

QUEBEC'S BILL 1:  
A CASE STUDY IN ANTI-CORRUPTION LEGISLATION  
AND THE BARRIERS TO EVIDENCE-BASED LAW-MAKING

by

Graham Steele

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## DEDICATION

For  
Tilly,  
Deivan,  
and  
Kiran

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## **ABSTRACT**

Corruption is a significant problem around the world. Large-scale public works projects are especially prone to corruption. Much international effort has been devoted to fighting corruption, but the impact of these efforts is debatable.

Public-sector procurement in the Canadian province of Quebec has, since 2009, been beset by scandal. After defeat of the Liberal government in 2012, the first bill introduced by the new Parti Québécois government was an anti-corruption measure. The heart of Bill 1 is a system by which construction contractors have to demonstrate “integrity” in order to bid on public contracts.

Quebec’s lawmakers could have looked to international and national anti-corruption instruments, a vast literature, and practical examples from other jurisdictions. Instead, there is almost no reference in the debates to this anti-corruption context. The lawmaking process was driven by other imperatives, particularly speed. The author draws conclusions for anyone wishing to influence the lawmaking process.

## LIST OF ABBREVIATIONS USED

ACRGTO	Association des constructeurs de routes et grands travaux du Québec (translation: Association of Road and Infrastructure Builders of Quebec)
AMF	Autorité des marchés financiers (translation : Financial Markets Authority) (Quebec). In most Canadian provinces, the agency with equivalent functions is called the Securities Commission.
CAQ	Coalition avenir Québec (translation: Coalition for Quebec’s Future) (Quebec political party)
CEIC	Commission d’enquête sur l’octroi et la gestion des contrats publics dans l’industrie de la construction (translation: Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry). Informally referred to as the Charbonneau Commission.
CFPOA	Corruption of Foreign Public Officials Act (Canadian legislation)
CMMTQ	Corporation des maîtres mécaniciens en tuyauterie du Québec (CMMTQ) (translation: Association of Master Pipe Mechanics of Quebec)
CPI	Corruption Perceptions Index (an initiative of TI)
CSN	Confédération des syndicats nationaux (translation : Confederation of National Trade Unions) (Quebec)
DGE	Directeur générale des élections (translation: Director General of Elections) (Quebec)
EPAC/EACN network	European Partners Against Corruption/European Contact-Point Network Against Corruption).
EU	European Union
FATCA	Foreign Account Tax Compliance Act (US legislation)
FATF	Financial Action Task Force on Money-Laundering (G7)
FCPA	Foreign Corrupt Practices Act (US legislation)
GPA	World Trade Organisation Agreement on Government Procurement
GRECO	Council of Europe Group of States against Corruption
MNA	Member of the National Assembly (Quebec)
Moneyval	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (Council of Europe)
OECD	Organization for Economic Co-operation and Development
OLAF	Office de lutte anti-fraude (translation: Anti-Fraud Office) (EU)
PLQ	Parti libéral du Québec (translation: Quebec Liberal Party) (Quebec political party)
PQ	Parti québécois (Quebec political party)
RBQ	Régie du bâtiment du Québec (translation: Quebec Building Authority)

RENA	Registre des entreprises non admissibles aux contrats publics (translation: Registry of businesses barred from public contracts) (Quebec)
TI	Transparency International
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNODC	United Nations Office on Drugs and Crime, which acts as the secretariat for the UNCAC
UPAC	Unité permanente anti-corruption (Quebec)

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It goes without saying that any deficiencies that remain are my own.



# CHAPTER 1 INTRODUCTION

## 1.1 BACKGROUND

The first bill introduced in Quebec’s National Assembly following the September 4, 2012, election victory of the Parti Québécois under leader Pauline Marois was the anti-corruption *Integrity in Public Contracts Act*.<sup>1</sup> Throughout this thesis, this bill will be referred to as Bill 1.<sup>2</sup>

Public-sector corruption, and specifically corruption in public-sector procurement, had risen to the top of Quebec’s political agenda in the three years preceding the introduction of Bill 1. Beginning with two reports from the Radio-Canada investigative show *Enquête* in September and October of 2009, a system of collusion and bid-rigging in the construction industry was exposed.<sup>3</sup> The widening

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<sup>1</sup> SQ 2012, c 25. The title in French is *Loi sur l’intégrité en matière de contrats public*. A note on translation: The official language of Quebec is French, and the working language of the Quebec National Assembly is French. The National Assembly also produces an official English version of its statutes. Where there is an official English version of a document or title, the English title will be used. Where there is no official English version, the French version will be used, with the author’s translation in square brackets. Subsequent uses of a document or title are to the English translation.

<sup>2</sup> In Quebec, as in other provinces, the numbering of bills begins afresh with every new session of the legislature. For example, the first bill introduced in every session is Bill 1. Over time, therefore, it becomes confusing to refer to a bill by its number, because there are so many. Nevertheless, there are two reasons why bill numbers are useful, and why the shorthand “Bill 1” is used throughout this thesis. First is the sheer convenience of using the bill number as a short title. Quebec does not follow the “short title” convention used in English-language legislatures, so the official bill names tend to be long. Second, a bill that attracts considerable public attention is known, ever after, by that bill number. The public often does not know, or care, what the official title of the bill is, nor the correct citation, nor the fact that there are many other bills with the same number.

<sup>3</sup> The broadcasts were “Un club select, selon un entrepreneur” [translation: “A select club, according to one businessman”], aired on September 21, 2009, available online at <<http://ici.radio-canada.ca/regions/Montreal/2009/09/20/004-construction-exclusif-enquete.shtml>> and “Collusion frontale: pratiques douteuses dans l’industrie de la construction” [translation: “Full-on collusion: dubious practices in the construction

scandal grew to cover Quebec's largest engineering firms, construction companies, construction trade unions, organized crime, and provincial and municipal politicians.

The Liberal government under Premier Jean Charest tried to deal with the ever-growing scandal with a series of legislative measures, setting up a co-ordinated anti-corruption unit, and eventually, appointing a public inquiry: the Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction.<sup>4</sup> The Commission is commonly referred to as the Charbonneau Commission after its chair, Justice France Charbonneau of the Quebec Superior Court. The Commission was set up by Order in Council on October 19, 2011,<sup>5</sup> and commenced its hearings on May 22, 2012.<sup>6</sup> The revelations at the hearings transfixed Quebecers, who were able to watch proceedings on the commission's dedicated television channel.

The opposition Parti Québécois (PQ) sensed a political opportunity and, in the period leading up to the provincial election on September 4, 2012, made Liberal corruption a key issue. The PQ won the most seats in the election, but fell short of a majority. The minority PQ government led by Marois was sworn in a couple of weeks later.

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industry", aired on October 15, 2009], available online at <<http://ici.radio-canada.ca/emissions/enquete/2009-2010/Reportage.asp?idDoc=93395>>.

<sup>4</sup> [translation: Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry]. In French media, the acronym "CEIC" is commonly used, as well as "la Commission Charbonneau." In English media, the reference is almost always to "the Charbonneau Commission".

<sup>5</sup> D 1029-2011, GOQ 2011.II.4767.

<sup>6</sup> The Charbonneau Commission has a website with extensive information about its operations, including verbatim transcripts and videos of all its hearings, at <[www.ceic.gouv.qc.ca](http://www.ceic.gouv.qc.ca)>.

The provincial legislature, known as the Assemblée Nationale,<sup>7</sup> was called into session on October 30, 2012.<sup>8</sup> Bill 1 was introduced the next day.<sup>9</sup> Given the prominence of the corruption issue in the election, it is not surprising that the PQ government should, in its legislative program, give priority to integrity in public-sector procurement. There was political advantage in painting an immediate, sharp contrast with the defeated Liberal government.

The minister responsible for Bill 1 was Stéphane Bédard, minister for the Treasury Board. Bédard, a 44-year-old lawyer, was a veteran member of the National Assembly (MNA). He was first elected MNA for Chicoutimi in 1998, when he was only thirty years old, and had served continuously ever since. His father, Marc-André Bédard, had been a PQ stalwart and had served as a minister in the government of Premier René Lévesque in the late 1970s and early 1980s.

Over the course of the parliamentary hearings on Bill 1, Bédard recounted the genesis of the bill. On his first day in office as minister, he sat down with a senior civil servant at the Treasury Board, Julie Blackburn, to sketch a plan.<sup>10</sup> A team was put together to research and draft a bill. Bédard recounts that this team worked night and day for a month and a half until the bill was ready.<sup>11</sup>

The “heart”<sup>12</sup> of Bill 1 is a new administrative procedure, in which companies wishing to bid on public contracts must obtain, from the Autorité des marchés

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<sup>7</sup> [Translation: National Assembly.]

<sup>8</sup> There is extensive online information about the National Assembly at <[www.assnat.qc.ca](http://www.assnat.qc.ca)>, including full transcripts of both the National Assembly itself and of its committees. The online transcripts do not, unfortunately, contain page numbers.

<sup>9</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (1 November 2012).

<sup>10</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (27 November 2012).

<sup>11</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques*, 40th Leg, 1st Sess (12 November 2012) (Stéphane Bédard).

<sup>12</sup> This expression (“the heart of the bill”) is used frequently by Minister Bédard throughout the legislative hearings : Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (12 November 2012; 23 November 2012; 27

financiers (AMF)<sup>13</sup> a certificate of integrity. Without the certificate, the company cannot bid. The AMF's decision whether to grant the certificate is to be based on a mixture of objective and subjective factors.<sup>14</sup>

Over the next thirty-six days, Bill 1 passed through all stages of the approval process, and received Royal Assent on December 7, 2012. Most of it entered into force on that day.

## **1.2 METHODOLOGICAL APPROACH AND ISSUES**

### **1.2.1 The Research Question and Why It Matters**

This thesis is a case study on the making of statute law, and specifically on lawmakers' reasoning as they consider how to confront a pressing public-policy issue; in this case, corruption in public-sector procurement.

The principal research question in this thesis is: What did Quebec's lawmakers think they were doing when they were debating Bill 1? To put it another way: Did Quebec's lawmakers believe Bill 1 would have an impact on corruption in public-sector procurement, and if so, what was the basis for that belief?

An immediate objection comes to mind: Why does it matter what Quebec's lawmakers were thinking? In Canada, there is a well-established legal principle that

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November 2012). The same expression is used by Julie Blackburn, Treasury Board Secretariat, on December 3, 2012.

<sup>13</sup> [Translation: Financial Markets Authority.] This body would be known in most other provinces as the Securities Commission.

<sup>14</sup> There is much more detail on the contents of Bill 1 in Chapter 4 of this thesis.

transcripts of proceedings in an elected assembly<sup>15</sup> are of limited value in the interpretation of statutes. The general rule has been laid down in two Supreme Court of Canada decisions: *R. v. Morgentaler*<sup>16</sup> in 1993, and *Re Rizzo & Rizzo Shoes*<sup>17</sup> in 1998. The rule is that Hansard is admissible, but should not be given much weight.

In *Morgentaler*, Sopinka J. traces the early rejection of Hansard evidence, and the more recent relaxation of that rule:

*The former exclusionary rule regarding evidence of legislative history has gradually been relaxed (Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297, at pp. 317-19), but until recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J. in Reference re Residential Tenancies Act, 1979, supra, at p. 721 as "inadmissible as having little evidential weight", and was excluded in Reference re Upper Churchill Water Rights Reversion Act, supra, at p. 319, and Attorney General of Canada v. Reader's Digest Association (Canada) Ltd., [1961] S.C.R. 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.<sup>18</sup>*

(Emphasis added.)

The last, underlined sentence is the one most commonly cited with respect to Hansard evidence.

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<sup>15</sup> Parliamentary transcripts are known in English-speaking provinces as “Hansard”, after an early printer and publisher of parliamentary transcripts at Westminster. That name will be used throughout this thesis, even though it is not commonly used in Quebec.

<sup>16</sup> [1993] 3 SCR 463, 1993 CanLII 74 (SCC), hereafter *Morgentaler*.

<sup>17</sup> [1998] 1 SCR 27, 1998 CanLII 837 (SCC), hereafter *Rizzo Shoes*.

<sup>18</sup> *R v Morgentaler*, [1993] 3 SCR 463 at 484.

In *Rizzo Shoes*, Iacobucci J. extends the principle of *Morgentaler* so as to apply to all cases of statutory interpretation, and not just constitutional “pith and substance” cases:

*Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation.*<sup>19</sup>

Notably, Iacobucci J. does not enumerate “the many frailties” of Hansard. The main difficulty, referred to by Sopinka J. in *Morgentaler*, is that in a multi-member body like a legislature, there is no single person who can speak about what “the legislature” intended. This conceptual difficulty is at the root of Canadian courts’ reluctance to accept Hansard evidence as proof of its contents.

In the end, the *Morgentaler/Rizzo* rule is clear enough: Hansard is admissible, but with limited weight. In *Rizzo Shoes* itself, Iacobucci J. demonstrated a restrained use of Hansard: a brief quotation from the sponsoring minister’s second-reading speech, supporting an interpretation reached by other means.<sup>20</sup>

Based solely on the *Morgentaler/Rizzo* rule, then, it may well be argued that a deep examination of Hansard is misplaced. But the purpose of the *legal scholarly* examination of Hansard, as proposed in this thesis, is different from the purpose of *judicial* examination. When a court is considering statute law, it is engaged in an interpretive exercise. It is trying to determine how a law stated in general terms should be applied to a set of facts. As part of this exercise, it will consider, among other things, the background to the law (sometimes expressed as “the mischief to be remedied”) and the lawmakers’ intention.<sup>21</sup>

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<sup>19</sup> *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at 46.

<sup>20</sup> *Ibid* at 45-46.

<sup>21</sup> The various *Interpretation Acts* across Canada all state some version of this requirement, e.g. *Interpretation Act*, RSQ c I-16, s 41; *Interpretation Act*, RSC 1985, c I-21, s 12.

The purpose of the methodology adopted in this thesis is not to aid in statutory interpretation, in the narrow sense in which that inquiry is conducted in the courts. The purpose is to put the law-making process under the microscope to determine how legislation is made.

Ultimately, the purpose of the methodology adopted in this thesis is to improve the quality of legislation. This thesis fits within the broad framework of law reform and public interest advocacy. The more we understand about how laws are made, the more likely it is that future lawmakers will understand how to make laws that actually achieve their ostensible objectives, and the more likely it is that engaged citizens will be able to influence future lawmakers to adopt effective laws.

There is another, more unique aspect to this thesis: I am myself a former lawmaker. I served for twelve years in the Nova Scotia House of Assembly. This personal experience influences my choice of topic, informs my analysis, and helps me to understand the dynamics in the Quebec National Assembly and its committees.

Outside the constitutional context, legal practitioners and scholars in Canada do not typically devote themselves to detailed study of how a particular law was made. There is a well-known gap between scholarly literature and what actually gets done in the legislature.<sup>22</sup> Scholars seem nonplussed by this gap, and uncertain what to do about it.

