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# *“Mechanical Arts and Merchandise”: Canadian Public Administration in the New Economy*

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The “New Economy”, with its attendant trends and consequences, presents a number of distinct challenges to Canadian public administration. The key features of the New Economy — changes in technology and the social organization of work, globalization and regional economic integration, and shifts in the boundary between the state and civil society — demand a reconsideration of the ways in which we have previously thought about bureaucracy, government, and the role of the interventionist state. These changes in our political economy have profoundly destabilized Canadian public administration and require us to find new ways to cope with their collective effects. The solutions we choose will dictate what our public administration will look like in the New Economy, in this, the “declining age” of the Canadian state.

In addition to exploring the impact of the New Economy on public administration, the author also considers how various strategies said to be appropriate for its reform are likely to play themselves out in the context of the New Economy. Traditionally, the three main strategies that have been proposed for the reform of public administration are increased legal control of the administration, enhanced professionalism in the public service, and greater democratic participation. The author suggests that these strategies are outmoded and will not likely be successful in the context of the New Economy. A fourth strategy, of more recent vintage, is that of reinventing public administration as a market. The author concludes that this strategy of “marketization” will result in dramatic changes in the way we view the role of government and public administration.

La «Nouvelle Économie» et les tendances et conséquences qui l’accompagnent, présentent de nombreux défis pour l’administration publique canadienne. Les éléments-clé de la Nouvelle Économie — les changements technologiques et l’organisation sociale du travail, la globalisation et l’intégration économique régionale de même que le déplacement des frontières entre l’état et la société civile — requièrent une remise en question des anciennes façons de concevoir la bureaucratie, le gouvernement et le rôle interventionniste de l’état. Ces changements dans notre économie politique ont profondément déstabilisé l’administration publique canadienne; il importe de trouver de nouveaux moyens de faire face à leur effet combiné. Les solutions que nous choisirons seront déterminantes quant à l’aspect que prendra notre administration publique à l’ère de la Nouvelle Économie et en cet «âge de déclin» de l’état canadien.

En plus d’explorer l’impact de la Nouvelle Économie sur l’administration publique, l’auteur examine comment les différentes stratégies préconisées pour sa réforme sont susceptibles d’interagir dans le contexte de la Nouvelle Économie. Traditionnellement, les trois stratégies principales proposées pour la réforme de l’administration publique sont un contrôle judiciaire accru de l’administration, une mise en valeur du professionnalisme dans le service public et une plus grande participation démocratique. L’auteur suggère que ces stratégies sont désuètes et peu susceptibles de mener au succès dans le contexte de la Nouvelle Économie. Une quatrième stratégie, plus récente celle-là, est de réinventer l’administration publique à la manière d’un marché. L’auteur conclut que cette stratégie de «mise en marché» engendrera des changements radicaux dans notre façon de concevoir le rôle du gouvernement et de l’administration publique.

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Revue de droit de McGill

To be cited as: (1997) 42 McGill L.J. 29

Mode de référence : (1997) 42 R.D. McGill 29

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**Introduction**

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## Introduction

*In the youth of a state, arms do flourish; in the middle age of a state, learning; and then both of them together for a time; in the declining age of a state, mechanical arts and merchandise.<sup>1</sup>*

Bacon, it seems, was a better philosopher and public administrator than he was a prophet. Canada is past the age of arms which helped to define our nationhood. We appear to have put behind us the age of learning, which laid the foundations of our modern economy and society in the post-war years. But alas, now that Canada edges towards its “declining age”, our economy — our “mechanical arts and merchandise” — is not flourishing. Ironically, the Canadian state we have known since the war — the welfare state — is declining precisely because the economy is not flourishing. Without a vibrant economy, we cannot afford the state we deserve; and without a healthy state, we will not have the essentials of the economy we need. The challenge for Canada is to affirm what the harsh realities and heady slogans of the “New Economy” seem to deny: the need for a dynamic private sector working in tandem with a benign and effective government. We once thought that we could count on a strong public administration to meet that challenge. The ambition of this paper is to see whether there is any likelihood that we ever can again.

From the inception of modern industrial society, and especially for the past sixty years, governments in all industrialized democracies have been served by a large and powerful administration, organized as some variant or other of Weberian bureaucracy.<sup>2</sup> For much of this period in most democratic countries, the *leitmotif* of conventional political and economic debate was where to strike the balance of power between these public bureaucracies on the one hand, and private interests and market forces on the other. In more recent iterations, however, while bureaucracy has remained the central issue, the agenda of debate has shifted considerably. From the sixties onward, critics on the left began to ask which private interests actually did benefit from the support of public administrators. Fears of regulatory capture and failures of accountability and stewardship alienated various constituencies that had been aligned with the activist state and the bureaucracies that were its agents. More recently, critics on the right have begun to ask not simply whether we can cure bureaucracy, nor even whether we can afford it, but whether indeed there is much need for public administration at all.

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<sup>1</sup> Sir Francis Bacon, “Of Vicissitude of Things” (Essay LVIII, ll. 177-180) in M. Kiernan, ed., *The Essayes or Counsels, Civill and Morall* (Oxford: Clarendon Press, 1985) 172 at 176 [modernized].

<sup>2</sup> See M. Weber, *The Theory of Social and Economic Organization*, 1st American ed. by T. Parsons, trans. A.M. Henderson & T. Parsons (New York: Oxford University Press, 1947).

Public law has likewise been preoccupied with bureaucracy, especially with the allocation of power and responsibility within and amongst the administrative departments and agencies of the state, and as between the executive branch of government and the legislative and judicial branches. Even the theory and practice of the modern science of management in the private sector has been much influenced by the study of public bureaucracies, the first large-scale, complex secular organizations.<sup>3</sup>

In short, bureaucracy — and public administration which is its paradigmatic form — has been a site of contestation for control of some of the most important concepts and institutions in our society. But these familiar institutions and concepts — democratic government and politics, public administration and public law, corporate management, bureaucracy itself — are constructs, shaped by time, place and circumstance. They are not immutable. All are being reshaped by the advent of the New Economy.

The New Economy, itself a construct, is a compendious reference to three intersecting trends: startling developments in technology — especially information technology — and resulting changes in the social organization of work; liberalization of the economies of most western democracies, accompanied by globalization of economic activity and the growth of regional economic integration; and shifts in the boundary between the state and civil society derived in part from the fiscal and economic crises engendered by the first two phenomena but also from long-term changes in political ideology, culture and institutions.

Sometimes practitioners of law and administration speak and act as if they believe themselves to be the servants of autonomous systems, detached from the controlling influence of the society, economy and polity that they ostensibly serve. Sometimes they define their task as the subordination of these primordial forces to higher principles of justice, legality, propriety or efficiency (and indeed, we sometimes wish that they would do so). But the New Economy challenges such beliefs, actions and task definitions quite explicitly and brutally. Public administration and public law are not likely to continue unchanged in a political economy in which traditional forms of work organization are being revised, in which important actors — principally global corporations — can evade domestic regimes of regulation, and in which growing numbers of citizens are increasingly agnostic about the fundamental premise upon which democratic public administration is built — the desirability, legitimacy, necessity and efficacy of state intervention.

The two projects of this essay, then, are to explore the impact of the New Economy on public administration as we have known it, and to consider how various strategies said to be appropriate for the reform of public administration — law, professionalism, democracy and markets — are likely to play themselves out in the context of the New Economy.

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<sup>3</sup> See *ibid.*; H. Fayol, *General and Industrial Management*, trans. C. Storrs (London: Pitman, 1949).

## I. The New Economy and Its Impact on Public Administration

The emerging socio-political and techno-economic paradigms that go by the name of the New Economy obviously have different provenances and attempt to capture different changes that have occurred at different rates of speed, and in differing degrees of extremity. Indeed, one of the important debates about the New Economy is whether the complex and contemporaneous changes it seeks to encapsulate in a single terse phrase merely coincide or are causally related. Moreover, paradigms are syntheses, recapitulations of the observations, diagnoses and predictions of different observers whose contributions are shaped by their different intellectual and ideological perspectives. It is the nature of the beast, as paradigms are always immanent, always emerging, that any snap-shot of the New Economy will fail to capture its unresolved contradictions and unrevealed consequences.

Thus, the New Economy cannot and should not be reified: it is only a heuristic device, a shorthand, which evokes a number of diverse and complicated phenomena. However, these phenomena are too palpable to be ignored. At the least, we have to acknowledge that they have profoundly destabilized Canadian public administration, and that we can usefully apply our minds to the task of "coping" with their collective effects. "Coping" is a term which signals either resistance to, or facilitation of, these forces. It therefore reminds us that public administration is contested terrain, whose control is a valuable strategic asset sought by contending forces. As a consequence, proposals for reform are not neutral: they express opposing views of what government can do and should be doing.

### A. *Changes in Technology and the Social Organization of Work*

While debate continues over the exact extent, consequences and significance of the shift from fordist to post-fordist modes of production, it is clear that the social organization of work in all industrialized countries has been altered largely to the benefit of employers and the prejudice of workers. The changes usually identified with this shift include: the introduction of computer-driven technologies; the adoption of flexible manufacturing and just-in-time supply strategies supported by corporate alliances and networks of suppliers and subcontractors; a dramatic reduction in the number of industrial workers and in the power of their unions; a corresponding rise in employment in the service sector, especially in casual and non-standard employment arrangements; the decline of traditional managerial hierarchies; the rise of a corporate "technostructure" comprising experts and professionals; and the proliferation of small consultancies. For present purposes, two important implications of these changes must be identified.

First, they have largely eviscerated the paradigmatic assumptions underlying not only our collective-labour laws, but many of the public policies that operated on similar assumptions about the nature and character of our industrial economy, about the workers, families and communities such an economy might be expected to sustain, and about the social-welfare system needed to maintain the viability of a society

organized around the fordist mode of production.<sup>4</sup> The resulting disjunctures of policy have caused great dislocation in public finance and program design, and as a result, in public administration.

Second, the social organization of work in the public sector is itself undergoing important changes similar to those observed in the private sector. Indeed, one of the most striking changes is the increasing use by public-sector managers of private-sector rhetoric, analytical tools and employment strategies.<sup>5</sup> Such changes are motivated, no doubt, by efficiency concerns, but also by a wish to be aligned with the dominant anti-state tendency in political discourse.

