industries in Britian and France after the Second World War.[50] Complex economic, technical and other managerial functions facing the state in the operation and administration of giant industries were thought to be reconcilable with the demand for public control of these industries.[51] However, as Friedmann points out,

> the public corporation and the nationalization of industries or indeed public enterprise as a whole should not be judged predominantly by ideological preconceptions.[52]

In fact, in the great majority of cases a blend of both political and practical factors has been the determining motive for the creation of public corporations.[53]

Although it is difficult to impart to the public corporation a general theoretical definition that can encompass the diversity of origins, purposes, legal systems and economic ideas of the various and many countries in which it is found, there are a number of common features which characterize most public corporations. Friedmann cites the following:[54]

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[50] Ibid., p. 544.

[51] Ibid., p. 544.

[52] Ibid., p. 545.

[53] Ibid., p. 545.

[54] Ibid., pp. 556-572.

- that a public corporation is created by a governmental procedure, either a special statute or a government ordinance, appears to be a universal practise;

- a seemingly indispensible and universal aspect of all public corporations is their separate legal personality which gives them the necessary degree of autonomy from government;

- the administration of the public corporation is by an independent board usually appointed by the executive of the government;

- in common law countries employees of public corporations do not have the status of civil servants whereas in other countries the status of public corporation employees is often separate from that of the general civil service;

- the financing of public corporations are either from periodical appropriations from the national budget or self-financing through the provision of permanent assets although no where is the public corporation wholly independent in its financial status and operations.

The means by which the activities and expenditures of public corporations has been subject to the control of the state differs from country to country. There are, however, four main types of public control to which the public corporation may be subject - ministerial direction; parliamentary control; audit control, or other ex post control by independent public authorities; and judical control.[55]

The first, ministerial or executive control, perhaps the most crucial but most elusive of the four, is held as indispensable by all countries that have created public corporations.[56] However, because of the almost infinite variety and

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[55] Ibid., p. 576.

[56] Ibid., p. 577.

extent of the directive and controlling powers of the government, it is

> almost impossible to assess accurately the real as distinct from the theoretical extent of the power because the relations between the corporation and the appropriate Minister are inevitably close and continuous.[57]

Hence, in many cases, it may be that ministerial direction is not exercised openly but, rather, behind closed doors in that it becomes a process of mutual consultation or other informal contacts.[58] As such, under these circumstances it will become difficult to discern who is the actual decision-maker and, in fact, obscurantism as a tactic may be employed by the Minister to avoid assuming responsibility for unpopular decisions to be implemented by the public corporation. Therefore unless the legal provisions are clear with regard to the delegation of authority and decision-making powers the principle of ministerial responsibility becomes diluted by secrecy and uncertainity.

The second, parliamentary control, is practised in one form or another by most countries. For countries in which responsible government is viewed as indispensible to power sharing,

> the question of the extent to which Parliament does and should control the operations of the public corporations is an exceedingly difficult one as it goes to the root of modern democracy.[59]

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[57] Ibid., p. 578.

[58] Ibid., p. 578.

[59] Ibid., p. 582.

The dilemma is one of subjecting the public corporation to the scrutiny of Parliament concerning matters of broad or national importance, and yet at the same time not encroaching on matters of day-by-day management that would destroy the very conception of the public corporation which involves considerable freedom and autonomy of management.[60] The public corporation is semi-autonomous, but it is nonetheless a creation of the state funded by appropriations for the purpose of creating an instrument of public policy. The difficulty is one of reconciling the semi-autonomous status of the public corporation with the criteria and objectives of responsible and representative government.

Third, it is generally accepted that the public corporation must be audited by independent experts. There is however a considerable variety of points of view as to the question of whether the Comptroller and the Auditor General or private auditors should audit the public corporation.[61] In 1954 Friedmann observed that many countries were experimenting with a form of audit control that would blend commercial and public accountancy principles. In fact many of these countries were moving to create at least one organ which could specialize on the auditing and the general financial conduct of the public corporation.[62] As Friedmann

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[60] Ibid., p. 583.

[61] Ibid., p. 585.

[62] Ibid., p. 587.

points out,

> the difference between random questioning and effective accountability for administrators is [thus] to be found in the existence of an independent and therefore impartial fact-finding body or bodies, with statutory power of access to administrative and financial records which are closed to private individuals.[63]

Lastly, judical control, has been a particularly thorny problem in that it has been particularly difficult to determine the legal status of the public corporation as the liability of the state itself has been a problem which continues to plague most legal systems.[64] Arora identifies four views which attempt to reconcile the theory of the public corporation with the sovereignty of the state.[65]

First, the distinct entity theory holds that a public corporation specifically incorporated as a legal person is technically a unit separate and distinct from government; that it is subject to the liabilities and charges of private and public law, and is not eligible to partake of the sovereignty of the state unless the statute stipulates the contrary. Therefore, although the public corporation may be entirely owned and completely controlled by the government it is a separate entity subject to suit its own part and must stand in court as a private litigant.

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[63] Normanton, p. 315.

[64] Arora, Administration of Government Industries: Three Essays on the Public Corporation, 1969, p. 24.

[65] Ibid., pp. 34-52.

The second, the functional test theory, holds that when determining whether any given body is a part of the general government of the country and in this sense 'in the hands of the Sovereign', it is material to consider the nature of the function or office - whether its essential character is governmental.

The third, the dependence test theory in considering whether any subordinate body of government is entitled to Crown privileges does not raise the question as to whether it is an 'emanation of the Crown', but rather whether it is properly to be regarded as the servant or agent of the Crown. The only test here considered is the nature of relationship between the public authority and the Crown in the shape of the control exercised by the Minister of the Crown.

Lastly, the view that the public corporation is equivalent in nature to the government itself, holds that all corporations owned and controlled by the government (chartered or authorised by Act of Parliament) are constitutional if their purposes are within the powers of Parliament. As such, they are instruments of the government and, therefore, may act as the government itself or as the distinct agent of the government.

Thus the public corporation, as a semi-autonomous instrument of government, exists on the margin of the state relatively isolated from the direct reach of central agencies, government and legislatures. As a form of public enter-

prise, the appeal of the public corporation to countries of differing levels of development with differing social, economic and legal systems is due to the high degree of freedom, flexibility and autonomy that the public corporation may command in contrast to conventional government departments. Many of the functions and responsibilities of the state are therefore delegated to those instruments of government existing on the margin of the state which are semi-autonomous, or at least meant to be. Indeed, as Sharkansky points out, "the proliferation of government activities on the margin of the state seems to be a universal trait".[66]

2.3 CROWN CORPORATIONS AND PUBLIC POLICY

Public corporations, in Canada called 'Crown corporations', have long been a feature of the Canadian economic and political landscape despite the fact that the term 'Crown corporation' has resisted exact definition in either legal or functional terms.[67] However, as a general definition, the Crown corporation in Canada may be defined as

> a non-departmental bureaucratic institution with a corporate form created by the government to perform a public function.[68]

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[66] Sharkansky, p. 7.

[67] Prichard and Trebilcock, 'Crown Corporations in Canada: The Choice of Instrument' in Atkinson and Chandler, (eds.), 1983, p. 201.

[68] Van Loon and Whittington, The Canadian Political System, 1981, p. 568.

Crown corporations at the federal level are created by one of three methods: a special constituent act of Parliament, letters patent (typically pursuant to the Canada Corporations Act), or articles of incorporation under the Canada Business Corporations Act.[69] Formerly, under the old Dominion Companies Act (and later under the Canada Corporations Act), a Minister could only create a Crown corporation by invoking the Canada Corportions Act if his own Act empowered him to apply to the Governor-in-Council to seek incorporation of a company.[70] However, under the Canada Business Corporation Act the Government, through a Minister, can incorporate any company without reference to the Governor-in-Council or Parliament.[71] Moreover, under the Canada Business Corporations Act, an existing Crown corporation may create a subsidary without prior government or parliamentary approval.[72]

Although the creation of the Canadian National Railways in 1919 has often been identified as the first major venture by government into public enterprise via the public corporation, it was not until the 1930s that the federal government

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[69] Trebilcock and Prichard, 'Crown Corporations: The Calculus of Instrument Choice', in Prichard, (ed.), 1983, p. 16.

[70] Ibid., p. 17.

[71] Ibid., p. 17. (see as well the 1977 Privy Council Office Report, 'Crown Corporations: Direction, Control and Accountability')

[72] Ibid., p. 17.

began to experiment in earnest with the corporte device as an instrument of government policy. Thus by 1939 there were 15 Crown-owned corporations in the rail, ship and air transportation, banking and credit, harbour administration, and economic marketing fields.[73] Thereafter, as part of the Second World War effort, Crown corporations became increasingly involved in such industrial activities as procurement, construction, production, manufacturing and distribution. Consequently, between 1939 and 1945, a total of 32 Crown corporations were estabished most of which were subsequently dismantled after the War. By 1951 there were 33 corporations in which the Government of Canada was whole or part owner.[74]

In the last two decades there has been the further expansion of the corporate form of public enterprise in the areas of energy, telecommunications, export and agricultural financing. As well, various types of marketing boards, research and operating councils, and advisory and regulating boards have been incorporated as Crown corporations. In fact, 58 per cent of all federal Crown corporations have been created since 1960 with over 36 per cent of the total being incorporated in the ten-year period 1970-79.[75] In 1981

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[73] 1977 Privy Council Office Report, 'Crown Corporations: Direction, Control and Accountability', p. 12.

[74] Ibid., p. 2.

[75] Langford and Huffman, 'The Unchartered Universe of Federal Public Corporations', in Prichard, (ed.), 1983, p. 274.

the Office of the Comptroller General identified 306 corporations (including subsidaries) in which the Government of Canada was whole or part owner.[76] Other counts have listed as many as 454.[77]

Crown corporations in Canada have evolved and proliferated in Canada as an empirical response to a multitudinous number of public policy needs without any preconcieved political or legal theory designed to expand the public sector through the creation of public enterprise.[78] Although Crown corporations have been used to achieve a diverse range of political goals it can be said that in general, and traditionally, Crown corporations are created to provide an economic or social service on behalf of government.[79]

The reliance upon public enterprise in general, and Crown corporations in particular, has been in Canada a pragmatic response to the necessities of the Canadian situation:

> [i.e.] - a vast country, rich in natural resources but small in population living alongside a powerful and pursuasive neighbor to the south.[80]

Therefore, although the corporations that most often come to mind when the term 'Crown corporation' is used are those which provide goods or services directly to the public on a

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[76] 1982 Report of the Auditor General, p. 48.