My personal experience is that judges, lawyers, law students, and legal academics are not, on the whole, very knowledgeable about the law-making process. If they are knowledgeable, it is about the formalities: second reading follows first reading, referral to committee follows second reading, and so on. (There are exceptions, of

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<sup>22</sup> See, for example, Michelle M. Mello & Kathryn Zeiler, “Empirical Health Law Scholarship: The State of the Field” (2008) 96 *Geo LJ* 649, Section III (Impact) and Section IV (Future Directions), where the authors trace the impact, or lack of impact, of empirical health law research in the legislative process.

course, especially those who have served in a legislature or at senior levels of the civil service.) There is relatively little understanding of the law-making process as a complex machine in motion. Lawmakers have their own psychology, and legislatures have their own sociology, but for most people they are a mystery.

“Nobody should watch a law or a sausage being made” is an aphorism frequently attributed to 19<sup>th</sup>-century German chancellor Otto van Bismarck. There is no evidence that he actually said it, but it’s a good line: the legislative process can be messy and unappetizing. The legal profession takes this Bismarckian aphorism too far, and generally averts its eyes from the law-making process. My research project is to take a long, hard, systematic look at one particular sausage produced by one particular sausage factory: Bill 1, the *Integrity in Public Contracts Act*, debated by the Quebec National Assembly in the late fall of 2012, and passed into law on December 7, 2012.

### 1.2.2 Sources and data

The circumstances of Bill 1’s passage through the National Assembly are amenable to careful study, because there are verbatim transcripts of all proceedings.

After introduction on November 1, 2012, Bill 1 was referred to the Commission des finances publiques,<sup>23</sup> which is a standing committee of the National Assembly. The Standing Committee held extensive hearings (four days, during which it heard eighteen formal presentations) and deliberations (eight days) for which there are also verbatim transcripts (totalling 171,425 and 216,607 words, respectively). Those transcripts, which are all available on-line,<sup>24</sup> provide the principal factual foundation for this thesis. Reliance on the transcripts has the methodological advantage that the transcripts are

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<sup>23</sup> [Translation: Standing Committee on Public Finance.] Hereafter, this committee will be referred to as “the Standing Committee”.

<sup>24</sup> Quebec, National Assembly, *Journal des débats*, available online <[www.assnat.qc.ca](http://www.assnat.qc.ca)>.



equally available to all researchers. Future studies of Bill 1 can proceed on the same factual basis as this study.

Apart from the simple fact that they are available, the Bill 1 transcripts are an unusually rich source of information. Because the Marois government could not command majority support from within the ranks of its own caucus, the government had to win opposition support not only for the bill itself, but for every amendment it proposed, and also to defeat any amendment it opposed. As Minister Bédard put it, during his second-reading speech:

*Donc, je reste ouvert aux commentaires. Nous sommes en situation, vous le savez, de... en situation minoritaire, ce qui nous impose à chacun, et pas seulement à moi, l'obligation d'agir avec souplesse, à l'écoute. On peut avoir des idées. Ce n'est pas parce qu'on a une idée que c'est la meilleure.<sup>25</sup>*

*[translation: So I'm open to comments. We're in the situation, you know, of... in a minority situation, which imposes on each of us, and not just on me, an obligation to act with flexibility, to listen. Everyone can have ideas. It's not just because one has an idea that it's the best.]*

The fact that Bill 1 was debated during a minority government means that the government's thought process is unusually transparent.

There are, however, methodological challenges with reliance on transcripts. First, there is the question of accuracy. Hansard is produced by after-the-fact transcription of audio recordings.<sup>26</sup> There is no guarantee that the written transcript is error-free.<sup>27</sup> On the

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<sup>25</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012) (Stéphane Bédard).

<sup>26</sup> In some assemblies, there are also video recordings. Video recordings of committee hearings are less common. Whether or not there are video recordings, Hansard is generally produced from the audio recording.

<sup>27</sup> In the Nova Scotia assembly, there is no formal mechanism for correcting errors in the transcript. In the House of Commons, a draft ("the blues") is circulated to members, who may request corrections, including (with restrictions) what they meant to say, rather than what they said: see <[http://www.parl.gc.ca/About/House/compendium/web-content/c\\_d\\_debateshansard-e.htm](http://www.parl.gc.ca/About/House/compendium/web-content/c_d_debateshansard-e.htm)>.

other hand, there is no better source of information on what was said during the legislative process. Another aspect of accuracy is the fact that something is lost, inevitably, in the reduction of oral speech to writing. One loses emotion, pace, tone, and similar features of the spoken word. The transcriber must also attempt to punctuate the utterances, and it may not be in keeping with how the speaker sounded or what the speaker intended.

Secondly, there is the question of context. The recordings, and therefore the transcript, capture mainly the voice of the person who “has the floor,” and so misses what is going on elsewhere in the room. The reality of legislative proceedings is that there are many people in the room, and much can be going on: asides, interjections, distractions, interruptions. It is, for example, sometimes apparent from the transcript that the speaker is responding to something that someone else has said, but the recording has failed to pick up that interjection. The researcher cannot be sure what the interjection was, or who said it, and must guess from the context of the speaker’s response. In short: transcripts of legislative proceedings are a rich source of information, but they must be used with due recognition of their limitations.

Another methodological route, either instead of or in addition to an examination of the transcripts, would have been to conduct interviews with the principal actors: for example, interviews with the minister who sponsored the bill, and led it through committee; with the chief spokespersons for the opposition parties; with the other members of the standing committee; and with the lead civil servants. I have chosen not to pursue that route for several reasons: the logistical reasons associated with travel to another province; the obtaining of ethics approvals; the uncertainty of whether the proposed interviewees would in fact agree to an interview; and the quality and reliability of the evidence so obtained. The last reason is, in my view, the most significant.

A researcher must, to be blunt, be concerned about the reliability of politicians’ recollections. First, there is simply the question of memory. With the passage of time, details may be forgotten or misremembered. In contrast, the transcript is a relatively

complete, contemporaneous record of what was said. Second, there is a question of a politician's later account being changed to suit a narrative motivated by reasons other than strict factual accuracy. My experience is that politicians are prone to "remembering" what they wish had happened, rather than what did happen. Ex-politicians can be more reliable, because they are less worried about negative repercussions from being truthful,<sup>28</sup> but that is not invariably true.

With respect to Bill 1, the principal dramatis personae are, with only one exception, still actively engaged in politics at the time that this thesis is being submitted (spring 2015). The principal actors in the development and debate of Bill 1 were:

- Stéphane Bédard. MNA for Chicoutimi since 1998. In the 2012 PQ administration, he was minister responsible for government administration, Chair of the Treasury Board, and Government House Leader. He was Bill 1's sponsoring minister, and therefore the chief spokesperson for the government on Bill 1.
- Sam Hamad. Liberal MNA for Louis-Hébert since 2003. Former minister in the Charest government. Opposition critic for Treasury Board, and chief spokesperson for the opposition Liberal party on Bill 1. First speaker for the Liberals on Bill 1 on November 20, 2012.
- Jacques Duchesneau. MNA for Saint-Jérôme, 2012-2014, with the Coalition Avenir Québec (CAQ). Police chief of Montreal, 1994-98. Chief spokesperson for CAQ on Bill 1.
- Amir Khadir. Co-leader of the small opposition party Quebec Solidaire. Participated occasionally in the standing committee hearings on Bill 1.
- Julie Blackburn. Secrétaire associée aux marchés publics, Secrétariat du Conseil du trésor [translation: Associate Secretary for Public Markets, Treasury Board

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<sup>28</sup> Alison Loat and Michael Macmillan, *Tragedy in the Commons: Former Members of Parliament Speak Out About Canada's Failing Democracy* (Toronto: Random House Canada, 2014) is a good example of the value of interviewing politicians after they have left politics. For reasons stated in the book, very few of the eighty ex-MPs interviewed could have been as forthcoming if they were still in office.

Secretariat]. Key civil servant in the Treasury Board Secretariat. Project lead on the drafting of Bill 1. Permitted to speak at meetings of the Standing Committee on Public Finances.

MNAs Bédard, Hamad, and Khadir were re-elected in the 2014 Quebec provincial election, and continue to sit as members of the National Assembly. Of the principal actors on Bill 1, only MNA Duchesneau is today out of politics. He did not re-offer in the 2014 election. Julie Blackburn continues to serve in a senior role in the Treasury Board Secretariat.

### **1.3 STRUCTURE**

This thesis is structured as follows. Chapter 2 reviews the concept of “corruption”, and the national and international instruments that have grown to fight it. Chapter 3 reviews the academic literature on corruption. Both Chapters 2 and 3 focus on corruption in public-sector procurement, because the anti-corruption fight and its literature are vast, and growing by the week. Chapters 2 and 3 are also generally limited to what was published by the end of 2012, because that was “the state of the art” when Bill 1 was being developed and debated in the Quebec National Assembly. Chapter 4 is the heart of the thesis. It consists of a close analysis of Bill 1 and its passage through the Quebec National Assembly. Chapter 5 draws some conclusions about what was going on in the Quebec National Assembly, and the implications for future lawmakers and law reformers.

## CHAPTER 2 CONCEPTS AND INSTRUMENTS

### 2.1 CONCEPTS: CORRUPTION AND PUBLIC PROCUREMENT

#### 2.1.1 Corruption as a contested concept

Bill 1 was a response to a series of stories of corrupt practices in recent years, but nobody would suggest that corruption is a new phenomenon. Corruption is referred to in the Old Testament<sup>29</sup> and appears throughout recorded history.<sup>30</sup> Corruption has existed throughout recorded history and across political systems.<sup>31</sup> There is a vast academic and non-academic literature on public-sector corruption. Kleinig and Heffernan, writing in 2004, refer to “a massive quantity of discussion and research.”<sup>32</sup> Yet despite the volume of writing on corruption, there is not universal agreement on what “corruption” is. That massive quantity of discussion and research, say Kleinig and Heffernan, has “yielded few shared understandings.”<sup>33</sup>

If there is agreement on corruption, it is that corruption is a complex phenomenon:

*Corruption is a complex phenomenon with economic, social, political and cultural dimensions, which cannot be easily eliminated.*<sup>34</sup>

In the same vein, Tabish and Jha, writing in 2011, say

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<sup>29</sup> Exodus 23:8: “And thou shalt take no bribe: for a bribe blindeth them that have sight, and perverteth the words of the righteous” (American Standard Version). Other references to bribery in the Old Testament include Deuteronomy 16:19 and 27:15, Proverbs 17:8, Ecclesiastes 7:7, Isaiah 5:23, and Amos 5:12.

<sup>30</sup> John T. Noonan Jr., *Bribes* (1984: New York: Macmillan), an erudite study of bribery, with illustrations from throughout recorded history.

<sup>31</sup> Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978) at 2, note 2.

<sup>32</sup> John Kleinig and William C. Heffernan, “The Corruptibility of Corruption,” in *Private and Public Corruption* (Lanham, Maryland: Rowman & Littlefield, 2004) at 3-4.

<sup>33</sup> *Ibid.*

<sup>34</sup> EU, Commission, *Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report* (Brussels: EC, 2014) at 3.

*Fighting corruption is very difficult because it is a multi-faceted social phenomenon that penetrates horizontally and vertically through many areas of society.*<sup>35</sup>

Even a very experienced anti-corruption crusader like Laurence Cockcroft, one of the co-founders of a leading anti-corruption NGO, Transparency International (TI),<sup>36</sup> does not attempt to define “corruption” in his recent book on corruption and the genesis of TI:

*Formal definitions of corruption range from the decay of society to the single act of bribery. The corruption discussed in this book always involves the acquisition of money, assets or power in a way which escapes the public view; is usually illegal; and is at the expense of society as a whole either at a ‘grand’ or everyday level. Personal enrichment is nearly always a key objective, although corruption may be engineered by a group with the intention of achieving or retaining political power, so that these motives can become closely entwined.*<sup>37</sup>

We see, in this quotation, that the definitional conundrum is simply avoided. Cockcroft settles instead for a description of certain features of what he will write about. This strategy is common throughout the literature: description and anecdote rather than definition.

Of the many conceptual difficulties involved in defining corruption, one of the knottiest is the question of cultural relativism. This idea is frequently expressed in some variation on the thought that an action considered corrupt in one society may not be considered corrupt in another society. In an era seeing substantial growth in international anti-corruption instruments and organizations, it is an important question whether anti-

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<sup>35</sup> S.Z.S. Tabish and Kumar Heeraj Jha (2012), “The impact of anti-corruption strategies on corruption free performance in public construction projects”, in *30 Construction Management and Economics* 21-35 at 21.

<sup>36</sup> For more on Transparency International, see section 3.3.2 below.

<sup>37</sup> Laurence Cockcroft, *Global Corruption: Money, Power, and Ethics in the Modern World* (Philadelphia: University of Pennsylvania Press, 2012) at 2.

corruption efforts are an attempt to impose upon developing countries moral values of Western, or Christian, or capitalist countries.<sup>38</sup>

How, then, to reconcile the vast literature on corruption with the fact that, when pressed, the concept becomes squishy, and can be elaborated only with the use of anecdotes and examples? It may be a matter of, as Justice Potter Stewart of the U.S. Supreme Court famously wrote in a different context, “I know it when I see it.”<sup>39</sup>

Always keeping in mind the vastness of the literature, and the paucity of shared understandings, the most widely-used definition of corruption is “the use of public office for personal gain,”<sup>40</sup> which can also be expressed as “the abuse of entrusted power for

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<sup>38</sup> Åse Berit Grødeland & Aadne Aasland, “Fighting corruption in public procurement in post-communist states: Obstacles and solutions” (2011) 44 *Communist and Post-Communist Studies* 17. Corruption is high in post-communist states, and is especially high in public procurement. Moreover, the corruption has been stubbornly resistant to anti-corruption measures. The authors posit that anti-corruption measures imported from Western Europe have largely failed to address local factors. Another example is “Sino-Forest execs blame Canada fraud charges on ‘cultural differences’”, *The FCPA Blog*, September 8, 2014, <<http://www.fcpablog.com/blog/2014/9/8/sino-forest-exec-blame-canada-fraud-charges-on-cultural-dif.html>>.

<sup>39</sup> He was, in *Jacobellis v. Ohio* (1964), writing about hard-core pornography. Here’s the full text of Justice Potter’s concurrence in *Jacobellis*, with the footnotes omitted:

It is possible to read the Court's opinion in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, in a variety of ways. In saying this, I imply no criticism of the Court, which, in those cases, was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that, under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

<sup>40</sup> C.W. Gray and D. Kaufmann, “Corruption and Development”, in 35 *Finance and Development* 1 at 7, cited by S.Z.S. Tabish and Kumar Heeraj Jha (2012), “The impact of anti-corruption strategies on corruption free performance in public construction projects”, in 30 *Construction Management and Economics* 21-35 at 21.

private gain.”<sup>41</sup> This definition is good enough for conversation, or for popular literature. But when it comes time to translate the concept into legal terms—a rule that can be promulgated, understood by those to whom it applies, and fairly enforced against them—it tends to fall apart. That is because “corruption” is at bottom a philosophical concept and not a legal one.