The affinities between private- and public-sector developments are considerable. State fiscal crises are made to stand proxy for global competition, as justification for hiring and wage freezes, redundancies and rollbacks. Privatization of government functions is treated as analogous to corporate divestiture of unprofitable subsidiaries, in order to achieve a clear focus on activities deemed central to its primary "business"; this is a self-justifying argument for reducing the scope of government activity and the size of the government workforce without actually having to assess the social consequences. Emulating the "make-or-buy" decisions of private firms, governments are "out-sourcing" many functions. The result is the creation of hybrid agencies and networks involving horizontal and vertical links among government agencies and with private firms, relationships known in the private sector as "strategic alliances". The reduction of government research capability, coupled with the demand for more accountability for internal programs and the need for more monitoring of privatized functions, is spurring the growth of numerous consultancies — often employing former civil servants — which in effect serve as "just-in-time contractors" for government. The flattening of public-service management structures to produce "lean organizations" is eliminating familiar career paths. And so on.

All of these developments — legitimated by anti-state rhetoric and facilitated by changes in technology and the organization of private-sector work — have demoralized public employees and made them extremely insecure. In due course, demoralization and insecurity affect recruitment, retention and job performance, at which point well-rehearsed disparagements of bureaucracy and civil servants become self-fulfilling prophecies.

Further, apart from transforming the social organization of work in the public service, technology has also had some powerful transformative effects on the state's

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<sup>4</sup> For a more extended account of this phenomenon, see H.W. Arthurs, "Labour Law Without the State?" (1996) 46 U.T.L.J. 1.

<sup>5</sup> See e.g. D. Cameron, "The Discipline and the Profession of Public Administration: An Academic's Perspective" (1982) 25 Can. Pub. Admin. 496; H.L. LaFramboise, "The Future of Public Administration in Canada" (1982) 25 Can. Pub. Admin. 507; D. Savoie, "Studying Public Administration" (1990) 33 Can. Pub. Admin. 389. See also K. Kernaghan, "Reshaping Government: The Post-Bureaucratic Paradigm" (1993) 36 Can. Pub. Admin. 636, which reviews a number of influential American contributions and cites as meriting "special attention" D. Osborne & T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, Mass.: Addison-Wesley, 1992).

capacity for social control. In some respects, technology has enhanced government's powers. For the first time, democratic governments find themselves with the technical capacity to maintain close surveillance not only of citizens implicated in criminal or anti-social behaviour, but of virtually everyone. This has forced a whole series of issues onto the agenda of public administration — the protection of confidential data banks, the creation of registers of individuals at risk from contagious or degenerative diseases, the use of electronic bracelets to monitor paroled offenders, the surveillance of highways with photo radar to detect speeders.

In other respects, however, technology has imposed new limits on government's regulatory powers. Innovations in telecommunications technology have rendered governments virtually incapable of controlling commercial and cultural activities traditionally within the state's natural sphere of influence. Rail and air transportation and postal services, once considered quintessential public enterprises and policy instruments, must now compete with private-sector alternatives offering identical or substitute services. Photocopiers, fax machines and electronic mail have made it so easy for private parties to disseminate or exchange funds, secrets, smut and hate propaganda that it is hard to see how government can ever reassert even minimally effective control. These developments, it seems, open up new chapters in the centuries-old debate over whether the state's regulatory reach can, should or does exceed its technological grasp.

Finally, technology not only shapes public employment, provides tools for regulators and defines the practical limits of government control, it is also a regulatory system. Technology demands a certain kind of behaviour from those who design, produce and use it. For example, the need to ensure that computers, television and telephones can interact requires that certain technical standards be internationally-agreed; these agreed standards, in effect, then function as a form of legislation. Technology users, such as air-traffic controllers or tax examiners, must possess certain competencies, follow standard procedures and function with no more or less discretion than is compatible with the demands and possibilities of the technology itself. Hence technology, by determining the way in which public servants perform their jobs, also operates normatively to establish, in effect, standards of airline safety and the limits of tolerance for tax evasion.

In each of these examples, private decisions about the design or adoption of technology shape public policies. This, to be sure, is not a new phenomenon. Almost from the beginning of the industrial revolution, governments frustrated by their inability to define and enforce specific safety standards for workers and consumers were sometimes able to achieve their regulatory objectives by persuading or coercing technology-based industries, such as mines, railways and shipping lines, to engineer enhanced safety features into their machines and vehicles.<sup>6</sup> This continuing symbiosis between state regulation and the normative character of privately developed technologies is evident today in efforts by government to negotiate the adoption of higher

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<sup>6</sup> I have traced this development in H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

automobile emissions standards and the development of safer aeroplane landing systems. Ultimately, then, acknowledgment that technology has normative effects leads us back to difficult questions: why technology is designed in a particular way; whether its social consequences are planned or unforeseen; whose interests are served — whether by design or happenstance — by its introduction. Profoundly important questions these, but for another occasion.

### ***B. Globalization and Regional Economic Integration***

Globalization has a private perspective and a public perspective. In the private perspective, globalization occurs as corporations reach across national borders to organize production and distribution, investors participate in international markets, and transnational institutions such as banks, brokers and law firms facilitate such activities. But this private perspective ultimately resides within the public perspective of globalization. For all of these activities to occur, states must abandon the familiar regulatory regimes of the post-war period, with which they protected their national economic space, in favour of domestic policies and international treaty commitments designed to liberalize trade. In so doing, states commit themselves not just to the free movement across national borders of goods, services and capital, but also to the increasing integration of their national economies and polities into larger systems, regional or global.

However, globalization can also be seen in quite different perspectives — the illicit traffic in drugs, guns and dirty money, the movement of immigrants and refugees, the ubiquitous preoccupation with “world-wide” news, entertainment, fashion and sport, or the emerging international human-rights and environmental movements — all of which both depend upon and challenge the capacity of states to define and protect national interests.

Even the most ardent supporters of globalization and free trade are not content to leave business activity entirely unregulated, either at home or abroad: trade marks must be protected, fraud must be punished, contracts must be enforced. Even the most highly principled humanitarians accept that movements of refugees and immigrants must be subject to some controls. And even the most cynical of governments — whatever their actual behaviour — will seldom confess to supporting the drug trade, terrorism or money laundering. However, since the ability of individual states to regulate international movements of all kinds has diminished, they have perforce begun to experiment with structures which might facilitate regulation and social control across national boundaries. Such arrangements include closer coordination and cooperation amongst national agencies concerned with fraud (Interpol), treaties or conventions whose signatory states agree to enact or enforce labour or environmental laws that meet specified standards (I.L.O., N.A.F.T.A. side-accords), the creation of regional trade blocs with regulatory powers (the E.U.), and regimes that define the terms of global trade (G.A.T.T./W.T.O.) or migration (the International Convention on Refugees). This globalization of the regulation not only of economic activity, but of crime and migration as well, considerably alters the dynamic of Canadian public administration.



Canada, compared to most countries, is unusually dependent on international trade. However, given the relatively small size of our economy, we are seldom able to influence the substantive policies of international regimes — the World Bank, the International Copyright Convention — in the way in which the United States and the other G7 nations are able to do.<sup>7</sup> Moreover, firms based in those very nations dominate many sectors of Canada's domestic economy, so that we cannot count on help from influential corporations which might align themselves with Canada's national interests. We therefore suffer from a diminished national capacity and will to resist or modify uncongenial international regimes. This diminished capacity is further constrained by other well-known Canadian problems. This is a world in which economic power derives in large measure from knowledge and capital. However, we are a net importer of intangibles: intellectual property, capital, technology, sophisticated legal and managerial concepts, high and popular culture and — for better or worse — even political ideologies and strategies. And this is a world in which social cohesion grounds at least some successful versions of capitalism.<sup>8</sup> However, social inequality has been growing rather than diminishing in Canada, and regional disparities have left in their wake palpable inequities, resentments and trade barriers which stand in the way of concerted national action. Indeed, with the Quebec question — and therefore decentralization — high on the agenda for the foreseeable future, we may well be unable to generate national consensus in any form, whether social democratic or neo-conservative. This certainly does *not* mean we count for nothing in the international sphere, or that we are utterly incapable of formulating domestic policy. But, more than many countries, our capacity to define and pursue our own interests in the global economy is limited by the peculiar conjuncture of our domestic political crises.

All of these factors produce a further consequence: we are not only vulnerable to pressure from both foreign governments and foreign investors, we are acutely sensitive about our own vulnerability. Fluctuations in the Canadian dollar and in the market for Canadian bonds and securities, complaints (often spurious) about our "unfair" trade practices, threats by multinationals to close Canadian plants or offers to expand them: such concerns cast their long shadow over virtually all aspects of public-policy formation, from taxation to labour relations to environmental policy to Quebec's independence. Thus, we make policy timidly, not merely because of possible domestic economic or political repercussions, not merely to avoid violating our treaty obligations, but because we do not wish to offend foreign investors or disquiet global markets.<sup>9</sup>

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<sup>7</sup> This is not to deny that Canada has made an important contribution in other areas, such as the environment, refugees and the law of the sea.

<sup>8</sup> See e.g. R.D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993); W. Hutton, *The State We're In* (London: Jonathan Cape, 1995) at 257-84.

<sup>9</sup> See e.g. the proposal by Michael Wilson, former Conservative finance minister, that all federal budgets should be proposed, as it were, in draft, so that markets can respond and appropriate corrections can be made in the final version (M. Wilson, "Wanted: A More Open, Useful Way to Deliver Canada's Budget" *The [Toronto] Globe and Mail* (22 May 1995) A11.

Furthermore, our subordinate position is neither solely the result of timidity nor likely to vanish if we resolve our political crises and regain our confidence. We have institutionalized our weakness by acceding to N.A.F.T.A. and committing ourselves, virtually in perpetuity, to free trade and all its consequences. This is not to deny that positive benefits may flow to Canada as a result of our trade relationship with the United States, but they do so because we have in effect agreed to integrate ourselves into the world's largest economy and predominant political and cultural power. In this sense, N.A.F.T.A. is more than a treaty guaranteeing free trade; it functions also as a "conditioning framework",<sup>10</sup> which generates pressures for us to comport ourselves in many respects as if we were integrated culturally, socially and politically, as well as economically. Thus, the long-term consequences of N.A.F.T.A. are as much psychological as they are juridical and economic.