[77] Langford and Huffman, p. 229.

[78] Tupper and Doern, p. 20.

[79] Ibid., p. 20.

[80] Adie and Thomas, Canadian Public Administration: Probematical Perspectives, 1982, p. 280.

commercial or quasi-commericial basis, the facts are that Crown corporations do much more than provide goods and services or operate on a commercial or quasi-commercial basis.[81]

That the creation of Crown corporations in Canada has been traditionally due to practical rather than ideological or philosophical motivations is acknowledged by most informed observers.[82] The reasons why the corporate device is chosen by governments as an instrument of 'last resort rather than as a first resort'[83] has to do with what Treblicock and Prichard call the 'calculus of instrument choice'.[84]

Treblicock and Prichard discuss a number of institutional factors that might suggest a policy preference, on occasion, for public ownership over private sector regulation many of which are derived from the notion of monitoring and information costs first developed in the economic literature on the theory of the firm, especially by Coase.[85] Adie and Thomas note that in the pursuit of broad public policy objectives the device of the Crown corporation has been considered desirable to the regular government department for two rea-

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[81] 1977 Priviy Council Office Report, p. 14.

[82] Adie and Thomas, p. 280.

[83] Tupper and Doern, p. 30.

[84] Treblicock and Prichard, in Pritchard.

[85] Ibid., pp. 26-35. (see also Borcherding, 'Toward a Positive Theory of Public Sector Supply Arrangements', in Prichard, (ed.), 1983.)

sons.[86] First, it is a way to avoid direct political control of a sensitive function - when the function might be subject to abuse for narrow partisan purposes; when the function is regulatory; when grants or subsidies are being allocated or when an advisory function is involved. A second reason for choosing the corporate device over a government department is to avoid certain departmental procedures, particularly when the activities performed are in competition with private enterprise. In addition, Trebilcock and Prichard suggest that a number of characteristics of Crown corporations that would favour their utilization over departmental bureaucracies have to do with the

> provision of goods or services to the public at a per unit price in circumstances closely resembling those under which private sector enterprises operate in the same or similar areas.[87]

Indeed, as Musolf was able to point out in 1959, the role of Crown corporations in Canada has been guided by two familiar landmarks which remain at present the relevant variables in the calculus of instrument choice.[88] The first is a tradition that the national government should act aggressively to establish and maintain national economic unity, whereas the second is a tradition of an economic system anchored on private enterprise. The former is an argument for the utilization of the Crown coporation only if national ec-

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[86] Adie and Thomas, p. 280.

[87] Treblicock and Prichard, in Pritchard, p. 35.

[88] Musolf, Public Ownership and Accountability, 1959, p. 13.

onomic unity is threatened. The latter is an argument for the establishment of the Crown corporation only as an instrument of last resort as the corporate device represents the most direct and blatant form of economic intervention by the state. In fact, the only political party in Canada that has favoured the use of the Crown corporation as an instrument of first choice is the New Democratic Party which has never formed the Government of Canada.

In the past a maximum of practical considerations and a minimum of socialist or even semi-socialist philosophy has dictated the motivations and functions of Crown corporations in Canada. There has, nevertheless, emerged in Canada over the last two decades a new generation of Crown corporations.

Tupper and Doern point out that an analysis of Canada's newer Crown corporations reveals two themes which set these new generation Crown corporations off from their predecessors.[89] The first is the growing importance of Crown corporations in the resource and manufacturing sectors. The second is the growth of Crown corporations as single firms in competitive industries rather than enjoying monopoly or industry-dominant status.

It is this new generation of Crown corporations, of which Petro-Canada is one, which has caused alarm and concern about the role of the state in the political economy of the nation. As Pratt points out,

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[89] Tupper and Doern, p. 12.

> Among Canada's large, commercially-oriented Crown corporations, Petro-Canada is certainly atypical, and perhaps unique, in the extent to which its corporate strategy and investment behavior are conceived directly within the framework of the federal government's larger energy policy and plans for economic development.[90]

The problem in the past has been that many of the executives of Canada's better-known Crown corporations repudiate the substantial role that public policy considerations should play in their decisions. Given these experiences, Cabinet was determined to see to it that Crown corporations such as Petro-Canada would not be permitted to pursue objectives independent from that charted by government policy.[91]

Thus the enabling legislation creating Petro-Canada contains a number of provisions (means) whereby Cabinet is able to control the policies and expenditures of the Corporation. Moreover, the Minister of Energy, Mines and Resources has been careful to maintain a system of informal and formal contacts with the board of directors and the management of Petro-Canada. Hence, while promoting Petro-Canada's expansion, the Department of Energy, Mines and Resources has also attempted to closely regulate its activities to ensure - as one federal official put it - "that the policy decisions are made here in Ottawa, not in Calgary".[92]

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[90] Pratt, in Doern, p. 87.

[91] Ibid., p. 91.

[92] Ibid., p. 103.

2.4 CROWN CORPORATIONS AND THE FINANCIAL ADMINISTRATION ACT

Federal Crown corporations are presently classified by the Financial Administration Act (FAA) - an Act passed in 1951 to provide the legislative foundation for the financial administration of Canada. Part VIII of the FAA (which deals specifically with Crown corporations) was intended to lay the foundation for a more uniform relationship of financial management, control, and accountability between the government and Crown corporations on the one hand, and the government and Parliament on the other.[93] The FAA defines a federal Crown corporation as

> a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and includes the corporations named in Schedule B, Schedule C and Schedule D[94]

of the Act.

There are three basic types of Crown corporations listed in the Schedules of the FAA: departmental corporations (Schedule B) financed by appropriations; agency corporations (Schedule C) usually given controlled 'revolving' funds; and proprietary corporations (Schedule D) ordinarily required by the provisions of the FAA to conduct their operations without appropriations. Crown corporations are listed in the schedules of the FAA classified according to two criteria. First, on the basis of general purpose for which the corpo-

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[93] 1977 Privy Council Office Report, p. 37.

[94] 1951 Financial Administration Act, Part VIII, section 66 (1).

ration was created and, secondly, on the degree of financial independence enjoyed by the corporation with respect to parliamentary scrutiny and annual appropriations. The departmental corporations are the least independent from Parliament, proprietary corporations the most independent, whereas agency corporations fall somewhere between these two extremes on the continum of financial independence. By provision of the Act, the Governor-in-Council may by order delete the name of any corporation from Schedule B, Schedule C or Schedule D and add the name of that corporation to the schedule it deems appropriate.'[95]

The departmental corporation, per the FAA,

> is a servant or agent of His Majesty in right of Canada and is responsible for administrative, supervisory or regulatory services of a governmental nature".'[96]

Because all of the financial affairs of the departmental corporation are carried out with funds appropriated by Parliament and encumbered from the Consolidated Revenue Fund (hence subject to the control of the Treasury Board and the Auditor General), the entire budget of the corporation is debated as one item in the estimates of the Department through whose Minister the corporation must report to Parliament. Moreover, all the departmental corporations must submit an annual report to the Minister responsible which is

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[95] Ibid., Part VIII, Section 66 (2).

[96] The Financial Administration Act, Part VIII, section 76 (3).

then required to be tabled in the House of Commons within fifteen days upon receipt by the said Minister.

The agency corporation, per the FAA,

> is an agent of His Majesty in right of Canada and is responsible for the management of trading or service of operations on a quasi-commercial basis, or for the management of procurement, construction or disposal activities on behalf of His Majesty in right of Canada.[97]

Agency corporations, like proprietary corporations, are subject to sections 79 to 88 of the FAA, both inclusive, except in the event of any inconsistency between the provisions of the FAA and the provisions of any other Act whereupon the provisions of the other Act shall prevail. As such, both the agency and proprietary corporations are required to submit to the appropriate Minister their annual capital budgets, approved by the Governor-in-Council on the recommendation of the appropriate Minister, the President of the Treasury Board, and the Minister of Finance. The budget is then tabled in the House of Commons. In addition, both agency and proprietary corporations must also submit to the appropriate Minister an annual report, including financial statements, which is also tabled in the House of Commons. However, unlike proprietary corporations, agency corporations are also required to submit annually to the appropriate Minister an operating budget for the next financial year for the approval of the appropriate Minister and the President of the Treasury Board.

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[97] Ibid., section 76 (3) (b).

According to the FAA, a proprietary corporation is one that:[98]

> (i) is responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public, and
>
> (ii) is ordinarily required to conduct its operations without appropriations.

Because proprietary corporations, unlike departmental and agency corporations, are expected to function without the aid of parliamentary appropriations and are expected to compete with private industry, they have been guaranteed a substantial degree of protection from both parliamentary and public scrutiny. Hence, although the Minister responsible may prescribe the form of the annual report forthcoming from the proprietary corporation (as with the agency corporation), they are usually only required to include the sort of information and data requested from a private firm under the Companies Act. Proprietary corporations are not normally required to submit to an audit by the Auditor General of Canada.

Cabinet exercises control over Crown corporations through its power to appoint chairmen and directors, approve by-laws and codes of conduct, the issuing of ministerial directives (in some cases) and, most prominently, throught its approval of corporation budgets both operating and capital. The operation of the Financial Administration Act as a means of

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[98] Ibid., section 76 (c).

ensuring Cabinet control over the policies of Crown corporations has, however, been criticized by a number of observers. Milligan and Ball point out that, first, a number of Crown corporations are not listed in its schedules and hence are exempt from its provisions. Second, in the event of inconsistency between its provisions and those of any other Act the latter will generally prevail.[99] Langford argues that the

> most obvious problems are the limitations in the FAA coverage, the potential for overlap and confusion in the particular criteria (type of task and degree of financial dependency) chosen to distinquish between the three types of Crown corporations recognized by the schedules, and the 'misfiling' of corporations in schedules for which they seemed ill suited.[100]

The 1979 Royal Commission on Financial Management and Accountability suggests that the number and the variety of functions as well as the organizational models that characterize Crown agencies pose two major issues.[101] First, the identification and classification of Crown agencies is inconsistent and non-inclusive. Second, the clarification and rationalization of the arm's length relationships of Crown agencies with government and Parliament is uneven and lack-

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[99] Milligan and Ball, 'The Crown Corporations' in Hanson, (ed.), 1954, p. 81.