In this respect, corruption takes its place among other concepts like “the public interest,” of which there are thousands of instances in Canadian statute law. As Michael Feintuck writes, “Though the very phrase ‘the public interest’ has an air of democratic propriety, the absence of any identifiable normative content renders the concept insubstantial, and hopelessly vulnerable to annexation or colonization by those who exercise power in society.”<sup>42</sup> Feintuck goes on to suggest, as an explanation for its persistence, “... the term is so commonly used, and so historically persistent, that we use it without thinking about what it means.”<sup>43</sup> The same can justifiably be said about corruption.

The conceptual difficulties lead to odd results. The United Nations Convention Against Corruption, for example, does not include any definition of what “corruption” actually is, though signatory states solemnly vow to fight it.<sup>44</sup> Quebec has an *Anti-Corruption Act*, but nowhere in that Act is there a definition of “corruption.”<sup>45</sup> So the law is “anti” what, exactly? The Act’s focus is on “a wrongdoing” (« acte répréhensible »), which is defined with a long list of criminal and administrative offences.<sup>46</sup> Perhaps “corruption” is nothing more than a handy catch-all for a list of illegal behaviours.

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<sup>41</sup> For example, it is used in the EU Anti-Corruption Report, note 34 above, at 2. This is also close to the definition used by Transparency International, the leading anti-corruption NGO, in its literature: see section 3.3.2 below for more on Transparency International.

<sup>42</sup> Mike Feintuck, *The Public Interest in Regulation* (Oxford University Press, 2004) at 33.

<sup>43</sup> *Ibid* at 35.

<sup>44</sup> The UNCAC is analyzed in more detail below, in section 2.2.3.

<sup>45</sup> *Loi concernant la lutte contre la corruption*, RSQ c. L-6.1.

<sup>46</sup> There is more on the *Anti-Corruption Act* below, in section 2.4.



If corruption is a contested concept—or simply a vague one—it goes without saying that any concept that incorporates corruption, such as “fighting corruption” and “anti-corruption”, are also contested or vague. The same is true of any concept that is at bottom an antonym or synonym for corruption. For example, Bill 1 in Quebec, the subject of this thesis, takes “integrity” as its focal point in the fight against corruption, but nowhere defines what “integrity” is. At best, there is the negative implication that if one receives the certificate of the Autorité des marchés financiers, and therefore is permitted to bid on public contracts, one must have integrity.

But “integrity” is itself a subjective and contested concept. It is not a term of art. It is not judicially defined. One author puts it this way:

*As philosophers also note, integrity is not only one of the most important and oft-cited ethical concepts, it is one of the most ambiguous. In common usage, “integrity” often functions as an all-purpose term of moral approval. In philosophical discussions, the concept connotes a more specific set of qualities that make for an integrated self. At a minimum, integrity demands practices that are consistent with principles, even in the face of strong countervailing pressures. Yet the term also implies something more than steadfastness. Fanatics may be loyal to their values, but we do not praise them for integrity. What earns our respect is a willingness to adhere to principles that satisfy certain basic demands, such as reasoned deliberation, internal consistency, generalizability and concern for others.<sup>47</sup>*

As Woolley and Stacey have pointed out in the context of professional regulation, practitioners in the field of psychology no longer subscribe to the idea that there is a quality known as “integrity” (or “good character”), that it can be judged in advance, and that an administrative proceeding is the right forum to identify it.<sup>48</sup> Nevertheless, the idea persists in law.

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<sup>47</sup> Deborah L. Rhode, *Personal Integrity and Professional Ethics* (New York: Routledge, 2010) at 29 (footnotes omitted).

<sup>48</sup> Alice Woolley and Jocelyn Stacey, “The psychology of good character: the past, present and future of good character regulation in Canada,” in K.B. Tranter et al., *Reaffirming Legal Ethics: Taking Stock and New Ideas* (New York: Routledge, 2010) at 165.

In the end, the word “corruption” is used, and used liberally, when precision is not required. When precision is required, as in the case of enforceable rules of law, the word will simply not do. As Kleinig and Heffernan put it, “Even though we may seek to provide corruption with a legal incarnation, it is not itself a legal notion.”<sup>49</sup> They add that “bribery, and possibly extortion, comes closer to fitting that profile [of a legal concept].”<sup>50</sup> That may well explain why, in legislation, the word “corruption” tends to be avoided, or broken down into smaller units.

### 2.1.2 Public-Sector Procurement and Corruption

This thesis zeroes in on a piece of legislation designed to counter one particular form of corruption—corruption in public-sector procurement—because that is the variety of corruption that prompted the Quebec government to respond with Bill 1. The concept of corruption becomes more concrete when applied to a specific sector like public-sector procurement.

For purposes of this thesis, “public-sector procurement” refers to contracts by public authorities for the acquisition of goods and services that the government needs to carry out its functions.<sup>51</sup> The concept of public-sector procurement can apply to every contract, from the the acquisition of paper clips to the building of a major bridge, and so too can the corruption of public-sector procurement.

Most of the attention in the literature, though, is on the building of very large infrastructure projects such as roads, airports, bridges, and similar civil infrastructure. It is widely acknowledged that public infrastructure is “particularly sensitive to corruption” because of the large amount of money involved, and the technical complexity of large

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<sup>49</sup> Kleinig and Heffernan, note 32 above, at 12.

<sup>50</sup> *Ibid* at 3-4.

<sup>51</sup> Sue Arrowsmith, “National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?”, in Sue Arrowsmith and Arwel Davies (eds.), *Public Procurement: Global Revolution* (London: Kluwer International Law, 1998) at 3.

projects.<sup>52</sup> As one expert witness told the Charbonneau Commission, “The problems of the vulnerability of the construction industry have created a systemic vulnerability that is exploited again and again everywhere.”<sup>53</sup>

Public procurement is a distinct management discipline, with its own body of knowledge and practitioners.<sup>54</sup> It also has its own body of literature.<sup>55</sup> In that literature, corruption is only one relatively small strand.

The essence of good public procurement is value for money. Overlaid on this basic concept are values like efficiency, effectiveness, and fairness.<sup>56</sup> Was the infrastructure

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<sup>52</sup> Helena Lindskog, Staffan Brege, and Per-Olof Brehmer, *Corruption in public procurement and private sector purchasing* (2010), 7 *Journal of Organisational Transformation and Social Change* 167-188 at 167. Elaine Dezenski, of the World Economic Forum’s Partnership Against Corruption Initiative (PACI) writes in “Is It Time to Design Corruption out of the System?”, available online at <[http://www.huffingtonpost.com/elaine-dezenski/is-the-time-right-to-design\\_b\\_4175733.html?utm\\_hp\\_ref=email\\_share](http://www.huffingtonpost.com/elaine-dezenski/is-the-time-right-to-design_b_4175733.html?utm_hp_ref=email_share)>, “there is fast-growing investment in the kind of large-scale strategic infrastructure projects—roads, airports, hospitals, energy grids, ICT networks—which are traditionally plagued by bribery.”

<sup>53</sup> Charbonneau Commission, Transcript, Volume 244 (October 7, 2014) at 131, lines 1-4 (evidence of Thomas D. Thacher). Thacher served as the first executive director of the Construction Industry Strike Force formed by New York State Governor Mario Cuomo in the 1980s, and as the New York City School Construction Authority’s first vice-president and inspector general from 1990 to 1996.

<sup>54</sup> There is, for example, a Canadian Council on Public Procurement, which describes itself as “the leading voice for professionals involved in public procurement in Canada” (see <[www.ccpp-ccmp.ca](http://www.ccpp-ccmp.ca)>); various provincial associations; and a variety of training programs for supply management and procurement education available in Canada and the United States.

<sup>55</sup> A leading international academic on public procurement is Sue Arrowsmith of the University of Nottingham. Her publications include *Public Procurement: Global Revolution*, note 51 above; and Susan L. Arrowsmith, John Linarelli, Don Wallace Jr., *Regulating Public Procurement* (The Hague: Kluwer International Law, 2000). The latest version (November 2012) of the on-line *Bibliography on Public Procurement Law and Regulation*, <[www.nottingham.ac.uk/law/pprg](http://www.nottingham.ac.uk/law/pprg)>, operated and updated by the Public Procurement Research Group, University of Nottingham, now runs to 343 pages. The latest version of the bibliography came out, coincidentally, at the same time Bill 1 was being debated in the Quebec National Assembly, and thus conveniently represents “the state of the art” at the time.

built? Was it built to a satisfactory standard and within a reasonable time? Was the standard achieved at the lowest possible price? Did all potential bidders get a fair opportunity to bid?

It follows that “corruption” of public-sector procurement can be understood as any action that intentionally interferes with the efficiency, effectiveness, and fairness of the procurement process. We are not focused here on good management practices, which would be an entirely different study. We are focused on deliberate attempts to subvert well-understood and well-accepted principles of public procurement.

Corruption is difficult to identify in any event, but particularly so in large-scale procurement:

*Corruption is difficult to identify since it occurs, in most cases, clandestinely and away from the public eye and records. It is very difficult to prevent or uncover these practices, for anyone who does not have the appropriate skills, access to the relevant documents and people and an in-depth involvement in the project.<sup>57</sup>*

The corruption can take many forms, and can occur at any stage of the project process, including “project identification, planning, financing, design, tender, execution, operation and maintenance.”<sup>58</sup> It is the very complexity of large-scale procurement that leads to the opportunity to engage in, and hide, corrupt practices.

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<sup>56</sup> There may also be other objectives, such as local industrial promotion. Some recent literature focuses on values like simplicity and flexibility: Sue Arrowsmith, “Modernising the EU’s Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility” (2012) 21 Public Procurement Law Review 71-82. These process values may be better subsumed in the more general values of efficiency. For example, an overly complex system is inefficient, and may be unfair, because it imposes complexity costs on potential bidders, who have different capacities to incur those costs.

<sup>57</sup> Tabish and Jha, note 35 above, at 21.

<sup>58</sup> Ibid at 22.

## 2.2 INTERNATIONAL ANTI-CORRUPTION INSTRUMENTS

By the time Bill 1 was introduced in the Quebec National Assembly, it took its place in the context of several decades' worth of international anti-corruption instruments. In an evidence-based law-making process, we should expect that Quebec's lawmakers would take this international context into account. This section reviews the major international instruments that existed when Bill 1 was being formulated and debated.

### 2.2.1 Foreign Corrupt Practices Act (FCPA)

The Foreign Corrupt Practices Act (FCPA) was enacted by the US Congress in 1977,<sup>59</sup> and amended in 1998 following the US government's ratification of the OECD Anti-Bribery Convention.<sup>60</sup>

The FCPA was the first major anti-corruption instrument in any developed country, and is arguably, still, the most impactful. Its enforcement is vigorous and penalties have been large.<sup>61</sup> The FCPA extends beyond domestic issues to any "concern" with a connection to the United States, and indeed to any legal individual. The definition of "foreign official" is expansive.<sup>62</sup> Interestingly, the FCPA provisions are linked to the obligations

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<sup>59</sup> 15 USC §78dd-1 et seq. Another US law of interest in anti-corruption efforts in the field of public-sector procurement is the False Claims Act (FCA), 31 U.S.C. §§3729-3733. The FCA was enacted during the US Civil War, in 1863, in response to concerns that "suppliers of goods to the Union Army were defrauding the Army" (US Department of Justice White Paper, available at <[http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf)>, retrieved January 3, 2015).

<sup>60</sup> 1998 Trade Act, §5003(d)(1) (US). The OECD Anti-Bribery Convention is discussed in the next section of this chapter.

<sup>61</sup> In 2014, ten companies paid \$1.56 billion to resolve FCPA cases. For more detail on recent enforcement actions, see "The 2014 Enforcement Index", FCPA Blog, January 5, 2015, <<http://www.fcpablog.com/blog/2015/1/5/the-2014-fcpa-enforcement-index.html>>.

<sup>62</sup> See, for example, "Why FCPA history matters: 'Congress was distraught'", FPCA Blog, December 5, 2014. This blog entry offers a long quotation from a US Department of Justice brief, tracing the history of the "foreign officials" definition, in a case in which

of securities issuers, including the obligation to maintain accurate financial records. Books are not accurate if bribes and other corrupt payments are not recorded in them.

The FCPA has arguably spawned all subsequent international anti-corruption efforts. Once the FCPA was in force, corporations operating from the United States were under tighter constraints than corporations anywhere else in the world. US-based corporations chafed under what they considered to be this competitive disadvantage, and so attempted to have similarly stringent legislation apply to corporations operating from other countries. There is now an extensive FCPA-compliance industry with a burgeoning literature<sup>63</sup> and on-line presence.<sup>64</sup>

## 2.2.2 OECD Anti-Bribery Convention

### 2.2.2.1 Ratification

The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter “the OECD Anti-Bribery Convention”) was signed on December 17, 1997, and came into force on February 15, 1999.<sup>65</sup> It was the first major multilateral anti-corruption instrument.

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the defendant disputed whether an official of Colombia’s state-controlled oil company was a “foreign official” within the meaning of the FCPA.

<sup>63</sup> The US Department of Justice (criminal division) and Securities and Exchange Commission (enforcement division) published a “Resource Guide” to the FCPA in November 2012, which coincidentally was the same time that Bill 1 was wending its way through the Quebec National Assembly. This commentary is itself the subject of commentary in Mark Pieth, Lucinda Low, and Peter Cullen (eds.), *The OECD Convention on Bribery: A Commentary* (2<sup>nd</sup> ed.; Cambridge University Press, 2014).

<sup>64</sup> For example, “The FCPA Blog”, which bills itself as “the world’s largest anti-corruption compliance portal”: <[www.fcablog.com](http://www.fcablog.com)>.

<sup>65</sup> Organisation for Economic Co-operation and Development (OECD), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1997, 37 ILM 1 (hereafter *OECD Anti-Bribery Convention*).

Canada, a member of the OECD, deposited its instrument of ratification on December 17, 1998, and the Convention entered into force in Canada on February 15, 1999.<sup>66</sup> As a linked measure, the Corruption of Foreign Public Officials Act (CFPOA) received Royal Assent on December 10, 1998, and entered into force on February 14, 1999. The CFPOA was, in essence, Canada's legislative response to its obligations under the OECD Convention, and Canada's equivalent to the American FCPA legislation.<sup>67</sup>

#### **2.2.2.2 Text of the Convention**

The key provisions of the OECD Anti-Bribery Convention are in Article 1, which amount to a definition of bribery:

*1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*

*2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.*

*3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".*

A "foreign public official" is then defined in Article 1, paragraph 4, to mean

*any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or*

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<sup>66</sup> SI/99-13.

<sup>67</sup> The CFPOA is discussed in more detail in section 2.3.1 below.