How will all this affect public administration? In accepting formal harmonization of our law under various international conventions and treaties, including N.A.F.T.A., we are actually subordinating ourselves to legal regimes shaped by the template of American law. But even without N.A.F.T.A. we might have found ourselves in a similar situation. Canada's corporate culture is so overwhelmingly of American (and other foreign) provenance, that we have been hard-pressed to create a management style consistent with our own socio-political circumstances. Popular culture — including attitudes towards government — is so profoundly influenced by American television that we run the risk of abandoning our modest and peculiar traditions of collectivism. And because of long-standing academic and professional affinities, we have borrowed from the United States much of our social and economic theory, our administrative technology and conceptual discourse of regulation. In consequence, we may have created an inadvertent predisposition to policies which do not always accord with our own values, conventions or interests.<sup>11</sup>

How did all this come about? In part, to be sure, we had no choice. As a small country, we were obliged to trade on the basis of whatever procedural, juridical and institutional arrangements were on offer, arrangements that naturally favoured more powerful trading nations. In part, however, we readily acceded to this new international regime, dominated by the United States, because of the tendency of important Canadian communities — labour, management, consumers, professions, political parties, government and universities — to look abroad for expertise, inspiration and validation.

By way of example, consider the consequences of globalization for the relationship between state regulation and corporate management. So long as we operated on the post-war premise that national economies would be managed nationally on Keynesian principles, and coordinated internationally under the Bretton Woods re-

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<sup>10</sup> See R. Grinspun & R. Kreklewich, "Consolidating Neoliberal Reforms: 'Free Trade' as a Conditioning Framework" (1994) 43 *Stud. Pol. Econ.* 33.

<sup>11</sup> I have explored this theme in "Labour Law without the State?", *supra* note 4. Securities, food and drugs, industrial property, rail and air transport, occupational health and safety and rate regulation are other areas where our regulatory strategies have been borrowed from other countries, albeit often with local adaptations.

gime, foreign firms wishing to do business in Canada found it expedient to establish subsidiaries in this country. Moreover, communications, marketing and financial requirements often reinforced the decision to establish local subsidiaries, rather than to operate from a foreign base. Managers and directors of these subsidiaries naturally owed their ultimate loyalty to their multinational employer. However, their managerial styles and strategies were somewhat influenced by the fact that they lived and worked in Canada. At a minimum, the fact that they had to deal on a daily basis with Canadian regulators, media, unions and consumers sensitized them to some degree to Canadian life and law. This sensitivity often enabled or induced them to influence decisions of the parent firm in favour of maintaining or expanding Canadian operations, which would naturally enhance their own personal interests as well.

Yet, this picture is changing rapidly. As a result of rapid advances in telecommunications and information systems, the head offices of many global corporations can now perform functions — production and inventory controls, financial accounting, sales analysis — that had previously to be performed locally. Advertising can now be generated in the United States and aimed directly at Canadian consumers from the United States. Under N.A.F.T.A. and the G.A.T.T., more and more goods and services can be supplied to Canadians directly from American plants rather than from Canadian branch plants with small, uneconomic runs of a large variety of products. Indeed, as economic integration proceeds apace under N.A.F.T.A., the very concept of a separate Canadian market becomes dubious. In the face of all these developments, the logic of having Canadian subsidiaries is rapidly evaporating. Consequently, many foreign-based firms appear to be reducing the status and authority of their Canadian managers and corporate boards, if not eliminating them entirely. Some, of course, are not only reducing their corporate presence in Canada; they are suspending production here altogether.

The diminished corporate presence of multinationals in Canada has potential repercussions for public administration. Much regulation becomes effective through moral suasion and, as noted, the socialization of corporate decision-makers. If corporate representatives are no longer present in Canada to be suaded or socialized, governments will have to fall back on more formal techniques of enforcement, which are often slow, costly and undependable. Worse yet: to the extent that regulation does depend upon the state's use, or threatened use, of its coercive powers, we are left with diminished capacity to coerce. Companies that serve the Canadian market from abroad, as part of a larger North American market, are essentially beyond the reach of Canadian law. And multinationals that retain a base in Canada can face down the state by making increasingly credible threats to reduce their Canadian operations, or even to leave Canada altogether.

It can fairly be said that we are witnessing only the intensification of previous patterns of corporate conduct. However, this intensification confronts public administrators more frequently and more forcibly with a painful dilemma: to regulate firmly, or to tread softly in order to advance the "higher" national interest of maintaining Canadian industrial production and jobs. As we will see next, what is presented as a di-

lemma for individual public administrators is also a profound issue for the Canadian state as a whole.

### ***C. Shifting the Boundaries between State and Civil Society: The Ideology of the New Economy***

In the liturgy of the New Economy, few hymns are so popular as the *Nunc Dimittis*, sung whenever the state appears in its interventionist role. The chorus joins many different voices in celebration of the retrenchment of the state: neo-conservative ideologues who believe in the market, liberals committed to individual rights and fearful of domineering government, finance ministers who are sympathetic "in principle" to state action but cannot work out how to pay for it, aggressive entrepreneurs for whom state action represents only an unwanted cost of doing business, populists — fulminating over *la trahison des clercs* — who want to lobotomize government, opportunist bureaucrats who are prepared to curry favour by disavowing all forms of state action (including the one they manage), and even social reformers who are coming to believe that decades of activist government have — to their frustration and regret — clearly failed to bring us any nearer the New Jerusalem. All of these voices, yet the result is a chorus, not a cacophony.

Of course the state still has its uses. The state alone can sign international treaties (which oblige it to abstain from acting like a state). It will retain its functions as nightwatchman (pending further experimentation with security firms and privatized prisons). It will continue to provide education (or education vouchers), welfare (or workfare) and health care (of a minimal sort, for those who cannot afford to buy private insurance). And it will defend society against illegal immigrants and drug dealers (a task made easier by the tendency to conflate the two categories), disruptive aboriginals (possibly by subcontracting to First Nations the power to subdue their own) and disaffected members of the working- and under-classes (many of whom, disaffection notwithstanding, vote for reductions in social welfare and increases in policing). If this indeed is to be the future of the Canadian state, who would wish — who would presume — to undertake its administration, and to what end?

The ambitions and strategies of the interventionist state have long been shaped, and its tools sharpened, by an uneasy alliance of inoral entrepreneurs, intellectuals and civil-service technocrats.<sup>12</sup> Of course, this alliance had no autonomous powers of enactment; conventions of parliamentary government and traditions of professionalism made civil servants responsible to elected ministers for the execution of policies adopted by the legislature. However, since most governments during the post-war years were committed to some extent to an interventionist state, they tended to work comfortably with the civil service and other groups concerned with the same objectives.

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<sup>12</sup> See S.E. Finer, *The Life and Times of Sir Edwin Chadwick* (London: Methuen, 1952); O. MacDonagh, *Early Victorian Government 1830-1870* (London: Weidenfeld & Nicolson, 1977); D. Roberts, *Victorian Origins of the British Welfare State* (New Haven, Conn.: Yale University Press, 1960).

This does not imply that the public service and the government always saw eye to eye. Wartime bureaucracies had to squeeze down to adjust to post-war "normality". Periods of growth in government's powers and staff alternated with periods of restraint. But only in the 1970s did governments begin serious retrenchment of their activities and personnel, and only in the 1980s was retrenchment accompanied by aggressive measures to limit the power of public-sector unions to resist it.<sup>13</sup> Now, in the 1990s, we are experiencing not merely cyclical qualms about state intervention, not merely modest rollbacks of public-service wages and staff complements, not merely modernization and reconfiguration of government, but a successful attack on the very idea both of interventionist government and of the need for committed public servants as its agents. The result is that, almost for the first time, governments are requiring that the public service participate in its own systematic denigration. Whether this is a "commonsense" revolution or not, it clearly presages a revolution of some sort in Canadian public administration.

For this revolution to be successful, the first prerequisites were the articulation of an ideology, a concrete program expressing that ideology, and public acceptance of that program (signalled by the arrival in office of political parties committed to it). Self-declared neo-conservative governments have come to power in Alberta and Ontario (two of our three richest provinces), but even Quebec and Saskatchewan, with nominally social-democratic governments, have followed a somewhat similar line. Without denying that degrees of brutality and gleefulness distinguish these two groups of governments, to paraphrase an old saw, it seems that "we are all fiscal conservatives now". In any event, winning elections is a necessary, not a sufficient, condition for the dismantling of the interventionist state. Given that the fundamental justification for anti-government governments holding power is that they wish to abandon its use, it is ironic that they must first find a way to concentrate internal authority.<sup>14</sup> Somehow, these governments must bind the hands of all of their members to prevent them from being wrung after an unplanned but disconcerting encounter with those of another persuasion. The prime minister must be able to control the entire direction of government; the finance minister must be able to control expenditures (but not necessarily policies) in line departments and transfer agencies; and "wet" members of cabinet or caucus must be made to maintain discipline.

Also required are a number of changes in the culture, conventions and law of administration. First, within the public service, leadership must pass from those who believe in the state to those who do not. This can be accomplished by more effectively subordinating the civil service to the political apparatus of the governing party, and by politicizing the civil service to ensure that the "right" people emerge in key positions. Second, where activism cannot be harnessed to the new agenda, it has to be discouraged. This can be accomplished either in a positive way, by expanding the numbers and influence within the civil service of economists, business school graduates and

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<sup>13</sup> See L. Panitch & D. Swartz, *The Assault on Trade Union Freedoms: From Wage Controls to Social Contract*, rev. ed. (Toronto: Garamond Press, 1993); D. Drache & H. Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System* (Toronto: James Lorimer, 1992).

<sup>14</sup> See Hutton, *supra* note 8.

others who are by training and background instinctively uncongenial to interventionist government, or negatively, by creating a "chilly climate" for public servants who cannot be weaned from their old commitment to non-partisan activism. Third, it is important to prevent any internal critique of planned reductions in government activity and spending. This can be accomplished by re-socialization of the public service through reduced consultation between the civil service and "client" groups seeking to preserve the former interventionist policies, and through increased consultation with groups hostile to the state. In addition, the risk of internal critique can be reduced by eliminating advisory bodies, research units or other centres of analytical capacity within government which might be the source of informed agnosticism about proposed initiatives. Fourth, ministries must be weaned from their attachment to their historic missions, and tutored, coerced and enticed into a posture of self-abnegation. This is accomplished not just by reducing program budgets but by establishing performance measures, accountability centres and *stakhanovite* reward systems for achieving reductions in expenditure and increases in "efficiency". And fifth, since government employees themselves are directly affected by reductions in government expenditures, programs and powers, it is necessary to forestall any concerted resistance by them, by undermining their solidarity and confidence through a program of dismissals, wage reductions and the constriction of public-sector collective-bargaining rights.