[100] Langford, 'The identification and classification of federal public corporations of federal public corporations a preface to regime building', Canadian Public Administration, Spring/1980.

[101] 1979 Royal Commission on Financial Management and Accountability, p. 269.

ing uniformity.

Furthermore, as the 1982 Report of the Auditor General observes, because there has been in recent years a tendency to establish corporations generally subsidiary to existing corporations under the Canada Business Corporation Act without naming them in the schedules of the FAA, these corporations are less accountable to Cabinet and to Parliament than they should be.[102] This has led,, as the Privy Council Office Report notes, to a lack of effective control over the proliferation of corporate entities.[103] Finally, the FAA addresses itself only to issues of financial direction, control, and accountability leaving policy direction, control, and accountability untouched.[104]

There has been in recent years two pieces of legislation tabled in the House of Commons designed to address the shortcomings of the Financial Administration Act. This legislation has been drafted in response to the growing concern among observers that neither the control exercised by Cabinet over the proliferation and the activities of Crown corporations, nor the means by which Parliament has been able to hold Cabinet accountable for the activities of Crown corporations, has been satisfactory. The Conservative government in November of 1979 tabled Bill C-27 which was designed

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[102] 1982 Report of the Auditor General, p. 43.

[103] 1977 Privy Council Office Report, p. 29.

[104] 1977 Privy Council Office Report, p. 13.

to remove the regulation of Crown corporations from the FAA and place it in its own omnibus bill. This Bill, in the opinion of the Auditor General,

> represented a major step toward a comprehensive and effective framework for the control, direction and accountability of Crown-owned corporations.[105]

Bill C-27, however, was never enacted as the Conservative government lost the confidence of the legislature before the Bill could become law.

Shortly thereafter, on June 30, 1982, the newly elected Liberal government tabled Bill-127, the Government Organization Bill, Part V of which intended to place most Crown-owned corporations under the jurisdiction of the Financial Administration Act. The proposed legislation would amend Part VIII of the FAA and would apply to those corporations now listed in Schedules C and D of the Act and to an unspecified additional number of wholly-owned Crown corporations. The intention of Bill-127 was to improve ministerial control and direction over Crown corporations.[106] The 1982 Report of the Auditor General suggests that because the Bill does not address significant concerns raised by its own Report, or the Royal Commission on Financial Management and Accountability, it is inadequate as a means of strengthening the measures whereby Crown corporations can be held accountable to Parliament.[107] This Bill was subsequently dropped from

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[105] 1982 Report of the Auditor General, p. 57.

[106] Ibid., p. 57.

the order paper as new and tougher legislation was being planned.

2.5 DISCUSSION: ACCOUNTABILITY

Robson claims that,

> To account for one's actions means that one gives a report of what one has done in a specified period of time, together with whatever explanations may be necessary to justify the actions performed or the ends pursued.[108]

In a private sector company, it is the function of the annual report to answer to the shareholders in precisely this sense. The main objective is to enable the owners of the company to decide whether they are satisfied with the manner in which the company is being managed and directed and, if not, whether they desire to change the board of directors.[109]

It is widely acknowledged, however, that for modern and complex companies shareholders' meetings are notoriously impotent in that it is manifestily impossible for a large and heterogeneous body of shareholders to control in any real sense the affairs of a large corporation.[110] Nevertheless,

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[107] Ibid., p. 57.

[108] Robson, Nationalized Industry and Public Ownership, 1960, p. 190.

[109] Ibid., p. 190.

[110] Ibid., p. 191. (see Galbraith, The New Industrial State, for an analysis of the relationship between corporate organization and the power of the shareholder in the large, modern corporation.)

the accountability of directors is of fundamental importance. Not only are the directors accountable according to the "bottom line", that is on the profitability of investments and the subsequent rate of return measured by share prices and dividend payments but, as well, accountability is imposed by law and safequarded by the practises and traditions of business executives, professional accountants and solicitors. Thus the directors of these companies are able to gain and hold the confidence of not only the shareholders but as well of stockholders, bankers, issuing houses and major investors.[111] However, with regard to public corporations, there are no shareholders or equity capital as exists in private corporations. As Robson points out,

> The undertaking is owned by the nation, and Parliament is supposed to represent the general interest of the public; but it cannot claim an exclusive right to do so, since the appropriate Minister has been given extensive powers to direct the public corporation in the national interest.[112]

If, therefore, it is conceded that there are no shareholders or equity capital strictly analogous to that which exists in a private corporation, the question arises as to exactly how in theory and practise Crown corporations can be held "ultimately' accountable - that is, publicly accountable? Robson observes that,

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[111] Ibid., p. 191.

[112] Ibid., p. 191.

> The public corporation is based on the theory that a full measure of accountability can be imposed on a public authority without requiring it to be subject to ministerial control in respect of its managerial decisions and multitudinious routine activities, or liable to comprehensive parliamentary scrutiny of its day-to-day workings.[113]

The theory assumes, that in major matters at least, government policy can be distinquished from corporate management decisions. As such, certain powers of decision are reserved to Ministers answerable to Parliament and everything else is left to the discretion of the public corporation acting within its legal limits.[114] On matters of policy the Minister must account to Parliament not only for what was done but, as well, for why it was done and who is responsible.

Thus Crown corporations are held accountable to their ultimate shareholders, the people of Canada, through the appropriate Minister, the trustee shareholder of the corporation. For this process of accountability to function effectively, the boards of directors of Crown corporations must be answerable to the appropriate Minister and to Cabinet for the implementation of corporate strategies and the expenditure of revenues encumbered via appropriation. It is the responsibility of Cabinet to ensure that the means are in place that will ensure and enforce this process of accountability. For this, and hence for the policies of Crown corporations, the appropriate Minister and Cabinet must ac-

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[113] Ibid., p. 74.

[114] Ibid., p. 75.

cept full responsibility and expect to be held fully accountable in the legislature.

If Parliament is to hold the appropriate Minister and Cabinet accountable for the corporate expenditures and policies of Crown corporations, then Members of Parliament must have access to sufficient information regarding the activities and expenditures of Crown corporations so to be able to discern who is making what decisions, why, and according to what criteria. Moreover, Members of Parliament must have this information in a form that they can understand and make use of at question time, during debates and at parliamentary committee hearings. Only then will Parliament have the means to hold the appropriate Minister and Cabinet publicly accountable for the policies and expenditures of Crown corporations.

Thus the cycle of accountability is closed with the post mortem examination of the expenditures of public corporations by an auditor appointed by the Governor-in-Council or provided for by the constituent act of the corporation. With respect to the auditing of Crown corporations, the Financial Administration Act

> provides that where, in respect to a Crown corporation (presumably scheduled Crown corporations under the Act), no provision is made in any constituent Act for the appointment of an auditor, or if the auditor is to appointed pursuant to the Canada Business Corporations Act, the Governor in Council shall appoint the auditor.[115]

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[115] Trebilcock and Prichard, in Pritchard, p. 21.

Where the Auditor General of Canada has been appointed as auditor, he shall report annually to the appropriate Minister the result of his examination of the accounts and financial statements of a corporation. Further, he shall call attention to any other matter falling within the scope of his examination that in his opinion should be brought to the attention of Parliament.[116] According to the FAA, the Auditor General may make a special report to the House of Commons on any matter of pressing importance or urgency that, in his opinion, should not be deferred until the presentation of his annual report.[117] In addition, the Act permits the Auditor General to inquire into and report on matters in response to requests from the Governor-in-Council when, in his opinion, such an assignment does not interfere with his primary responsibilities.[118]

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[116] Financial Administration Act, Part VIII, section 7.

[117] Ibid., section 8 (1).

[118] Ibid., section 11.

Chapter III

THE ACQUISITION OF PETROFINA CANADA

3.1 INTRODUCTION

On July 30, 1975, an enabling Act passed by Parliament received Royal Assent thus creating Canada's first publicly-owned petroleum company, Petro-Canada. The first and foremost rationale forwarded by the federal government for the creation of a national petroleum company was that of achieving security of energy supply. The Hon. Donald S. Macdonald (then Minister of Energy, Mines and Resources) told the House of Commons on March 12, 1975, during the second reading of Bill C-8, that the bill was

> a most important element in the government's long-term planning to secure adequate supplies of energy to meet [our] national needs.[119]

Security of supply was to be, in part, achieved through the participation of Petro-Canada in joint ventures in high risk areas of exploration and development, especially in the frontiers. Moreover, as a wholly government-owned enterprise whose financial needs were virtually quaranteed by the federal government, it was assumed that Petro-Canada would operate with a lower rate of discount than a private sector

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[119] Hon. Donald S. Macdonald, Commons Debates, March 12, 1975.

petroleum company. Hence the Corporation was expected to pursue the goal of self-sufficiency or security of supply by accelerating the timing of high-risk exploration and development through the supplementing of the market-generated rate of frontier exploration via the direct investment of public funds.[120]

The problem facing investment capital in the oil and gas industry was that spending on the frontier was not expected to yield significant revenues until the latter part of the decade.[121] This time lag, associated with the high geological risks and the massive amounts of capital investment required for both exploration and possible production, made investment in frontier exploration unattractive in relation to investment opportunities elsewhere. The federal government recognized this state of affairs as the following statement by Mr. Macdonald indicates,

> The government does not feel assured that the private sector can be relied upon to mobilize all of the enormous amounts of capital which will be required to secure energy development consonant with

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[120] Pratt, 'Petro-Canada', in Tupper and Doern, (eds.), p. 106, 1981. (see Arrow and Lind, 'Uncertainity and the Evaluation of Public Investment Decisions', American Economic Review, Vol. LX, no. 3, June, 1970; and Arrow, 'Criteria for Social Investment', Water Resources Research, Vol. 1, no. 1, pp. 1-8, 1965; for a discussion of social discount rates.)

