

ARTICLE

# PUBLIC PROCUREMENT AND THE CHARBONNEAU COMMISSION: CHALLENGES IN PREVENTING AND CONTROLLING CORRUPTION

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## INTRODUCTION

Corruption is an insidious problem which has long plagued our society. Its frequently unseen mechanisms and destructive consequences ripple from small, local stages to a vast, global scale. Its costs range from fractured faith in public administration, deep inefficiencies in our use of time and resources, and most notably a vast financial drain on society.<sup>1</sup> Fighting corruption is one of the primary challenges of modern times. In particular, public procurement and the construction industry are notoriously vulnerable to corruption.<sup>2</sup> The public procurement sector has often been described as exceptionally prone to corruption due to the substantial amounts of money changing hands and an all too common lack of proper oversight or concomitant expertise. Professor Gerry Ferguson, in his work examining global corruption, notes that one, if not the, most prevalent area of public procurement corruption is the construction industry.<sup>3</sup> A key political and legal focus in contemporary Canadian society is the attempt to address and curb corruption in these specific contexts.

The province of Quebec is a jurisdiction that has publicly struggled with a public procurement regime and construction industry riddled with corruption. Quebec is often known for its history of corruption crises, emanating from deep social and economic changes stemming from the Quiet Revolution.<sup>4</sup> The scandals have spanned a breadth of areas including political financing regimes, the appointment of judges, and the federal “Sponsorship Scandal.”<sup>5</sup> However, in recent years, corruption in public procurement and organized crime in the construction industry have come particularly to the fore. In October 2011, amidst the furor of political scandal and increasingly ruptured public confidence in the government, then-Premier of Quebec Jean Charest announced a public inquiry to investigate the awarding and management of public contracts in the construction industry: the Charbonneau Commission (alternatively, the “Commission”). The Charbonneau Commission, and the report it published four years later, will be the primary focus of this paper.<sup>6</sup>

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- 1 Susanne Kuhn & Laura B Sherman, *Curbing Corruption in Public Procurement: A Practical Guide* (2014) at 9-10, online: Transparency International <[www.acec.ca/source/2014/november/pdf/2014\\_AntiCorruption\\_PublicProcurement\\_Guide\\_EN.pdf](http://www.acec.ca/source/2014/november/pdf/2014_AntiCorruption_PublicProcurement_Guide_EN.pdf)> archived at <<https://perma.cc/G2GE-H37E>>.
  - 2 See AO Arewa & P Farrell, “The Culture of Construction Organisations: the Epitome of Institutionalised Corruption”, *Construction Economics and Building*, 2015, 15(3), 59-71, online: <[epress.lib.uts.edu.au/journals/index.php/AJCEB/index](http://epress.lib.uts.edu.au/journals/index.php/AJCEB/index)> archived at <<https://perma.cc/4JDK-2VWS>>. This study examined the culture of corruption in the United Kingdom construction sector and suggests that the nature of the construction industry itself promotes fraud and corruption.
  - 3 Gerry Ferguson, *Global Corruption: Law, Theory and Practice*, 2nd ed, Coursebook (Creative Commons License, 2017), ch 11 at 3, online: <[icclr.law.ubc.ca/wp-content/uploads/2017/06/Global-Corruption-Law-Theory-and-Practice-2017.pdf](http://icclr.law.ubc.ca/wp-content/uploads/2017/06/Global-Corruption-Law-Theory-and-Practice-2017.pdf)> archived at <<https://perma.cc/TJ6X-YWUM>>.
  - 4 For an in-depth commentary on the history and causes of Quebec corruption, see Martin Patriquin, “Quebec: The most corrupt province”, *Maclean’s* (24 September 2010), online: <[www.macleans.ca/news/canada/the-most-corrupt-province/](http://www.macleans.ca/news/canada/the-most-corrupt-province/)> archived at <<https://perma.cc/SUFK-HEAL>>.
  - 5 These issues will be explored in further detail in Part II of this paper.
  - 6 Quebec, *Rapport final de la Commission d’enquête sur l’octroi et la gestion des contrats publics dans l’industrie de la construction* (November 2015) (France Charbonneau) online: <[https://www.ceic.gouv.qc.ca/fileadmin/Fichiers\\_client/fichiers/Rapport\\_final/Rapport\\_final\\_CEIC\\_Integral\\_c.pdf](https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf)> archived at <<https://perma.cc/K5QW-6RPL>> [Charbonneau Report]. Note that the Charbonneau Commission’s full report is currently available only in French.

The Charbonneau Commission and consequent report are important moments in the Canadian legal landscape and in the global fight against corruption. Following the release of the report in November 2015, there is merit in now reflecting on what led to the report, what it accomplished, and whether its numerous recommendations might be effective in curbing corruption in public procurement. In seeking to answer these questions, this paper will first sketch out a broad overview of public procurement generally, the nature of public commissions, and their context in the province of Quebec. It will then discuss the Charbonneau report and describe and critically assess its recommendations, particularly as they relate to public procurement. Finally, this paper will canvas the implementation of and reaction to the Charbonneau recommendations, examining several legislative responses and elucidating their strengths and weaknesses through a comparative analysis with certain international standards, as well as aspects of the Canadian federal public procurement regime. Ultimately, this paper seeks to demonstrate that the Charbonneau Commission has been a unique opportunity for a detailed and sophisticated examination of corruption in an industry sector that has long been accepted as one of the most prone to corruption—and that the Charbonneau Commission’s recommendations have the potential for major structural reform of public procurement in Quebec.

## I. AN OVERVIEW OF PUBLIC PROCUREMENT

Before embarking on an examination of the Charbonneau Commission and report, we must arm ourselves with an understanding of public procurement, both in terms of its general nature and its particular susceptibilities to corruption.<sup>7</sup> The Quebec Treasury Board Secretariat, a government department tasked in part with overseeing the management of contracts and resources in Quebec’s public administration, defines public procurement as the act of public and municipal bodies and government corporations procuring goods and services in order to fulfil their respective mandates.<sup>8</sup> Essentially, public procurement occurs anytime a governmental or public body acquires goods or services. Public procurement is a broad term encompassing all the stages of the often-complicated procurement process, from the initial needs assessment to the implementation of the final contract. The governmental acquisition of goods and services ranges from something as simple as obtaining materials for schools to massive construction projects.<sup>9</sup> It has been described as a complicated and opaque process which consumes vast amounts of global gross domestic product, meaning rampant corruption in public procurement wastes these public funds to a tremendous degree.<sup>10</sup> The costs of corruption in public procurement extend beyond the financial: corruption distorts competition, drives down the quality of public works and the likelihood that a given project will actually meet the public’s needs, and ultimately undermines the public’s trust in government.<sup>11</sup>

Corruption arises in the public procurement context in a variety of ways. To begin, we must determine exactly what is meant by corruption. In its guide to curbing public procurement corruption, Transparency International defines corruption as “the abuse of entrusted

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7 In the interests of brevity, this will be a cursory overview of public procurement and related corruption problems. For a much more in-depth exploration of these issues, see Ferguson, *supra* note 3.

8 Quebec, Secretariat du Conseil du trésor, “Government Procurement: Role of the Secretariat du conseil de trésor” (2009), online: <<https://www.tresor.gouv.qc.ca/en/public-procurement/government-procurement/>> archived at <<https://perma.cc/G5JM-ZKJN>>.

9 Kuhn & Sherman, *supra* note 1 at 6.

10 *Ibid* at 4.

11 *Ibid*.

power for private gain.”<sup>12</sup> This broad definition allows for many iterations of corruption, which can occur at any stage of the procurement process, and can be initiated on either side of the procurement relationship (that is, the private sector on the supply side, or the government on the demand side).<sup>13</sup> Corruption spans from small-scale, everyday abuse by low-level public officials to large-scale corrupt acts committed by public officials in massive projects. It includes such techniques as bribes—through the form of donations to political parties, for example—being offered to obtain a contract, rather than the award being based on merit or efficiency.<sup>14</sup> Transparency International also references the prevalence of collusion in public procurement, which it defines as “secret agreements between parties [...] to conspire to commit actions aimed to deceive or commit fraud with the objective of illicit financial gain.”<sup>15</sup> Collusion in the context of procurement might arise where government officials and bidders collude to pre-arrange bids and deceive the competition, or where bidders collude amongst themselves to manipulate the contract award decision.<sup>16</sup>

With a basic understanding of the public procurement process and how corruption might operate within it, we can now ask: what makes public procurement and the construction industry particularly susceptible to corruption, to the extent that Transparency International has ranked construction and public works as the industry sector most prone to corruption?<sup>17</sup> To begin with, public procurement procedures are often complex and play out with limited transparency, rendering corruption extremely hard to detect. Further, those who do uncover corruption—be it intentionally or by chance—rarely report it, for a variety of reasons, including a lack of engagement with the money at stake, a sense of futility in the reporting process, and a fear of retaliation.<sup>18</sup> One study suggests that the very culture of construction organizations may promote institutionalized corrupt practices.<sup>19</sup> This vulnerability to corruption stems from the character of construction projects, which are often massive in size and disjointed in nature. As Professor Denis Saint-Martin notes in his work examining the Charbonneau Commission and corruption in Quebec, the scale and complexity of such projects, particularly since they are often one-of-a-kind enterprises, render it difficult to effectively monitor payment and ensure proper standards and guidelines are followed.<sup>20</sup> Finally, the nature of these projects is such that private actors are frequently and repeatedly asking for public approval, which increases the opportunity for bribes and inappropriate influence in public decision-making processes.<sup>21</sup> Ultimately, while numerous factors operate here, the overarching principle to be drawn from this

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12 Transparency International, *The Anti-Corruption Plain Language Guide* (2009) at 14, online: <[www.transparency.org/whatwedo/pub/the\\_anti\\_corruption\\_plain\\_language\\_guide](http://www.transparency.org/whatwedo/pub/the_anti_corruption_plain_language_guide)> archived at <https://perma.cc/F6YR-LR8E>.

13 Kuhn & Sherman, *supra* note 1 at 6.

14 *Ibid.*

15 Transparency International, *supra* note 12 at 9.

16 Kuhn & Sherman, *supra* note 1 at 7.

17 Deborah Haroon & Finn Heinrich, *Bribe Players Index 2011* (2011) at 3, online: Transparency International <[www.transparency.org/whatwedo/publication/bpi\\_2011](http://www.transparency.org/whatwedo/publication/bpi_2011)> archived at <<https://perma.cc/UR7C-P2BP>>.

18 Kuhn & Sherman, *supra* note 1 at 7.

19 Arewa & Farrell, *supra* note 2. This study was conducted in the United Kingdom construction industry in particular, but I suggest its lessons may reveal institutionalized traits around the nature of the construction industry in general.

20 Denis Saint-Martin, “Systemic Corruption in an Advanced Welfare State: Lessons from the Quebec Charbonneau Inquiry” (2015) 53:1 *Osgoode Hall LJ* 66 at 72 <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss1/4/>> archived at <<https://perma.cc/JA2B-649J>>.