To be sure, some such strategies would have to be undertaken in order to effect any fundamental change in the role of government, whether that change was in the direction of more activism or less. Some, for example, were used by the N.D.P. government of Ontario that was overthrown by the Conservative "commonsense revolution". However, such assaults on the public service — and, by extension, on its moral and intellectual allies — are likely to become more extreme and debilitating as the neo-conservative agenda takes hold, precisely because that agenda fundamentally challenges not just the job security of the public service, but also its world view and professional self-image. When this transformation is linked to changes in the institutional structures of Canadian government, the results are likely to be more far-reaching yet.

Canada is experiencing an acute and extended attack of "centrophobia". We seem determined to accomplish the wholesale devolution of financial, administrative and legislative powers from the federal government to the provinces, statelets and largish townships that (at least for now) constitute the Canadian federation. There they will be sequestered under political, constitutional and *Charter*<sup>15</sup> constraints, so that the national government will never again be able to assert itself as promoter of the common good or bulwark against foreign and domestic aggregations of private interest.<sup>16</sup> De-

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<sup>15</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>16</sup> I am not embarrassed to acknowledge the influence of the eponymous Frank Scott — in whose honour this paper was originally given — on my unfashionable and intemperate views. See F.R. Scott, "Federal Jurisdiction over Labour Relations — A New Look" (1960) 6 *McGill L.J.* 153; F.R. Scott, "Canadian Federalism: the Legal Perspective" (1967) 5 *Albany L. Rev.* 263.

mands for devolution from all parts of the country, and across the political spectrum, are not new: after all, centrifugal forces have been in play almost since the beginning of the Canadian federation, often said to be one of the most decentralized in the world. However, there is something a little odd about the current situation.

Previous versions of the devolution debate were about allocating the authority and credit, the responsibilities and burdens, of the interventionist state. By contrast, the debate today is not about which programs should be funded and delivered by what level of government, but about who should be blamed — or praised — for their demise. The debate is no longer whether the provinces should be encouraged to function as social laboratories but whether some provinces will be able to afford any social experiments at all. The debate, therefore, is not whether Canadian citizens should be able to move freely across the country, and to receive a reasonable level of service and protection wherever they are, but whether national standards should be abandoned as an intolerable interference with the democratic right of provincial governments to dismantle the interventionist state in the manner of their own choosing. And finally, the debate is certainly not whether, in the populist vernacular, government closer to the people will be more efficient and responsive, but whether we may be initiating a regulatory “race to the bottom”, comparable to what some identify as the likely by-product of globalization.<sup>17</sup>

Today’s debate over devolution is quite different in another respect. It implicates, of course, many of the traditional questions of identity and alienation which are endemic in Canadian constitutional and political discourse. But in the current context, these questions cut to the core of Canada’s continued viability as a nation. Quebec, the West and First Nations have very different historical and juridical claims, but they are all incompatible with the continued existence of a strong federal government. For the past half-century, their claims might have been countered by the argument that the federal government was the custodian of Canada’s social-welfare system, of many regulatory safeguards and of essential elements of public infrastructure. Now that those federal functions are being devolved, privatized or abandoned altogether, the case in favour of a radically decentralized federation seems unanswerable.

Unanswerable, that is, so long as we are committed to a minimalist state: after all, it hardly matters which government is not a presence, so long as none of them is. But if the pendulum should swing, if we should again become enamoured of the interventionist state and again convince ourselves that we can afford it, what will happen then? Multiple regimes of welfare, medical care, securities regulation and labour-market adjustment may increase cost, reduce efficiency and, in many cases, foster inequity and complexify interprovincial mobility. Global competition and new patterns of trade and manufacturing require careful attention to the concertation of public policies and private initiatives, to the enhancement of civic infrastructure and to the strategic deployment of government’s few remaining fiscal, monetary and economic

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<sup>17</sup> See e.g. R. Janda, “Reviving Federalism: Canadian Reflections on an American Dream” (1994) 19 *Yale J. Int’l L.* 207; B. Langille, “Canadian Labour Law Reform and Free Trade” (1991) 23 *Ottawa L. Rev.* 581.

powers. These are all reasons, in general, why the federal government became the dominant actor in the first place. But if we were to create constitutional structures whose effect might be to prevent the re-emergence of national standards and programs, we would in effect have built inefficiency and inequity into the structure of such programs, thereby reducing the likelihood of ever reintroducing them, even at the local level. And if we abandon what remains of national power to tax, spend, regulate and co-ordinate, we will never again be able to take positive steps to improve our economic fortunes and pay for social programs.

Thus, we are confronted with an unattractive choice. If we ignore demands for radical devolution — radical because they are expressed as *de jure*, not simply *de facto*, demands — we run the risk of having no country at all. But if we accede to them, we run the risk of having constitutionalized a neo-conservative vision of the passive state. In this sense, then, the federal question becomes intertwined with the equally fundamental question of the Canadian state's future role in economic and social life.

Nor is devolution the only constitutional issue that casts a long shadow. We must also consider the effect of the *Charter* on the juridification of politics and public administration. The *Charter* acknowledges that the Canadian state is founded upon principles which include adherence to the rule of law<sup>18</sup> in the legislative and executive, if not the judicial,<sup>19</sup> branch of government. In Dicey's classic exposition, the rule of law is a strategy both for frustrating the rise of the interventionist state and for hobbling its characteristic institutional forms, ministries and administrative agencies.<sup>20</sup> In this sense, the *Charter* neither initiated nor much intensified the judiciary's hegemonic claims over the administration. These had become amply evident, for example, in the courts' inflation of section 96 of the *Constitution Act, 1867*,<sup>21</sup> as well as in the everyday practice of judicial review.<sup>22</sup> However, the *Charter* has helped to transform Canadian law and legal culture in five important respects which have profound effects for public administration.

Previously, requirements of procedural fairness in administration were treated as implicit, subject to specific legislative indications of what procedures were mandated; with the enactment of the *Charter*, procedural fairness became an explicit requirement in many fields of administrative law, especially those involving deprivations of personal liberty, such as refugee and immigration claims and prison discipline. Previously, legislatures were accorded broad latitude in constructing regulatory regimes; with the enactment of the *Charter*, legislative policies had to pass the tests of over-

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<sup>18</sup> See *Charter*, *supra* note 15, preamble.

<sup>19</sup> See *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

<sup>20</sup> See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965); see also H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

<sup>21</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

<sup>22</sup> See H.W. Arthurs, "Protection against Judicial Review" (1983) 43 R. du B. 277.



breadth and proportionality, and as we have recently seen, had to demonstrate that they had done so with convincing evidence.<sup>23</sup>

Hence a third consequence of the *Charter*: it adds considerably to the transaction costs of constructing and administering any administrative regime. Those seeking to forestall regulation or escape its reach can now use *Charter* litigation either *in terrorem* (as an argument against new legislation or regulations) or after the fact, in order to obstruct and delay, if not to fatally wound, administrative agencies pursuing public policies. The resulting administrative structures are more cumbersome and costly, less supple and proactive. The presence of lawyers becomes inevitable; litigation is a constant threat; and the prospect of being declared unconstitutional lends an air of contingency to all regulatory initiatives. And thus a fourth consequence. By both precept and example, the *Charter* teaches that the particular late-twentieth-century cultural artifact we happen to know as law — rights, legislation, courts, adjudication, lawyers — is not only inevitable but the very hallmark of a democratic society. This teaching blinds us to the positive potential of other social visions and values, other institutional forms and processes.

Ultimately, however, the *Charter's* greatest effect is not so much direct as indirect. It has helped to reshape the consciousness of Canadians, and thereby to reinforce the power of the New Economy paradigm. The *Charter* has legitimated — and arguably even launched — the growing tendency to see ourselves as rights-bearing individuals rather than as members of a community, as operating at odds with the state rather than as its beneficiaries, as seekers of personal redress through litigation rather than as agents of social improvement through political activity. These perceptions, for obvious reasons, are very pertinent to the ways in which we relate to the state and its administration.

The ideology of the New Economy, then, is not merely — perhaps not primarily — a belief in the virtue of markets. Changing attitudes towards individualism, communities, nations, states, politics, public institutions, law and civic participation have converged around a central conviction that the boundaries between the state and civil society should be redrawn — the realm of private action expanded, and the role of government reduced. This conviction, however, is shot through with ironies. First, the boundaries between state and civil society have always been shifting and permeable; the state has never had a total monopoly on legitimacy or coercion; it could never count on having its way with the market or with local communities; it has always shared with private institutions its putative authority over regulation and social control.<sup>24</sup> Second, in the early running at least, civil society — newly revived — is demonstrating only a limited inclination and capacity to address the complex and urgent problems of our times; we may soon find ourselves reinventing the state. And third, those who move and shake the New Economy do not have a monopoly on disdain for

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<sup>23</sup> See *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1.

<sup>24</sup> This, of course, has been the great insight of legal pluralist scholarship. See e.g. S.E. Merry, "Legal Pluralism" (1988) 22 *Law & Soc'y Rev.* 869 at 890: "The dialectical analysis of relations among normative orders provides a framework for understanding the dynamics of the imposition of law and of resistance to law ..."

government and public administration. As the next section of this essay suggests, they are joined by many who are nominally committed to the idea of an interventionist state. But three ironies do not a paradigm confute. The new anti-state ideological consensus has important, and possibly transformative, implications for public administration.

## II. The New Economy and Its Administration: Law, Professionalism, Democracy and Markets

In that innocent, far-off time — until, say, the 1990s — when resuscitation of the activist state remained a project with some plausibility, three main strategies were proposed for the reform of public administration: increased external accountability through legal controls; internal accountability through enhanced professionalism; and greater democratic participation. None of these was ever particularly promising, but in the event all have now acquired a faint whiff of anachronism. More recently, in the heyday of the New Economy, another strategy has come into prominence, the “reinvention” of public administration as its own antithesis — a market. This strategy, by contrast, is promising indeed, but what it promises may not be to everyone’s liking.