[121] Mr. Hopper, President and Chief Executive Officer of Petro-Canada, Proceedings and Evidence of the Standing Committee on National Resources and Public Works, RESPECTING: Main Estimates 1981-82 under ENERGY, MINES and RESOURCES, Bill C-48, An Act to regulate oil and gas interests in Canada lands and to amend the Oil and Gas Production and Conservation Act, May 28, 1981.

> Canadian needs over the longer term. Nor can it be certain that, faced with attractive investment opportunities abnd geological possibilities abroad, the private oil industry will be able to concentrate as much effort on our own petroleum prospective areas over the next decades as our needs require.[122]

As Pratt points out, no private-sector oil company, large or small, would devote 60 per cent of its exploration funds to high-risk areas which offered little hope of any early cash flow and just 30 per cent to area of lower-risk which offered the propspect of nearer-term profitability.[123] Petro-Canada, therefore, was to invest "patient money" in the search for new oil and gas reserves in high-risk areas.[124]

From 1976 to 1980 Petro-Canada did in fact invest 60 per cent of its five-year exploration budget in the frontiers, with the remaining split between the conventional basins of Western Canada (30 percent) and overseas ventures (10 per cent).[125] By contrast, the more risk-averse private sector spent only about 18 percent ($700 million) on the frontiers in 1980 as compared to 82 percent ($3.4 billion) of their exploration dollars in Western Canada,[126] and this was a major increase over 1979 levels. Because the private sector's spending on exploration had been overwhelmingly oriented to

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[122] Hon. Donald S. Macdonald, Commons Debates, March 12, 1975.

[123] Pratt, in Tupper and Doern, p. 134.

[124] Pratt, in Doern, p. 90.

[125] Pratt, in Tupper and Doern, p. 132.

[126] Pratt, in Doern, p. 94.

the areas of lower-risk and near-term profitability in Western Canada, Petro-Canada's capital spending was primarily directed to the frontiers to compensate for the industries risk-averse behavior.[127]

The skewing of investment capital to the exploration of the frontiers from 1976 to 1980 has been justified by the Corporation and the federal government on two accounts.[128] First, the market-generated rate of frontier exploration has been much too slow given the precipitous decline in Canadian conventional oil production and the risks and costs of importing oil. Second, the federal government insists that it 'needs to know' the extent, cost and timing at which frontier hydrocarbons might be available so that it can make cost-effective energy choices.

While the concerns that led Cabinet to propose the establishment of a national petroleum company relate principally to matters of energy supply, particularly oil and gas, the Corporation was expected to fulfill other objectives. Furthermore, Cabinet wanted an instrument of government policy that could compete as an equal with private sector entities and, as well, deal with a number of possibly competing policy goals in which trade-offs were inevitable. Cabinet at the time viewed the creation of a national petroleum company as only one additional instrument that could be utilized to

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[127] Ibid., p. 94.

[128] Ibid., p. 97.

advance its objectives, however the Corporation was without doubt expected to be a key and crucial element.[129] As Pratt points out,

> Petro-Canada's legislation thus gives the Crown corporation and its shareholder, the federal Minister of Energy, Mines and Resources a sweeping mandate for public intervention in the Canadian energy industries.[130]

Although not specifically mentioned in the legislation, the debates prior to the creation of Petro-Canada indicate that many of the objectives expected to be pursued by the Corporation were similiar to those as listed in the 1973 'An Energy Policy For Canada - Phase 1'.[131] They were:

- to increase Canadian participation in the oil industry;

- to provide the government with a "window" on the energy industry that would supply more reliable information on Canada's resources, and on the oil industry;

- to create a public entity that would be able to negotiate State-to-State contracts for crude oil imports;

- to acquire a degree of operating knowledge and expertise with regard to oil gas exploration and development;

- to generate economic and social benefits for Canadians through oil and related energy development such as the training of native peoples in the petroleum industry and to Canadians in general wishing to link their careers with the oil industry in the service of Canada;

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[129] Hon. Donald S. Macdonald, Commons Debates, March 12, 1975.

[130] Pratt, in Tupper and Doern, p. 116.

[131] 1973 Energy Policy For Canada - Phase 1, pp. 186-87.

> - to carry out research into problems of petroleum development which are peculiar to Canadian circumstances; and
>
> - to bring to the petroleum sector the social benefit of to Canadians of the pride, satisfaction and confidence of owning a portion of what was considered a critically important Canadian industry.

The very nature of Petro-Canada's role as an instrument of government policy dictates that it perform certain functions that are in the national interest, but which may not be profitable or commericially justifiable. What was desired by Cabinet was a policy instrument would in its organization and business methods be subject to the basic disciplines of an operating statement and balance sheet, but which would also be viewed as being responsible to its "ultimate" shareholders, the people of Canada.[132] As Mr. Hopper emphasized in 1981,

> It is important to recognize that Petro-Canada's primary objective is to serve the national energy needs and the government policy goals.[133]

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[132] Ibid.

[133] Mr. Hopper, Minutes of Proceedings and Evidence of the Standing Committee on National Resources and Public Works, op. cit., May 28, 1981.

3.2 THE PETRO-CANADA ACT: AN ANAYLSIS

On March 12, 1975 the Honourable Donald S. Macdonald, Minister of Energy, Mines and Resources, speaking on behalf of the Government of Canada with regard to Bill C-8, a measure to establish a national petroleum company, stated that

> We are nevertheless convinced that the national interest now requires a significant degree of federal public enterprise in the oil and natural gas area.[134]

Thus the federal government endorsed Bill C-8, an Act that would create Canada's first publicly-owned petroleum company; a proprietary Crown corporation listed in Schedule D of The Financial Administration Act.

The initial authorized capital of the Petro-Canada was $500 million divided into 100 common shares of the par value of $5 million each.[135] This was subsequently increased to 120 common shares on the acquisition of the capital stock of Panarctic Oils Ltd., previously owned by the Government of Canada.[136] In addition, the Corporation could raise up to $1 billion through government-guaranteed debentures or other securities, loans from the government, or sales of preferred shares to the government.[137] From January 1976 to the end of 1980 the government invested $580 million in common shares

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[134] Hon. Donald S. Macdonald, Commons Debates, March 12, 1975.

[135] 1975 Petro-Canada Act, section 5 (1).

[136] 1982 Public Accounts of Canada, Volume III, p. 161.

[137] 1981 Study by the Staff of the U.S. General Accounting Office, p. 6.

and $423.8 million in preferred shares of the corporation, a total of roughly $1.004 billion of the $1.5 billion which the government was authorized to invest.[138] Pursuant to the Petro-Canada Act,[139] and subject to certain conditions and limitations as to the aggregate amount,[140] the authorized capital of the Corporation is increased by the issue of preferred shares.[141]

Petro-Canada is also authorized to borrow from private financial institutions.[142] Indeed, the Act states that,

> Nothing in this section shall be interpreted as limiting the amount (a) that the Corporation may borrow without a Crown guarantee or; (b) that a subsidary of the Corporation may borrow.[143]

Thus, in addition to government funds, the Corporation from January 1976 to the end of 1980 incurred outside debts totalling $1.8 billion before repayment.[144] This debt consisted of preferred shares issued by its subsidary, Petro-Canada Exploration, to Canadian banks ($1.5 billion) and long-term debt ($264 million) through income debentures to banks, mortgages, secured and unsecured notes and other noninter-

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[138] Ibid., p. 6.

[139] 1975 Petro-Canada Act, section 22 (1).

[140] Ibid., section 23 (1).

[141] Ibid., section 22 (2).

[142] Ibid., section 13.

[143] Ibid., section 23 (2).

[144] 1981 Study by the Staff of the U.S. General Accounting Office, p. 6.

est-bearing debt.[145]

Petro-Canada's mandate, according to the Act, is very broad and inclusive making provision for the establishment of a fully integrated national oil company. The general purpose clause in the Act declares that,

> The purpose of this Act is to establish within the energy industries in Canada a Crown owned company with authority to explore for hydrocarbon deposits, to negotiate for and acquire petroleum and petroleum products from abroad to assure a continuity of supply for the needs of Canada, to develop and exploit deposits of hydrocarbons within and without Canada in the interests of Canada, to carry out research and development projects in relation to hydrocarbons and other fuels, and to engage in exploration for, and the production, distribution, refining and marketing of, fuels.[146]

The objects, powers and duties of of the Corporation are listed as follows:[147]

- to engage in exploration for and the development of hydrocarbons and other types of fuel or energy;

- to engage in research and development projects relating to fuel and energy resources;

- to impact, produce, transport, distribute, refine and market hydrocarbons of all descriptions;

- to produce, distribute, transport and market other fuels and energy; and

- to engage or invest in ventures or enterprises related to the exploration, production, importation, distribution, refining and marketing of fuel, energy and related resources.

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[145] Ibid., p. 6.

[146] Petro-Canada Act, section 3, 1975.

[147] Ibid., section 6.

The discretionary powers of the board of directors are extensive and wide ranging. The Act states that,

> The Coporation may do such things as it deems expedient for or conducive to the furtherance of the objects of the Corporation, within and without Canada.[148]

In fact, the Act goes so far as to declare that the Corporation may

> do all such things as are incidental or conducive to the attainment of the objects and exercises of the power of the Corporation.[149]

The potential scope of Petro-Canada's activities can be inferred from the Corporation's interpretation of its mandate given in its first annual report,

> Petro-Canada's mandate, as defined in the Act, applies generally to the energy field and makes Petro-Canada a key element in the evolution and implementation of national energy policy.[150]

There are, however, provisions in the Act which establishes the Crown's control over the Corporation as Petro-Canada's sole or trustee shareholder. The Crown as Petro-Canada's supplier of equity funds and guarantor of its debt through its approval of the Corporation's capital budget, and via the issuing of policy directions, is strongly placed to control the finances and broad corporate strategy of the Corporation.[151]

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[148] Ibid., section 7 (1).

[149] Ibid., section 7 (1) (z).

[150] 1976 Petro-Canada Annual Report, p. 2.

[151] Ibid., p. 125.