*public enterprise; and any official or agent of a public international organisation; ...*

(Emphasis added.)

### 2.2.2.3 Supporting documents

Public procurement, as such, is nowhere mentioned in the OECD Convention, but the official commentary to the Convention states that “public function [in Article 1, paragraph 4] includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.”<sup>68</sup> The official commentary also mentions public procurement in the context of possible sanctions for bribery:

*24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.*

(Emphasis added.)

In 2009, the OECD Council adopted further, detailed recommendations for member states.<sup>69</sup> One recommendation was that each member state should take “concrete and meaningful steps” to examine how public procurement contracts (and similar advantages) could be denied as a sanction for bribery.<sup>70</sup>

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<sup>68</sup> OECD, Negotiating Conference, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997).

<sup>69</sup> OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009).

<sup>70</sup> *Ibid*, Recommendation III, paragraph vii. To the same effect is Recommendation XI, paragraph i: “Member countries’ laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member’s national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public



In its most recent assessment of the OECD Anti-Bribery Convention, Transparency International reported that only four of 40 signatories to the Convention (the United States, Germany, the United Kingdom, and Switzerland) were actively enforcing the Convention; five, including Canada, had moderate enforcement; eight had limited enforcement; twenty-two had little or no enforcement; and one (Iceland) could not be classified.<sup>71</sup> In the same report, TI moved Canada from the “limited” to the “moderate” category, one of only two countries to improve (the other was New Zealand, which moved from “no” enforcement to “limited” enforcement).

The OECD Anti-Bribery Convention does not apply directly to Quebec, as a sub-national jurisdiction. Nevertheless, the Convention and its ancillary documents, along with a burgeoning literature,<sup>72</sup> formed an important part of the international context at the time Bill 1 was being drafted.

## 2.2.3 United Nations Convention Against Corruption

### 2.2.3.1 Ratification

The United Nations Convention Against Corruption (UNCAC) was negotiated in 2002-2003, adopted by the General Assembly in 2003, and entered into force on December 14, 2005.<sup>73</sup> The UNCAC is administered through the United Nations Office on Drugs and Crime (UNODC).<sup>74</sup> A conference of the states parties reviews implementation and

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officials, such sanctions should be applied equally in case of bribery of foreign public officials.”

<sup>71</sup> Transparency International, “Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery” (Berlin, 2014).

<sup>72</sup> For more on the literature, see section 3.3.1.3 below.

<sup>73</sup> *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41, A/58/422 (hereafter UNCAC).

<sup>74</sup> For this and related factual information about the UNCAC, see online <[www.unodc.org](http://www.unodc.org)>.

facilitates activities required by the UNCAC. As of late 2013, the UNCAC had 168 state parties.<sup>75</sup>

Canada signed the UNCAC on May 21, 2004, and ratified it on October 2, 2007. The UNCAC came into force for Canada on November 1, 2007. Canada did, however, make a number of reservations.<sup>76</sup> One of Canada's reservations, for example, is with respect to Article 20 of the UNCAC, which recommends establishment of the offence of illicit enrichment.<sup>77</sup> Canada filed a reservation, on the grounds that such an offence would be contrary to its constitution and the fundamental principles of its legal system.

### 2.2.3.2 Text of the UNCAC

The UNCAC covers some of the same ground as the OECD Anti-Bribery Convention, but is much broader. For example, it contains specific commitments with respect to public procurement (Article 9, section 1):

*1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:*

*(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender*

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<sup>75</sup> The full list of countries and their reservations is available online <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-14&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en)>.

<sup>76</sup> See online <<https://treaties.un.org/doc/Treaties/2003/12/20031209%2002-50%20PM/Related%20Documents/CN.981.2007-Eng.pdf>>.

<sup>77</sup> Article 20: "Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."

*and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;*

*(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;*

*(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*

*(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;*

*(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.*

### **2.2.3.3 Supporting Documents**

There is a “legislative guide” to the UNCAC, published by UNODC.<sup>78</sup> It does not offer a great deal of assistance of this procurement provision, as it consists mainly of a re-phrasing of the UNCAC’s terms. It does, however, include this pertinent observation and warning:

*79. Such [procurement] systems may take into account appropriate threshold values in their application, for example in order to avoid overly complex procedures for comparatively small amounts. Past experience suggests that excessive regulation can be counterproductive by increasing rather than diminishing vulnerability to corrupt practices.*

(Emphasis added.)

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<sup>78</sup> UNODC, Division for Treaty Affairs, *Legislative guide for the implementation of the United Nations Convention against Corruption: Second Revised Edition* (Vienna, 2012).

The UNCAC legislative guide also makes an observation that is relevant to a federal state such as Canada:

*87. Past experience also shows that local authorities can be particularly vulnerable to corruption in connection with public procurement, as well as real estate, construction, town planning, political financing, etc. The requirements of the Convention against Corruption should thus be taken into account at all administrative levels.*

(Emphasis added.)

The UNODC also publishes a “technical guide” to the UNCAC, but again, like the legislative guide, it adds little to the procurement provisions of the UNCAC.<sup>79</sup> It does contain a useful enumeration of the most common forms of procurement corruption:

*Specifically, such a body would undertake or require to be undertaken risk assessments of the main areas of potential corruption and fraud, including: rigged specifications and procedures; collusive bidding; false claims and statements; failure to meet specifications, including use or supply of substandard or counterfeit materials; co-mingling of contracts; false invoices; duplicate contract payments; contract variation misuse and split purchases; phantom contractors.<sup>80</sup>*

The UNCAC does not apply directly to Quebec, as a sub-national jurisdiction. Nevertheless, the principles of the UNCAC, and the guidance provided to implement it, formed an important part of the international context at the time Bill 1 was being drafted.

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<sup>79</sup> UNODC, *Technical guide to the United Nations Convention against Corruption* (Vienna, 2009). The relationship of the two documents is explained in the Technical Guide: “The two Guides actually complement each other: the Legislative Guide had been drafted for use mainly by legislators and policymakers in States preparing themselves for the ratification and implementation of the Convention. The Technical Guide focuses not so much on guidance in relation to the necessary legislative changes for the incorporation of the Convention into the domestic legal system of the States concerned, but attempts to highlight policy issues, institutional aspects and operational frameworks related to the full and effective implementation of the provisions of the Convention” (at xvii).

<sup>80</sup> Ibid at 34.

## 2.2.4 European Union

The European Union (EU) has issued a series of anti-corruption instruments, as well as engaging in regular evaluation of anti-corruption efforts in member states. In the most recent EU anti-corruption report,<sup>81</sup> the following instruments and standards are said to have played an important role in setting the terms of reference for assessment:

- UNCAC,
- The Council of Europe Group of States against Corruption (GRECO) and the OECD, for example:
  - the Council of Europe's Criminal Law Convention on Corruption and its Additional Protocol,
  - the Civil Law Convention on Corruption,
  - twenty guiding principles for the fight against corruption adopted by the Committee of Ministers of the Council of Europe,
  - Council of Europe Recommendations on financing political parties,
  - Council of Europe Recommendations on codes of conduct for public officials, and
  - OECD Anti-Bribery Convention.

This represents a sophisticated understanding of the international context for country-specific anti-corruption measures.

The EU is also the source of public procurement directives, which have the force of law in EU member states.<sup>82</sup>

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<sup>81</sup> EU, Commission, *Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report* (Brussels: EC, 2014) at 41.

<sup>82</sup> For more on EU procurement, see online <[http://ec.europa.eu/growth/single-market/public-procurement/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm)>.

## 2.3 CANADIAN ANTI-CORRUPTION INSTRUMENTS

### 2.3.1 Criminal Code

The first and most important Canadian legislative response to corruption is the *Criminal Code*.<sup>83</sup> The most common offences that we associate with corruption—such as bribery, extortion, theft, fraud, forgery, and breach of trust—are all offences under the *Criminal Code*.<sup>84</sup>

There are a couple of *Criminal Code* provisions dealing specifically with public contracts:

*121. (1) Every one commits an offence who*

*...*

*(f) having made a tender to obtain a contract with the government,*

*(i) directly or indirectly gives or offers, or agrees to give or offer, to another person who has made a tender, to a member of that person's family or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or*

*(ii) directly or indirectly demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind for themselves or another person as consideration for the withdrawal of their own tender.*

*(2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes or gives, or agrees to subscribe or give, to any person any valuable consideration*

*(a) for the purpose of promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or*

*(b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in Parliament or the legislature of a province.*

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<sup>83</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>84</sup> Bribery, ss 119 and 120; extortion, s 346; theft, s 322 and following; frauds on the government, s 121; fraud generally, s 380; false pretences, ss 361 and 362; forgery, s 366; false return by public officer, s 399; breach of trust, s 122.

There do not appear to have been any reported cases in which these sections were the foundation of the charge.

The only significant federal extension of the *Criminal Code* provisions is the *Corruption of Foreign Public Officials Act*,<sup>85</sup> but that law is more about extending the territorial reach, rather than the conceptual reach, of Canadian criminal law.

### 2.3.2 Federal anti-corruption legislation

The Canadian *Corruption of Foreign Public Officials Act* (CFPOA)<sup>86</sup> was enacted for the purpose of ratifying the OECD Anti-Bribery Convention and to implement Canada's obligations under that convention.<sup>87</sup>

On behalf of the government, Julian Reed, Parliamentary Secretary to the Minister of Foreign Affairs, called the CFPOA "a dramatic and significant first step in the right direction."<sup>88</sup> In reply, Bob Mills, Reform MP, did not deal directly with the substance of the bill. Rather he complained "we are ramming it through the last week of parliament. There has been very little planning on this bill. ... All of a sudden, here it is in the House

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<sup>85</sup> SC 1998, c 34 (hereafter CFPOA). The CFPOA is analyzed in more detail in the next section of this chapter, section 2.3.2.

<sup>86</sup> SC 1998, c 34. The CFPOA was amended by SC 2001, c 32, s 58, as part of a *Criminal Code* reform package. Sections 4 to 7 of the CFPOA, dealing with proceeds of crime and money laundering, were repealed because amendments to the *Criminal Code* made them redundant.

<sup>87</sup> The unofficial summary of the CFPOA, reproduced in the Canada Gazette, Part III, reads as follows: "This enactment relates to the implementation of Canada's obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, negotiated in the Organisation of Economic Co-operation and Development. In particular, the Convention binds the signing parties to establish a criminal offence of bribery of foreign public officials in business transactions."

<sup>88</sup> House of Commons Debates, 36th Parl, 1st Sess, No 167 (December 7, 1998) at 1340 (Julian Reed).

and we are expected to ram the thing through with little time to look at it.”<sup>89</sup> And indeed, the bill went through all stages in the House of Commons in a single day, namely Monday, December 7, 1998.

Although the word “procurement” does not appear anywhere in either the OECD Anti-Bribery Convention or the FCPOA, it is hard to imagine any sensible argument that the procurement function is not captured by these two instruments.

As noted earlier, in section 2.2.2.3, the official commentary to the OECD Anti-Bribery Convention states that the phrase “public function,” as used in the Convention, includes any activity in the public interest, “such as the performance of a task delegated by it [the government of a foreign country] in connection with public procurement.”

The CFPOA definition of “foreign public official” is not identical to the OECD Anti-Bribery Convention definition, but does track it closely. Where the Convention refers to “any person exercising a public function for a foreign country”, the CFPOA refers to “a person who performs public duties or functions for a foreign state.” It is a reasonable conclusion that the CFPOA extends to public procurement, although there has not yet been a CFPOA prosecution dealing with procurement.

In fact, there have been remarkably few CFPOA prosecutions at all. For many years, the CFPOA seemed almost a dead letter. There was a conviction in 2005<sup>90</sup> in a case

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<sup>89</sup> Ibid at 1345. This complaint provides a curious historical parallel to the same complaints about the speed with which Quebec’s Bill 1 was moving through the National Assembly. This aspect of Bill 1 is discussed at greater length in Chapter 4 below.

<sup>90</sup> *R. v. Watts*, [2005] A.J. No. 568 (Alta.Q.B.).



described as “minor” and “a simple, straightforward action.”<sup>91</sup> The next conviction did not occur until 2011.<sup>92</sup> In May 2014, the first CFPOA jail term was imposed.<sup>93</sup>

The OECD’s Phase 3 report on Canada’s implementation effort, published in March 2011, was sharply critical of Canada’s anti-corruption effort.<sup>94</sup> The opening paragraph of the OECD news release captures the flavour of the report:

*Although Canada has recently made progress in investigating the bribery of foreign public officials by Canadian businesses, Canada has only completed one prosecution since it enacted its foreign bribery law in 1999. A new report by the OECD states that Canada’s regime for*

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<sup>91</sup> Transparency International Canada Inc., *UNCAC Implementation Review: Civil Society Organization Report* at 46. The pages of this document are confusingly numbered. The quotation is from page 6 of the appendices, in a document titled “Grading Canada’s Record on Compliance with International Obligations.”

<sup>92</sup> There is no reported decision for the Niko Resources Ltd. case. In the TI publication cited in the previous note, at 8, footnote 46, the facts of the case are described as follows: “In 2011, Niko Resources Ltd. pled guilty to offering two bribes valued at US\$200,000 to the Bangladeshi State Minister for Energy and Mineral Resources. According to the (Niko) Agreed Statement of Facts, following explosions at its north-eastern Bangladesh natural gas field, Niko provided a vehicle worth approximately \$190,000 to the Energy Minister in Bangladesh and paid his travel costs of \$5,000 to attend an Energy Expo in Calgary and for a personal trip to New York. Niko provided these bribes to persuade the Minister to exercise his influence to ensure that Niko could obtain a favourable gas purchase and sales agreement and to ensure the company would be dealt with fairly in relation to claims relating to the gas field explosions. The Court accepted the sentencing recommendation, which consisted of a fine and victim surcharge totaling \$9,499,000 and a probation order. The probation order makes Niko subject to court supervision and regular audits to confirm its compliance with the CFPOA.”

<sup>93</sup> “Nazir Karigar, Air India bribe plotter, sentenced to 3 years in prison,” *CBCNews.ca mobile* (May 24, 2014). The article also includes the following passage: “Canada has faced years of criticism from the Organization for Economic Co-operation and Development (OECD) and the watchdog group Transparency International for having ‘little or no enforcement’ against companies paying bribes in developing countries, despite being a signatory to international anti-bribery conventions. In 2012, Canada’s global ranking improved slightly to acknowledge ‘moderate enforcement’ after the RCMP and Quebec provincial police laid a series of charges against executives of SNC-Lavalin in cases that have yet to come to trial.”

<sup>94</sup> OECD, Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (2011).