### A. Increased Legal Control of the Administration

Virtually since the beginning of the activist state in Victorian England, public administration has been confronted with two very different visions of law. One sees law as a “bridle for leviathan”, a device to hold the administration accountable and protect citizens’ rights; the other sees law as a set of norms arising within the administration — as in any site of complex social interaction — in order to organize and facilitate the performance of complex tasks. These two visions have generally been associated with opposing political ideologies. Legal accountability — “the rule of law” — has usually served the cause of those who wished to frustrate state intervention; the notion of an indigenous and largely autonomous law of the administration has been favoured by those who want democratic governments to be able to get on with their work without constraints imposed by unelected judges at the behest of wealthy and powerful private interests.<sup>25</sup>

In the New Economy, however, while “law” in both senses continues to have salience for public administration, their magnetic fields seem to be reversing; what formerly attracted one now appeals to the other. As we will see, leviathan’s bridle is now being tentatively examined for its potential to urge the beast of state forward, rather than restrain it; and there are clear signs that the indigenous law of public administration may be used to make activist governments quiescent. In short, in the New Economy, law and public administration are implicated in the same conflicts, and suffer from the same debilities. The one is therefore a most unlikely cure for the other.

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<sup>25</sup> I have explored this notion elsewhere: see Arthurs, *supra* note 6.

True, law may still be called upon to lend permanence, coherence and discipline to the New Economy. Formal legal arrangements may be adopted in order to permanently disable government from recovering its capacity to regulate. For example, international treaties and conventions often require governments to foreswear intervention in their own economies as an illicit encumbrance on free trade,<sup>26</sup> and to "harmonize" their own domestic law with so-called transnational norms, in order to facilitate regional or global economic integration, thus requiring them to abandon policies designed to protect domestic industries or institutions.<sup>27</sup> Constitutions may be amended or interpreted to devolve responsibilities to lower levels of government that do not have the means to discharge them, to strictly limit state spending on welfare or to force regulation into procedural and institutional forms that increase its costs and reduce its efficacy. Charters of rights and malleable doctrines of judicial review may arm powerful private interests with the means of challenging government action and tempt individual citizens to pursue their concerns through the courts, rather than through the political process or regulatory and administrative regimes. And domestic legislation that establishes regulatory regimes and welfare entitlements may be repealed or retrenched.

In all of these respects, law is being used as an external force to limit state action and redefine the mandate and *modus operandi* of public administration. In this sense, the New Economy can be said to be embedded in a foundation of law and a culture of legalism.

However, many signs and portents point the other way. The New Economy is indeed generating prolific normative changes, but many of these are not expressed in formal law, such as treaties, constitutions, statutes or judge-made doctrine. Rather, much of the normative transformation of the state is emerging from the interstices of public administration in the form of executive orders, management directives, organizational arrangements, low visibility decisions, patterns of behaviour, and a shifting consensus about the ends to be achieved by the exercise of discretion. There are two reasons for this phenomenon.

The first is that external law is not self-executing. Law educates; it intimidates; sometimes it even inspires. But in the end, when used to control or transform public administration, it requires the agency of judges. Here is the Achilles' heel of law: in John Willis's often repeated aphorism, judges are civil servants in the department of dispute resolution. Courts themselves are bureaucracies of a particular kind, and as it happens they are neither an efficient nor an effective bureaucracy.<sup>28</sup> In consequence, they are a problem rather than a solution for those who want to use law to reshape public administration.

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<sup>26</sup> See Grinspun & Kreklewich, *supra* note 10.

<sup>27</sup> See e.g. J. Horton, "Pharmaceuticals, Patents, and Bill C-91: The Historical Perspective" (1993) 10 Can. Intell. Prop. Rev. 145.

<sup>28</sup> See M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canada Communication Group, 1995).

This problem is in fact likely to receive attention in the New Economy, as part of a general concern to make government more efficient. The justice system is notoriously slow, expensive and inaccessible. Attempting to respond to these concerns, many courts have experimented with case management and pretrial conferences, and with alternative dispute resolution (A.D.R.) techniques which will enable them to dispose of disputes more cheaply, rapidly and conveniently than they would be able to do through formal adjudication. These strategies, of course, are borrowed from other public bureaucracies. However, the courts are not just any other bureaucracy. As exemplars of constitutional propriety and legal rectitude, they must not only be efficient; they must at the same time make good on their well-advertised commitment to provide citizens with access to the highest quality of justice in their conflicts with each other and the state.

Since courts will not be given additional resources, and since their own traditions preclude radical changes in management or procedures, they will have few options save to ration access to formal adjudication. By reserving this precious resource for the most deserving and needful, they would be acting in a manner consistent with the general approach of public administration in the New Economy. Thus, prospective litigants are likely to be subjected to a form of triage. Those with "important" claims — constitutional rights, significant business or institutional interests, personal liberty — will be given access as of right to curial adjudication; an intermediate category of claimants — those involved in property or consumer or family disputes — may be offered access to adjudication, although in fact discouraged from actually litigating by user fees and other deterrents; and high volume, low significance claims — "minor" or "routine" claims for social benefits, regulatory protection, immigration — will if possible be disposed of non-adjudicatively. Non-adjudicative disposition, to be efficient, must become increasingly impersonal. It will therefore take the form of standardized responses dispensed by computers or clerks, while the routinization of mass justice will be concealed by initiatives to "empower" citizens by providing them with information about their rights and entitlements via pamphlets, voice-response systems and home pages on the Internet.

These arrangements are likely to trigger a chain of consequences. The scope of routine entitlements may come to be increasingly defined not by what legislation prescribes, but by what is programmed into the government's computers<sup>29</sup> or by training manuals for front-line personnel. Given the prevailing negative attitude towards regulation and benefit regimes, some government agencies may yield to the temptation to deter citizens' claims and reduce their expectations by providing them with parsimonious and discouraging information about their entitlements. Because there will be fewer personal encounters between citizens and civil servants, there will be less occasion for the quiet exercise of benign discretion (or, for that matter, of hostile discretion), and less informed feedback from front-line decision-makers to their superiors. Deprived of personal contact with civil servants, and not much "empowered" by what is provided in lieu, citizens will need more and more help from others in or-

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<sup>29</sup> See J. Frémont, "Computerized Administrative Decision Making and Fundamental Rights" (1994) 32 *Osgoode Hall L.J.* 817.

der to navigate the increasingly clogged channels of government decision-making. However, due to cutbacks in public funding for legal aid and other advocacy services, such help will increasingly have to be provided by volunteers and entrepreneurial, sometimes unqualified, advisors-for-hire.

In short, more efficiency may well translate as more rights for the privileged, and less for everyone else. This, upon reflection, is not atypical of the outcomes one would expect in the New Economy. But it is not an outcome which could be categorized as an improvement in public administration. Or rather this might be the outcome if one assumed that formal adjudication yields rights, which is a somewhat dubious assumption.

To illustrate: a favourite prescription of the populist right (and the populist left, for that matter) is that abuses of state power could be curtailed if the transaction of public business were made more transparent and if officials were made more accountable.<sup>30</sup> Experience so far with transparency, under freedom-of-information legislation, suggests that it is particularly helpful to privileged users, such as businesses, lobbyists and journalists who have the time and money to take advantage of it. Legal accountability might provide similar outcomes.

Suppose a new statute or a ruling of the Supreme Court made public officials legally liable for misfeasance or dereliction of duty. What would be the practical result? No one knows, although experience to date indicates that nothing much is likely to happen.<sup>31</sup> Courts might be reluctant to hold individuals liable. If they did impose liability, the consequence might be, with equal probability, either a higher calibre of administrative decisions or a decline in the willingness of decision-makers to decide anything, for fear of being sued. If the courts failed to make awards against public servants personally, they might nonetheless hold ministers and deputy ministers to a new duty of due diligence. The result might be better public-sector management; but based on comparable experience with corporate officers and directors, it might just as likely be the introduction of indemnities and other legal protections to insulate them from liability. Conceivably, when the dust settles, all that will have happened is that the state has assumed the burden of greater accountability — damages paid to aggrieved citizens — as an additional “cost of doing business”. If so, the outcome of this whole legal initiative will be not a more responsive and competent public service, but only a state weighed down with additional financial liabilities.

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<sup>30</sup> Espousing such arrangements should not be confused with actually implementing them. For example, Ontario's Conservative government has instituted user fees for freedom-of-information requests which will present a considerable barrier to ordinary citizens seeking information (see “Government Information No Longer Free” *The Ottawa Citizen* (3 February 1996) A13).

<sup>31</sup> It is now almost 40 years since the landmark decision in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, but the tort of abuse of power established in that case remains almost unknown. As Peter Hogg notes, in this general area of government liability in tort, “the academic commentary is more voluminous than the cases” (P.W. Hogg, *Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 111, n. 159). Recent developments are reviewed in P.W. Hogg, “Compensation for Damage Caused by Government” (1995) 6 N.J.C.L. 7.

If more stringent rules to ensure greater openness and accountability are by no means certain to produce wiser, faster or better-considered action by public servants, we arrive at an important initial conclusion: law is of limited use in reshaping public administration from the outside in because it is too inefficient and unreliable.

The second reason why law is not likely to be the strategy of choice for reforming public administration has less to do with the practical difficulties of using law than with the political difficulties of making it. In the New Economy, most governments of whatever provenance are committed to reducing public spending, the size of the public service and the state's regulatory presence. The conventional political wisdom holds that radical reduction in public expenditure and services must be accomplished quickly and without temporizing, if it is to succeed.<sup>32</sup> Sometimes — the “Contract with America” being a good example — this strategy translates into an overt legislative assault on the activist state and the clienteles and communities that it has supported. However, the process of enacting legislation can be slow, public and, potentially, a focus for political resistance. Governments committed to such programs may therefore try to short-circuit it. In Ontario, for example, the Conservative government attempted to move virtually its entire legislative program through the legislature on an accelerated schedule and in the form of a so-called omnibus bill.<sup>33</sup> Only obstructive parliamentary tactics and a general public outcry blocked this attempt, and forced the government to accede to public hearings lasting several weeks, during which scores of amendments were introduced.