21 Ferguson, *supra* note 3, ch 11 at 8-9.

analysis is that public procurement inherently tends to involve the massive exchange of money and resources, with continued regulatory approvals from public actors; this in itself leads to huge incentives for abusive practices and corruption.<sup>22</sup>

## II. PUBLIC INQUIRIES AND THE QUEBEC CONTEXT

### A. Public Inquiries Generally

To properly situate an examination of the Charbonneau Commission, we must first consider the nature and purpose of commissions of inquiry generally, with due regard to their strengths and weaknesses. In his work critiquing commissions of inquiry, Professor Ed Ratushny describes them as a unique form of administrative tribunal whose function is to investigate and report on a certain issue. After this task is completed, the commission ceases to exist.<sup>23</sup> Public inquiry commissions are created under and governed by both provincial and federal legislation. Quebec's *Act Respecting Public Inquiry Commissions* sets out the power to establish a public inquiry and its fundamental purposes:

1. Whenever the Government deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of Quebec, the conduct of any part of the public business, the administration of justice or any matter of importance relating to public health, or to the welfare of the population, it may, by a commission issued to that effect, appoint one or more commissioners by whom such inquiry shall be conducted.<sup>24</sup>

The language of this provision, which mirrors a similar provision in the federal *Inquiries Act*,<sup>25</sup> is noticeably broad. The inclusive wording allows the government to call an inquiry for any matter connected with good government and public interest generally. Commissioners are given expansive powers to incur expenses, to summon witnesses, and to compel the production of documents. Commissioners have considerable autonomy once appointed, as long as the investigation is restricted to the authorized mandate.<sup>26</sup>

Justice Gomery, who chaired a public inquiry commission following the federal “Sponsorship Scandal” (which will be briefly considered later in this paper), has since opined on the benefits of public inquiries. He suggests the core function of an inquiry is to investigate, to educate, and to inform—all of which, in his opinion, operate to the benefit of Canadian society.<sup>27</sup> Common complaints levied against commissions include criticisms

22 Note that much of what Transparency International says about corruption (at Kuhn & Sherman, *supra* note 1) dovetails with the costs and consequences of corruption as identified by the Charbonneau report. The causes of corruption in the report are broken down between those related to the construction industry, the public procurement process generally, those linked to government actors and public institutions, the infiltration of organized crime into the construction industry, and a lack of adequate oversight or control (Charbonneau Report, *supra* note 6, Volume 3, ch 2 at 20-33). The consequences of corruption include economic costs (both direct and indirect), an increase in organized crime, the diversion of public interest objectives, a threat to democracy and the rule of law, and an erosion of confidence in public institutions (Charbonneau Report, *supra* note 6, Volume 3, ch 3 at 33-49). The Charbonneau Commission specifically set out to address these harms in its report and recommendations.

23 Ed Ratushny, “The Commission of Inquiry: A Residual Institution of Government” (2010) 4 J Parliamentary & Pol L 275 at 275.

24 *Act Respecting Public Inquiry Commissions*, CQLR 2006, c C-37, s 1.

25 *Inquiries Act*, RSC 1985, c I-11, s 2.

26 Justice John H Gomery, “The Pros and Cons of Commissions of Inquiry” (2006) 51:4 McGill LJ 783 at 786.

27 *Ibid* at 792.

that they take too long and cost too much.<sup>28</sup> Justice Gomery acknowledges these concerns but counters that the Supreme Court of Canada has generally rejected these viewpoints and upheld the legitimacy and necessity of public inquiries.<sup>29</sup> He concludes by extolling the benefits of inquiries: they are independent and impartial, their open nature allows the public to be apprised of the circumstances that led to the critical issue in question, and they typically offer recommendations to the government (which not only assist in remedying whatever situation necessitated the inquiry, but further tend to restore public confidence in the process overall).<sup>30</sup>

Public inquiries have some strategic political value, but I suggest this does not necessarily undermine their ability to investigate difficult issues, offer recommendations, or reinforce faith in public institutions. Ratushney notes the political aspect of public inquiries, describing them as both a “check on politics” and a “political tool.”<sup>31</sup> Inquiries are created in exceptional circumstances: where there has typically been a total failure to properly address the issue at hand. In this sense they are inherently political in nature. This political purpose might be to engage stakeholders and the public, or to obtain policy advice on thorny issues.<sup>32</sup> It has also been suggested, in a more cynical light, that they serve an important tactical purpose:

The primary political advantage in appointing a commission of inquiry is to take the heat off the government in relation to a problem with a high public profile. The government can say it has ‘done something’ without having to admit wrongdoing, at least temporarily.<sup>33</sup>

On the one hand, then, the Charbonneau Commission could be seen primarily as a political instrument and an expensive mechanism to deflect negative attention from the government, the true value of which is limited. On the other hand, however, it is precisely the willingness of the government to call an inquiry and investigate allegations of misconduct which lends it inherent worth in our democratic society. Indeed, Justice Gomery lauds this aspect of public inquiries for their ability to restore public confidence in the government itself: “[i]n Canada we tend to take this for granted, but very few nations subject their governments to this kind of independent and public scrutiny.”<sup>34</sup>

## B. Corruption in the Quebec Context

The context of scandal and corruption in which the Charbonneau Commission was struck is not a new phenomenon. Quebec has been called Canada’s “most corrupt province,” and journalists and political commentators have long speculated on the source and accuracy

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28 *Ibid* at 794.

29 *Ibid* at 789.

30 *Ibid* at 792.

31 Ratushney, *supra* note 23 at 280.

32 *Ibid* at 276.

33 *Ibid* at 280.

34 Gomery, *supra* note 26 at 787. While the government’s willingness to appoint a public inquiry to investigate allegations of public wrongdoing is laudable, it should be noted that when Charest initially announced the creation of the Commission, he did so by cabinet decree rather than under Quebec’s *Act Respecting Public Inquiry Commissions*. This meant the power of the Commission was substantially fettered. It was only after a period of sustained public criticism that the Charest government granted the Commission full powers under the *Act* and thus ensured the full independence of the Commission. This fact must be borne in mind when commending the Quebec government’s willingness to investigate allegations of public procurement corruption. See Linda Gyulai, “Charbonneau Commission timeline”, *Montreal Gazette* (24 November 2015), online: <[montrealgazette.com/news/local-news/the-5-ws-of-the-charbonneau-commission](https://montrealgazette.com/news/local-news/the-5-ws-of-the-charbonneau-commission)> archived at <<https://perma.cc/SL2X-35XJ?type=image>>.

of such a statement.<sup>35</sup> Without supporting the assertion that Quebec is the *most* corrupt province as compared to the rest of Canada, I would at minimum argue that Quebec has struggled for decades with high levels of ongoing corruption in many of its institutions.<sup>36</sup> Quebec's climate of corruption can perhaps be traced back to the rapid modernization in the 1960s known as the Quiet Revolution. This period led to massive projects with poor oversight that were fertile ground for corrupt practices; projects were also plagued by ongoing strife and union violence.<sup>37</sup> Today, the constant scandals are easy to name: allegations of inappropriate influences in the appointment of judges and in political financing, corruption in the construction industry, and the federal sponsorship scandal.<sup>38</sup> A stark representation of the purported extent of corruption is captured in the following figure: according to Transport Canada figures, "it costs Quebec taxpayers roughly 30 per cent more to build a stretch of road than anywhere else in the country."<sup>39</sup>

This history of public scandals indicating high levels of corruption in Quebec is an important context to properly situate the social and political milieu from which the Charbonneau Commission emerged. For example, the federal "Sponsorship Scandal," which came to light through the late 1990s and early 2000s, revealed rampant corruption and cast a dim view not only of the federal Liberal Party but of politics in Quebec.<sup>40</sup> A sponsorship fund had been established as an advertising campaign to promote federalism in Quebec, following the failed referendum on sovereignty in 1995. However, it was alleged that the Liberal government abused the system and flagrantly broke rules in awarding public contracts by misappropriating public funds into the pockets of supporters of the Liberal Party in Quebec.<sup>41</sup> This scandal resulted in the Auditor General of Canada launching a full investigation, a finding that CAD100 million had been paid to advertising companies operating in Quebec for work that was never even done,<sup>42</sup> a public inquiry headed by Justice Gomery,<sup>43</sup> and a crisis of confidence in the Liberal government which set the stage for the Conservative Party to take federal power.<sup>44</sup> More recently, allegations emerged in

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35 Patriquin, *supra* note 4.

36 For a deeper analysis of the systemic corruption in Quebec and a consideration of Quebec's historical trajectory since the Quiet Revolution, see Saint-Martin, *supra* note 20 at 81-91. Saint-Martin accepts the high levels of corruption in Quebec, although he argues that the very idea of "systemic corruption" is not a sound conceptual basis for creating change in anti-corruption research.

37 Patriquin, *supra* note 4.

38 *Ibid.*

39 *Ibid.*

40 "Federal sponsorship scandal", *CBC News Online* (26 October 2006), online: <[www.cbc.ca/news2/background/groupaction/](http://www.cbc.ca/news2/background/groupaction/)> archived at <<https://perma.cc/T8VE-WN3P>> ["Federal sponsorship scandal"].

41 For an in-depth description of the Sponsorship Scandal, see Jay Makarenko, "Gomery Commission of Inquiry & Sponsorship Scandal" (1 January 2006), *Mapleleafweb*, online: <[www.mapleleafweb.com/features/gomery-commission-inquiry-sponsorship-scandal.html](http://www.mapleleafweb.com/features/gomery-commission-inquiry-sponsorship-scandal.html)> archived at <<https://perma.cc/6H5D-V7R8>>.

42 For the full report, see Office of the Auditor General of Canada, *2003 November Report of the Auditor General of Canada*, online: <[www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200311\\_e\\_1126.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200311_e_1126.html)> archived at <<https://perma.cc/7BHY-5SBP>>.

43 For the full report, see Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Phase 1 Report* (1 November 2005) and *Restoring Accountability, Phase 2 Report* (1 February 2006), online: <[epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm](http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/sponsorship-ef/06-02-10/www.gomery.ca/en/phase1report/default.htm)> archived at <<https://perma.cc/CF9L-8XBL>>.

44 "Federal sponsorship scandal", *supra* note 40.