*enforcement of the Corruption of Foreign Public Officials Act (CFPOA) remains problematic in important areas.*<sup>95</sup>

Perhaps in response to this criticism, the CFPOA was amended in 2013 by the *Fighting Foreign Corruption Act*,<sup>96</sup> which received Royal Assent on June 19, 2013. The unofficial summary provided by the Department of Justice says the amendments:

*(a) increase the maximum sentence of imprisonment applicable to the offence of bribing a foreign public official;*  
*(b) eliminate the facilitation payments exception to that offence;*  
*(c) create a new offence relating to books and records and the bribing of a foreign public official or the hiding of that bribery; and*  
*(d) establish nationality jurisdiction that would apply to all of the offences under the Act.*

When the CFPOA amendments were introduced, Transparency International issued a news release saying that the amendments would “greatly strengthen” the CFPOA.<sup>97</sup> Particular mention was made of “nationality jurisdiction”, which gave Canadian courts jurisdiction over matters involving a Canadian citizen or permanent resident by deeming their actions to have taken place in Canada. The amendments came into force on Royal Assent, with the exception of the repeal of the “facilitation payments” exception.<sup>98</sup>

In its 2011 assessment, the OECD asked Canada to make an oral report on its enforcement efforts within one year, and a written report within two years. Canada did in fact submit a written report dated February 2013, and it was approved by the OECD in March 2013.<sup>99</sup> According to this Phase 3 report submitted by Canada, there were thirty-

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<sup>95</sup> Available online <[http://www.oecd.org/corruption/canadasenforcementofthe\[-\]foreignbriberyoffencestilllaggingmusturgentlyboosteffortstoprosecute.htm](http://www.oecd.org/corruption/canadasenforcementofthe[-]foreignbriberyoffencestilllaggingmusturgentlyboosteffortstoprosecute.htm)>.

<sup>96</sup> SC 2013, c 26.

<sup>97</sup> Available online <[http://www.transparency.org/news/pressrelease/05022012\[-\]transparency\\_international\\_canada\\_says\\_ottawas\\_move\\_to\\_strengthen](http://www.transparency.org/news/pressrelease/05022012[-]transparency_international_canada_says_ottawas_move_to_strengthen)>.

<sup>98</sup> See “Foreign bribery cases are focus of new RCMP crackdown”, available online <<http://www.cbc.ca/m/news/politics/foreign-bribery-cases-are-focus-of-new-rcmp-crackdown-1.2878369>>, which focuses on the possible impact of the 2013 amendments.

<sup>99</sup> OECD, Working Group on Bribery, *Canada: Follow-Up to the Phase 3 Report & Recommendations* (2013).

five CFPOA investigations underway.<sup>100</sup> There is unfortunately no way to verify this number, nor the depth or seriousness of the investigations, so it is still difficult to judge Canada's implementation effort.

In any event, the number of investigations, charges, or convictions cannot be an adequate measure of implementation effort. A country that is making no implementation effort, and a country whose effort is so strong as to have eliminated foreign bribery by its nationals, may both show a low number of investigations, charges, and convictions.

### 2.3.3 Federal procurement

Another major player in Quebec infrastructure projects is the federal government. Its constitutional jurisdiction extends, for example, to ports, including the Port of Montreal. Public Works Canada changed its own contract processes, apparently in response to the revelations at the Charbonneau Commission, but without fanfare:

*Le donneur d'ouvrage principal du gouvernement fédéral, le ministère des Travaux publics, a discrètement changé ses procédures d'octroi de contrats à certaines firmes nommées à la commission Charbonneau. En mai, le Ministère a décidé que les contrats accordés à des entreprises comme SNC-Lavalin, Genivar, Dessau, Construction DJL ou CIMA+ nécessiteraient l'approbation d'un haut fonctionnaire, comme un sous-ministre adjoint ou un directeur général. Certaines modifications doivent aussi être approuvées de la sorte. Jusqu'ici, seule la défunte Agence canadienne de développement international (ACDI) avait suivi l'exemple de la Banque mondiale et décrété que le géant SNC-Lavalin serait écarté de ses appels d'offres.<sup>101</sup>*

*[translation: The main giver of contracts in the federal government, the Department of Public Works, discreetly changed its procedure for awarding contracts to certain companies named at the Charbonneau Commission. In May, the Department decided that contracts awarded to companies like SNC-Lavalin, Genivar, Dessau, Construction DJL or*

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<sup>100</sup> Ibid at 5.

<sup>101</sup> "Moins de contrats pour les firmes nommées à la commission Charbonneau," *La Presse+* (26 January 2014) [translation: "Fewer contracts for the firms named at the Charbonneau Commission"]

*CIMA+ would require the approval of a senior official, such as an associate deputy minister or an executive director. Some contract amendments would have to be approved the same way. Until now, only the former Canadian International Development Agency followed the World Bank's example and ruled that the giant SNC-Lavalin would be debarred from its requests for proposals.]*

These changes became controversial only later, after the *Globe & Mail* reported that Hewlett-Packard Canada (HP) might be debarred from federal contracts because of an FCPA conviction involving HP operations in Russia.<sup>102</sup>

There is no reference, in the federal procurement policy, to co-ordination of anti-corruption efforts between the federal and provincial governments.

## **2.4 QUEBEC ANTI-CORRUPTION INSTRUMENTS**

When Bill 1 was introduced in October 2012, Quebec already had an extensive set of anti-corruption laws. Bill 1 consists almost entirely of amendments to existing laws. One would expect Quebec's lawmakers to be aware of this local context.

The *Act respecting contracting by public bodies*<sup>103</sup> governs public procurement generally. Like similar procurement laws across Canada, it is primarily concerned with good management of public contracts. Prior to Bill 1, the *Public Contracts Act* had the following six statutory objectives:

*(1) transparency in contracting processes;*

*(2) the honest and fair treatment of tenderers;*

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<sup>102</sup> "HP faces 10-year ban as Canadian government's technology supplier", *Globe and Mail* (24 September 2014); "Companies worried about strict Ottawa rules on corruption", *Globe and Mail* (12 October 2014); "Coalition pushes to delay Ottawa's corruption rules", *Globe and Mail* (10 November 2014).

<sup>103</sup> RSQ c C-65.1, hereafter the *Public Contracts Act*, although that is not an official short title.

*(3) the opportunity for qualified tenderers to compete in calls for tenders made by public bodies;*

*(4) the use of effective and efficient contracting procedures, including careful, thorough evaluation of procurement requirements that reflects the Government's sustainable development and environmental policies;*

*(5) the implementation of quality assurance systems for the goods, services or construction work required by public bodies; and*

*(6) accountability reporting by the chief executive officers of public bodies to verify the proper use of public funds.<sup>104</sup>*

In its current form, the *Public Contracts Act* was enacted in 2006, replacing Chapter V of the *Public Administration Act*.<sup>105</sup> There is also a long list of regulations under the *Public Contracts Act*.

Another key statute concerning public procurement in the construction industry is the *Building Act*.<sup>106</sup> The Act is important because a person or company must hold a license under the Act if it is to hold itself out as a building contractor, and must not use any sub-contractor which does not itself hold a license:

*46. No person may act as a building contractor, hold himself out to be such or give cause to believe that he is a building contractor, unless he holds a current licence for that purpose.*

*No contractor may use, for the carrying out of construction work, the services of another contractor who does not hold a licence for that purpose.*

The licensing system under the *Building Act* is administered by the Régie du bâtiment du Québec (RBQ) [translation: Quebec Building Authority].

A third key statute is the *Elections Act*, which dictates how political parties may be financed. The links of construction contractors to political parties has been a recurring

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<sup>104</sup> Ibid s 2.

<sup>105</sup> RSQ c A-6.01.

<sup>106</sup> RSQ c B-1.1.

theme in Quebec’s corruption scandals, and was a regular feature of the evidence at the Charbonneau Commission. Quebec’s elections law includes limits on the source and amount of donations, and reporting requirements. The Act is administered by the Director-General of Elections (DGE).

With these foundations already in place—the *Public Contracts Act*, the *Building Act*, and the *Elections Act*—the corruption scandal that started enveloping the Charest government led to a flurry of anti-corruption activity in 2011 and into 2012.

First was the announcement of the Escouade Marteau [translation: Hammer Squad], a joint operation of the Sûreté du Québec (Quebec’s provincial police force) and the Montreal police.<sup>107</sup>

Next, on February 18, 2011, was the announcement of the formation of the Unité permanente anti-corruption (UPAC) [translation: Permanent Anti-Corruption Unit].<sup>108</sup> The UPAC was said to be “inspired” by New York City’s Department of Investigation.<sup>109</sup> The UPAC would co-ordinate the efforts of the following anti-corruption groups already operating within the government:

- the Escouade Marteau
- the expanded anti-collusion unit
- the investigation unit at the Commission de la construction du Québec (CCQ)
- the municipal contract management audit unit of the Department of Municipal Affairs
- the corruption and embezzlement investigation unit of Revenue Québec
- the audit and investigation unit of the Régie du bâtiment du Québec (RBQ).

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<sup>107</sup> “La Sûreté du Québec lance l’Opération Marteau”, Government of Quebec news release (22 October 2009).

<sup>108</sup> “Création de l’Unité permanente anticorruption”, Government of Quebec news release (18 February 2011).

<sup>109</sup> “Québec dévoile son unité anti-corruption”, *Le Devoir* (February 19, 2011).

At the same time, the government announced that a team of prosecutors would be formed that would be devoted exclusively to UPAC files. Critics noted that the Director-General of Elections, who had important anti-corruption responsibilities, was not brought under the UPAC's umbrella.<sup>110</sup>

On March 16, 2011, the Minister of Public Security announced the appointment of Robert Lafrenière as the first Anti-Corruption Commissioner.<sup>111</sup> The UPAC and the Commissioner were given formal legal status in the *Anti-Corruption Act*,<sup>112</sup> introduced on May 11, 2011, and adopted by the National Assembly on June 13, 2011. Most of it entered into force on the same day.<sup>113</sup> The *Anti-Corruption Act* also sets up a whistleblower regime, and a register of contractors who are ineligible to bid for public contracts because of prior convictions for “wrongdoing.”

On October 26, 2011, the Charest government introduced *An Act to prevent, combat and punish certain fraudulent practices in the construction industry and make other amendments to the Building Act* (hereafter “Bill 35”).<sup>114</sup> Bill 35 received Royal Assent on December 9, 2011. Bill 35 is most significant for the provisions that are precursors to the key provisions of Bill 1. For example, the *Building Act* is amended to add an “integrity” criterion to the issuance of a license:

*62.0.1. The Board may refuse to issue a licence if issuing the licence would be contrary to the public interest, for example because the applicant or, in the case of a partnership or a legal person, it or any of its officers is unable to prove good moral character and a capacity to*

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<sup>110</sup> Ibid.

<sup>111</sup> “Québec choisit Robert Lafrenière pour diriger l'unité anti-corruption”, *Le Devoir* (16 March 2011).

<sup>112</sup> SQ 2011, c 17; RSQ c L-6.1.

<sup>113</sup> Ibid s 74. Certain sections were to come into force no later than September 1, 2011, and the rest no later than June 1, 2012. The Act was therefore fully in force at the time Bill 1 was introduced in October 2012.

<sup>114</sup> SQ 2011, c 35. French title: *Loi visant à prévenir, combattre et sanctionner certaines pratiques frauduleuses dans l'industrie de la construction et apportant d'autres modifications à la Loi sur le bâtiment.*

*exercise activities as a contractor with competence and integrity, given the past conduct of the applicant or the officer.*

*The Board may, in that regard, conduct or commission any verifications it considers necessary.*

(Emphasis added.)

There is an interesting translation point here. Where the English version of Bill 35 uses the word “integrity”, which is the same as Bill 1, the French version of Bill 35 uses the word “probité”, which is different from the key word “intégrité” used in Bill 1. One is left to wonder whether Bill 35 has precedent value for Bill 1. To date, there are only a handful of reported decisions on the meaning of “probité”, none very expansive and all at the administrative level.<sup>115</sup>

Bill 35 also forbids the issuance of a license to a contractor which has an officer or shareholder with a conviction, within the previous five years, of a range of offences.

Both the Charest and Marois governments tackled the issue of political party financing, which was another element lurking behind the corruption scandals. The Charest government introduced *An Act respecting political party leadership campaigns*,<sup>116</sup> which amended the *Elections Act* so as to apply to leadership campaigns financing rules similar to those already applying to political parties. The Marois government, as part of its

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<sup>115</sup> For example, *Régie du bâtiment du Québec c 9153-1418 Québec inc*, 2014 CanLII 35903 (QC RBQ), in which the Registrar turns to the dictionary to assist in interpreting the word “probité”: “Selon le dictionnaire, la probité s’évalue au respect et à l’observance des règles de la morale sociale et des devoirs imposés par l’honnêteté et la justice” [translation: “According to the dictionary, probity is measured by respect and observance of the norms of social morals and the duties imposed by honesty and justice”]. The dictionary is also used in *9187-0725 Québec inc c Québec (Régie du bâtiment)*, 2014 QCCRT 278 (CanLII). In *Corporation des maîtres mécaniciens en tuyauterie du Québec c Plomberie André Côté (1981) ltée*, 2012 CanLII 28465 (QC CMMTQ), the committee defines probity thus: “La probité consiste en une grande rigueur, une honnêteté intellectuelle” [translation: “probity consists of a great rigour, an intellectual honesty”]. In *Régie du bâtiment du Québec c Daniel Kochenburger couvreur inc*, 2013 CanLII 23836 (QC RBQ), and *Entreprise Vulci inc c Québec (Régie du bâtiment)*, 2012 QCCRT 521 (CanLII) the probity provision is noted but without discussion that would lend itself to use as a precedent. All of these decisions are lower-level, administrative hearings.

<sup>116</sup> SQ 2011, c 38. French title: *Loi concernant les campagnes à la direction des partis politiques*.



reform package that included Bill 1, introduced as Bill 2 *An Act to amend the Election Act*. Bill 2 reduced the elector contribution limit, lowered the ceiling on expenses and increased public financing of Quebec political parties.<sup>117</sup>

Despite this panoply of anti-corruption measures,<sup>118</sup> one of the themes of the Bill 1 debate is that the existing law is not working. Stéphane Bédard, the minister responsible for Bill 1, mentions frequently in the debates that the previous law was too easily “contourné”, or evaded.

A final note on the Quebec statutory context. The Charbonneau Commission, in Annex IV to its interim report, lists the statutory changes related to the Commission’s mandate that were adopted between the date it was formed and the date of its interim report.<sup>119</sup> The Commission notes that the constantly changing legal context creates a triple challenge for the Commission :

*Pour la Commission, cela pose un triple défi. D’abord, elle doit expliquer les stratagèmes et les activités sous enquête en fonction des règles qui étaient en vigueur au moment où ils se sont produits, afin de montrer comment les régimes alors en place ont été exploités par les acteurs. Ensuite, la Commission doit mettre à jour son objet d’étude au fur et à mesure de l’adoption des nouvelles mesures. Enfin, elle doit tenter de les évaluer, pour déterminer si elles contribuent à régler les problèmes ou, au contraire, si elles ont pour effet de les exacerber. Or, il n’est pas facile d’évaluer des mesures récentes, puisqu’il faut toujours*

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<sup>117</sup> SQ 2012, c 26. French title: *Loi modifiant la Loi électorale afin de réduire la limite des contributions par électeur, de diminuer le plafond des dépenses électorales et de rehausser le financement public des partis politiques du Québec*.