But legislation is not always necessary. Once a budget is adopted — which is, obviously, a formal and public act of the legislature — what follows can be made to appear inevitable rather than controversial, as the inexorable operation of rationing principles which will ensure that scarce public resources are allocated in an orderly, responsible and humane fashion. And except where overarching constitutional requirements or parliamentary conventions intervene, these rationing principles can be adopted *sub rosa*, without public debate or formal legislation. It is much easier to stand down the activist state by means of orders-in-council, ministerial directives, and subministerial decisions to reduce funding, eliminate staffing, suspend work routines

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<sup>32</sup> See R. Douglas, *Unfinished Business* (Auckland, N.Z.: Random House, 1993). The Conservative government in Ontario reduced welfare payments by 20 percent by order-in-council (as it had a legal right to do) before even meeting the legislature (see M. Mittelstaedt, “Ontario Tories Slash Spending by \$1.9-billion” *The [Toronto] Globe and Mail* (22 July 1995) A1; M. Mittelstaedt, “Slashing Spending Tops Conservatives’ Agenda” *The [Toronto] Globe and Mail* (28 June 1995) A5). Its announcements of intended cuts in transfer payments to municipalities and social agencies led those agencies to begin to adopt new rules for allocating benefits long before a budget was brought down implementing those cuts.

<sup>33</sup> Ontario's *Savings and Restructuring Act*, S.O. 1996, c. 1, comprises 211 pages, 400 clauses, 17 appendices, and amendments to 47 other statutes dealing with hospitals and doctors' services, environmental controls, fishing licenses, public-service redundancies and pensions, arbitration awards, highway tolls, municipal taxes and user fees, etc. A similar strategy was used, more successfully, by the federal Conservatives to implement the N.A.F.T.A. treaty. See the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, which comprised 193 pages, 242 clauses, and amendments to scores of statutes.

and eviscerate programs by pursuing them perfunctorily. In this way, parliamentary and extra-parliamentary opposition can be delayed until changes become irreversible, deflected away from big principles onto small details, decoyed into a series of skirmishes amongst constituencies competing for what is left of the budget, debilitated by having to fight so many battles in so many different venues, and thus denied all but minimal opportunities for challenge.

The techniques of clandestine and non-statutory change are familiar. A good deal of the substantive content of law is contained in orders-in-council and ministerial directives which can be amended or repealed. Ministries, boards and transfer agencies can be forced to absorb budget cuts without being specifically told to eliminate given programs; they, in turn, assign the task to sub-units where services are delivered, but which lack authority over policy. In some cases, budgets of disfavoured agencies and units are cut disproportionately or eliminated altogether; attrition and early retirements are used to eliminate unwanted functions and troublesome employees; warnings of future staff reductions generate conditions of general insecurity within the public service; and insecurity, in turn, helps to ensure at least grudging compliance with the new government's philosophy. Compliant attitudes are then converted into compliant conduct: the aggressive exercise of regulatory initiative is discouraged by managers; revised operating procedures are introduced which result in reduced levels of service; rules-of-thumb that permit a margin of generosity in the distribution of benefits are quietly abandoned. An enormous change in the behaviour of public administrators can be accomplished by stealth, with a minimum of legislation and a minimum of political risk.

Thus, for the most part, neo-conservative governments committed to a New Economy agenda neither need, nor want, to use law to reconfigure public policies or transform public administration. Ironically, however, by opting for more clandestine and informal means, they may expose themselves to complaints of executive overreaching, similar to those that were used to attack the initiatives of the early New Deal, the very prototype of the interventionist state they are now seeking to abolish.<sup>34</sup> Such complaints may not have much political resonance; they may, however, be framed as legal challenges. Orders-in-council, ministerial directives and other low visibility changes in the mandate of public administration may be attacked on procedural or jurisdictional grounds or on the basis that they violate constitutional standards. However, unlike the judicial obstruction of the New Deal in the mid-1930s, such challenges in Canada are not likely to accomplish much more than brief delays in the dismantling of the activist state,<sup>35</sup> and perhaps the odd touch of ironic humour.

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<sup>34</sup> See P.H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982); M.E. Parish, "The Great Depression, the New Deal, and the American Legal Order" (1984) 59 Wash. L. Rev. 723; R.A. Maidment, *The Judicial Response to the New Deal: The U.S. Supreme Court and Economic Regulation, 1934-1936* (Manchester: Manchester University Press, 1991).

<sup>35</sup> See e.g. *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, 89 O.A.C. 81.

In Canada, conservatives have tended to treat judicial review of administrative action as a manifestation of the rule of law and a fundamental principle of our polity.<sup>36</sup> By contrast, Canadian supporters of interventionist government have tended — with reason — to see judicial review of administrative behaviour as the extension of right-wing politics by other means.<sup>37</sup> However, as suggested earlier, in the New Economy the positions are likely to be reversed. The left will attack government “secrecy” and “arbitrariness”; the right will defend it on grounds of urgent necessity. The right will preach judicial deference to the will of parliamentary majorities, while the left will extol the virtues of fundamental rights and judicial activism. In the end, however, the courts are not likely to be much more capable of challenging the state in its diminished form than they were when it was more robust. Judicial review has always been too slow, costly, clumsy, incoherent and unpredictable to be much use to anyone. And as the left may ultimately recall, in addition to all of these well-advertised shortcomings, judicial review has usually been more effective as a sedative for government than as a tonic.

Thus, neo-conservative governments wishing to remake public administration in their own image are likely to live by the principle of “law if necessary, but not necessarily law”. While treaties and legislation may help to invest the premises of the New Economy with an air of legitimacy, or even inevitability, exclusive reliance on such measures involves an unacceptable and unnecessary element of political risk. What ultimately changes the behaviour of government are the tough practical measures which can be generated within public administration. Government is relatively safe in pursuing such measures, and need not be unduly concerned about rearguard actions in the courts in defence of the activist state. In fact, from government’s point of view, they have some positive attractions: the more such actions fail, the more they may make resistance to the New Economy agenda seem futile.

### **B. Enhanced Professionalism in the Public Service**

Whether one favours expansion of the state or retrenchment, professionalism would not seem to be a promising way of reforming public administration. The very concept of professionalism has been attacked by social theorists as a project of mystification and self-aggrandizement;<sup>38</sup> many professions — medicine, law and urban planning, for example — are accused of doing as much harm as good; and expert professional knowledge has been attacked as anti-democratic and self-referential. None-

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<sup>36</sup> See Ontario, *Royal Commission Inquiry into Civil Rights* (Toronto: Queen’s Printer, 1968) (Commissioner: J.C. McRuer).

<sup>37</sup> See J. Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 U.T.L.J. 351.

<sup>38</sup> The literature is reviewed in R.L. Nelson & D.M. Trubek, “New Problems and New Paradigms in Studies of the Legal Profession” in R.L. Nelson, D.M. Trubek & R.L. Solomon, eds., *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (Ithaca, N.Y.: Cornell University Press, 1992) 1. See also M. Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977); E. Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago: University of Chicago Press, 1986).



theless, because "professionalism" is often used to describe the value system that is said to prevail in at least the higher reaches of public administration, it deserves close scrutiny.

Members of a profession are conventionally identified by their mastery of a specialized body of knowledge and skills which they put at the disposal of their client. As a corollary, the dependency of the client on the professional and his or her knowledge is said to impose ethical responsibilities on the professional: to advance the client's interests at all times, to adhere to high standards of care and competence, and to abstain from taking unfair advantage of the client. This description of professionals can easily enough encompass public servants, at least at the senior levels.<sup>39</sup> However, professionalism in the public sector has several distinctive features. First the "client" — the state itself — constantly reappears in new incarnations and with new concerns under succeeding governments. Second, public-sector professionals are not independent practitioners; they work only in bureaucratic or organizational settings. And third, there is a long-standing debate over whether public-service professionals ought to be specialists or generalists, and whether technical credentials and extensive experience in a particular field should be regarded as negative, rather than positive, credentials. Each of these features presents particular problems in using enhanced professionalism as a strategy for the reform of the public service.

However, difficulties begin with the central concept of professionalism itself: expert knowledge. We might imagine that enhanced professionalism within the public service would be especially important at a moment when new socio-political and techno-economic paradigms are emerging, and when the machinery of government itself is being transformed. However, expert knowledge seems to be in disrepute. Critics at both ends of the political spectrum are sceptical of professional expertise which, they argue, is not neutral but value-laden, and is employed not to serve public interests and elected governments but to sabotage and dominate them. Expertise must be diluted with a healthy dose of common sense (the right) or popular politics (the left). But it is not just expertise which is suspect; it is the experts themselves. Incoming governments committed to fundamental change often perceive senior public servants as adherents of the status quo, if not of the previous regime itself. They may therefore decide to purge or marginalize some of the most knowledgeable and competent professionals. New recruits to senior positions may come from junior ranks, but especially in the case of governments with radical agendas, there will be a temptation to recruit individuals from outside the public service whose ideological positions and special professional expertise are thought to be compatible with the government's agenda. In the New Economy, of course, an anti-state ideology and private-sector managerial experience may be regarded as especially attractive credentials.

Professional ethics are also a problem. In most professions, ethics are transmitted through a *mélange* of maxims and precepts, embedded attitudes and symbolic behav-

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<sup>39</sup> Obviously, many public servants think of themselves in these terms, as evidenced by the existence of organizations such as the Professional Institute of the Public Service of Canada and the Canadian Institute of Public Administration, and a host of others with specialized or local memberships.

iours, codes and codicils. Only a very few ethical rules — honesty and competence — are expressed in the form of clear rules, and even these are difficult to define and enforce in hard cases. Most professions — including the public service — therefore tolerate a high degree of ethical ambiguity. Indeed, a characteristic of professional ethics is that they are preoccupied with the accommodation of competing principles. Architects, for example, must somehow reconcile the Vitruvian trinity of “firmness, commodity and delight”, lawyers, their duty to vigorously advocate their client’s interests with their duty to act as decorous “officers of the court”.