There are three provisions in the Act which are significant. First, it is stipulated in the Act that,

> Three months before the commencement of each financial year of the Corporation, the Corporation shall submit to the Minister, in such form as the Minister may prescribe, its capital budget for that financial year including therein the capital budget of such subsidaries of the Corporation as the Minister may prescribe and setting out therein the proposed capital expenditures and commitments of the Corporation and such subsidaries.[152]

Only when there is prior approval of its budget by the Governor-in-Council on the recommendation of the Minister, the President of the Treasury Board and the Minister of Finance does Petro-Canada obtain the authority for its capital expenditures and commitments. Second,

> In the exercise of its powers, the Corporation shall comply with such policy directions as may from time to time be given to it in writing by the Governor-in- Council.[153]

In effect, this provision means that Cabinet can override Petro-Canada's board of directors through the publication of an Order in Council. Third, a range of controls derives from the Governor-in-Council appointment of Petro-Canada's board of directors, approval of its chairman and president (both of whom are selected by the board) and approval of the Corporation's by-laws.[154] The normal arms-length relationship usually created between the executive and a Crown corporation seems to have been deliberately shortened in the

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[152] Petro-Canada Act, section 7 (3).

[153] Ibid., section 7 (2).

[154] Ibid., section (9) (10) and (11).

case of Petro-Canada.

It is clear from the Petro-Canada Act that it was the intention of the Cabinet to put in place those measures that would enable the Cabinet to control the financial and operational strategies of Petro-Canada. As Pratt notes,

> In general terms, the Petro-Canada Act can be interpreted as an attempt to strike a new balance in law between the two potentially conflicting priorities that co-exist in all proprietary corporations: commercial drives, requiring adequate managerial autonomy and discretionary authority; and the goals of public policy, requiring workable instruments of governmental control over broad corporate strategies.[155]

However, "on the matter of Petro-Canada's accountability to Parliament [however] the legislation is strikingly silent".[156]

3.3 THE PETROFINA DEAL

In early 1981, Petro-Canada reached as agreement with Petrofina S.A. headquartered in Brussels, Belgian, to purchase all of the assets of Petrofina Canada Incorporated for a total of $1.6 billion.[157] On April 18, 1981 Petro-Canada made a tender offer to purchase for cost at $120 per share, subject to adjustment to reflect imputed interest and dividend payments, any and all of the outstanding shares of Petrofina Canada, subsequently renamed Petro-Canada Enterprises Incor-

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[155] Pratt, in Tupper and Doern, p. 115.

[156] Ibid., p. 115.

[157] 1981 Petro-Canada Annual Report, p. 2.

porated.[158] Effective May 12, 1981, the shareholders of Enterprises approved the sale of substantially all its net assets to Petro-Canada in exchange for securities issued by a subsidary of Petro-Canada which were valued at $1,612,950,000, being the equivalent of $120 per common share of Enterprises after adjustment for estimated imputed interest and dividends on common shares of Enterprises not yet acquired by Petro-Canada.[159]

As of December 31, 1981, Petro-Canada had acquired 6,750,418 shares (55.7%) of the outstanding common shares of Enterprises at a cost of $825.5 million financed by funds from a revolving term loan.[160] During 1982, Petro-Canada increased its holdings of the outstanding common shares of Enterprises from 55.7% held on December 31, 1981, to 76.2% at December 31, 1982, at a cost of $350,308,000.[161] From January 1 to February 28, 1983, Petro-Canada purchased additional common shares of Enterprises for the sum of $374,000,000 which increased its interest to 96.6% of the outstanding shares, pursuant to the April 18, 1981 tender offer which was open for acceptance until February 28, 1983.[162] Petro-Canada proposes to acquire the remaining 3.4% of the issued

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[158] Ibid., p. 34.

[159] Ibid., p. 34.

[160] Ibid., p. 26.

[161] 1982 Petro-Canada Annual Report, p. 34.

[162] Ibid., p. 34.

shares of Enterprises under the provisions of the Canada Business Corporation Act for an estimated cost of $62,000,000.[163]

The acquisition of Petrofina Canada by Petro-Canada was financed through an agreement with two Canadian chartered banks providing for a three year credit facility amounting to $1.5 billion Canadian or the equivalent in U.S. dollars.[164] Much of the loan is to be repaid by funds from the Canadian Ownership Account in acknowledgement of which Petro-Canada is issuing convertible notes to the Government of Canada.[165] (The Canadian ownership special charges would consist of (i) a special charge on domestic petroleum received for processing or consumption in Canada and foreign petroleum and petroleum products imported into Canada, and (ii) there will be special taxes increasing the natural gas and gas liquids tax, which is a tax on marketable natural gas, propane, ethane and butane.) The Corporation was to continue to receive funds available to the Canadian Ownership Account and issue convertible notes in acknowledgement thereof until the portion of the revolving term loan, including interest thereon, applicable to the acquisition of Enterprises to a maximum of $1.7 billion had been repaid.[166]

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[163] Ibid., p. 44.

[164] Ibid., p. 38.

[165] 1981 Petro-Canada Annual Report, p. 26.

[166] 1982 Public Accounts of Canada, p. 161.

These notes were to be converted into common shares of the Corporation at a later date. Revenue from these charges are to be placed in the Canadian Ownership Account and to be used to help defray the cost of the Petro-Canada acquisition of Petrofina.

The revolving term loan bears interest at floating rates. At December 31, 1982, the interest rates on the Canadian dollar and the U.S. dollar borrowings were approximately 13% and 10%, respectively.[167] The minimum repayment of the long-term debt in each of the next five years is as follows: 1983 - $73,286,000: 1984 - $42,643,000; 1985 - $36,199,000; 1986 - $22,116,000; 1987 - $17,987,000.[168]

The acquisition of Petrofina Canada added to Petro-Canada's oil and gas production, its land base, and its oil and gas reserves.[169] In addition, Petro-Canada acquired a further five per cent in the Syncrude consortium, an additional eight per cent in the Alsands Group, a refinery in Montreal, coal leases, 932 retail marketing outlets in eastern Canada, and 3 000 additional employees.[170] Moreover, the acquisition of Petrofina Canada raised the direct federal public sector ownership of the industry from 4.7 per cent to 6.3 per cent of total upstream revenue.[171] From the government's point of

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[167] 1982 Petro-Canada Annual Report, p. 38.

[168] Ibid., p. 38.

[169] 1981 Petro-Canada Annual Report, p. 2.

[170] 1982 Petro-Canada Annual Report

view this was a major step in its objective of building Petro-Canada into a fully-integrated company with national scope.[172]

Thus in 1982 Petro-Canada became the first Canadian-owned corporation to have a national refining and marketing system which retailed gasoline in every province except Newfoundland.[173] Reidentification of the Petrofina service stations began late in 1981 with the simultaneous opening of stations in Montreal, Toronto and Halifax and was completed by June of 1982.[174]

From both a financial and processing position, the acquisition of Petrofina Canada

> had a dramatic effect on the marketing and manufacturing activities of the Corporation.[175]

Because Petro-Canada lacked internally-generated funds, as its strategy of investing heavily in high-risk areas where lead-times are long and the prospect of short-term profits are nil, it attempted to address its funding problems by acquiring - mostly through debt financing - other oil companies and by moving aggressively into downstream refining and marketing.[176] As Pratt points out, earnings from Petro-Cana-

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[171] 1982 National Energy Program Update, p. 47.

[172] Ibid., p. 47.

[173] 1982 Petro-Canada Annual Report, p. 21.

[174] Ibid., p. 21.

[175] Ibid., p. 17.

[176] Pratt, in Doern, p. 99.

da's conventional 'upstream' oil and gas properties in Western Canada are extremely important to the Corporation's financial position and to its capacity to support its high-risk investments from internally generated funds.[177]

Hence Petro-Canada began to direct some of its financial capacity into activities that were currently profitable in order to provide a revenue stream that would be able to support their longer-term investment requirements in the frontiers and the newer technologies of non-conventional oil production.[178] In 1982 Mr. Hopper stated Petro-Canada's position clearly,

> Petro-Canada does not drive the exploration pace in this country; it is only in some areas that we can be of influence.[179]

Consequently, in 1981 Petro-Canada reported that "more than 30 per cent per cent of its capital budget was spent on frontier exploration and related activities".[180] In 1982, in total, frontier exploration and equipment expenditures accounted for only 35 per cent of the Corporation's total cap-

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[177] Ibid., p. 99.

[178] Mr. Joel Bell (Executive Vice-President of Petro-Canada), Minutes of Proceedings and Evidence of the Standing Committee on Energy Legislation, RESPECTING: Organization and Bill C-101, An Act to amend the Petro-Canada Act, April 29, 1982.

[179] Mr. Hopper, Minutes of Proceedings and Evidence of the Standing Committee on national Resources and Public Works, RESPECTING: Supplementary Estimates (B) for the fiscal year ending March 31, 1983, November, 1982.

[180] 1981 Petro-Canada Annual Report, p. 2.

ital expenditures.[181]

The cash flow generated by the acquisition of Petrofina Canada (and others) was to be used to fund a significant portion of non-conventional activities from internally generated funds.[182] As Mr. Hopper stated in 1982,

> In the final analysis, Petro-Canada's reason for the purchase was commercial and financial, that in the longer term it will provide cashflows to this corporation so it will not be so reliant on government funding to carry out the activity which has to be the most important one, and that is exploration and production of hydrocarbons in Canada for Canadians.[183]

In fact, Petro-Canada claimed to have been able to finance more than half of all their capital investments from the revenues generated by currently productive activities.[184]

Petro-Canada justified its decision to purchase Petrofina Canada as a means of acquiring a long-term cash flow by the fact that gasoline sales at reidentified stations increased in contrast to a decline for the industry as a whole in 1981 and 1982. In 1981 there was an overall increase in sales of two per cent at reidentified stations despite a general industry decline of three per cent. Moreover, credit card ap-

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[181] 1982 Petro-Canada Annual Report, p. 5.

[182] Mr. Joel Bell, Minutes of Proceedings and Evidence of the Standing Committee on Energy Legislation, April 29, 1982.