2010 that third parties had inappropriately influenced the appointment of three judges to the Court of Quebec, which resulted in the establishment of a public inquiry to investigate those issues.<sup>45</sup>

Finally, a consideration of corruption in Quebec must also examine the establishment of the Permanent Anticorruption Unit (Unité permanente anticorruption) (“UPAC”). UPAC was created by the provincial government in February 2011 in order to combat corruption in Quebec.<sup>46</sup> UPAC emerged out of public calls for action and accountability following the same revelations of corruption in Quebec’s construction industry which led to the Charbonneau Commission.<sup>47</sup> UPAC consists of over 350 members with an annual budget of CAD30 million, and UPAC coordinates law enforcement forces and expertise on behalf of the government in the fight against corruption.<sup>48</sup> UPAC operates on three distinct fronts related to corruption: prevention, verification, and investigation. The UPAC Commissioner, who is considered a peace officer throughout the province of Quebec, has broad powers to investigate possible corruption, coordinate responses, and formulate recommendations to individuals, governmental bodies, and public sector entities on the management of their contracts with a view to preventing corruption.<sup>49</sup> UPAC also has a strong educational component, which includes such techniques as offering various public information sessions on integrity in public contracts and challenges regarding corruption generally.<sup>50</sup> UPAC has been active in high profile investigations and arrests in recent years, which suggests it is establishing itself as a centre of expertise and a crucial and independent force in the fight against corruption in Quebec.<sup>51</sup>

The characterization of Quebec as Canada’s “most corrupt” province is itself highly controversial, and a comparative analysis to reject or substantiate that assertion is beyond

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- 45 Marc Bellemare, Quebec’s Minister of Justice from 2003 to 2004, made public allegations in 2010 that third parties who were involved in fundraising for the Quebec Liberal Party had inappropriately influenced the appointment of three judges to the Court of Quebec. These allegations resulted in Charest calling an Inquiry Commission on the Process for Appointing Judges. While the Commission found insufficient evidence to establish an inappropriate influence in the appointment of these three judges, it nevertheless noted that certain stages of the appointment process are vulnerable to all manner of intervention and influence, and made several recommendations to respond to public expectations and restore public confidence in the administration of justice in Quebec. See the Inquiry Commission on the Process for Appointing Judges of the Court of Quebec and Municipal Courts and Members of the Tribunal administratif du Québec (Les Publications du Québec, 2011), online: <[www.cepnj.gouv.qc.ca/](http://www.cepnj.gouv.qc.ca/)> archived at <<https://perma.cc/9ACN-PUTW>>.
- 46 For a more detailed examination of UPAC, see Maxime Reeves-Latour & Carlo Morselli, “Fighting Corruption in a Time of Crisis: Lessons from a Radical Regulatory Shift Experience” (2017) *Crime L Soc Change* at 5.
- 47 For details on UPAC’s purpose, powers, and creation, see Quebec’s *Anti-Corruption Act*, SQ 2011, c 17 [*Anti-Corruption Act*].
- 48 Quebec, Commissaire a la lutte contre la corruption, “Lutter contre la corruption pour un système public intègre”, online: <<https://www.upac.gouv.qc.ca/upac/mandat.html>> archived at <<https://perma.cc/9LXM-96KL>> [author’s translation].
- 49 Quebec, Commissaire a la lutte contre la corruption, “Le Commissaire”, online: <[www.upac.gouv.qc.ca/upac/le-commissaire.html](http://www.upac.gouv.qc.ca/upac/le-commissaire.html)> archived at <<https://perma.cc/8VDS-JREF>> [author’s translation].
- 50 Quebec, Commissaire a la lutte contre la corruption, “Formation en ligne”, online: <<https://www.upac.gouv.qc.ca/prevenir/formation-en-ligne.html>> archived at <<https://perma.cc/HFZ5-Q6VK>> [author’s translation].
- 51 For example, UPAC arrested several high-ranking Quebec Liberals on such charges as fraud on government, corruption, and abuse of trust for allegedly criminal behavior related to political financing and abuse of public contracts, amid calls for the Charbonneau Recommendations to be implemented: see Jason Magder, “High-ranking Liberals, including Nathalie Normandeau, arrested by UPAC on fraud charges”, *Montreal Gazette* (17 March 2016), online: <[montrealgazette.com/news/local-news/high-ranking-liberals-including-nathalie-normandeau-arrested-by-upac-on-fraud-charges](http://montrealgazette.com/news/local-news/high-ranking-liberals-including-nathalie-normandeau-arrested-by-upac-on-fraud-charges)> archived at <<https://perma.cc/3ABX-8MBZ?type=image>>.



the scope of this paper.<sup>52</sup> However, I suggest that the above consideration of Quebec's history demonstrates high levels of corruption, and it sets the stage for an understanding of the significance of the Charbonneau Commission and its recommendations. A plausible explanation for the high levels of corruption in Quebec is simply that Quebec is more vigilant in its policing of corruption.<sup>53</sup> This suggestion draws on the idea that wherever there is government, there is corruption, and perhaps corruption is the most visible in Quebec because this is where it has been the most visibly exposed and tackled, with the establishment of forces such as UPAC.<sup>54</sup> Indeed, most anti-corruption researchers today start from the premise that all human societies are corrupt, and that some nations are simply better than others at detecting and eradicating corruption.<sup>55</sup> I accept this suggestion, and argue that we would be well served to scrutinize the experience in Quebec for lessons in the fight against corruption, as I strive to do in this paper. Quebec faces high levels of corruption, but the lessons learned from the Charbonneau Commission and report have the potential to lead to major structural reform, which might render Quebec more adept and sophisticated in its ability to deter corruption and reduce its associated costs.

Saint-Martin argues that corruption is deeply adaptable. To this end, he suggests the Charbonneau Commission as a “moment” in the fight against corruption might have beneficial short-term effects but fewer long-term impacts, as corrupt officials learn to manipulate new institutional changes resulting from the Charbonneau recommendations.<sup>56</sup> He writes that “[t]he shift in societies from a systemically corrupt social order to a less corrupt one is never achieved once and for all as ‘big bang’ models of change lead us to believe.”<sup>57</sup> I agree. And I do not suggest that the Charbonneau Commission will operate as the “big bang” moment which will conclusively set Quebec on a path away from systemic corruption. However, I would argue that the depth of the Charbonneau inquiry and the light it sheds on institutionalized corruption nevertheless offers an important vehicle for significant structural reform in Quebec and sophisticated mechanisms in the ongoing fight against corruption in that province.

### III. THE CHARBONNEAU COMMISSION, REPORT, AND RECOMMENDATIONS

#### A. The Charbonneau Commission

Having assessed public procurement and corruption generally, the nature of commissions of inquiry, and the Quebec context, we turn now to the central focus of this paper: the Charbonneau Commission. The Commission was established in 2011 by then-Premier Jean Charest amid sustained pressure following allegations of widespread corruption

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52 It has been argued, for example, that Quebec is unique in being truly more corrupt than any other province in Canada: see Patriquin, *supra* note 4. Several explanations for this phenomenon include the high levels of provincial spending on projects in Quebec, which increase the scope for corruption, as well as Quebec's quest for independence where the public focuses on the haunting question of separation rather than on demanding an accountable and transparent government.

53 Globe Editorial, “Is Quebec corrupt, or just more vigilant?”, *Globe and Mail* (23 March 2016), online: <[www.theglobeandmail.com/opinion/editorials/is-quebec-corrupt-or-just-more-vigilant/article29365096/](http://www.theglobeandmail.com/opinion/editorials/is-quebec-corrupt-or-just-more-vigilant/article29365096/)> archived at <<https://perma.cc/7TMY-9B3Q>>.

54 *Ibid.* See also Saint-Martin, *supra* note 20 at 72, where the author accepts that Quebec faces high levels of endemic corruption but asserts that Quebec is not alone in this regard, and lists numerous other developed countries that similarly face systemic corruption in particular industries.

55 Saint-Martin, *supra* note 20 at 77.

56 *Ibid.* at 105.

57 *Ibid.*

in Quebec's public procurement processes and construction industry.<sup>58</sup> Charest named Quebec Superior Court Justice France Charbonneau to head the inquiry. Formally titled the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, its primary focus—as the name suggests—was to examine and improve practices related to public procurement in the construction industry. I argue that the Charbonneau Commission is a robust show of democracy, rather than operating primarily as a political strategy to deflect sustained criticism of the Quebec government. The Commission's lengthy investigation and recommendations respond to central concerns in the fight against public procurement corruption. Integrity in public procurement requires not only good governance, but also a sustained political effort to review and update sound procurement rules.<sup>59</sup> The Commission and report are a part of that necessary political effort.

According to the Commission's final report, concerns around corrupt schemes relating to public contracts in the construction industry began circulating in 2007.<sup>60</sup> There were questions regarding conflicts of interest in the awarding of public contracts, inappropriate ties between union executives and construction contractors, and allegations of bid-rigging which sparked media attention and public controversy.<sup>61</sup> The Quebec legislature reacted by passing a bill to tighten up regulations around public contracts, add certain restrictions on building licences, and amend penal provisions relating to the construction industry.<sup>62</sup> Further legislative changes were made regarding ethics in municipal affairs and election funding.<sup>63</sup> However, new schemes continued to be unearthed, and after the release of yet another damning report in the fall of 2011, the Government of Quebec announced the creation of the Charbonneau Commission.<sup>64</sup>

The Commission's mandate was trifold: first, to examine activities of collusion and corruption in public contracts within the construction industry; second, to investigate the possible infiltration of organized crime in the construction industry; and third, to suggest recommendations to better identify, reduce, and prevent corruption and organized crime in these industries.<sup>65</sup> The scope of the investigation covered the period from 1996 to 2011.<sup>66</sup> The Commission directed a monumental investigation into these issues, which is demonstrated by the degree of evidence that came before it. Notably, the Commission conducted 263 days of hearings, heard from approximately 300 witnesses, filed 3,600 documents and produced 70,000 pages of transcripts.<sup>67</sup> The Commission defined public contracts as those with any agency or person in the public sector, meaning that hundreds of bodies were covered in its ambit, including government ministries and agencies, universities, municipalities, school boards, and certain companies with a degree of government ownership.<sup>68</sup> The Commission heard explosive testimony from such witnesses as engineers, contractors, former mayors, members of the National Assembly of Quebec,

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58 Sidhartha Banerjee & Peter Rakobowchuk, "Quebec corruption inquiry ends after 30 months of public hearings", *Toronto Star* (14 November 2014), online: <[https://www.thestar.com/news/canada/2014/11/14/quebec\\_corruption\\_inquiry\\_ends\\_after\\_30\\_months\\_of\\_public\\_hearings.html](https://www.thestar.com/news/canada/2014/11/14/quebec_corruption_inquiry_ends_after_30_months_of_public_hearings.html)> archived at <<https://perma.cc/X4DF-PEW4>>.

59 Ferguson, *supra* note 3, ch 11 at 24.

60 Charbonneau Report, *supra* note 6, Part 1, ch 1 at 4.

61 *Ibid.*

62 *An Act to provide measures to fight crime in the construction industry*, SQ 2009, c 57.

63 Charbonneau Report, *supra* note 6, Part 1, ch 1 at 6.

64 *Ibid.* at 8.

65 *Ibid.*, Part 1, ch 2 at 12.

66 *Ibid.*

67 *Ibid.*, "Mot de la Presidente" (no page number: PDF at 16).

68 *Ibid.*, Part 1, ch 2 at 12.

and union organizers which demonstrated shocking degrees of alleged corruption.<sup>69</sup> Overall themes in the evidence demonstrated the depth of corruption in engineering firms and construction contractors in Quebec, issues around conflicts of interest, collusion and kickbacks, the infiltration of the Mafia in the construction industry, and the hidden face of political financing.<sup>70</sup> The “relentless testimony of kickbacks and greased palms,” which resulted in the resignation of three Quebec mayors, constituted what legal commentators have called a clear signal that the entire Quebec construction industry is in need of a regulatory overhaul.<sup>71</sup> This overhaul is precisely what the Charbonneau recommendations set out to accomplish.