In public administration, similar ambiguities and conflicts abound. For example, public servants must obey the legislation that delimits their own mandates, powers and procedures and defines the rights and obligations of citizens. At the same time, they must accept direction from their “political masters”, elected ministers who act individually at the departmental level and collectively through cabinet. These two principles often exist in tension with each other, and the mark of the ethical — the truly “professional” — public official is that she or he knows how and when to resolve that tension.<sup>40</sup>

Alas, the New Economy is both a rock and a hard place, where ethics will not flourish easily. Consider the plight of senior public-service managers confronted with the quintessential ethical dilemma of the New Economy: how to respond to an elected government committed to a political agenda of budget cutting and free markets on the one hand, and existing statutory mandates to regulate activity or disburse benefits on the other? If fewer inspectors can be hired, to cite an example, the frequency of site inspections will have to be reduced, possibly to the point where consumers’ health or workers’ safety are endangered. If courtrooms are closed or legal aid is withheld, to cite another, the result may be that accused persons are denied a fair trial within a reasonable time or that spouses are denied access to divorce; the social consequences are potentially grave.<sup>41</sup> The ethical dilemma for public-sector managers is not simply how to maintain adequate services with inadequate budgets, but also how to deal with this question without being perceived as disloyal or obstructive.

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<sup>40</sup> One pathological variant of the professional civil servant’s response is wickedly caricatured in the successful British television series, *Yes Minister* (B.B.C., first televised 25 February 1980); another — perhaps an ideal-type, rather than a portrait from life — is chronicled in *Strangers and Brothers*, C.P. Snow’s cycle of novels whose protagonist, Lewis Eliot, a law don, spends three decades in Whitehall’s “corridors of power” (see C.P. Snow’s novel-sequence consisting of eleven novels published over a ten year period, beginning with *Strangers and Brothers* (New York: Scribner, 1960)).

<sup>41</sup> In Ontario, rumoured budget-driven reductions of up to 25 percent in the number of crown attorneys were resisted on the grounds that the ensuing delay in trials would cause large numbers of prosecutions to be discontinued or dismissed under the *Askov* rule (see *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355), and that withdrawal of funds would lead to termination of a project to streamline the processing of criminal trials and reduce the overall number of trials, which would further exacerbate the problem (see M. Valpy, “Prosecutions at Risk, Crowns Warn” *The [Toronto] Globe and Mail* (6 January 1996) A1). After months of controversy, the Attorney General ultimately promised that very modest reductions in the ranks of crown attorneys would be accomplished largely by attrition and that caseloads would be controlled by more selective prosecution, especially of less serious offences (see K. Makin, “Harnick Pledges Only ‘Minimal’ Layoffs” *The [Toronto] Globe and Mail* (22 May 1996) A3).

To be sure, there is room for a variety of responses. Since legislation is seldom unambiguous, and since political direction is seldom explicit, public servants actually do have choices that are ethical, in the sense that they are neither insubordinate nor illegal. They can thus take the high road and defend the status quo pending receipt of direct political or statutory orders to change; or they can accept the new regime dutifully, find a way to do more-or-less what is expected of them without making a fuss, and hope for better times in the future; finally, they can “get on-side” by enthusiastically embracing and advancing the government’s ideology and programs.

These responses are all ethically defensible, but which most nearly conforms to the highest professional ideals? No clear answer is to be found in any written or unwritten code. Which is to be preferred from the pragmatic perspective of defending the public interest? The problem is that public interests conflict: elected governments must be allowed to govern, but on the other hand, the continuity of public administration should be protected against abrupt dislocation by successive political regimes; public debt should be reduced and economic growth promoted, but on the other hand, vulnerable citizens should be protected against the effects of poverty and predatory business practises. Again, there is no clear answer.

Of course, this approach assumes that ethics and a transcendent view of the public interest drive behaviour, a somewhat dubious proposition. All professionals are supposed to be self-effacing, and to protect the interests of their client in preference to their own; all public servants are supposed to be committed to the public interest; and both these suppositions have some resonance in reality. In fact, however, self-interest is often a powerful determinant of behaviour. This is especially likely to be true within public administration, where survival and advancement depend upon the favourable judgment of others — a civil-service commission, bureaucratic superiors or, at senior levels, the “political masters”. That is why calls for greater professionalism in the public service — in the sense of greater ethical sensibility and greater devotion to the general good — are unlikely to bear much fruit. Few public servants are likely to respond to such calls, if by doing so they will have to oppose the ideology and political direction of the very people on whom their careers depend.

Thus, we can predict with some accuracy what will happen. Sooner or later, if the government is determined enough and is able to sustain its popularity, it will have its way with even the most “professional” civil servant. Legislation will be passed when it must be; direct orders will be given to senior officials by cabinet or individual ministers as required; but for the most part, change will be pursued by indirection. Ministers will speak to policy advisors who will speak to deputies and assistant deputies. Recalcitrant officials will be replaced; managers will either toe the line or quietly disappear into less influential or secure positions; line personnel will learn to contain their enthusiasm for the old way of doing things and to collaborate in advancing the new. In other words, self-interest — a *grundnorm* of the New Economy — will become more important than arcane ethical concepts such as political neutrality, accountability, integrity and conformity to law. If pursued over a lengthy period and with sufficient bloody-mindedness, such actions will transform even the notoriously resistant culture of public administration, and especially its professional ethics. Ulti-

mately, a new public administration will emerge that responds — as it is bound to do — to the new direction set by a neo-conservative government. It will be a public administration with a new culture, a new set of values, a new professional ethic. It will be an administration for the New Economy. Politics will have triumphed over professionalism.

### C. Democratic Participation

“The real issue of our time,” says a leading critic on the left, “is not less state versus more state, but rather a different kind of state.”<sup>42</sup> Indeed, some on the left perceive in government precisely the anti-democratic qualities that they most dislike in corporations: “Bureaucracy is the primary form of organized power ... today, and it is therefore a primary target for those who seek liberation from modern forms of human domination.”<sup>43</sup> Of course, bureaucracy is not without its defenders across the political spectrum. Some view it almost as a force of nature, others as a proven instrument for the synchronization of complex tasks. Some, indeed, claim that modern bureaucracies no longer conform to Weber’s ideal-type — or to the worst caricatures of critics.<sup>44</sup> Bureaucratic organizations, they contend, whether public or private, are reflexive and have a capacity to learn.<sup>45</sup>

However, we cannot ignore the fact that even those committed to the notion of an interventionist state are often alienated by what they perceive to be its increasing bureaucratization. Bureaucracy, they argue, depersonalizes citizens, destroys initiative, dilutes moral agency, and subverts the practice of democratic politics. Power, they contend, hides behind the “scientization” of public administration, and seeks to disguise itself as “instrumental rationality”.<sup>46</sup> Attempts to justify bureaucracy, especially in public administration, are “theoretically impoverished, politically dangerous, and, all too frequently, morally bankrupt.”<sup>47</sup> The remedy for public — and private — bureaucracy, these critics argue, is democracy: transparency and accountability, popular participation and decentralization of power, the de-privileging of expert knowledge, and less hierarchy in the organization of work within the administration itself.

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<sup>42</sup> L. Panitch, “A Different Kind of State?” in G. Albo, D. Langille & L. Panitch, eds., *A Different Kind of State? Popular Power and Democratic Administration* (Toronto: Oxford University Press, 1993) 2 at 5 [emphasis in original removed].

<sup>43</sup> G.E. Frug, “The Ideology of Bureaucracy in American Law” (1984) 97 Harv. L. Rev. 1276 at 1295.

<sup>44</sup> See e.g. D.F. Thompson, “Bureaucracy and Democracy” in G. Duncan, ed., *Democratic Theory and Practice* (Cambridge: Cambridge University Press, 1983) 235.

<sup>45</sup> See e.g. G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993). For a critique, see A. Beck, “Is Law an Autopoietic System?” (1994) 14 Oxford J. Legal Stud. 401. See also D. Wolfe, “State, Law and Economy: The Reflexive Basis of Institutions” (Workshop paper, Program in Law and the Determinants of Social Ordering, Canadian Institute of Advanced Research, 1994) [unpublished].

<sup>46</sup> See L. Sossin, “Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State” (1994) 26 Ottawa L. Rev. 1.

<sup>47</sup> K.E. Ferguson, *The Feminist Case against Bureaucracy* (Philadelphia: Temple University Press, 1984) at 80, quoted in Sossin, *ibid.* at 8.

There is an odd convergence here. As we have seen, many who identify with the dominant trends of the New Economy likewise favour the radical transformation of bureaucracy, in both the private and public sectors.<sup>48</sup> Calls for “flatter” management structures, for a culture of “organizational learning”, for the “empowering” of workers are as likely to come from management consultants as from neo-marxist critics, and are as likely to be prescribed for government agencies as for corporations.<sup>49</sup> There is even an eerie resonance — ideological discordance notwithstanding — between the New Economy’s prescription that public bureaucracies should be more responsive to their “customers” or “clients”, on the one hand, and the argument of leftist critics that corporations should be more responsive to the needs and wishes of “citizens”, on the other.

What would democratization of public administration imply? Gerald Frug, a prominent proponent of “administrative democracy”, envisages a five-part reform of government. He proposes

the transformation of the internal organization of the government to promote workplace democracy; the creation of more effective public control of government administration; the decentralization of political power; and the insertion of a democratic voice into the agencies of the national government that remain after decentralization has taken place.<sup>50</sup>

He also places special emphasis on the transformation of “bureaucratic consciousness” which, he insists, is characterized by “anti-democratic prejudice”,<sup>51</sup> a dismissive attitude towards the possibility of accommodating the need for technical expertise with respect for democratic values such as participation and compromise. The project — in the words of other like-minded authors — is nothing less than the creation of a “popular” or “democratic alternative state”.<sup>52</sup>

However, this is not an agenda that would appeal to all governments, if any. The merest glance at Frug’s manifesto (a “sketch” he calls it) reveals that most of his proposals are at odds with the premises of the New Economy. Only the call for reducing the size of the national government (of the United States, as it happens) has some resonance. Workplace democracy, public control of administration, insertion of citizens into the machinery of government: none of these is consistent with the need to centralize and discipline public administration in order to reduce expenditures and re-trench government activity. After all, in a democratic workplace, public servants would have the chance to resist government initiatives that attacked their professionalism and their very jobs. Public control of administration, as proposed by Frug, might reveal the current clandestine transformation of public administration which is essen-

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<sup>48</sup> For an interesting account of how these views converge, see C. Pollitt, “Democracy and Bureaucracy” in D. Held & C. Pollitt, eds., *New Forms of Democracy* (London: Sage, 1986) 158.

<sup>49</sup> See generally Frug, *supra* note 43.

<sup>50</sup> J. Frug, “Administrative Democracy” (1990) 40 U.T.L.J. 559 at 562.