[183] Mr. Hopper, President and Chief Executive Officer of Petro-Canada, Minutes of Proceedings and Evidence of the Standing Committee on National Resources and Public Works, RESPECTING: Supplementary Estimates (B) for the fiscal year ending March 31, 1983.

[184] Ibid.

plications during the last quarter of 1981 increased four times over the same period in the previous year.[185] During 1982 gasoline sales in Petro-Canada service stations increased by 11 per cent in Eastern Canada and by four per cent nationally, while they dropped by nine per cent respectively throughout the industry as compared with 1981.[186] The demand for Petro-Canada credit cards increased by 49 per cent in Eastern Canada and by 14 per cent nationally over the preceeding year.[187] Hence, Petro-Canada's share of the national market increased from 6.4 per cent in 1981 to 8.7 per cent in 1982.[188]

There has never been much policy justification for Petro-Canada's forward integration into downstream refining and marketing activities as the

> principle rationale for Canada having a national oil company have always concerned the difference such an entity could make in the upstream - exploration and development - and in international trading.[189]

During second reading of the Bill to establish Petro-Canada, the Minister did make mention of provisions contained therein that would authorize the company to engage in downstream activities such as oil refining and marketing. However,

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[185] 1981 Petro-Canada Annual Report, p. 19.

[186] 1982 Petro-Canada Annual Report, p. 21.

[187] Ibid., p 21.

[188] Ibid., p. 21.

[189] Ibid., p. 100.

these provisions were justified simply as the means whereby the government would keep its options open and enable it to respond to future needs and opportunities.[190] Cabinet's view at the time was that this sector of the industry was well provided for by private companies. Moreover, the costs of entering this phase of the business were extremely high and might not be immediately justified in relation to the more pressing need for development of the basic resources.[191] Petro-Canada's subsequent evolution into a coast-to-coast integrated operation was supported by Cabinet because the government wanted the Corporation to be a major player capable of self-financing most of its activities,

> but also because the company's marketing outlets - complete with the patriotic maple leaf logo - provides a tangible link between national energy policy and the Canadian voters.[192]

3.4 POLITICAL ACCOUNTABILITY

On May 23, 1980, Mr. Broadbent (Leader of the New Democratic Party) questioned the Prime Minister about the steps his government was prepared to undertake to expand the role of Petro-Canada in the oil and gas sector of the economy. Mr. Roy MacLaren (Parliamentary Secretary to the Minister of Energy, Mines and Resources) answered for the government with the following,

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[190] Hon. Donald Macdonald, Commons Debates, March 12, 1975.

[191] Ibid.

[192] Pratt, in Doern, p. 101.

> Any further evolution in the direction of additional retailing would be part of the normal corporate expansion of Petro-Canada, an expansion which we on this side of the House see as contributing toward the commitment we made to further Canadian ownership in the petroleum industry.

Mr. Broadbent then asked the government if the decision to expand is to be made by Petro-Canada alone or was it to be considered to be government policy to make sure there was an expansion specifically east of Thunder Bay in Ontario, Quebec and Atlantic Canada. Mr. MacLaren replied that,

> the possibilities of moving toward a greater degree of Canadian ownership in the oil industry in Canada will find expression partly through the expansion of Petro-Canada and partly through various incentives which will promote Canadian ownership in the industry.

Moreover, Mr. MacLaren went on to state that,

> As far as retailing in eastern Canada is concerned, we would look toward the possible involvement of Petro-Canada in that area as part of the normal corporate expansion of the company.

When asked by Mr. Broadbent if the government would direct Petro-Canada to take the necessary steps to buy out one of the multinationals, possibility Petrofina, which has a modern refinery in the province of Quebec and outlets in Eastern Canada, Mr. MacLaren replied that the

> possibilities of further expansion have been underlined by the additional financing which the government has provided to Petro-Canada, and the possibilities of acquisition are, of course, always possible.

However, as Mr. MacLaren was careful to make clear, those possibilities

> are of a commercially confidental nature, and any discussions that might be going on now or later

> would only be announced when they have been completed.

On May 26, 1980, Mr. Broadbent questioned the Hon. Marc Lalonde (Minister of Energy, Mines and Resources) about his party's campaign pledge to significantly expand the role of Petro-Canada in the energy sector of the economy. Mr. Lalonde replied that,

> The government is indeed committed, not only to expanding the role of Petro-Canada but also to expanding significantly Canadian ownership generally in the oil and gas industry.

Questioned further by Mr. Broadbent about whether or not the government would be, if not instructing, then issuing a strong request to Petro-Canada to expand its operations into Ontario, Quebec and Atlantic Canada, Mr. Lalonde stated that

> I have always taken the position that it is not the role of the minister to interfere in the daily management decisions of Petro-Canada.

Mr. Lalonde went on to state that,

> There are executives and a board of directors of that corporation, and they should be left to run it. However, there are regular contacts with the officials of Petro-Canada.

Mr. Broadbent then asked the Minister if the government was going to take steps to request that Petro-Canada buy out one of the major petroleum companies such as Petrofina. Mr. Lalonde replied with the admonishment that,

> even if I had taken part in such discussions with the chairman of Petro-Canada, I am sure the leader of the New Democratic Party would be the first to recognize that it would be extremely inappropriate for me to reveal their contents.

On January 16, 1981, Mr. Lalonde was asked by Mr. Hal Hubert (Vaudreuil) if he could deny or confirm that Petro-Canada had made a purchase offer to Petrofina Canada. Mr. Lalonde replied that, "I am not aware of any approach made by Petro-Canada to Petrofina in recent months".

On February 3, 1981, the date Petro-Canada announced the deal that would allow it to purchase the common shares of Petrofina Canada, the Hon. Allan J. MacEachen (Deputy Prime Minister and Minister of Finance) told the House that

> the government is very pleased that Petro-Canada has been able to negotiate arrangements which will lead to this acquisition and add to the public sector, as indicated in the national energy plan.

Mr. MacEachen was then questioned by Mr. Waddell (Vancouver-Kingsway) as to how the Minister would in the future control the price paid for common shares of companies targeted for acquisition by Petro-Canada as the share price of Petrofina prior to the acquisition by Petro-Canada were selling for between $60 and $65 on the market, however, Petro-Canada had agreed to purchase the common shares for $120 per share. As well, Mr. Waddell wished to know if the Minister could tell the House and the public how Petro-Canada planned to finance the purchase of Petrofina. Mr. MacEachen replied that, with regard to the first point,

> it has been the experience in previous acquisitions, either by Petro-Canada or by private companies, that in order to acquire control of a new acquisition usually a premium is required for the purchase of shares.

As to the question concerning the method of financing, Mr. MacEachen stated that,

> It has not been determined finally how the acquisition will be paid for, although the Hon. member will recall that in the budget it was indicated that there would be a Canadian ownership charge that would be used to finance acquisitions. It will be through this method that equity by the Government of Canada will be provided.

On February 10, 1981, the Hon. Michael Wilson (Etobicoke Centre) asked Mr. Lalonde the following questions:

> what instructions did he give to the chairman of Petro-Canada as to the basis on which they will take over Petrofina? Were there any limits set on the total size of the transaction? Was there any direction regarding the size of the company or the role which the government would play in the acquisition, or did the minister just simply say, 'Bill, hop out and buy me an oil company and send me the bill later'?

With regard to Cabinet's role in the acquisition Mr. Lalonde replied that "cabinet examined the acquisition, setting a maximum limit on the price to be paid" and that the exact way in which the acquisition was to be financed would be discussed between cabinet and the president of Petro-Canada. However, some indication with regard to financing was given in that Mr. Lalonde stated that,

> Some funds may come from equity, some from borrowing and some from taxation. This is a matter we will review with the authorities of Petro-Canada, and a decision will be made in due course.

Mr. Wilson then asked the Minister if he could explain

> why the federal government did not play a role in setting the price when in fact it is going to be called on to levy the taxes which will finance the entire transaction.

Mr. Lalonde replied that,

> As far as the point raised by my Hon. friend is concerned, the decision to go after and take over Petrofina was made by the board of directors and management of Petro-Canada. Negotiations were carried out on a business basis by the management of Petro-Canada. The government has approved the takeover. It has also fixed a maximum limit that we were ready to consider for that takeover.

The Right Hon. Joe Clark (Leader of the Opposition) then asked

> Will the Minister of Energy tell us on what date cabinet began to examine the acquisition by Petro-Canada of Petrofina, and on what date did cabinet approve that acquisition?

Mr. Lalonde stated that,

> It was on Thursday at the end of the day that cabinet considered this particular acquisition proposal, and the final negotiations took place on that weekend.

On April 21, 1982, Mr. Lalonde speaking with regard to Bill C-103, an Act to amend the Petroleum Administration Act and to enact provisions related thereto, stated that formal authority is being sought for several oil and gas pricing and compensation initiatives one of which is to

> establish the Canadian ownership special charge and the Canadian ownership account and ensure the charge cannot be raised above its current level without additional legislation.

Mr. Lalonde stated further on April 21, 1982, that,

> We are seeking formal authority for the Canadian ownership special charge which provides the means to allow the Government of Canada to expand its ownership in the oil and gas industry. Revenue form the charge which is placed in the Canadian ownership account is currently being used to help defray the cost of Petro-Canada's purchase of Petrofina slightly more than a year ago.

3.5 FINANCIAL ACCOUNTABILITY

Auditing has a constructive and key role to play in providing assurances that the financial accountability of the government for the expenditures of Crown corporations is achieved. Indeed, according to the Auditor General,

> an independent audit may be a means whereby the autonomy of Crown-owned corporations can be maintained and reconciled with accountability to Government and to Parliament.[193]

The assurance to be gained from an independent audit, however, depends on the audit mandate and scope.[194] The mandate and scope of an audit should be such that the audit meets the informational needs of the user of the audit.

The Petro-Canada Act states that the accounts of the Corporation shall be audited each year by an auditor appointed by the Governor-in-Council.[195] Since the establishment of the Corporation it has been audited by the private firm of Peat, Marwick, Mitchell and Company. The purpose of the audit, according to Peat, Marwick, & Mitchell & Co. is to

> conduct an independent examination, in accordance with generally accepted auditing standards, and express their opinion on the financial statements.[196]

In 1981 the firm was able to report that,

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[193] 1982 Report of the Auditor General, p. 77.