## B. The Charbonneau Report

In November 2015, four years following its creation, the Commission tabled its final report. The report, nearing 2,000 pages in length, offers a unique and comprehensive analysis of public procurement, the construction industry, and political financing. The report focuses on the Quebec context buttressed by a lengthy analysis of foreign experience. The report has much to offer in the fight against corruption generally, but unfortunately is still only available in French.<sup>72</sup> An official English translation would go far to bring the lessons of the Commission’s work to the rest of the world. The report itself is divided into five parts. Part 1 sets out the context of the creation of the Commission, including its mandate and evolution. Part 2 provides extensive summary information regarding public contracts, the construction industry, political financing, and organized crime, while also canvassing foreign experiences with regard to these issues. Part 3 summarizes the facts uncovered and evidence as a whole, broken down into several chapters simply due to the sheer amount of testimony collected. Part 4 analyzes the nature of the schemes and their causes as uncovered by the evidence. Part 5 contains 60 recommendations proposed by the Commission to the government. In light of the shocking depth of corruption unearthed by the Commission, the report opens with a *cri de coeur*<sup>73</sup> appealing citizens to become more actively involved in the fight against corruption, recommending that journalists keep watch, and encouraging regulatory bodies and UPAC to continue their important work. Collaboration from all levels of society is essential, in the Commission’s opinion, to address corruption in Quebec.<sup>74</sup>

## C. The Charbonneau Recommendations

In Part 5 of its report, the Commission turns to the third and final aspect of its mandate: examining potential solutions and making recommendations to prevent public procurement corruption in the construction industry. The Commission strove to incorporate a broad and comprehensive range of perspectives in its recommendations. To this end, the Commission heard suggestions from a variety of experts, interest groups, professional associations, international organizations, and public institutions. The Commission also identified and incorporated academic literature on the relevant subjects raised by its mandate. Finally, the Commission took heed of public debates, comments from citizens, and general discussions from observers.<sup>75</sup> The extensive consideration of a diversity of expert opinions and foreign

69 “10 witnesses whose testimony rocked the Commission”, *CBC News* (14 November 2014), online: <[www.cbc.ca/news/canada/montreal/10-witnesses-whose-testimony-rocked-the-charbonneau-commission-1.2834413](http://www.cbc.ca/news/canada/montreal/10-witnesses-whose-testimony-rocked-the-charbonneau-commission-1.2834413)> archived at <<https://perma.cc/7LKB-FFRK>>.

70 Charbonneau Report, *supra* note 6, “Mot de la Presidente” (no page number: PDF at 17-18).

71 Douglas Oles, “Anti-Corruption Legislation in the United States (An Introduction)” [2014] *J Can C Construction Law* 67 at 67.

72 This author speaks French and worked from the French report as well as several English summaries.

73 This is a French phrase meaning “a passionate outcry or appeal.”

74 Charbonneau Report, *supra* note 6, “Mot de la Presidente” (no page number: PDF at 17).

75 *Ibid*, Part 5 at 1.

experience is one of the great strengths underpinning the Charbonneau recommendations. Legislation, for example, is sometimes criticized for being speedily enacted without proper debate or sufficient academic background.<sup>76</sup> In this sense, commissions of inquiry have a certain advantage over legislative change as a better avenue through which to effect long-term, well-informed solutions to systemic problems.

### i. Action Strategies

The Commission first gave an account of various principles and strategies that guided its recommendations. It identified two overarching parameters: the recommendations must underscore basic principles of democracy and the rule of law, and they must be curative in nature.<sup>77</sup> The Commission then set out eight action strategies to underpin the recommendations.<sup>78</sup> The strategies focused on effectively regulating intervention with measures of increasing intensity; by starting with awareness and education and working gradually to coercive measures, the recommendations sought to maximize resources and avoid disengaging actors willing to comply with standards.<sup>79</sup> The strategies also included targeting structural reform rather than punishing individual action, and improving the quality of state intervention by acting proactively rather than reactively.<sup>80</sup> The final strategies targeted public procurement specifically: to depoliticize the process of granting public contracts, to use a nuanced and informed transparency, to engage citizens by better protecting whistleblowers, and to strengthen the integrity of actors in the public sector overall.<sup>81</sup> In these strategies, the Commission reinforced the notion that citizens are agents of change in an attempt to reinvigorate public trust in a fractured system. These strategies also combat apathetic attitudes about inevitable corruption in Quebec by bolstering the idea that individual action can lead to positive, structural reform.

### ii. Recommendations Regarding Public Procurement

The Commission established five main areas of intervention: (i) to review the public procurement framework; (ii) to improve detection and sanctions; (iii) to target inappropriate political financing; (iv) to promote citizen participation; and (v) to renew trust in elected officials and civil servants. A consideration of all 60 recommendations is beyond the scope of this paper, which will focus primarily on the first block of recommendations regarding public procurement. The first central recommendation made by the Commission is the establishment of a provincial public procurement authority (“PPA”) for Quebec.<sup>82</sup> The report suggests that due to the unique, complex, and sometimes urgent nature of public construction projects, public contracting authorities (“PCAs”) are rarely able to ensure the integrity of such contracts on their own.<sup>83</sup> Oversight from such a public body would purportedly respond to central vulnerabilities in the existing procurement system, including excessive discretion afforded to PCAs in applying rules for awarding contracts and a lack of sufficient internal expertise when evaluating contracts.

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76 See Graham Steele, *Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Schulich School of Law, 2015) at 86-88, online: Faculty of Graduate Studies Online Theses <dalspace.library.dal.ca/bitstream/handle/10222/56272/Steele-Graham-LLM-LAWS-March-2015.pdf?sequence=1&isAllowed=y> archived at <<https://perma.cc/Y6L6-6LG5>>. These considerations will be addressed in greater detail in Part IV of this paper.

77 Charbonneau Report, *supra* note 6, Part 5 at 1.

78 *Ibid*, Part 5, ch1 at 83.

79 *Ibid* at 84.

80 *Ibid* at 85.

81 *Ibid* at 86-87.

82 *Ibid*, Part 5, ch 2 at 91-92.

83 *Ibid*.

The Commission suggested several ancillary recommendations to provide the PPA with information and enforcement measures necessary to ensure the integrity of public procurement. The PPA would require access to information from all parties involved in public procurement, and it should share that information with control bodies such as UPAC and the Competition Bureau of Canada.<sup>84</sup> It was also recommended that the PPA produce an annual report and offer training courses for PCAs relating to public procurement. In this sense, the report envisions a strong educational function for the PPA, on top of its ongoing monitoring powers. In terms of regulating the work of PCAs, the report suggested a number of steps which would integrate the PPA within all stages of public procurement (including the tendering system and appointment of selection committees), require the presence of inspectors to ensure integrity, ensure clear complaint responses free of political influence, and generally allow the PPA to act as a buffer between public and private actors.<sup>85</sup> Finally, the report recommended that the PPA take over the power to licence businesses wishing to enter into public contracts, a responsibility which currently rests with the *Autorité des marchés financiers* (“AMF”).<sup>86</sup> While there were no current issues found with the AMF regulating business licences, transferring this power to the PPA would maximize its use of expertise and resources.<sup>87</sup>

The report then recommended altering the tendering rules in the construction industry to depart from the “lowest compliant bidder” approach. While professional services contracts are decided based typically on a combination of both quality and price, construction contracts consider price alone, meaning the bid with the lowest price is selected.<sup>88</sup> This approach has numerous setbacks, including a disproportionate focus on price which incentivizes companies to minimize costs at the expense of quality and innovation.<sup>89</sup> This approach also increases the possibility of collusion; results are predictable, since the lowest price tender will win, which allows bidders to collude to divide contracts.<sup>90</sup> Therefore, the Commission recommended that the tendering rules be changed to provide the PCA with the best intersection of price and quality, based on the nature of the work. However, the report did not set out proposed rules. Rather, it suggested that the PCAs have the authority, under the supervision of the PPA, to craft rules which reflect an appropriate weighing of price and quality criteria depending on the construction contract in question.<sup>91</sup>

This recommendation responds to one of the central forms of public procurement corruption identified by Transparency International, as set out in Part I of this paper: collusion. However, departure from the lowest compliant bidder approach imports more discretion into the process, particularly since this recommendation does not itself suggest rules to achieve the best intersection of price and quality. Increasing space for discretion also increases the possibility of corruption.<sup>92</sup> Thus, while departure from the lowest common bidder approach is justified to import quality into the tendering process, its implementation could have counterintuitive results by increasing the scope for corruption. I suggest that any response to this recommendation would be well-served not to leave discretion of the PCAs entirely unfettered, and that the supervision of the PPA should establish certain overarching guidelines to reduce the risk of corruption stemming from

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84 *Ibid.* As with many of its recommendations, the Commission envisioned that the PPA would work in conjunction with UPAC in its investigation and analytical activities.

85 *Ibid.* at 94-96.

86 *Ibid.* at 97.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.* at 99.

90 *Ibid.* at 98.

91 *Ibid.* at 99.

92 Ferguson, *supra* note 3, ch 11 at 49-50.

increased discretion. PCAs could maintain some, but not total, discretion to determine the appropriate intersection of price and quality when it comes to selecting a bidder.

The latter proposals in the first block of recommendations address discrete sub-issues relating to public procurement. First, the Commission identified political influence in the approval of road infrastructure projects by the Ministry of Transportation of Quebec, and suggested measures to depoliticize this process.<sup>93</sup> The Commission then referenced rampant collusion in the field of asphaltting and the acquisition of materials and licensed products. The recommendations suggested measures to increase healthy competition in these regards, since it was deemed the current system limits competition and drives prices disproportionately high.<sup>94</sup> Next, the Commission recommended tightening rules for awarding contracts to para-municipal companies and non-profit organizations. Currently, these bodies are not entirely subject to legislation governing public procurement, such as the *Act respecting contracting by public bodies* (“*ACPB*”).<sup>95</sup> During the Commission’s work, UPAC raised concerns that corrupt individuals could use non-profit organizations as a tool for fraud and tax evasion, thereby wasting public funds. The Commission thus recommended that such bodies be subject to the same legislative rules as the public bodies with which they are associated.

Finally, the Commission recommended changing the deadline for the receipt of tenders. Currently the deadline is set at a minimum of 15 days. However, many companies do not have adequate time to prepare a bid and are eliminated from the competition.<sup>96</sup> On the other hand, 15 days can be too long of a deadline in situations of urgency. The report thus suggested greater flexibility by allowing PCAs to establish a reasonable deadline for receipt of bids, depending on the financial importance and complexity of the project at hand. While flexibility is arguably required in this process, the same concerns highlighted above regarding discretion resulting in an increased potential for corruption apply in this context. However, as I suggest above, an established PPA could create guidelines and monitor deadlines to ensure that any increased flexibility is properly used and does not in itself increase the scope for corruption in this particular context.

### iii. Recommendations Regarding Sanctions, Political Financing, Citizen Participation, and Confidence in Public Officials

After addressing public procurement, the Commission offered further recommendations in four blocks: improving prevention and strengthening sanctions, addressing political party financing, promoting citizen participation, and renewing confidence in public officials. This paper will now canvass the second block of recommendations as it focuses specifically on preventing collusion, corruption, and the infiltration of organized crime in the construction industry.

The Commission recommended improved whistleblower protection legislation of general application.<sup>97</sup> Currently, whistleblowers are protected by sector-specific legislation such

93 Charbonneau Report, *supra* note 6 at 99.

94 *Ibid* at 101.

95 *Act respecting contracting by public bodies*, CQLR c C-65.1 [*ACPB*]. See also Charbonneau Report, *supra* note 6 at 105. The Commission noted that government agencies often subsidize construction projects which are carried out by para-municipal or non-profit organizations. However, such organizations are not subject to the *ACPB*, which means they may enter contracts with companies who have been deemed ineligible for public contracts, using public subsidies in the process. The Commission noted particularly that the recent *Recovery Act* extends to para-municipal and non-profit organizations, and suggests that other pieces of legislation should be similarly extended (*Recovery Act*, *infra* note 155). The *ACPB* and the *Recovery Act* will be addressed in greater detail in Part IV of this paper.

96 *Ibid* at 107.

97 *Ibid* at 109.



as Quebec's *Anti-Corruption Act*.<sup>98</sup> However, this legislation is limited in that it targets only the public procurement sector and is only available for a person who reports directly to UPAC (rather than to a colleague or manager, for example). On a related note, the Commission also recommended improved witness immunity for those cooperating in investigations.<sup>99</sup> The recommendation of a general system of protection for whistleblowers and improved witness immunity responds directly to one of the central challenges to corruption identified by Transparency International in Part I above, being that those who do uncover public procurement corruption rarely tend to report it.