<sup>118</sup> There were other bills besides the ones already noted. In December 2011, the National Assembly passed *An Act to eliminate union placement and improve the operation of the construction industry*, SQ 2011, c 30 (hereafter “Bill 33”). As the title suggests, Bill 33 was aimed at loosening the grip of certain trade unions over the workforce on construction sites, which had been identified as one aspect of corruption in the construction industry. In June 2012, the National Assembly passed *An Act to amend various legislative provisions concerning municipal affairs*, SQ 2012, c 21. Among other things, this law amended the *Public Contracts Act* concerning certain procedural details of the restrictions on companies that had run afoul of the Act.

<sup>119</sup> Commission d’enquête sur l’octroi et la gestion des contrats publics dans l’industrie de la construction, *Rapport d’étape* (Montreal, 2014) at 26-28.

*un certain temps pour apprécier les effets des règles et donc pour savoir si elles atteignent ou non leurs objectifs.*<sup>120</sup>

*[Translation: For the Commission, this poses a triple challenge. First, it has to explain the stratagems and activities under inquiry as a function of the rules at the moment they occurred, in order to show how the rules then in place were exploited by the actors. Next, the Commission has to continually update what it is considering, as new measures are adopted. Finally, it has to try to evaluate the new measures, to determine if they are contributing to a solution of the problems or, on the contrary, if they are actually making them worse. It simply is not easy to evaluate the recent measures, because it always takes time to note the effect the rules are having and to know whether or not they are achieving their objectives.]*

The parade of anti-corruption laws continues. In December 2014, for example, the new provincial government introduced Bill 26, which created a legal regime for the reimbursement of sums obtained through fraudulent contracts.<sup>121</sup>

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<sup>120</sup> Ibid at 8.

<sup>121</sup> “Projet de loi pour récupérer les sommes détournées”, *La Presse+*, section Actualités, screen 12 (4 December 2014).

## CHAPTER 3 LITERATURE AND PRECEDENTS

### 3.1 INTRODUCTION TO ANTI-CORRUPTION LITERATURE

As we saw in the last chapter, almost all of the national and international anti-corruption instruments are of very recent vintage. The Foreign Corrupt Practices Act (FCPA) of the United States was enacted in 1977. It was the first major anti-corruption instrument in any developed country. The FCPA, in turn, spurred the creation of international anti-corruption instruments.

Scholarly anti-corruption literature is of similarly recent vintage. One of the world's leading scholars on corruption, Susan Rose-Ackerman of Yale University, noted in 1978 that “[anti-corruption] work in economics is especially scanty” and that only basic sources were available in political science.<sup>122</sup> Writing in 1984, in his magisterial treatment of bribery, John T. Noonan Jr. observed that “academic lawyers” have had little to say about contemporary corruption.<sup>123</sup>

Today, there is an anti-corruption literature so vast as to be almost overwhelming. Much of it comes from what can only be described as an international anti-corruption industry, composed of supra-national organizations, NGOs, and consulting firms. There is a cross-over of people and ideas between this industry and the academy. For the sake of exposition, however, the anti-corruption literature will be divided into academic and non-academic streams.

The purpose of this literature review is to have an idea of what “the state of the art” was at the time Bill 1 was being developed in Quebec in September and October of 2012. In an evidence-based law-making process, one would expect lawmakers to be aware, even in general terms, of the state of the art.

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<sup>122</sup> Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978) at 4, note 5.

<sup>123</sup> John T. Noonan, Jr., *Bribes* (New York: Macmillan, 1984) at xxiii.

### 3.2 THE ACADEMIC LITERATURE

There is a substantial literature, both academic and non-academic, on the law and practice of public-sector procurement and its regulation.<sup>124</sup> This literature extends well beyond questions of corruption and anti-corruption. As pointed out in the UNODC Technical Guide to the UNCAC,

*It is important to note that public procurement regulation is not about anticorruption per se – the common objectives of most procurement systems include value for money, integrity, accountability, fair treatment, and social/industrial development. Balancing these objectives, some of which may conflict, is the challenge in procurement regulation.*<sup>125</sup>

We can consider the literature on corruption in public-sector procurement to be one strand of this broader procurement literature.

One of the foremost scholars of corruption, Susan Rose-Ackerman, published *Corruption: A Study in Political Economy* in 1978.<sup>126</sup> It is a seminal work, attempting to unify the insights of economics and political science in the context of corruption. The rest of Rose-Ackerman's distinguished career can be understood as the working-out of the analytical framework established in her first book.

Rose-Ackerman's "central methodological task" is to "develop a set of analytic techniques that combine an economist's concern with modeling self-interested behavior with a political scientist's recognition that political and bureaucratic institutions provide incentive structures far different from those presupposed by the competitive market paradigm."<sup>127</sup> While recognizing that citizen–government interactions take many forms, Rose-Ackerman notes "I shall always keep bribery in the analytic foreground." She

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<sup>124</sup> The latest version (2012) of the on-line *Bibliography on Public Procurement Law and Regulation*, <[www.nottingham.ac.uk/law/pprg](http://www.nottingham.ac.uk/law/pprg)>, operated and updated by the Public Procurement Research Group, University of Nottingham, now runs to 343 pages.

<sup>125</sup> Note 79 above, at 29.

<sup>126</sup> Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978).

<sup>127</sup> *Ibid* at 3-4.

acknowledges “the importance of variations in individual scruples and accepted practices”, but concentrates on structural incentives.<sup>128</sup>

As early as this first book in 1978, Rose-Ackerman sounds a warning which the Quebec government could usefully have taken into account in 2012:

*A practical difficulty in instituting an appropriate corruption-reducing strategy is the fragmentation of authority over law enforcement policies, personnel policies, changes in internal organization, and structural remedies. Hence the tradeoffs in anticorruption policy are seldom perceived, or if perceived, seldom acted upon. This often leads to a strategy of “following the scandals” rather than a broader look at the range of alternatives available and a more fundamental reappraisal of the role of private influence and of quasi-market schemes on the whole range of government behavior.<sup>129</sup>*

Following in Rose-Ackerman’s footsteps, the later academic literature on corruption is dominated by economists.<sup>130</sup>

The domination of anti-corruption literature by economists means that this body of literature uses concepts and tools that can seem foreign to most lawyers, legal academics, and law-makers. Take, for example, the following paragraph, written by a pair of economists, which freely mixes economic and legal concepts:

*For corruption to continue to thrive, three elements must co-exist. First, someone must have discretionary power. Defined broadly, this power would include authority to design and administer regulations in a discretionary manner. Second, there must be economic rents associated with this power. Moreover, the rents must be such that identifiable groups could acquire those rents. Third, the legal/judicial system must be*

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<sup>128</sup> Ibid at 4-5.

<sup>129</sup> Ibid at 224-225, note 13.

<sup>130</sup> Maurizio Lisciandra, “A Review of the Causes and Effects of Corruption in the Economic Analysis” (2014, unpublished paper), gives an overview of the literature on the economics of corruption.

*such that there is a sufficiently low probability of detection and/or penalty for any wrongdoing.*<sup>131</sup>

While legal scholars tend to assume that corruption is undesirable, economics scholars can be more sanguine, treating corruption as a neutral economic phenomenon. There is a strand of the literature that points out that certain kinds and levels of corruption may, at least in theory, increase the overall efficiency of a particular procurement. For example, economists tend to focus on concepts like efficiency, which refers to maximizing the amount by which the value of outputs exceed the cost of inputs. There is no moral judgment involved. Thus an economist can conclude that, under certain conditions, some corruption may be economically efficient<sup>132</sup> or “optimal.”<sup>133</sup> In another economics paper, the author does not say that financing political parties with the fruits of procurement corruption is wrong; rather, the author remarks that it is “socially inefficient.”<sup>134</sup> Similarly, some economists question whether a “zero tolerance” policy is really a good idea. This idea is a hard sell for politicians, police and the public, but only because they misread the economist’s concept of “efficiency” as meaning “acceptable” or “desirable” or “morally neutral”.

Almost all of the economics literature is theoretical. There is not much in the way of empirical research, because it is the nature of corruption that it is illegal, and therefore hidden, and therefore not amenable to controlled experiments in the field. A theme running through the literature is the difficulty of measurement. It is difficult or impossible to measure how much corruption there is, or to measure the effectiveness of

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<sup>131</sup> Tabish and Jha, note 35 above, at 23, citing A.K. Jain, “Corruption: a review”, 15 *Journal of Economic Surveys* 71–121 (2001).

<sup>132</sup> J.B. Nye, “Corruption and Political Development: A Cost Benefit Analysis” (1967) 61 *American Political Science Review* 417, cited by Susan L. Arrowsmith, John Linarelli, and Don Wallace Jr., *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000) at 37.

<sup>133</sup> For example, Emmanuelle Auriol, “Corruption in procurement and public purchase” (2006), 24 *International Journal of Industrial Organization* 867-885 at 869, summarizing the literature on this point: “under asymmetric information [about the supervisor’s susceptibility to corruption], it is optimal to tolerate some corruption.”

<sup>134</sup> Auriol, note 133 above, at 881.

anti-corruption strategies. Tabish and Jha have already been quoted on this point.<sup>135</sup>  
Another set of authors put it this way:

*There are no straightforward methods to measure corruption due to the illicit nature of the issue and imprecise definition of what exactly should be considered as corruptive behaviour.*<sup>136</sup>

Another author puts it this way:

*It is not possible to assess the extra cost [of the allocative inefficiency caused by corruption] by classical survey techniques because nobody knows what would have been the final purchase cost if the most efficient supplier had won the tender.*<sup>137</sup>

Thus Tabish and Jha, writing as recently as 2011, are able to point out the lack of empirical support for the theoretical analyses:

*The state of research on corruption is such that there is little inductive theory or statistical evidence about the kinds of policies that work under particular conditions. Neither is there much analysis of how corruption has been or might be reduced or how to identify it. Unfortunately, the construction industry continues to rely heavily on traditional preventive and punitive measures. This implies that the mechanism of measuring the anti-corruption performance or arresting corruption in construction projects is in its infancy and needs to be developed.*<sup>138</sup>

Later in the same paper, the authors write the following:

*The field of corruption in public sector construction has remained a relatively underresearched area. Those measures to combat corruption that have been suggested by institutions and individuals have been based on their gut feelings and the application of such measures is restricted to the specific cases in which the institutions or the individuals were*

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<sup>135</sup> See text accompanying note 57 above.

<sup>136</sup> Helena Lindskog, Staffan Brege, and Per-Olof Brehmer, "Corruption in public procurement and private sector purchasing" (2010), 7 *Journal of Organisational Transformation and Social Change* 167-188 at 172.

<sup>137</sup> Emmanuelle Auriol, note 133 above, at 874.

<sup>138</sup> Tabish and Jha, note 35 above, at 22.

*involved. Very limited research has been carried out to examine the relationship between anti-corruption strategies and corruption free performance.*<sup>139</sup>

Kleinig and Heffernan give as good a summary as any of the academic literature:

*Not unexpectedly, the weight of opinion opposes corruption, however conceived, whether it is of the public or private kind. Yet, even when there is agreement about its identity, there is little agreement about how it should be prevented, controlled, or eradicated. Is corruption amenable to legal solutions or more broadly political and administrative strategies? Do democratic and republican polities deal with corruption more effectively and acceptably than authoritarian or oligarchic ones? Or are all formal strategies like porous cloth, no more than temporary obstacles to self-servingness? Should corruption be seen instead as a culturally transmitted disease, requiring the reformation of traditions and social attitudes more than formalized constraints; and, if so, how ought such changes to be effected?*<sup>140</sup>

Perhaps because of the lack of empirical study to support economic theory, the moral judgment (“all corruption is bad”) appears to be winning out. Thus Linarelli, writing in 1998, is able to say “The trend...is to condemn corruption as bad for economic growth and for the sustainability of institutions that facilitate development.”<sup>141</sup> And this is, indeed, the underlying premise of most of the non-academic literature, to which we now turn.

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<sup>139</sup> Ibid at 33.

<sup>140</sup> Kleinig and Heffernan, note 32 above, at 4.

<sup>141</sup> John Linarelli, “Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives,” in Sue Arrowsmith and Arwel Davies (eds.), *Public Procurement: Global Revolution* (London: Kluwer Law International, 1998), Volume 8 of International Economic Development Law Series, series editor J.J. Norton, 125-137 at 126.



### 3.3 THE NON-ACADEMIC LITERATURE

There are several streams of non-academic literature on corruption in public-sector procurement: supra-national organizations; non-governmental organizations; professional advisors; popular literature; and the daily press.

In the last section, on the academic literature, several themes were identified. These themes are taken up often in the non-academic literature. One might even say they are amplified, because the non-academic literature is not always operating under the constraints that mark the academic literature, such as careful delineation of methodology, and reference and comparison to the existing body of literature.

For example, one of the themes identified in the academic literature is the difficulty in measuring corruption. Even though this difficulty may be mentioned—for example, a recent EU Anti-Corruption Report says “The total economic costs of corruption cannot easily be calculated”<sup>142</sup>—the non-academic literature is full of attempts to estimate the cost of corruption. The point, it seems, is to stress the importance of the issue as a prelude to discussing it.

Other common tropes in the non-academic literature are the complexity of the problem<sup>143</sup> and the difficulty of finding effective solutions.<sup>144</sup> Because these themes are so common, the following sections on the various kinds of non-academic literature do not specifically repeat them.

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<sup>142</sup> EU Anti-Corruption Report, note 34 above, at 3, footnote 3. This report suggests that corruption imposes an annual cost of EUR 120 billion on the EU economy.

<sup>143</sup> For example, the quotation from the EU Anti-Corruption Report (February 2014), cited above in the text accompanying note 34 above.

<sup>144</sup> Ibid: “An effective policy response cannot be reduced to a standard set of measures; there is no ‘one size fits all’ solution”. In the UNODC’s legislative guide to the UNCAC, note 78 above, at v: “Since the causes of corruption are many and varied, preventive, enforcement and prosecutorial measures that work in some States may not work in others.”

### 3.3.1 Supra-national organizations

Most of the writing on corruption is being produced by supra-national organizations like the United Nations, the World Bank, the OECD, and the EU. University-based scholars are contracted to do some of this work, so in a sense it represents the merging of academic and non-academic literature.

#### 3.3.1.1 United Nations

The United Nations has assigned secretariat duties for the United Nations Convention Against Corruption (UNCAC) to its Vienna-based United Nations Office on Drugs and Crime (UNODC). The UNODC is therefore the source of much of the official UNCAC literature.