<sup>51</sup> See *ibid.* at 583ff.

<sup>52</sup> See I. Bakker & R. Miller, “Escape from Fordism — The Emergence of Alternative Forms of State Administration and Output” in R. Boyer & D. Drache, eds., *States against Markets — The Limits of Globalization* (London: Routledge, 1996) 334.

tial to the implementation of a neo-conservative ideology; indeed, Frug intends it should. And citizen voices within government — at least representative citizen voices — might speak loudly: they would surely not speak unanimously in favour of the slashing of public services and the retrenchment of the state's attempts to civilize marketplace behaviour.

The transformation of bureaucratic consciousness, arguably, is what proponents of the New Economy also seek, but clearly their "transformation" and Frug's would yield very different outcomes. And this, in fact, is the central difficulty of most projects of democratic administration originating on the left. While proposed reforms are couched in institutional and procedural terms, their genesis is a desire to advance highly substantive ideologies and political agendas which are at odds with the dominant trends associated with the New Economy. Conversely, the proponents of the New Economy, for all their populist rhetoric, for all their disparagement of bureaucracy, for all their dismissal of failed attempts at social engineering, are committed neither to democracy nor to public administration. The New Economy assigns a central role to private wealth and power; it depends upon undemocratic, hierarchical decision-making in both the public and private sphere; and it is indifferent — if not hostile — to the achievement of social justice and social security, the crucial preconditions of effective democratic participation.

The project of democratic administration, as sketched out by Frug and others, is anathema not only to neo-conservatives. It does not attract much support elsewhere across the political spectrum. Richard Simeon, a centrist committed to "making hard decisions as if democracy matters" — that is, hard decisions about the future of the activist state in the New Economy — argues that such decisions must emerge from democratic politics:

[O]nly by a sustained effort to re-create a social contract more attuned to the circumstances in which we live can we find a long-term solution to the challenges of policy and governance. That solution must be built from a process of genuine and deep public deliberation; it must restore to citizens some sense of control over both governments and the seemingly ineluctable economic forces that rule their lives. It involves, therefore, a greater sense of mutual responsibility, a civic sense.<sup>53</sup>

For Simeon, however, a new social contract, a new civic sense, does not necessarily imply strong democratic participation within public administration. His metaphor for the process of coming to terms with the New Economy is that of building a bridge. To build a bridge, he says, we need "a design, a plan, a vision ... engineers, architects, and artisans".<sup>54</sup> Thus, while his project in its initial conception rests on initial democratic consent, and requires revalidation through ongoing democratic consultation, in its execution, Simeon's social contract is to be the work of trained minds and skilled hands. It is to be wrought, in other words, by the sort of public administration we always imagined that we had.

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<sup>53</sup> R. Simeon, *In Search of a Social Contract: Can We Make Hard Decisions as if Democracy Matters?* (Toronto: C.D. Howe Institute, Benefactors Lecture, 1994) at 62-63.

<sup>54</sup> *Ibid.* at 63.

Frug's proposals, and others like them, are anathema to neo-conservatives. They do not seem to attract centrists like Simeon. One must concede that, at a minimum, they are not likely to shape the reform of public administration, at least until the left again comes to power. And if recent experience is any guide, much of the left itself will need to be persuaded that the principled advantages of democratic participation in public administration will outweigh the practical costs.<sup>55</sup>

#### **D. "Reinventing" Public Administration As a Market**

Government is constantly attacked on the grounds that it costs too much, and that it is neither efficient nor effective. Auditors, ombudsmen, consultants, public-accounts committees and academics document case after case. New governments vow to end the profligacy and poor management of their predecessors. Populists and neo-conservatives are confirmed in their worst fears about the state, and even those who are comfortable with activist government are often forced to agree. Markets seem to be the antithesis of public administration. In markets, nothing costs too much, or at least not for long; markets expose and eradicate inefficiency, and are effective in measuring wants and allocating resources. Thus markets — the paradigmatic institution of the New Economy — have acquired a curiously ecumenical appeal as an important response to the most egregious shortcomings of public administration.<sup>56</sup>

Proposals for "marketization" of the state are various, but all of them are designed to subject those who provide public services to the discipline of consumer choice: deregulation, privatization, partnerships, out-sourcing, vouchers, use-rights, user-pay, competitive bidding and so forth. Indeed, free trade is an ultimate form of marketization, subjecting not only public administration but the whole polity to a similar discipline. These devices, proponents believe, will give "users" better choices, provide them with proper signals about the true costs of what they use, eliminate perverse incentives and unintended forms of cross-subsidization, and ensure that providers of public goods and services are driven to adopt the most cost-effective methods of delivery.

At least in some quarters, markets, like democracy, are proposed as means, not ends, as apolitical or policy-neutral, as one-solution-fits-all. However, it is clear that markets will have significant consequences for public administration as we know it. There will be far less of it for one thing. For another, the functions of whatever remains of the core public service will clearly be less concerned with actually providing services and regulatory functions than with negotiating and then monitoring the new marketized arrangements to ensure they are in fact producing the desired results at the

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<sup>55</sup> For understandable reasons, proponents of democratic administration are hard-pressed to provide examples of successful experiments which might reassure those of more conventional disposition. Most examples come from local government, few from larger bureaucracies (see e.g. Albo, Langille & Panitch, eds., *supra* note 42).

<sup>56</sup> Some of the literature is reviewed in R. Howse, "Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State" (1993) 31 *Alta. L. Rev.* 455; and R. Howse, J.R.S. Prichard & M.J. Trebilcock, "Smaller or Smarter Government?" (1990) 40 *U.T.L.J.* 498.

agreed price. And of course, the marketization of public administration not only proceeds from, but helps to reinforce, the notion that citizens should relate to government essentially as consumers of the goods and services it provides or arranges for. In this respect, marketization is the very antithesis of proposals to enhance democratic participation in public administration.

While the state may cease to perform many functions, it does not follow that these functions will cease to be regarded as government's responsibility. Elected governments cannot for long hide behind privatization or other market-driven arrangements. "Public" services may be privatized, hybridized or devolved, but government will at least have to intervene to ensure quality, efficiency, access and equity. Poor health care, stock-market fraud, escaping prisoners, dangerous highways, starving children, faltering pension schemes, dysfunctional labour markets or an inaccessible information highway will soon bring demands for government intervention. Assuming that, in the New Economy, intervention cannot and will not involve resuscitation of the interventionist state, government would have to learn how to calibrate, monitor, coordinate and — if needs be — renegotiate private-sector provision of what used to be public goods. It will have to set up new agencies to ensure adequate levels of public service, and those agencies will have to develop a new repertoire of monitoring skills and a new discourse of evaluation.

But note: these new agencies will have to be perceived as effective if marketization of state functions is to remain a viable option for governments. "Effectiveness" in turn implies that the state can treat business transactions as transparent, and subject them to accountability procedures that differed from those applied in conventional market transactions. However, insistence on transparency and accountability will not endear the state to its private-sector partners, who are likely to resist exposure of confidential business information.

Two recent controversies illustrate the point. The first involves an agreement between the government of New Brunswick and Andersen Consulting Canada, whereby the latter agreed to "re-engineer" the provincial Department of Human Resources Development in order to achieve cost savings of \$17.5 million per year in administrative efficiencies and the reduction of ineligible payments. Only when and if the agreed level of savings is achieved are the consultants to be paid.<sup>57</sup> A considerable public controversy erupted as the result of demands for disclosure of the terms of the agreement, the uncertain scope of the firm's mandate and the inadequacy of controls to ensure that the required savings were in fact achieved. The second involves the privatization of Pearson Airport in Toronto, an episode which will almost certainly affect the way in which governments handle future privatizations, and will contribute to a reexamination of conventions governing professionalism in the civil service and ministerial responsibility, as well as the confidentiality of government's commercial

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<sup>57</sup> See M. Staples, "Joint Initiative Creating 70 Jobs" *The [Fredericton] Daily Gleaner* (27 January 1995) 1.



agreements and the nature of the obligations that attach to private providers of public goods.<sup>58</sup>

In fact, the application of market discipline to public administration may even produce at least one consequence that advocates of this strategy would find counter-intuitive. If we want the benefits of market discipline, we may have to accept its burdens. Amongst those burdens is a considerable degree of confidentiality, which is necessary to enable each party to a market transaction to take an arm's length position from the other in negotiations. Or perhaps this outcome is not counter-intuitive: after all, it is one thing to ask the state to act democratically and openly when government is acting like government, but quite another to do so when it is acting like a broker or an entrepreneur.

Governments committed to market strategies may therefore have to abandon even their residual "regulatory" functions of monitoring and measuring the performance of private-sector providers. If they do, private or hybrid intermediary institutions are likely to fill the regulatory vacuum left by this further stage of privatization. Indeed, many such institutions are already active, including trade associations, standards organizations, industry advisory bodies, professions, unions and consumer groups, as well as traditional intermediaries such as lawyers, consultants and lobbyists. In one way or another such groups keep track of the private sector's performance of public functions (at a minimum, by complaining when such functions are not performed to the satisfaction of their members or clients; at a maximum, by establishing and enforcing standards of honesty, adequate levels of service and some modicum of accessibility). However, to make the obvious point, these groups are committed to their own views of propriety, to the advancement of their own special interests and to their own methodologies, rather than to the broad public interest or to democratic practice.

Michael Trebilcock, a strong believer in the efficacy of markets and one of the most thoughtful Canadian proponents of "reinventing government", is generally sympathetic to the proposition that the state should no longer row — it should steer.<sup>59</sup> At the risk of mixing metaphors, as Trebilcock himself acknowledges, this is a far cry from the proposition that the invisible hand, rather than the state's, should rest on the tiller. The fundamental question for public administration, then, is not "How will it get there?" but "Where is it going?" These two questions are closely related, however, in the sense that both must be answered in order to imagine what public administration and public law will look like in the New Economy, in the "declining age" of the Canadian state.

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<sup>58</sup> See R. Nixon, "Pearson Airport Review" (Report to the Prime Minister, 29 November 1993).

<sup>59</sup> See M.J. Trebilcock, *The Prospects for Reinventing Government* (Toronto: C.D. Howe Institute, 1994). The metaphor is that of Osborne & Gaebler, *supra* note 5, whose work is the subject of Trebilcock's commentary.