The Commission then set out a series of interrelated recommendations to prevent the infiltration of organized crime into the construction industry. These include expanding the list of offences that can result in the cancellation of a construction contractor's licence by the Régie du bâtiment du Québec ("RBQ"),<sup>100</sup> tightening the rules on the waiting period imposed by the RBQ for license holders that have committed an offence,<sup>101</sup> and expanding the scope of criminal record checks for shareholders in construction companies.<sup>102</sup> Further recommendations targeted issues such as reducing payment delays to construction contractors,<sup>103</sup> cracking down on violence and intimidation in construction sites,<sup>104</sup> targeting false billing,<sup>105</sup> reviewing the appointment process for the UPAC Commissioner to ensure proper independence from political influence,<sup>106</sup> and improving the reliability of the data gathered by the Quebec register of enterprises on companies authorized to do business in Quebec.<sup>107</sup> The Commission also suggested changes for improved monitoring of Quebec's professional system.<sup>108</sup> These numerous recommendations reflect increasing criminalization tactics rather than ensuring compliance through cooperation and self-regulation, and they operate in conjunction with a view to drive down the possible infiltration of organized crime in the construction industry and to improve the monitoring and reporting of possible corruption. They reflect a more punitive approach to anti-corruption which is analyzed in more detail in Part IV(B)(i) below.

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98 *Anti-Corruption Act*, *supra* note 47.

99 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 111-113. This recommendation is made on the basis that evidence from repentant witnesses is crucial in cases of corruption and collusion, where it is typically difficult to acquire the necessary evidence.

100 *Ibid* at 114. The RBQ is tasked with ensuring the quality of work and safety of buildings and facilities, and the professional qualifications and integrity of contractors. It enacts and enforces construction, safety, and professional qualification standards. Currently, if officers of a business with a construction contractors' license have been convicted in the last five years of a tax offence, an indictable offence connected with the construction industry, or gangsterism, their license is cancelled by the RBQ. The Commission recommended that the RBQ licensing requirements be tightened so that this list is expanded to include the offences of trafficking, production or importation of drugs, laundering the proceeds of crime, and offences related to collusion and corruption. This aims to address particular vulnerabilities of companies in the construction industry to the infiltration of organized crime.

101 *Ibid* at 115.

102 *Ibid* at 117.

103 *Ibid* at 118.

104 *Ibid* at 119-120.

105 *Ibid* at 131.

106 *Ibid* at 127.

107 *Ibid* at 130.

108 *Ibid* at 136-141. The testimony during the Commission revealed concerns around a lack of ethics in Quebec's professional system and insufficient monitoring of the professional system due to a lack of data and professional inspections. These recommendations targeted engineering firms in particular; the Commission noted that many engineering firms had cultures which allowed corrupt practices regarding political financing and collusion, and suggested changes to ensure that engineering firms be made subject to proper oversight, rather than the professionals themselves. As it currently stands, oversight bodies can only discipline professionals rather than the firms themselves, which the Commission highlighted as a fundamental challenge in curbing corrupt practices in professional systems.

The report also addressed the protection of sensitive information and advocated for a form of “nuanced transparency.”<sup>109</sup> The Commission concluded, based on expert testimony, that transparency *alone* cannot necessarily guarantee effectiveness and fairness in the public procurement process.<sup>110</sup> Interestingly, this suggestion is somewhat at odds with the premise that transparency is the hallmark to any good public procurement system.<sup>111</sup> Transparency in public procurement has been described as reducing the risk of corruption by ensuring the accountability of decision-makers and the engagement of stakeholders.<sup>112</sup> Somewhat conversely, the Commission found that disseminating information may in fact facilitate collusion and exert undue pressure on key players in the public procurement process, particularly information relating to the composition of selection committees and the identity of parties accepting tender documents.<sup>113</sup> The Commission thus recommended that laws be standardized to ensure the confidentiality of such information in the hopes of decreasing opportunities for collusion and corruption. I suggest that the Commission’s advocacy for the concept of nuanced transparency demonstrates the depth of its examination into the nature and sources of procurement corruption. By refusing to rely on transparency as a panacea for all corruption, the Commission presented a more sophisticated and nuanced strategy in the fight against corruption in Quebec.

The final three blocks of recommendations will now be briefly addressed, but their full consideration is beyond the scope of this paper. Part Three addresses political financing. The Commission distinguished legitimate influence in a democratic society from inappropriate interference, and made recommendations regarding political financing as a way to depoliticize public procurement processes.<sup>114</sup> Part Four is intended to promote citizen participation and to encourage Quebec citizens to take on an active monitoring role in the fight on corruption.<sup>115</sup> This would be primarily achieved through a central recommendation that Quebec adopt a law allowing citizens to prosecute fraudsters on behalf of the government, mirroring the existing American *False Claims Act*.<sup>116</sup> The final block of recommendations focuses on renewing confidence in elected officials and civil servants, notably by reviewing existing ethical and professional conduct frameworks, tightening rules on gifts, and tightening post-employment rules for employees transitioning from the public to private sector.<sup>117</sup> While the primary focus of the Commission’s work targeted public procurement and crime in the construction industry, a brief review of the major organizational themes in the recommendations demonstrates a focus on major structural change touching on many aspects of Quebec industries and public systems, as well as an effort to change attitudes and basic societal engagement with issues around corruption.

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109 *Ibid* at 129-130.

110 *Ibid*.

111 Ferguson, *supra* note 3, ch 11 at 22-23.

112 Kuhn & Sherman, *supra* note 1 at 12.

113 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 130.

114 *Ibid* at 151.

115 *Ibid* at 166.

116 *Ibid* at 166-172. This recommendation discusses the United States’ *False Claims Act* in great detail and suggests ways it could be transposed into the Quebec context. Legal commentators have considered this possibility and concluded that there are no obvious legal barriers to the adoption of a civil remedy for fraud in Quebec, although such legislation would almost certainly be challenged in the courts if it were passed: see Paul Daly, “Final Report of Quebec’s Corruption Inquiry: Recommendation of a False Claims Act” (24 November 2015), *Paul Daly, Administrative Law Matters* (blog), online: <[www.administrativelawmatters.com/blog/2015/11/24/final-report-of-quebecs-corruption-inquiry-recommendation-of-a-false-claims-act/](http://www.administrativelawmatters.com/blog/2015/11/24/final-report-of-quebecs-corruption-inquiry-recommendation-of-a-false-claims-act/)> archived at <<https://perma.cc/E4NB-EEMP>>.

117 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 177-192.

## IV. RESPONSES TO THE CHARBONNEAU REPORT

### A. Reaction, Criticisms, and Implementation

After an extensive review of the Charbonneau Commission's recommendations, this paper will now turn to a critical assessment of their goals, implementation, and utility. The recommendations' inherent value lies in their broad application, their vision for systemic change, and their responsiveness to central challenges in curbing corruption. As identified in Part III of this paper, many of the recommendations respond directly to the paramount obstacles of corruption as identified by bodies like Transparency International. Examples include changing tendering rules to curb collusive practices and expanding the scope of whistleblower protection legislation to encourage reporting. The guidance offered by the eight action strategies also offers a framework for cohesive and structural change, rather than a haphazard approach. In this sense, the Charbonneau Commission offers a sophisticated examination of corruption in public procurement, and has the potential for major structural reform in this industry in Quebec.

Reaction to the effectiveness of the Charbonneau Commission has been varied. One commentator made the following comment regarding its reception: “[w]hile the commission had the makings of a potential political bombshell, the final report was met with little acclaim, and commentators have been quick to dismiss the inquiry as a [...] failed mission.”<sup>118</sup> There were suggestions of political influence and infighting among the members of the Commission, and the report has been called an “expensive disappointment” with its cost of approximately CAD45 million, which failed to yield high profile political arrests.<sup>119</sup> However, the report has also been defended as a valuable contribution to good governance, notably by exposing the true scale of corruption in Quebec and generating recommendations which will lead to, and perhaps have already resulted in, meaningful change. On this basis, the Charbonneau Commission cannot simply be written off as an expensive failed venture. As this paper has sought to demonstrate, it represents an unprecedented examination of corruption in public procurement and an opportunity to generate systemic reform.

In terms of implementation, Quebec's Liberal government moved quickly to begin implementing certain recommendations. Justice Minister Stéphanie Vallée publicly avowed the government's commitment to enact the recommendations, an estimated 80 percent of which require legislative or regulatory amendments.<sup>120</sup> And Quebec's Liberal Party recently announced that “[o]ver 80 [percent] of the recommendations have been realized or are in the process of being implemented.”<sup>121</sup> This is reflected in the specific legislative changes addressed in the next section of this paper, as well as several bills which have recently been introduced in Quebec to respond to specific recommendations made by

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118 Daniel Binette, “The Charbonneau Commission's Underappreciated Contributions to Fighting Corruption in Quebec”, (15 January 2016), *The Global Anticorruption Blog: Law, Social Science, and Policy* (blog), online: <<https://globalanticorruptionblog.com/2016/01/15/the-Charbonneau-commissions-underappreciated-contributions-to-fighting-corruption-in-quebec/>> archived at <<https://perma.cc/G3U4-MZ9D>>.

119 *Ibid.*

120 Sarah Leavitt, “Charbonneau commission: Quebec to create public works authority”, *CBC News* (24 March 2016), online: <[www.cbc.ca/news/canada/montreal/Charbonneau-commission-liberal-government-recommendations-1.3505437](http://www.cbc.ca/news/canada/montreal/Charbonneau-commission-liberal-government-recommendations-1.3505437)> archived at <<https://perma.cc/9YTB-5TZ9>>.

121 Parti Libéral du Québec, Annonce Gouvernementale, “Creating the base for a new Quebec” (8 December 2017), online: <<https://plq.org/en/press-release/creating-the-base-for-a-new-quebec/>> archived at <<https://perma.cc/5J3H-RM69>>.

the Charbonneau Commission, although they have not yet been enacted.<sup>122</sup> Despite the government's professed commitment to enact the Charbonneau recommendations, some of the proposed legislation has been criticized as failing to get to the heart of corruption problems, or even as being counterproductive.<sup>123</sup> Additionally, there are questions as to whether the Commission has made any difference regarding general opinions about the fight against corruption; allegations of corruption continue to emerge, and the media has asserted that "Quebecers don't seem to think much has changed on the corruption front."<sup>124</sup> Nevertheless, I suggest the recommendations have at the very least a strong potential for major structural reform in public procurement in Quebec. Time will tell whether that potential is borne out.