Apart from publishing the official UNCAC text, the UNODC publishes the “Legislative guide for the implementation of the United Nations Convention against Corruption.”<sup>145</sup> The stated purpose of this guide is “to assist States seeking to ratify and implement the Convention by identifying legislative requirements, issues arising from those requirements and various options available to States as they develop and draft the necessary legislation.”<sup>146</sup> The purpose of the guide is to achieve a degree of consistency across member states, while recognizing different legal traditions and stages of development.<sup>147</sup>

The UNODC also publishes a “technical guide” to the UNCAC. This guide, published in 2009, is a good but high-level survey of the elements of a well-functioning procurement system. The guide mentions debarment as a possible sanction for corrupt conduct,

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<sup>145</sup> Note 78 above.

<sup>146</sup> Ibid at iii.

<sup>147</sup> Ibid: “Parallel to the need for flexibility, there is a need for consistency and a degree of harmonization at the international level.”

without saying more, and refers to only one specific, unhelpful journal article as a guide.<sup>148</sup>

In September 2011, the UNODC launched a web-based portal called “Tools and Resources for Anti-Corruption Knowledge” or TRACK.<sup>149</sup> This website promises to provide “up-to-date information on national legislation implementing the Convention.”

The most recent review of Canada’s UNCAC implementation is dated February 13, 2014, and was presented to a meeting of the Implementation Review Group in Vienna in June 2014.<sup>150</sup> This review includes the following description of how Canada’s federal structure affects treaty implementation:

*Canada is a federal state comprising 10 provinces ... and three territories .... While the ratification of international treaties falls under federal jurisdiction, their implementation, where necessary, includes the participation of all levels of government. As a State party that follows a dualist tradition for implementing its treaty obligations, a treaty cannot as a general rule be invoked as a source of law in a Canadian court unless it has been transformed or implemented into Canadian law, usually by legislation.*

In other words, the Government of Canada can speak only to what it is doing to implement the UNCAC. The review document examines all relevant federal laws, especially the Criminal Code, but it does not touch, at all, on provincial efforts. This review was issued after Bill 1 was adopted, so its analysis was obviously not available to Bill 1’s drafters.

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<sup>148</sup> The guide mentions <[http://www.eipa.eu/files/repository/eipascope/Scop06\\_3\\_3.pdf](http://www.eipa.eu/files/repository/eipascope/Scop06_3_3.pdf)> in the text. This is a reference to Liisa Koskinen, “Reform of Public Procurement Remedies: A First Look at the Commission Proposal for an Amending Directive”, EIPASCOPE 2006/3 at 19-24. The article will be unhelpful to readers outside the EU, because it deals with modest improvements to amendments to a highly-developed procurement regime.

<sup>149</sup> See online <[www.track.unodc.org](http://www.track.unodc.org)>.

<sup>150</sup> UN, Conference of the States Parties to the United Nations Convention Against Corruption, Implementation Review Group, document CAC/COSP/IRG/I/3/1/Add.8 (Vienna, 2-6 June 2014).

### 3.3.1.2 World Bank

The World Bank is a supra-national organization set up by member states. It consists of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The World Bank Group includes the World Bank plus three more supra-national agencies: the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).<sup>151</sup>

The significance of the World Bank and the World Bank Group for corruption in public-sector procurement is that they are major funders of large-scale infrastructure projects around the developing world. They describe the genesis of their anti-corruption efforts this way:

*The World Bank's Articles of Agreement require the institution to make arrangements to ensure that the proceeds of Bank financing are used for their intended purposes and with due attention to economy and efficiency. This fundamental requirement is often referred to as the 'fiduciary duty', which forms the legal and policy basis for much of the Bank's fiduciary framework for its operations, including its project-level anti-corruption efforts.*<sup>152</sup>

Despite the fact that these words have appeared in the Articles of Agreement since the World Bank was formed in 1945, it is generally agreed that the “decisive turning point” was a speech by World Bank president James Wolfensohn in 1996 in which he called on the World Bank to “deal with the cancer of corruption.”<sup>153</sup> Work on a formal sanctions process began the same year.<sup>154</sup>

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<sup>151</sup> For more information about the World Bank and the World Bank Group, see online <[www.worldbank.org/en/about](http://www.worldbank.org/en/about)>.

<sup>152</sup> Anne-Marie Leroy and Frank Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms* (Washington, DC: World Bank Group, 2012) at 1.

<sup>153</sup> Ibid at 9. See also World Bank, Office of Suspension and Debarment, *Report on Functions, Data and Lessons Learned 2007-2013* (Washington, DC: The World Bank, 2014) at 8.

<sup>154</sup> Ibid at 10.

The World Bank has developed its own taxonomy of corruption-related offences. There are standardized definitions for four types of corruption: corrupt practice, fraudulent practice, collusive practice, and coercive practice.<sup>155</sup> In addition, there is a fifth category of sanctionable practice known as obstructive practice, which relates to interference, or lack of co-operation, with a World Bank anti-corruption investigation.<sup>156</sup> This taxonomy seems designed more for reporting purposes than anything else, as there appears no difference in procedure or sanctions for the different categories. Moreover, the taxonomy may not be practically useful, as “fraudulent practice” dominates the other categories, with 86% of the cases having at least one claim under this category. The next largest category, “corrupt practice”, covers only 14% of cases.<sup>157</sup>

The World Bank has developed an elaborate set of internal processes for sanctioning corruption. Although the World Bank says it has looked carefully at other international and national sanctions regimes, and has tried to take into account different legal and cultural traditions, its sanctions system is not exactly like any other system:

*...the World Bank’s sanctions process is not identical with any single corresponding administrative or judicial process in domestic or national law. Thus, for example, the Bank’s sanctions process is considerably more elaborate than most administrative schemes, vesting as it does a quasi-investigative function in INT, placing the ‘burden of proof’ on INT (rather than requiring Respondents to demonstrate that they are ‘presently responsible’), and conferring quasi-judicial functions upon the EO and Sanctions Board. The fact that it is concerned with activities that are criminal in most countries also inevitably colors the way in which the Bank, Respondents, and stakeholders alike view the sanctions process. For these reasons, internal reviews and audits of the sanctions process*

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<sup>155</sup> For definitions, see *ibid* at 12.

<sup>156</sup> *Ibid* at 2.

<sup>157</sup> *Ibid* at 28. Other categories were collusive practice (9%), obstructive practice (2%), and coercive practice (1%). The totals do not add to 100% because a case may include more than one type of corruption.

*have tended to benchmark it, among other things, against criminal law systems.*<sup>158</sup>

The World Bank has released a detailed report on its suspension and debarment decisions from 2007 to 2013,<sup>159</sup> and there is an on-line database of debarred firms<sup>160</sup> and debarment decisions.<sup>161</sup>

The most significant point, for purposes of the present thesis, is that the World Bank consciously chose not to attempt a system of pre-qualification, preferring instead a system of sanctions for proven misconduct. The closest the World Bank comes is a system for early temporary suspension, instituted in 2009, to prevent companies under investigation from winning and executing World Bank contracts. Even here, exclusion is not automatic. There must be concrete evidence of sanctionable conduct.<sup>162</sup>

As a supra-national agency, the World Bank cannot lay down criminal or quasi-criminal sanctions. It is dealing at the intersection of contract law, tort law, trust law, and administrative law. In essence, when responding to corruption, the World Bank is making decisions about with whom it will contract. The World Bank's principal weapon—the default sanction—is “debarment”, which is a prohibition on bidding on or holding a World Bank contract. The power of this sanction is amplified by a reciprocal debarment arrangement with other development banks—the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank. Pursuant to the Agreement

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<sup>158</sup> Ibid at 8. In this passage, “INT” refers to the World Bank’s vice-presidency for Institutional Integrity, and “EO” refers to the World Bank’s Evaluation and Suspension Officers.

<sup>159</sup> World Bank, Office of Suspension and Debarment, *Report on Functions, Data and Lessons Learned 2007-2013* (Washington, DC: The World Bank, 2014). Note that this document would not have been available to the drafters of Bill 1.

<sup>160</sup> See online <[www.worldbank.org/debarr](http://www.worldbank.org/debarr)>.

<sup>161</sup> See online <[www.worldbank.org/sanctions](http://www.worldbank.org/sanctions)>.

<sup>162</sup> Leroy and Fariello, note 152 above, at 12-14. The World Bank sanctions process is also examined in detail in Roman Majtan, “The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes” (2013), 45 *Geo. Wash. Int’l L. Rev.* 291 esp at 322-336.

for Mutual Enforcement of Debarment Decisions, signed on April 9, 2010, to be debarred by one is to be debarred by all.<sup>163</sup>

Most recently, the World Bank has emphasized the need for international co-operation:

*As the president of the World Bank announced recently at a panel we hosted in Washington DC, “Corruption is public enemy number one”, which can only be overcome by the momentum of an inclusive and coordinated movement.*<sup>164</sup>

The World Bank system is not without problems. Some private lawyers, especially in the United States, have expressed concern, given the financial consequences of a suspension or debarment ruling, that the World Bank isn’t “required to follow any nation’s rules of criminal procedure or recognize the American concept of due process.”<sup>165</sup>

### 3.3.1.3 OECD

The OECD has published a number of anti-corruption documents which collectively form an impressive body of literature. In 2007, the OECD boasted that “over the last 10 years, the OECD has become the leading source of anticorruption tools and expertise in areas including business, taxation, export credits, development aid, and governance.”<sup>166</sup>

At least one major player in the Quebec construction industry agrees with the OECD’s self-assessment. Luc Martin, executive vice-president of the Corporation des entrepreneurs généraux du Québec (CEGQ), said in 2014 “À trois reprises, on est allés à

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<sup>163</sup> See, for example, information on cross-debarment at the website of the African Development Bank Group, online <<http://www.afdb.org/en/about-us/structure/integrity-and-anti-corruption/afdb-and-other-mdbs-initiatives/cross-debarment/>>; and “Asian Development Bank bans 31 companies for fraud, corruption”, ABC News, March 14, 2014, online <<http://www.abc.net.au/news/2014-03-14/an-adb-corruption/5321624>>.

<sup>164</sup> [Citation.]

<sup>165</sup> “World Bank combats corruption—but questions linger about process”, FCPA Blog, May 22, 2014.

<sup>166</sup> OECD, *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, (OECD Publishing, 2007) at 99.

l'OCDE, et je peux vous dire qu'en comparaison, ici, en matière de contrôle, on est encore à la maternelle.»<sup>167</sup>

One stream of documents is the regular self-assessment and peer assessment of progress, something contemplated by the OECD Anti-Bribery Convention. There is an extensive, public literature of country reports from the OECD. The OECD has itself published guidance on good practices for companies.<sup>168</sup> The second edition of an article-by-article legal commentary was published in February 2014.<sup>169</sup> The first edition would have been available to the team developing Quebec's Bill 1.<sup>170</sup>

An earlier OECD publication is *Bribery in Public Procurement: Methods, Actors and Counter-Measures*,<sup>171</sup> which is an overview of corruption in public procurement:

*It summarises the techniques and means used to bribe, examines the relationship between bribery and other crimes as well as the motivations of those offering and accepting bribes. It also offers insights into the prevention, detection and sanction of bribery. Finally, pertinent cases on which the outlined observations are based are also provided.*<sup>172</sup>

The report uses a “functional, process-based analysis” to help define counter-measures to bribery.<sup>173</sup> And as the report notes, “Governments must lead the fight against bribery and

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<sup>167</sup> Quoted in La Presse+, news section, screen 13 (30 May 2014) [translation: “Three times, we went to the OECD, and I can tell you that in comparison, here, with respect to controls, we’re still in kindergarten”].

<sup>168</sup> OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (OECD Publishing, 2010). Good practices include, *inter alia*, support and commitment from senior management for the company's measures for preventing and detecting foreign bribery; a clearly articulated and visible corporate policy prohibiting foreign bribery; ascribing the duty to comply to all individuals at all levels of the company; and ascribing oversight to a senior corporate officer with autonomy from management, adequate resources, and authority. There are twelve in all.

<sup>169</sup> Mark Pieth, Lucinda Low, and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2nd ed.; Cambridge University Press, 2014).

<sup>170</sup> The first edition, also published by Cambridge University Press, came out in 2007.

<sup>171</sup> OECD Publishing, 2007.

<sup>172</sup> *Ibid* at 3.

<sup>173</sup> *Ibid* at 15.



drawing lessons from each other's experiences is key to making progress" (emphasis added).<sup>174</sup>

The most recent OECD Anti-Corruption Report, from 2013, sounds a warning that is highly relevant to Quebec lawmakers:

*The Report shows that, while almost all countries took steps to reform their procurement systems between 2008 and 2012, these efforts have mostly focused on legislative changes. Only half of the countries surveyed undertook reforms going beyond the tendering process, whereas the OECD Recommendation urges countries to address the whole cycle, from needs assessment to the award stage, contract management and final payment.*

(Emphasis added.)

Annex A to the report contains the OECD's 2008 recommendations on promoting integrity in public-sector procurement. This would have represented "the state of the art" when Quebec was drafting Bill 1.<sup>175</sup>

### **3.3.1.4 European Union**

The European Union (EU) is the author of a number of instruments and guidance on anti-corruption measures.

First and foremost, it is the source of the public procurement directives which have the force of law in member states. These directives, by their nature, incorporate anti-corruption measures. In 2011, a proposal was put forward for reform of EU procurement law.<sup>176</sup> This reform proposal represented "the state of the art" of procurement law at the time Bill 1 was being drafted and debated. For example, there is a reference in the document to "self-cleaning" by companies found to have engaged in corrupt practices.

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<sup>174</sup> Ibid at 13.

<sup>175</sup> OECD, *Implementing the OECD Principles for Integrity in Public Procurement: Progress since 2008*, OECD Public Governance Reviews (OECD Publishing, 2013).

<sup>176</sup> The proposal can be retrieved online at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0896:EN:NOT>>.

Cecilia Malmstrom, the EU Commissioner for Home Affairs, gave a speech at an anti-corruption conference in March 2013, in which she presaged future directions for the EU's anti-corruption efforts. The following is a key point: "We do not see new EU legislation on corruption as the way forward at this stage."<sup>177</sup> According to Malmstrom, the necessary instruments are in place, and the emphasis should be on moving from intention to action.

The EU Anti-Corruption Report released on February 3, 2014, is the elaboration of the approach outlined by Commissioner Malmstrom in her speech.<sup>178</sup> It is a smart, sophisticated assessment of the state of the art, including a frank assessment of the methodological challenges.<sup>179</sup> The report also introduces the concept of "the sustainability of an anti-corruption agenda." This is a useful phrase, which captures the idea that an anti-corruption agenda can start—for example, with legislation introduced in response to public outcry over corruption—but then tail off.