[194] Ibid., p. 77.

[195] 1975 Petro-Canada Act, section 26 (1).

[196] 1981 Petro-Canada Annual Report, p. 27.

> In our opinion, these consolidated financial statements present fairly the financial position of the corporation as of December 31, 1981 and the results of its operations and the changes in its financial position for the year then ended in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceeding year.[197]

The report went on to state that

> We further report as required by Section 77 (1) of the Financial Administration Act that, in our opinion, proper books of account have been kept by the corporation and the transactions that have come under our notice have been within the powers of the corporation.[198]

With regard to the questions raised by the Auditor General concerning the acquistion of Petrofina Canada Mr. Hopper was asked by Mr. Andre of the Standing Committee on National Resources and Public Works in March, 1983,

> Why was Petro-Canada apparently unwilling to make this information available to the Auditor General, who reports to Parliament and is the mechanism by which the elected representatives of the people oversee, if you will, the expenditure of public funds? As part of that question, can he suggest how this committee - or we, as members - can fulfill our responsibilities as watchdogs of public expenditure if in fact we are not able to directly ourselves, or indirectly through the Auditor General, obtain the kind of information that he points out quite specifically as being absolutely necessary if you are going to ensure that public funds are spent properly and with due consideration for effectiveness, efficiency, and so on.[199]

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[197] Ibid., p. 27.

[198] Ibid., p. 27.

[199] Mr. Andre, Standing Committee on National Resources and Public Works, RESPECTING: Organization meeting in relation to Standing Orders 69(2) and (4)(a) and Main Estimates 1983-84: Vote 1 under ENERGY, MINES AND RESOURCES, March 15, 1983.

Mr. Hopper replied that,

> To begin with, Mr. Andre, the acquisitions that we have made, and the one that the Auditor General refers to specifically, were made carefully, with agreement coming. The issue was taken to our board, and the board of Petro-Canada, which is largely private sector orientated, agreed to those acquisitions -- as did the government, in the final analysis. The government has appointed an auditor for Petro-Canada, a private sector auditing firm. The firm is Peat-Marwick. They have been auditing us since we started, and they fulfill the role of the auditor as far as we are concerned.
>
> I have not talked to the Auditor General in any detail about these matters, but I can only say to you that if the government wishes to change the relationship we have with out current auditor and in some way involve the Auditor General, that is a government policy issue. It is not an issue that we can resolve.[200]

However, as the Auditor General stated in his testimony to the Standing Committee on Energy Legislation, 1982,

> It is the position of my office, Mr. Chairman, that if Parliament wants to have improved accountability over its investments it should require all government Crown corporations and probably a large proportion of other corporations owned by the Crown to have comprehensive auditing or something so close to it that it does provide accountability by the investees of Canada to Parliament.[201]

The Auditor General defends his position with the argument that,

> If an organization is established to accomplish a public purpose, then its finances must be specifically subject to the scrutiny of Parliament. Experience in Canada would suggest that if Crown-owned corporations are to be held to the social purposes for which they were established, their

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[200] Ibid.

[201] Ken Dyer, Auditor General of Canada, Standing Committee on Energy Legislation, RESPECTING: Bill C-101, An Act to amend the Petro-Canada Act, April 22, 1982.

> activities must be visible to Parliament and to the public. Failing this, there is a high probability they will serve primarily their own corporate interests.[202]

3.6 DISCUSSION: PUBLIC ACCOUNTABILITY

The acquisition of Petrofina Canada by Petro-Canada illustrates the necessity of discerning government policy from that of corporate management strategies. Members of Parliament attempted during question period to determine who with regard to the Petrofina acquisition made what decisions, why, and for what reasons. Members of the Opposition wanted clarification as to the role of the Minister of Energy, Mines and Resoures and of Cabinet in the decision by Petro-Canada to purchase Petrofina Canada Incorporated. In this manner, ministerial responsibility could be identified and the appropriate Minister held accountable for his role in the decision by Petro-Canada to purchase Petrofina Canada.

After persistent questioning, the Minister of Mines, Energy and Resources made it clear that the decision to acquire Petrofina was made by the board of directors of Petro-Canada, final approval was given by Cabinet, and the manner of of financing was to be negotiated between the board of directors and Cabinet. It would appear that the decision to acquire Petrofina Inc. was a decision made by the management and board of directors of Petro-Canada to improve the profitability of the company which at the same time advanced the

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[202] Ibid., p. 11.

policy objectives of the government.[203]

The relationship existing between Cabinet and the board of directors of Petro-Canada, in both informal and formal terms, is clearly close and binding. As an analysis of the Petro-Canada Act demonstrates, Cabinet can if it so wishes exert its control over the Corporation in a number of ways. Thus Petro-Canada makes major decisions with at least the tacit if not overt approval Cabinet and the Minister of Energy, Mines and Resources.

It is clear that Members of Parliament were able to to discern corporate decision-making from government policy objectives. Moreover, the decisions taken were openly debated, scrutinized and criticized in a forum where the Minister can be held accountable - Parliament. With regard the purchase of Petrofina Canada by Petro-Canada, ministerial responsibility for the decision was determined.

There is, however, a second process of accountability which is also a measure of the adequacy of public accountability. With regard to the acquisition of Petrofina Canada by Petro-Canada the Auditor General of Canada was of the opinion that because departmental and central agency officials did not have the responsibility to ensure that due regard to economy was demonstrated and value for money achieved with respect to the transaction, this being left to the exclusive province of the Corporation, that accountabil-

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[203] This view was substantiated by officials of the Corporation during an interview in October, 1983.

ity for such expenditures of public funds was effectively removed.[204] In order to fulfill his responsbility the Auditor General is of the view that he must have access to this information as an auditor and, as well, explanations of the events leading up to the loan transactions, including an examination of the role of the Department of Energy, Mines and Resources, Petro-Canada and others.[205]

It is not arqued here that the Auditor General should be required to audit Petro-Canada rather than a private auditor, but rather that as an Officer of Parliament he should have priviledge of conducting his own investigation where he deems there is a need. Nor is it suggested that the Auditor General should be responsible for the internal or operational audit of the company. The integrity of Petro-Canada as a semi-autonomous Crown corporation must be maintained.

As the Petrofina acquisition illustrates public enterprise must be accountable in more ways and to more authorties than must private enterprise. It has been noted that it is not accountability merely to submit a certified financial account each year.[206] Financial accounts must be accompanied by explanations and, moreover, explanations that are adequate and acceptable to those to whom an accounting is owed. If the auditors of public enterprise have access and

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[204] 1982 Report of the Auditor General, p. 517.

[205] Ibid., p. 516.

[206] Normanton, p. 314.

if their skills are sufficient they should be able to provide facts and insights of value to Members of Parliament.[207] This in any event, asserts Normanton, is the only basis for an accountability which both derives its information from original sources and is impartial.[208] Auditing and fact-finding services constitute the back-room strength of public accountability.[209]

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[207] Normanton, p. 315.

[208] Ibid., p. 315.

[209] Ibid., p. 316.

Chapter IV

CONCLUSION: ACCOUNTABILITY, AUDITING AND CROWN CORPORATIONS

4.1 INTRODUCTION

If, in the broadest sense, accountability is the cental objective of democratic government,[210] the question then arises as to how in a democratic state those to whom power is delegated can be held accountable for the exercise of that power. Smith states that democratic theory provides the following traditional answer,

> power emanates from the people and is to be exercised in trust for the people. Within the government each level of executive authority is accountable to the next, running up to the President or the Cabinet. The executive authority as a whole is accountable to the Congress or Parliament which is assisted in its surveillance of expenditures by an independent audit. Officials are required to submit themselves to periodic elections as a retroactive evaluation of their performances and to receive a new mandate from the people.[211]

There are many devices by which those in power and those too whom authority has been delegated may be held accountable for the exercise power and authority in a democratic state. External and internal audit, scrutiny by mass media, legislative oversight, party responsibility, and the electoral

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[210] Smith, 'Accountability and Independence in the Contract State', in Shepherd, (ed.), 1976, p. 26.

[211] Ibid., p. 26.

process are a few of the more common elements of a system of public accountability.[212]

4.2 AUDITING AND ACCOUNTABILITY

Auditing is a process in which one person verfies the financial assertions of another. The auditor is a specific kind of accountant who examines and verifies reports of economic activities to determine whether these reports conform to accepted quidelines for their presentation.[213] The committee of the American Accounting Association broadly defines an audit as,

> a systematic process of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to assertain the degree of correspondence between those assertions and established criteria and communicating the results to interested users.[214]

This definition is broad enough to encompass the three different types of audit found in the field - internal audits performed by the employees of business entities, governmental audits performed by the staff of the Office of the Auditor General, and the independent audits performed by public accounting firms. The conceptual framework as well as the appropriate audit standards and objectives will differ according to the type of audit performed.

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[212] Ibid., p. 26.

[213] Thomas and Henke, Auditing: Theory and Practise 1983, p. 3.

[214] Ibid., p. 3.

There are a number of phrases in the above definition which are essential to an understanding of the audit process.[215] The phrase "objectively obtaining and evaluating evidence" suggests that the evidence-gathering process should be objective and not subject to the biases of the observer. "Assertions about economic actions and events" can be taken to suggest that the audit can involve an examination of the information system and the accounting process from which the financial data is derived as well as of the information presented in financial statements. The "established criteria" against which economic assertions are evaluated should be uniform and mutually understandable by both preparer and user. "Communicating the results to interested users" involves the preparation of the audit report, the format and content which varies with the type of audit involved and the circumstances under which the report is issued.

The above criteria as a means of ensuring the credibility and effectiveness of the audit process applies to all organizations subject to audit. This means that both private and public sector organizations may have differing objectives with regard to auditing, however the quidelines by which the audit is carried out remains as stated above. The question concerning the remainder of this study is whether the auditing process applied to Petro-Canada meets the above criteria

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[215] Ibid., p. 4.

in a manner acceptable to the requirements of Parliament.