## B. Legislative Responses to the Charbonneau Report

This paper will now address specific legislative responses to public procurement which have been enacted as a result of the Charbonneau Commission. However, we must first acknowledge that law reform comes about in a variety of ways that extend beyond concrete legislative change. While the Charbonneau Commission has value in acting as a catalyst for new legislation, it also achieves indirect law reform in more subtle ways. Systemic corruption itself is reflected in both formal institutions as well as social norms and cultural beliefs.<sup>125</sup> This mirrors the formal and informal manifestations of law reform. The Charbonneau Commission has wrought change in generating formal and informal discussions around corruption in public procurement, bringing critical issues to the fore in Quebec society, and perhaps positively affecting general public opinion in these regards. Such subtle changes are particularly important at a time where there has been a crisis of public confidence in governance in Quebec. While legislative change is thus worth consideration, we must be careful to not place undue emphasis on these formal changes without being aware of the deeper ripple effects that may spread in more informal ways as a result of the Commission's work. An increased awareness of corruption in public procurement, through informal discussions, media publicity,<sup>126</sup> and academic

122 As of November 2016, six Charbonneau-related bills had been introduced by the Quebec government on such topics as political financing, whistleblowing, professional orders, the establishment of a central procurement authority, and UPAC: for a brief description, see Andy Riga, "Charbonneau Commission report: One year later, has anything changed in Quebec?", *Montreal Gazette* (23 November 2016), online: <[montrealgazette.com/news/local-news/Charbonneau-commission-report-one-year-later-has-anything-changed-in-quebec](http://montrealgazette.com/news/local-news/Charbonneau-commission-report-one-year-later-has-anything-changed-in-quebec)> archived at <<https://perma.cc/6ZYV-DJHH?type=image>>. More recently, several bills have been introduced to respond to recommendations around decreasing violence and intimidation in Quebec's construction industry, and to increase the power of the Regie du batiment du Quebec around issuing licences under the *Building Act*. See Bill 152, *An Act to amend various labour-related legislative provisions mainly to give effect to certain Charbonneau Commission recommendations*, 1st Sess, 41st Leg, Quebec, 2017. See also Bill 162, *An Act to amend the Building Act and other legislative provisions mainly to give effect to certain Charbonneau Commission recommendations*, 1st Sess, 41st Leg, Quebec, 2017.

123 Riga, *supra* note 122.

124 *Ibid.*

125 For further discussion on systemic corruption reflected in both formal and informal institutions, and the differences between them, see Saint-Martin, *supra* note 20 at 78-81. I note for completeness that in his discussion of formal and informal institutions, Saint-Martin cautions against an overreliance on the conceptual use of "systemic corruption" generally as a way to understand and respond to cycles of corruption, a term which may not provide sufficient allowance for human agency and may not be the best concept to explain the persistence of systemic corruption in increasingly advanced welfare states.

126 I suggest that media publicity is an important driver of structural change, by focusing social attention on issues such as rampant corruption. However, it should be noted that there can be adverse effects of sustained media scrutiny on such topics. See, for example, Reeves-Latour & Morselli, *supra* note 46 at 15, where the authors consider the role of the media in Quebec's anti-corruption efforts, and note that while increased media scrutiny has raised societal awareness about corruption on an unprecedented scale, it can also arbitrarily affect strategic prosecution choices and may threaten whistleblowers if investigative strategies become too invasive.

commentary—often stemming from direct reactions to the Charbonneau Commission—is also an important driver of law reform and structural change.

i. *The Integrity in Public Contracts Act*

Bill 1, or the *Integrity in Public Contracts Act*,<sup>127</sup> was the first bill passed by the new Parti Québécois government after the defeat of the Liberal government in 2012.<sup>128</sup> The Charbonneau Commission was already underway at this point. The new government acted preemptively in passing this anti-corruption measure to curb the various practices that were coming to light as a result of the Commission's work. Public procurement was at that time regulated through the *ACPB*, which was significantly amended in the *Integrity in Public Contracts Act*. The existing regulatory framework was deemed insufficient, and the new government—in response to the Commission and in an attempt to distance itself from the scandals that beset the Liberal government—made dramatic changes in the *Integrity in Public Contracts Act*. The heart of these changes was a pre-authorization requirement obligating *any* enterprise (not only those within the construction industry) that wished to contract with a public body to first apply to the AMF for authorization.<sup>129</sup> It was envisioned that the AMF would work closely with UPAC to exercise its new powers.<sup>130</sup> Authorization would be based on an assessment of the enterprise's integrity, and the AMF would have a broad discretion to refuse an enterprise that failed to meet a requisite standard of integrity.

The system of pre-authorization established by the *Integrity in Public Contracts Act* has attracted criticism. Legal commentators, on review of the bill, have asserted that “the application of the new law is likely to be fraught with difficulties and challenged by stakeholders.”<sup>131</sup> While that legislation aims to ensure that any enterprises wishing to contract with public bodies in Quebec demonstrate a high threshold of “unassailable integrity,” it is maligned as allowing a broad discretion leading to unpredictable results.<sup>132</sup> Professor Graham Steele, in his analysis of the bill, noted the significant differences between automatic and discretionary refusals for pre-authorization.<sup>133</sup> The AMF has the discretion to refuse an authorization “if the enterprise concerned fails to meet the high standards of integrity that the public is entitled to expect.”<sup>134</sup> Steele denounced the problematically subjective nature of this provision and the lack of clarity as to what might result in a refusal, particularly since none of the language used in the provision is a legal term of art.<sup>135</sup>

Steele considered some of the bill's frailties with regards to its objectives. While the bill had a clear objective to restore integrity in public procurement, it also had a political objective to restore public confidence in procurement processes. Steele assigned this political objective as responsible for some of the bill's problems, particularly the speed with which it was

127 *Integrity in Public Contracts Act*, SQ 2012, c 25.

128 Steele, *supra* note 76 at 72.

129 Ian Gosselin & Antoine Pellerin, “Public Contracts in Quebec: A Question of Integrity” [2013] J Can C Construction L 1 at 2.

130 *Ibid* at 12.

131 *Ibid* at 2.

132 *Ibid* at 13.

133 Steele, *supra* note 76 at 77. See also Ferguson, *supra* note 3.

134 *Integrity in Public Contracts Act*, *supra* note 127, s 21.27. This discretionary criterion has broadly attracted criticism, although it was assessed and upheld by the Quebec Superior Court less than a year after its enactment. For a discussion of these considerations, see Clementine Sallee & Liviu Klafman, “Public Procurement in Quebec: New Authorization Regime under Judicial Scrutiny”, (12 June 2013), online: Blake, Cassels & Graydon LLP <[www.mondaq.com/canada/x/320228/Government+Contracts+Procurement+PPP/Public+Procurement+In+Quebec+New+Authorization+Regime+Under+Judicial+Scrutiny](http://www.mondaq.com/canada/x/320228/Government+Contracts+Procurement+PPP/Public+Procurement+In+Quebec+New+Authorization+Regime+Under+Judicial+Scrutiny)> archived at <<https://perma.cc/W9JX-6XZL>>.

135 Steele, *supra* note 76 at 79.

passed and the lack of evidence based decision-making.<sup>136</sup> He noted with surprise that there was “not a single mention of any of the international and national anti-corruption instruments” in the debates around Bill 1, nor was there a reference to anti-corruption literature or expert advice.<sup>137</sup> He commented that the Charbonneau Commission heard from two witnesses from New York City, who testified that pre-authorization is only a small part of a much larger anti-corruption system, and that it could actually do more harm than good if not properly integrated within a larger system.<sup>138</sup> Steele concluded with the following assertion: “there has to be a serious doubt whether Bill 1 represents a sustainable anti-corruption agenda.”<sup>139</sup>

Steele’s criticisms of Bill 1 illuminate the value of the Charbonneau recommendations. Steele noted that legislative change alone, particularly when it does not capitalize on expert advice or proper research on the issue, is insufficient. He pointed to jurisdictions such as the European Union or New York City, which do not rely on legislative change alone but rather “enforcement, measurement, reporting, and correction” as the most effective anti-corruption agendas.<sup>140</sup> The Commission’s true potential lies in these kinds of nuanced changes, rather than calling only for legislative change. While the Commission commented on public procurement legislation, it also affirmed systemic, high-level reform which focused on enforcement, measurement, and reporting. This is demonstrated in the recommendations around whistleblower protection, establishing a central procurement authority, and focusing on monitoring procurement processes and building expertise around best practices. The Commission capitalized on expert testimony and foreign experience to suggest a broad spectrum of change, extending beyond legislation, and in so doing set Quebec on a path to achieving a similarly nuanced anti-corruption agenda.

Indeed, Quebec’s approach to anti-corruption in light of the Charbonneau inquiry has been described as a radical regulatory shift which represents a more punitive model.<sup>141</sup> This relates to Steele’s comment above, in that enforcement and correction measures are the most effective anti-corruption agendas, beyond simply legislative change. Quebec’s anti-corruption measures have historically been lacking in enforcement measures, penalties, and collaboration. Between the establishment of UPAC and the many recommendations of the Commission, the new anti-corruption agenda has been characterized as more punitive in nature.<sup>142</sup> A more punitive model carries some unforeseen challenges—for example, collaboration between agencies working with UPAC can be difficult, and increased criminalization brings the likelihood of complex offences and contested litigation.<sup>143</sup> However, the more punitive model has been seen by some as necessary to promote respect for laws by actors in public procurement.<sup>144</sup> In this sense, the nuanced suggestions made by the Commission include potential for better monitoring and enforcement of anti-corruption measures, in an effort to root out some of the rampant corruption in Quebec’s public procurement industry.

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136 *Ibid* at 82-83.

137 *Ibid* at 102-103.

138 *Ibid* at 107-108.

139 *Ibid* at 117.

140 *Ibid*.

141 See Reeves-Latour & Morselli, *supra* note 46, at 5.

142 *Ibid* at 7-9.

143 *Ibid* at 19-20.

144 *Ibid*.



## ii. Quebec's Bill 108

On June 8, 2016, the Quebec government introduced Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*.<sup>145</sup> This bill proposes establishing the Autorité des marchés publics ("AMP") as a central authority to take over responsibility from the AMF with regards to overseeing public contracts. This bill is a direct response to the Commission's suggestion that Quebec enact a public procurement authority to ensure the integrity of public procurement in Quebec. The bill envisions the AMP taking on all existing responsibilities currently held by the AMF (namely, the pre-authorization of public contracting bodies in Quebec), as well as overseeing all other contracting processes determined by the government.<sup>146</sup> This bill also amends the *ACPB* in a number of ways. These amendments relate primarily to when the government might require an enterprise to obtain authorization and when authorizations might be cancelled by the AMP, and they establish a one year waiting period for an enterprise that has withdrawn or had its application cancelled before it can re-apply.<sup>147</sup> The actual process to obtain prior authorization for public contracts, however, remains unaltered.<sup>148</sup> The bill also tasks the AMP with maintaining the register of enterprises ineligible for public contracts.<sup>149</sup>

Bill 108 helps to better situate Quebec's pre-authorization scheme within a more nuanced public procurement framework. Section 21.27 of the *ACPB*, which contains the provision allowing discretion to refuse authorization if an enterprise "fails to meet the high standards of integrity" expected by the public,<sup>150</sup> is not amended by the bill.<sup>151</sup> This means the same "startling subjectivity" raised by Steele would still be present in the legislation.<sup>152</sup> However, the broad discretion might be tempered somewhat since pre-authorization would now be established within the concentrated expertise of the AMP, whose mission would include not only pre-authorization but also generally overseeing all public contracts and ensuring integrity and ongoing compliance with public procurement processes. Bill 108 has been lauded as a significant change that would bring positive developments and greater uniformity to Quebec's public procurement processes.<sup>153</sup> It responds directly to one of the most central recommendations made by the Commission with regards to public procurement. Bill 108 was assented to on December 1, 2017 and came into force on that same day, so its actual implementation and practical impacts remain to be seen.<sup>154</sup>

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145 Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*, 1st Sess, 41st Leg, Quebec, 2016 [Bill 108].