4.3 THE OFFICE OF THE AUDITOR GENERAL

In 1878 the office of the Auditor General was established and with it came the Auditor General's annual report - both of which compelled the branches of the public service to stiffen their internal accounting regimes.[216] The Act had essentially one intent: centralized control of all public monies coming in and going out with a strict audit which was to be reported on to the House of Commons.[217] The duties of this new officer of Parliament included,

> the examination of all the appropriation accounts kept in the several executive departments, to ensure that all payments were supported by proof of payment and were in accordance with parliamentary authority; the auditing of public accounts other than appropriation accounts, as might be directed by the Minister of Finance; and the making of an annul report which the Minister of Finance, in the first instance, was to present to the House of Commons.[218]

From the beginning the Auditor General took a firm line in the interpretation of both his own duties and those of the departments which had to supply him with vouchers and other necessary documents. Moreover, from the beginning the Auditor General was in conflict with departments and departmental officials over what was and what was not within his pre-

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[216] Ward, p. 72.

[217] Ibid., p. 71.

[218] Ibid., p. 72.

rogative.[219]

There are three basic types of audit that the Auditor General may perform.[220] The first, the attest audit, is designed to provide assurance that the financial position of the audit entity is fairly presented. The second, the legislative audit, is designed to fulfill the aims of the attest audit and also to provide assurances that legislative authorities have been complied with and that funds have been spent for the purposes intended and that any other matters are reported on. The last, the comprehensive audit, is designed to achieve the aims of the legislative audits and also to provide assurance that value for money has been received for funds spent.

The comprehensive audit became a formal and statutory tool of the Auditor General with the passing of the new Auditor General Act in 1977. The new Act delegates to the Office of the Auditor General a considerable degree of latitude with regard to the process of audit and comment on the administration of the accounts of the Government of Canada. As the auditor of the accounts of Canada, including those relating to the Consolidated Revenue Fund,[221] the Auditor General may investigate government departments and agencies for not only economy and efficiency but, as well, for effec-

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[219] Ibid., p. 73.

[220] 1982 Report of the Auditor General, p. 79.

[221] 1977 Auditor General Act, section 5.

tiveness.[222] Currently known as comprehensive auditing, the auditing technique involved has been variously referred to as 'value-for-money audit', 'effectiveness audit', 'effectiveness evaluation', 'management controls' and 'program evaluation'.

The new powers of audit assumed by the Office of the Auditor General has led one critic to comment that

> where the officer began as a traditional auditor, he is now an independent figure holding the potential of considerable political power.[223]

The problem, according to Sutherland, is twofold

> One is the Auditor General's new de facto power to 'certify' policy, or the substance of expenditure decisions, in addition to the traditional comment on the probity of expenditures. The other related problem is that this power interferes with the cabinet's ability to initiate, conduct and consider appropriate analyses of the performance of its programs.[224]

In short, the new powers assumed by the Office of the Auditor General, if exercised, would in Sutherland's opinion require the government to seek some form of legitimation to govern falling outside the normal conceptions of parliamentary accountability.[225] Sutherland contends that their is no objective technique whereby effectiveness may be measured with regard to relating expenditures to policy objectives

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[222] Ibid., section 7 (2) (d) and (e).

[223] Sutherland, 'On the audit trail of the Auditor General: Parliament's servant, 1973-1980', 1980.

[224] Ibid.

[225] Ibid.

attained or intended. Thus Sutherland maintains that the process of comprehensive auditing is flawed from the beginning and can therefore only become another form of valuation based on non-objective technique which should not be the role of nonpolitical evaluation.[226]

4.4 THE AUDITOR GENERAL AND CROWN CORPORATIONS

Should the Auditor General have the statutory authority to audit the accounts of Petro-Canada and, if so, what should be the scope and and extent of this audit?

At the present time, the Auditor General is required to express an opinion, as either the auditor or joint auditor on the accounts of 34 agency and proprietary Crown corporations (in accordance with section 77 of the FAA) and on 50 departmental Crown corporations and other entities.[227] All other Crown corporations, at present only proprietary Crown corporations, are audited by private sector auditors. It is the opinion of the Auditor General that he has the responsibility, and hence should have the authority, to satisfy himself as to the scope and quality of all these audits.[228] Moreover, the Auditor General would like to subject those corporations of his choice to the searching comprehensive audit to which all departments of government are now sub-

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[226] Ibid.

[227] 1982 Report of the Auditor General, p. 552.

[228] Ibid., p. 14.

jected according to the provisions of the Auditor General Act.

Indeed, Section 77 (1) of the FAA states, in part, that

> The auditor shall report annually to the appropriate Minister the results of his examination of the accounts and financial statements of a corporation.[229]

The Act goes on to specify that,

> the auditor shall call attention to any other matter falling within the scope of his examination that in his opinion should be brought to the attention of Parliament.[230]

The 1982 Report of the Auditor General, however, was unable to find a single instance in the past seven years where a private sector auditor of a Crown coporation has felt compelled to insist that his report go to Parliament.[231] By comparision, from 1976 to 1982 there were a total of 51 separate observations brought to the attention of Parliament and the government relating to those corporations audited by the Office of the Auditor General.[232] For the same period of time, no reservations of opinion were brought to the attention of Parliament or the government for those Crown-owned corporations not audited by the Office of the Auditor General as stipulated under section 77 of the Financial Administration Act.[233]

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[229] Financial Administration Act, Section 77 (1) and (2).

[230] Financial Administration Act, Section 77 (1) and (2).

[231] 1982 Report of the Auditor General, p. 76.

[232] Ibid., p. 80.

[233] Ibid., p. 80.

The issue is essentially one of how to separate those public entities dependent from those less or not substantially dependent on appropriations by vote. It is the opinion of the Auditor General that,

> we must be auditors of those investments of Canada where significant taxpayer dollars are being appropriated annually and we are content to have private-sector auditors in place in those Crown corporations which are financially viable. I do not believe it is necessary to have the Auditor General audit all investments of Canada, but where taxpayer dollars are involved to any great extent, it is my view that we should be the auditors.[234]

In fact, the Auditor General would find it acceptable to have Crown corporations be subjected to comprehensive auditing by private auditing firms who have the expertise.[235] Principle, tradition and the seeming reluctance or hesitation of private sector auditors to forward their reports to Parliament would suggest, however, that the Auditor General, as the servant of Parliament, must be in a position to verify the adequacy of the audit. The adequacy of the audit is its effectiveness as a tool for providing Members of Parliament with the information they need to hold Cabinet accountable for the expenditures of Crown corporations.

The risk, as the Auditor General acknowledges, is that the freedom to act by the Crown corporation in the business community will be seen by corporate management to be severly curtailed, perhaps to the point where management cannot do its job.[236] Rob-

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[234] Standing Committee on Energy Legislation,

[235] Ibid.

[236] 1982 Report of the Auditor General, p. 11.

son has stated this view more emphatically with the suggestion that,

> if the management of a [public corporation] is overfearful of spending money unless it is absolutely certain to obtain a safe return on the outlay, the result is bound to be a highly conservative, exceedingly purdent, and technically backward undertaking.[237]

These are risks that must be considered as it is these considerations which will determine the parameters of the external audit to which proprietary Crowns will be compelled to submit either by private or public auditing agencies. That all Crown corporations must be held both politically and financially accountable to taxpayers and voters is indisputable. Democratic theory and practise, in fact, depends upon public accountability as the benign mechanism restraining the abuse of power and priviledge.

4.5 CONCLUSIONS

For Parliament to be able to effectively scrutinize the finances of Crown corporations, members must receive the information concerning these finances in a form that is comprehensible and which asks the right questions. This must be the case as the political system does not produce a high proportion of members of Parliament whose knowledge and inclinations fit them for the specialized work involved in scrutinizing public expenditures. This is especially the case when in the search for greater flexibility to cope with new and more complex tasks, modern governments create new

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[237] Robson, p. 196.

and more decentralized administrative structures and begin to depend upon a growing range of extra-departmental and extra-governmental instruments.[238]

With respect to proprietary Crown corporations this function can best be fulfilled by an audit that blends public and commercial auditing principles. This does not mean, however, that comprehensive auditing is advocated by this study. What it means simply is that the Auditor General should at his discretion have the right to audit the expenditures of those Crown corporations which involve substantial sums of public funds appropriated by vote. If the Government feels that the terms of reference as given by the Auditor General Act are too broad and searching, then the Act should be amended to change the mandate of the Auditor General with regard to the auditing of proprietary Crown corporations. This should not, however, deter the Government from acting on principle and making it a matter of law that the Auditor General, as a servant of Parliament, should have the right and priviledge of auditing those expenditures of public funds wherever he sees the need.

Thus it is recommended that the Petro-Canada Act be amended to allow the Auditor General to review the private audit ex post facto and to carry out its own audit where it sees fit. This is not to suggest that the corporate decision-makers of the Corporation acted with impropriety or

[238] Howell, 'Public Accountability: Trends and Parliamentary Implications', in Smith and Hague, (eds.), 1971, p. 233.

without regard to the letter and intent of their legislative mandate as all evidence points to the contrary. Moreover, it is not implied nor suggested that the acquisition of Petrofina Canada by Petro-Canada constitutes de facto an example whereby the process of ensuring responsible government broke down. What is suggested, however, is that the potential exists for public funds to be appropriated by vote and thereafter misused or mismanaged unless all avenues leading to public accountability are exhausted. The right of audit by the Auditor General, an Officer of Parliament reporting to Parliament, could considerably reduce this possibility and ensure that all formal procedures that could be utilized are activated.

There are two ways of relating a sovereign source of power on lower levels.[239] One is by the issue of detailed orders about everything. The other is by giving the lesser authorities wide discretion to act within the scope of their duties, and holding them accountable a posteriori, thus affording them the opportunity to prove themselves worthy of their responsibilities. The development of accountability processes in the direction just outlined offers the prospect, in part, of reconciling the tension between corporate autonomy and legislative oversight. This reconciliation is, however, only viable if all formal avenues leading to public accountability are recognized, institutionalized, and uti-

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[239] Normanton, p. 320.

lized.

Accountability is both a matter of trust and confidence, and a matter of having enforceable rules and procedures that will as last resort force those to answer for a responsibility that has been delegated or conferred on them. The former is much preferred, the latter is absolutely necessary.

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