146 Natalie Beauregard & Marjolaine Verdon-Akzam, "Public contracts: Quebec introduces the Autorité des marchés publics", (17 June 2016), online: Osler, Hoskin & Harcourt LLP <<https://www.osler.com/en/resources/regulations/2016/public-contracts-quebec-introduces-the-autorite-d>> archived at <<https://perma.cc/8CPT-Y2TD>>.

147 See Bill 108, *supra* note 145, at the explanatory notes for a list of the central changes proposed in the bill.

148 Beauregard & Verdon-Akzam, *supra* note 146.

149 Bill 108, *supra* note 145 at cl 20(4).

150 *Integrity in Public Contracts Act*, *supra* note 128.

151 At the time of writing, the bill had very recently been assented to and the finalized version is not yet available. However, while it has been subject to numerous amendments since it was introduced, none of them appear to relate to the discretion established in section 21.27 of the *Act respecting contracting by public bodies*, nor to any of the central aspects of the bill which have been considered in this part of the analysis.

152 Steele, *supra* note 76 at 79.

153 Marc-Alexandre Hudon, Madeleine Renaud & Dominic Therien, "Important Proposed Modification to Quebec Public Procurement Rules" (20 June 2016), online: McCarthy Tétrault LLP <[www.mccarthy.ca/article\\_detail.aspx?id=7273](http://www.mccarthy.ca/article_detail.aspx?id=7273)> archived at <<https://perma.cc/4NK6-878V>>.

154 *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*, SQ 2017, c 27.

### iii. Quebec's Voluntary Reimbursement Program

A final legislative change which merits consideration in the wake of the Charbonneau Commission is the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* (“*Recovery Act*”).<sup>155</sup> This legislation provides exceptional measures for the recovery of amounts improperly paid due to fraud in connection with *all* public contracts, not only those within the construction industry.<sup>156</sup> It was enacted in April 2015, meaning the Quebec government again acted preemptively, passing legislation to respond to the concerns raised by the Commission before the final report was released. The *Recovery Act* has been called a “unique and innovative regime” to recoup amounts lost in public contracts due to fraud.<sup>157</sup> The *Recovery Act* applies to para-municipal and non-profit organizations as well as public bodies. The *Recovery Act* envisions a voluntary reimbursement program, wherein an individual or corporation which has improperly received funds during the course of a public project can repay those amounts in exchange for a release from the affected public body.<sup>158</sup> The legislation creates numerous incentives to encourage participation, including an express provision that anything disclosed within the framework of the program is confidential.<sup>159</sup> While the program is designated as being “voluntary,” parties that fail to avail themselves of this reimbursement option may expose themselves to civil litigation for the recovery of those amounts.<sup>160</sup> It should be noted, however, that in the event civil recourse is initiated, constitutional challenges to the statutory regime are likely.<sup>161</sup> Specifically, the *Recovery Act* establishes a presumption that any body which has participated in fraudulent tactics in the public procurement process is presumed to have caused *injury* to the public body concerned, and this statutory presumption may well be the target of a constitutional challenge in the event that civil recourse is initiated through the *Recovery Act*.<sup>162</sup> Ultimately, it is a unique piece of legislation which is backwards looking, targeting the drain on public funds wrought by corruption and an attempted recovery of those amounts.

## V. A COMPARATIVE ANALYSIS WITH FEDERAL AND INTERNATIONAL PROCUREMENT

### A. Federal Public Procurement Regime

This paper will close with a consideration of the Charbonneau Commission's recommendations as compared to both the Canadian federal public procurement regime and international standards under the Organisation for Economic Cooperation and Development (“OECD”).

Canadian federal procurement laws and policies tend to be more sophisticated than provincial procurement schemes.<sup>163</sup> Accordingly, while the different level of detail in federal

155 *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraudulent tactics in connection with public contracts*, SQ 2015, c 6 [*Recovery Act*].

156 Pierre-Jerome Bouchard et al, “Public contracts and Bill 26: recovery of amounts improperly paid and changes to the AMF authorization regime” (28 April 2016), online: McCarthy Tetrault LLP <[https://www.mccarthy.ca/article\\_detail.aspx?id=7091](https://www.mccarthy.ca/article_detail.aspx?id=7091)> archived at <<https://perma.cc/8VLE-Q5AV>>.

157 Yvan Houle, “Quebec's Voluntary Reimbursement Program: Looking for a Few Volunteers” (2016) *J Can Construction Law* 1 at 2.

158 *Recovery Act*, *supra* note 155 at ss 3 and 22.

159 *Ibid* at s 7.

160 Houle, *supra* note 157 at 8-10.

161 *Ibid* at 10. See also Bouchard et al, *supra* note 156, where the authors assert that the constitutional validity of these rules could be challenged.

162 Houle, *supra* note 157 at 8-9.

163 Ferguson, *supra* note 3, ch 11 at 40.

and provincial regimes should be borne in mind, it is useful to assess the Commission's recommendations by comparing them to a more detailed and comprehensive procurement scheme. Public Works and Government Services Canada ("PWGSC") is the main procurement arm of the Canadian federal government, and it is responsible for procuring goods and services for the majority of federal departments.<sup>164</sup> Federal public procurement is based on the following common law principles: the two-contract framework set out in Canadian jurisprudence, that only compliant tenders may be accepted, and that bids must be evaluated fairly and equally.<sup>165</sup> Federal procurement is also subject to Canada's obligations under trade agreements, such as the North American Free Trade Agreement and the Agreement on Internal Trade (an intergovernmental trade agreement replaced by the Canadian Free Trade Agreement in 2017), which further differentiate federal and provincial procurement processes.<sup>166</sup> PWGSC, as the principal purchasing agent for the government, must act in accordance with various legislative and regulatory precepts, as well as directives issued by the Treasury Board of Canada; however, PWGSC nevertheless retains considerable discretion to establish procedures around public procurement.<sup>167</sup>

Canadian public procurement is subject to the federal Integrity Regime, which is established and directed by PWGSC. This federal framework operates to ensure integrity in procurement processes through debarment, a process wherein suppliers are rendered ineligible to do business with the government. Certain offences lead to automatic ineligibility, while others are determined on a discretionary, case-by-case approach.<sup>168</sup> The most recent Integrity Regime, implemented in July 2015 (and amended in April 2016) is the latest in a series of iterations dating back to 2007. Legal commentators welcomed the changes in the latest Integrity Regime, as the earlier regime on debarment was considered to be so "inflexible, punitive and far-reaching" that it was actually counterproductive to its objective of furthering integrity.<sup>169</sup> Under the old regime, suppliers deemed to be ineligible faced a mandatory 10 year period of ineligibility with no scope for reduction, and no concomitant incentive for companies to acknowledge and mitigate the conduct resulting in ineligibility.<sup>170</sup> The new regime has been applauded for reducing the length of debarment from 10 to 5 years through remediation in certain circumstances and adding a degree of transparency to the manner in which ineligibility decisions will be made. However, Canadian federal procurement is still an incredibly strict regime as compared to foreign jurisdictions.<sup>171</sup>

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164 Gerry Stobo & Derek Leschinsky, *Pocketbook on the Canadian Public Procurement Regime* (Borden Ladner Gervais, 2009), online: <[blg.com/en/News-And-Publications/documents/publication\\_1799.pdf](http://blg.com/en/News-And-Publications/documents/publication_1799.pdf)> archived at <<https://perma.cc/XSQ4-BWRT>> [BLG Pocketbook]. See also Public Services and Procurement Canada, "PSPC Services: Buying and Selling", online: <<https://www.tpsgc-pwgsc.gc.ca/app-acq/index-eng.html>> archived at <<https://perma.cc/5YCD-Q6Y6>>.

165 For more on these common law principles, see BLG Pocketbook, *supra* note 164 at 6-8.

166 *Ibid* at 10.

167 *Ibid*.

168 See Public Works and Government Services Canada, "About the Integrity Regime", online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html>> archived at <<https://perma.cc/MJV6-WPNR>>. The regime applies across government to agreements with a transaction value over CAD10,000 and is made up of three parts: the *Ineligibility and Suspension Policy*, the integrity directives, and the integrity provisions. Ineligibility may result if suppliers have been convicted of certain offences (under the *Criminal Code*, *Competition Act*, or *Financial Administration Act*, for example), if suppliers have entered into subcontracts with an ineligible supplier, or if suppliers have provided false or misleading information to Public Services and Procurement Canada.

169 Milos Barutciski & Matthew Kronby, "Canadian Government Overhauls the Integrity Regime for Suppliers" (6 July 2015), online: Bennett Jones LLP <<https://www.bennettjones.com/en/Publications-Section/Updates/Canadian-Government-Overhauls-the-Integrity-Regime-for-Suppliers>> archived at <<https://perma.cc/P3LH-PNK4>>.

170 *Ibid*.

171 *Ibid*.

There is value in comparing debarment under the federal Integrity Regime with the system of pre-authorization that emerged in Quebec in tandem with, and perhaps as a result of, the Charbonneau Commission. As set out above, entities wishing to enter public contracts in Quebec must first apply for prior authorization to the AMF, a responsibility which the Commission recommended be reassigned to a central procurement authority. This central procurement authority would be responsible for the integrity of procurement in Quebec, much like the PWGSC on a federal level. Conversely, PWGSC makes ineligibility determinations “on its own initiative, upon receiving a request from a supplier to conduct a review to determine its ineligibility, or upon receiving a request from a department, agency or other federal entity to which the policy applies.”<sup>172</sup> Thus the timing and triggering of the two processes are different, with the onus on entities in Quebec to seek prior authorization while PWGSC typically makes determinations on its own initiative (although under the federal regime suppliers can request an advanced determination of eligibility).<sup>173</sup> Debarment has also been decried as being inflexible and for focusing too heavily on punishment and deterrence, the domain of criminal law, rather than protecting the integrity of federal procurement.<sup>174</sup> In this sense, pre-authorization imports more discretion than the mandatory debarment period, with the licensing authority having a broad discretion as to when to declare an entity ineligible. However, as discussed in Part IV above, this discretion has been condemned as being *too* broad and leading to problematic and unpredictable results. Discretion is clearly an important element in either regime, with too little arguably afforded under the federal regime and too much under the current Quebec regime. Discretion must be subject to clear guidance and established parameters, and a middle ground is arguably necessary between these approaches.

Critics of the federal Integrity Regime have also noted that it fails to properly distinguish between criminal law aims versus good governance in public procurement, and have called for an integrity regime that is *remedial*, rather than *punitive*.<sup>175</sup> As compared to the federal debarment regime, which arguably prioritizes punishment at the expense of remediation, the public procurement framework suggested by the Commission (which includes the pre-authorization scheme) focuses extensively on educational and remedial components. While some commentators have deemed Quebec’s recent regulatory shift in the field of anti-corruption as being punitive in nature, this characterization is tethered closely to the expansive powers of the UPAC rather than the Charbonneau Commission’s recommendations specifically.<sup>176</sup> While some of the Commission’s recommendations are more punitive in nature in attempts to minimize the infiltration of organized crime into the construction industry, I suggest they also demonstrate strong educational and remedial mechanisms which counterbalance the punitive nature of other aspects of Quebec’s anticorruption regime. Such components include recommendations to educate procurement stakeholders, coach contracting authorities, and act quickly to respond to complaints.<sup>177</sup> In this sense, the Charbonneau recommendations and existing pre-authorization scheme have the potential to better encourage integrity in present and future conduct, rather than punishing past conduct and debarring entities for periods of 5 to 10 years on that basis. However, it should be noted that there is an office of the Procurement Ombudsman at the federal level, whose mandate is to review practices of

172 Public Works and Government Services Canada, “Ineligibility and Suspension Policy” at s 9(a), online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>> archived at <<https://perma.cc/Q35K-V25Z>>.

173 Public Works and Government Services Canada, “About the Integrity Regime: Frequently Asked Questions”, online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/faq-eng.html#a1>> archived at <<https://perma.cc/HBP8-7YYZ>>.

174 Barutciski & Kronby, *supra* note 169.

175 *Ibid.*

176 See Reeves-Latour & Morselli, *supra* note 46.

177 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 96.

departments (including PWGSC) for fairness and transparency, review complaints, and issue reports on the results.<sup>178</sup> In this sense, the work of the Ombudsman might import an important monitoring and reporting function which has been decried as lacking in the federal Integrity Regime.

Beyond debarment and pre-authorization, there are other useful comparisons to be drawn between the Charbonneau recommendations and federal procurement. The first of these is rules around tendering processes. The Commission recommended that procurement in Quebec depart from the lowest compliant bidder approach, a recommendation which accords with federal procurement policies. For example, the treaties mentioned above which impose obligations on the federal government generally require that contracts be awarded to the most qualified bidder, considering price *and* non-related price factors.<sup>179</sup> Similarly, the Treasury Board of Canada's federal Contracting Policy, which governs aspects of public procurement, states that government procurement should strive for an optimal balance of overall benefits, which requires consideration of all relevant costs and factors, rather than the basic contractual costs alone.<sup>180</sup> These aspects of federal procurement policies demonstrate that Quebec would likely be well-suited to follow the recommendation that the lowest compliant bidder approach be abandoned, so that public contracts are not only awarded to the cheapest project. As discussed in Part III, this approach comes at the expense of quality in public works and leads to greater opportunities for collusion. However, as I suggested in Part III(C)(ii) above, such a recommendation would best be implemented under the supervision of a central procurement contracting authority, to reduce any risks of corruption from the unfettered discretion of procuring agencies to select the best intersection of price and quality. Further, the Commission recommended that the government import more flexibility into the deadline for tenders, which is currently set at 15 days. This recommendation accords with discretion around tendering deadlines at the federal level. The Agreement on Internal Trade, which applies at a federal level, stipulates that each party shall be afforded a reasonable period to submit a bid, depending on the nature and complexity of the project at hand.<sup>181</sup> Thus, the Charbonneau recommendations pertaining to tendering rules and deadlines accord with the more detailed regime existing at the federal level.

Further comparisons between federal procurement and the Charbonneau recommendations involve ethics around employment in public and private sectors, whistleblower protection, and increased citizen involvement. First, the Commission recommended tightening rules around employees transitioning from the public to private sector.<sup>182</sup> This recommendation mirrors the federal government's Policy on Conflict of Interest and Post-Employment, which imposes similar restrictions on employees transitioning from the public sector to work for a private entity with which they had significant official dealings.<sup>183</sup> Second, the Charbonneau recommendations regarding whistleblower protection actually seem to exceed protections at the federal level. For example, Transparency International Canada has asserted that Canada's current legal framework for whistleblowing is outdated, noting

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178 Canada, Office of the Procurement Ombudsman, "The Office: Our Mandate" (3 March 2017), online: <[opo-boa.gc.ca/bureau-office-eng.html](http://opo-boa.gc.ca/bureau-office-eng.html)> archived at <<https://perma.cc/ZSZ6-G6UG>>.

179 Barutciski & Kronby, *supra* note 169.

180 Treasury Board of Canada, "Contracting Policy, 9: Best Value", online: <[www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494](http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494)> archived at <<https://perma.cc/2H7Y-Y35X>>.

181 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 107.

182 *Ibid* at 183. Specifically, recommendation 55 requires that any employees involved with the contract management of a public entity wait until one year after termination of their employment to accept a position with a private sector entity with which they had significant dealings.

183 Treasury Board of Canada, "Policy on Conflict of Interest and Post-Employment", online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25178>> archived at <<https://perma.cc/W9F6-S744>>.

that there is a lack of federal *or* provincial protection for public sector whistleblowers.<sup>184</sup> Therefore, the Charbonneau recommendations to improve whistleblower protection and witness immunity, if enacted, may in fact surpass parallel protections at the federal level.<sup>185</sup> Finally, the central recommendation made by the Commission around citizen engagement was the suggestion of enacting legislation to mirror the United States' *False Claims Act*.<sup>186</sup> There is no similar legislation that exists at the federal level, although some commentators have advocated for such a change.<sup>187</sup> Accordingly, if a *False Claims Act* were enacted in Quebec, it might pave the way for a similar change at the federal level, to increase citizen involvement in the fight against corruption.

## B. International Public Procurement Standards

Finally, the recommendations can also be critically assessed with reference to the work of the OECD, an organization whose members form the bulk of the world's advanced economies, including Canada. The OECD operates as a forum in which governments share work, collect expertise, and set international standards in a variety of areas.<sup>188</sup> In light of this, it is particularly helpful to assess the Charbonneau recommendations and their potential for reform in Quebec against the expertise of the OECD. In 2009, the OECD produced a set of principles to achieve integrity in public procurement.<sup>189</sup> The Charbonneau recommendations accord in large part with the suggested reforms set out by the OECD. First, the OECD criticized the fact that public procurement reforms have focused predominantly on the formation of contracts stage only, which is construed as the "tip of the iceberg."<sup>190</sup> The OECD identified a need for governments to prevent corruption in the entire procurement cycle, rather than focusing almost exclusively on the contract formation stage. This broad change affecting every aspect of procurement is precisely what the Charbonneau recommendations seek to trigger. While some recommendations focus on the rules around tendering and contract formation, the majority extends beyond formal contract management to touch on every aspect of public procurement, as well as consolidating expertise and improving knowledge around best public procurement practices generally.

Beyond the basic premise that reform must focus on every stage of public procurement, numerous other Charbonneau recommendations accord with principles enunciated by the OECD. First, the OECD concluded that the needs assessment stage is particularly

184 Government of Canada, *Open Government*, "Idea details: Enhancing Whistleblower Protection", online: <[open.canada.ca/en/idea/enhancing-whistleblower-protection](https://open.canada.ca/en/idea/enhancing-whistleblower-protection)> archived at <<https://perma.cc/LQ53-SBMF>>.

185 For calls to improve whistleblower protection in Quebec, see Syndicat de professionnelles et professionnels du gouvernement de Québec, *Whistleblower Protection: For a Québec with integrity* (2014: Service de recherche), online: <[www.spgq.qc.ca/utilisateur/documents/Protection-divulgateurs\\_Vanglais.pdf](http://www.spgq.qc.ca/utilisateur/documents/Protection-divulgateurs_Vanglais.pdf)> archived at <<https://perma.cc/ERH6-3KUK>>.

186 Charbonneau Report, *supra* note 6, Part 5, ch 2 at 166.

187 See Kaitlyn Mason, "Incentivizing Integrity: Adopting a Canadian False Claims Act" (30 June 2016), *Calgary Chamber Blog* (blog), online: <[www.calgarychamber.com/sites/default/files/user/files/Incentivizing%20Integrity%20-%20Adoption%20of%20a%20Canadian%20False%20Claims%20Act.pdf](http://www.calgarychamber.com/sites/default/files/user/files/Incentivizing%20Integrity%20-%20Adoption%20of%20a%20Canadian%20False%20Claims%20Act.pdf)> archived at <<https://perma.cc/8NHD-SHPM>>. Mason notes that current federal laws to protect public procurement are deficient and should be reformed, particularly in light of the ambitious infrastructure spending plan tabled by the federal government in the 2016 Federal Budget. Mason thus recommends a *False Claims Act* as an efficient enforcement mechanism, particularly based on its success in the United States.

188 For more information on the OECD, see The Organisation for Economic Cooperation and Development, "About", online: <[www.oecd.org/about/](http://www.oecd.org/about/)> archived at <<https://perma.cc/5JWF-VHXV>>.

189 OECD, *OECD Principles for Integrity in Public Procurement* (2009), online: <[www.oecd.org/gov/ethics/48994520.pdf](http://www.oecd.org/gov/ethics/48994520.pdf)> archived at <<https://perma.cc/PS9M-J7RN>>.

190 *Ibid* at 9.



vulnerable to corruption and political interference.<sup>191</sup> The Commission's recommendation to establish a central authority on procurement, particularly to assist public contracting authorities that have insufficient expertise at the needs assessment stage, responds directly to this concern. The OECD integrity principles focus on the better management of public funds and the need to ensure that procurement officials meet "high professional standards of knowledge, skills and integrity."<sup>192</sup> Again, the Commission paid particular attention to these principles by enacting a raft of recommendations focused specifically on reviewing and enhancing existing ethics and professional conduct frameworks, as set out in Part III(C)(iii) above. The OECD also construed, as a central principle, close cooperation and high standards of integrity as between government and the private sector.<sup>193</sup> The Commission's recommendations mirror this principle with a specific focus on depoliticizing procurement processes, as well as ensuring a "cooling-off" period for employees transitioning from the public to private sector.

Finally, the OECD stressed the importance of establishing a clear chain of responsibility, effective control mechanisms, and empowering individual involvement where "[d]irect control by citizens can complement these traditional accountability mechanisms."<sup>194</sup> The Charbonneau recommendations (set out in Part III(C)(ii) and (iii) above) accord thoroughly with these principles, focusing in part on proper enforcement and complaint management, and clearly designating chains of authority as between control bodies such as the PPA and UPAC. The recommendations are also buttressed throughout by suggestions to empower individual action and citizen involvement, through general educational endeavors as well as the establishment of legislation to allow citizens to pursue allegations of fraud on behalf of the state. Empowering individuals as agents of change is reflected both in the recommendations and in the action strategies, set out in Part III(C)(i) above, as well as the recommendation that Quebec adopt a law mirroring the American *False Claims Act*.<sup>195</sup> This brief review of the Charbonneau recommendations as compared to principles enunciated by a sophisticated body such as the OECD demonstrates that the Commission's work aligns broadly with key concerns and suggestions for reform from expert international communities in the fight against corruption, and lends credence to the assertion that the Charbonneau report offers much by way of structural reform to target corruption in public procurement in Quebec.

## CONCLUSION

In conclusion, the Charbonneau Commission has been a unique opportunity for a detailed and sophisticated examination of corruption in an industry sector which has long been accepted as one of the most prone to corruption. The Commission's recommendations have the potential for major structural reform in public procurement, and I suggest that the nature of the Commission as a public inquiry does not undermine the validity of the recommendations. While public inquiries have some strategic value, the Commission represented more than mere political grandstanding. The recommendations were based on an extensive assessment of expert testimony, a consideration of domestic and foreign experience, and a sound understanding of corruption generally. They extended beyond the "tip of the iceberg" of tendering rules and touched on extensive aspects of Quebec industries and public systems. The recommendations accord with and even surpass parallel federal legislation in certain respects, and respond to what sophisticated international entities such as the OECD have identified as central challenges in the fight against corruption.

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191 *Ibid* at 10.

192 *Ibid* at 11-12.

193 *Ibid* at 12.

194 *Ibid* at 13.

195 For more detail, see the discussion at note 116.

While it remains to be seen whether the Commission's work will repair public confidence in government in Quebec, the recommendations have already led to legislative change, provide a sound basis for reform, and are a valuable contribution to an examination and understanding of public procurement corruption in Quebec.