The EU Anti-Corruption Report repeats the key point from the Malmstrom speech, namely that more legislation is not the way forward:

*EU Member States have in place most of the necessary legal instruments and institutions to prevent and fight corruption. However, the results they deliver are not satisfactory across the EU. Anti-corruption rules are not always vigorously enforced, systemic problems are not tackled effectively enough, and the relevant institutions do not always have sufficient capacity to enforce the rules. Declared intentions are still too distant from concrete results, and genuine political will to eradicate corruption often appears to be missing.*<sup>180</sup>

The report puts a special focus on procurement because it is "of crucial importance for the internal market; it is covered by extensive EU legislation, and subject to significant

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<sup>177</sup> See online <[http://europa.eu/rapid/press-release\\_SPEECH-13-187\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-187_en.htm)>.

<sup>178</sup> Ibid.

<sup>179</sup> Note 34 above, Appendix.

<sup>180</sup> Ibid at 2.

corruption risks.”<sup>181</sup> There is also an appendix which neatly lays out the methodological challenges of measuring and fighting corruption.

The EU Anti-Corruption Report briefly discusses “blacklists” (debarment lists) as a sanction:

*As for black lists, only a third of countries require using them because of the risk of manipulation or lack of sufficient evidence of companies’ involvement in corrupt activities. One example is Portugal, which has defined the conditions for excluding tenderers from procurement procedures in Article 55 of the Code of Public Contracts.*<sup>182</sup>

(Footnotes omitted.)

In a footnote to this passage, the report notes the use of debarment databases by international agencies such as the Asian Development Bank, and that “more than 45 country agencies and 13 development institutions have been given access to the database.”

### 3.3.2 Non-governmental organizations

A second and large stream of literature is from non-governmental anti-corruption organizations. There is a long list of such organizations, some quite sophisticated and apparently well-funded.

Especially prominent is Transparency International. The current Chair of the TI Board of Directors is Huguette Labelle, a Canadian (though not a Québécoise).

TI produces the annual Corruption Perceptions Index (CPI), the most widely-used and widely-cited comparative measure of corruption. Although the CPI is subject to ongoing methodological debate, and has been revised over the years in response to that debate, no better comparative measure has been produced in the literature. TI also produces the

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<sup>181</sup> Ibid at 4.

<sup>182</sup> Ibid at 88.

Bribe Payers Index, the Global Corruption Barometer, and National Integrity System assessments.

TI also produces a wide variety of other anti-corruption documents, which reflect TI's long experience and relatively deep resources, if not academic heft. TI is primarily aiming at a non-academic audience. One recent publication from TI's United Kingdom chapter, for example, is the cheekily titled *How to Bribe*.<sup>183</sup>

TI also publishes a range of anti-corruption documents focusing specifically on corruption in construction projects.<sup>184</sup> The introduction to these resources emphasizes the importance of co-operation :

*Transparency International (TI) believes that corruption on construction projects can only be eliminated if all participants in construction projects co-operate in the development and implementation of effective anti-corruption actions which address both the supply and demand sides of corruption. These participants include governments, funders, project owners, contractors, consultants, and suppliers, and the business and professional associations which represent these parties.*

One long-running campaign is “Publish What You Pay” (PWYP), launched in 2002, and later amended to add “...and What You Extract.” The extractive industries—oil and gas, and mining—are, like public-sector infrastructure projects, especially vulnerable to corruption because of the large sums involved. PWYP is an initiative with the premise that transparency in payments permits citizens to hold their governments to account for revenue received.<sup>185</sup> An important part of PWYP's work is contract transparency.

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<sup>183</sup> Transparency International UK (2014), *How to Bribe: A Typology of Bribe-Paying and How to Stop It*. This report, despite its cheeky title and light tone, follows at least some of the typology of the more serious OECD report in note 175 above.

<sup>184</sup> These resources are collected online at [http://archive.transparency.org/tools/contracting/construction\\_projects](http://archive.transparency.org/tools/contracting/construction_projects).

<sup>185</sup> A typical statement goes like this: “If citizens could see how much their governments receive for projects in their communities, they would be in a better position to hold political leaders to account, says Jonathan Kaufmann, legal advocacy coordinator for Earth Rights International, a member of PWYP US”: Thompson Reuters, “Canadian oil companies ready to disclose more of their payments than U.S.” (14 February 2014).

The Extractive Industries Transparency Initiative (EITI) is another initiative that appears to have had some success.<sup>186</sup> It is described thus by the Government of Canada:

*The EITI is an international standard for resource revenue reporting and disclosure that aims to combat corruption, ensure greater transparency and better governance of a country's oil and mining resources. Launched in 2002, EITI operates as a coalition of governments, industries, investors, and international and non-governmental agencies that support improved governance in resource-rich countries through the full publication and verification of company payments and government revenues for oil, gas and mining industries.*<sup>187</sup>

On June 12, 2013, in the context of a meeting of G-8 leaders in the United Kingdom, Prime Minister Stephen Harper announced that

*Canada will be establishing new mandatory reporting standards for Canadian extractive companies with a view to enhancing transparency on the payments they make to governments.*<sup>188</sup>

Consultations were promised “over the coming months” with provincial governments, First Nations leaders, industry and civil society organizations, but as of the date of writing (January 2015), there has been no further announcement on the progress of talks towards establishing such standards. Canada is still not a member of the EITI, nor is it yet a candidate country.<sup>189</sup>

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<sup>186</sup> See online <[www.eiti.org](http://www.eiti.org)>, which includes the EITI Standard.

<sup>187</sup> Government of Canada, news release, “Prime Minister Stephen Harper announces partnerships with Peru and Tanzania to further strengthen transparency in their extractive industries” (12 June 2013).

<sup>188</sup> Government of Canada, news release, “Transparency and Accountability in the Canadian Extractive Sector” (12 June 2013). In a similar vein, on 13 December 2013 the Government of Canada issued a consultation paper on corporate governance. According to the *Globe & Mail*'s early report, “The government is also seeking input on ways to improve transparency and reporting to combat bribery in international transactions, and is suggesting there could be improved disclosure rules for share ownership to reduce money laundering, terrorist financing and tax evasion.”

<sup>189</sup> Based on information on <[www.eiti.org](http://www.eiti.org)> retrieved on January 5, 2015.

In February 2014, a consortium of international NGOs launched a new global campaign called “Stop Secret Contracts.” Led by the Open Knowledge Foundation, the campaign was supported by (among others) Transparency International, Global Witness, Integrity Action, the International Budget Partnership, and the Sunlight Foundation.<sup>190</sup>

Another multi-stakeholder initiative is the Open Contracting Partnership.<sup>191</sup> The OCP is a relatively new organization which is currently in the process of organizing as a stand-alone office. Its major sponsors include the World Bank. An example of its work is the Open Contracting Data Standard (OCDS), which “aims to enhance and promote disclosure and participation in public contracting.” Having a data standard will allow direct comparison of contract awards and performance.

Yet another initiative, formed by private corporations, is the World Economic Forum. The WEF describes itself as “an international institution committed to improving the state of the world through public–private cooperation.”<sup>192</sup> It has formed a Partnership Against Corruption Initiative (PACI) task force. The task force’s focus is “how the global anti-corruption agenda can be aligned and the current slew of initiatives can be better coordinated.”<sup>193</sup> There are two significant points here: first, the recognition that there is, in fact, a “slew” of anti-corruption initiatives; and second, the need for alignment and coordination. Dezenski adds this prescient warning:

*...corruption is sophisticated, fast-moving and dynamic—and regulatory institutions often lag behind. Greater alignment and coordination of the many fragmented anti-corruption initiatives being embarked upon around the world is the only way to tackle that challenge successfully.*

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<sup>190</sup> Transparency International, press release, “Launch of new global campaign to stop secret government contracting” (27 February 2014). The campaign has a website ([stopsecretcontracts.org](http://stopsecretcontracts.org)) but activity appears to be limited.

<sup>191</sup> See online <[www.open-contracting.org](http://www.open-contracting.org)>.

<sup>192</sup> See online <[www.weforum.org/world-economic-forum](http://www.weforum.org/world-economic-forum)>.

<sup>193</sup> Elaine Dezenski, “Is It Time to Design Corruption out of the System?”, available online at <[http://www.huffingtonpost.com/elaine-dezenski/is-the-time-right-to-design\\_b\\_4175733.html?utm\\_hp\\_ref=email\\_share](http://www.huffingtonpost.com/elaine-dezenski/is-the-time-right-to-design_b_4175733.html?utm_hp_ref=email_share)>. Not surprisingly, the author’s answer to the title question is “Yes”.

Finally, mention should be made of U4, which describes itself as “a web-based resource centre for development practitioners who wish to effectively address corruption challenges in their work.” U4 is operated by the Chr. Michelsen Institute in Norway, hence the website location <www.U4.no>. U4 is funded by nine national international development agencies.

### 3.3.3 Professional advisors and private firms

Another significant stream of non-academic anti-corruption literature is from professional advisors. Accounting and management advisory firms<sup>194</sup> and law firms<sup>195</sup> publish literature on best practices and compliance.

Spurred by FCPA prosecutions, some of the leading work on anti-corruption compliance is being done by, and within, international corporations. For example, Wal-Mart, stung by revelations about bribery in Mexico, reviewed and revised its worldwide compliance systems. The result is described by one FCPA observer as “stunning” and “a complex, ‘living laboratory’ for compliance innovations.”<sup>196</sup>

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<sup>194</sup> For example, Ernst & Young, “Overcoming Compliance Fatigue: Reinforcing the commitment to ethical growth,” 13th Global Fraud Survey (3 June 2014); Grant Thornton, “Time for a new direction: Fighting fraud in construction”, Global Fraud Commentary 2013. Some Canadian examples are PricewaterhouseCoopers LLP (2013), “Top 10 questions to ask about bribery and corruption”; Grant Thornton (2013), “Construction fraud in Canada—Understand it, prevent it, detect it.”

<sup>195</sup> For example, McCarthy Tétrault, “Canada Experiences Its Most Active Year Yet in Anti-Corruption Law and Enforcement” (8 January 2014); Davies Ward Phillips & Vineberg LLP, “Corrupt Practices in Canada: Context, Substantive Insights and Managing Your Risk” (October 2013); Michael Osborne, “Canada’s Foreign Anti-Bribery Law” (unpublished paper). The author is a partner with the law firm Affleck Greene McMurtry LLP in Toronto. Although the paper is undated, it refers to events occurring in 2013.

<sup>196</sup> “Walmart is now the world’s living laboratory for compliance,” FCPA Blog (21 May 2014). The Walmart program includes the following elements: structure; expertise; training; global escalation and review procedures; compliance and ethics committees; anti-corruption controls and procedures; global compliance systems; and corporate governance.

### 3.3.4 Popular literature

A fourth stream of corruption literature is what might be called “popular” literature, written by individuals who are promoting, to a general audience, the anti-corruption cause. In this stream would be recent books by Transparency International activists Laurence Cockcroft<sup>197</sup> and Frank Vogl,<sup>198</sup> and the multi-platform campaign by Charmian Gooch of Global Witness to end anonymous companies.<sup>199</sup>

### 3.3.5 Daily press

A fifth stream of corruption literature is the daily press and, in the modern era, Internet blogs. The illegality of corruption produces a seemingly endless stream of stories. TI produces the “Daily Corruption News,” a compilation of international corruption stories. There is also “Corporate Embezzler”, “Whistleblower Today”, “the FCPA Blog”, and “The Ethical Alliance Daily”, among others, which compile, analyze, and relay corruption news from media outlets around the world.

This stream was particularly lively in Quebec during the hearings of the Charbonneau Commission. The hearings produced a daily stream of characters, incidents, and analysis. For an extended period, Quebec’s newspapers covered corruption almost daily.

## 3.4 THE CASE OF NEW YORK CITY

New York City provides probably the best, clearest precedent for anti-corruption efforts in public-sector procurement.<sup>200</sup> There are remarkable parallels to the situation in

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<sup>197</sup> Laurence Cockcroft, *Global Corruption: Money, Power, and Ethics in the Modern World* (Philadelphia: University of Pennsylvania Press, 2012).

<sup>198</sup> Frank Vogl, *Waging War on Corruption: Inside the Movement Fighting the Abuse of Power* (Lanham, MD: Rowman & Littlefield Publishers Inc., 2012).

<sup>199</sup> Her TED talks on this subject can be viewed online at <[www.ted.com](http://www.ted.com)>.

<sup>200</sup> Most of the information in this section is taken from the evidence of Rose Gill Hearn and Thomas D (Toby) Thacher II to the Charbonneau Commission on October 7, 2014.



Quebec. Furthermore, New York City's population of 8.4 million, and its annual capital budget of about \$6 billion, makes it roughly the same size as Quebec. If Bill 1's drafters were going to look somewhere for guidance, New York City would be a leading candidate.

A growing controversy in the 1980s over construction corruption in New York City led to the appointment by the state governor, in 1985, of an Organized Crime Task Force. Crucially, the Task Force did not focus solely on investigation and prosecution—although there was plenty of both—but also included, as an essential part of its mandate, a deep study of the historical, economic, labour, and social roots of corruption in the construction industry.<sup>201</sup> The Task Force reported its results in 1990.<sup>202</sup> The task force exposed deep-rooted patterns of extortion, bribery, illegal cartels, and bid-rigging. Unions, which controlled labour supply, were a critical element of the corruption.

As a result of the Task Force report, new processes were implemented. The new processes are complex and interrelated, but they include pre-bid vetting, consistent contractual language, central control over contracts by the Mayor's Office of Contract Services, a central contract database, a system for receiving tips and complaints, and a system of independent "monitors" to oversee contract administration. The monitors are paid for by the contractors and have total access to the site and to the contractor's offices and staff.

In addition, the longstanding Department of Investigations (DOI) was reinvigorated. The DOI, first created in the 1870s in the wake of an earlier scandal, is a mayoral agency, led by a commissioner. Following revisions of the city charter in 1989, the commissioner is nominated by the mayor but approved by New York City Council, and may not be

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The full transcript is available on-line via the commission's website  
<[www.ceic.gouv.qc.ca](http://www.ceic.gouv.qc.ca)>.

<sup>201</sup> Evidence of Toby Thacher to the Charbonneau Commission at 123 (7 October 2014).

<sup>202</sup> *Corruption and Racketeering in the New York City Construction Industry: The Final Report of the New York State Organized Crime Taskforce* (1990), which was published in book form by New York University Press in 1991.

summarily dismissed. The DOI's mandate is to investigate wrongdoing, but it also places considerable importance on recommending process improvements and ensuring that goods and services are provided without interruption.<sup>203</sup>

The pre-vetting that is part of the New York contract system does not, itself, result in many firms being disqualified. In 2011, there were eighteen companies deemed “non-responsible”—that is, not eligible to contract with the city—and in 2012 there were twelve. Compared to the many thousands of companies and contracts awarded in any given year, that number is very low. Nevertheless, the vetting system brings to light a variety of issues, such as unpaid fines, that the contractor can clear up.<sup>204</sup> The city's policy is “to have as many people in the bid pool as possible,” so there is no debarment as such, but case-by-case evaluation.<sup>205</sup>

The anti-corruption efforts in New York City have spawned an extensive literature,<sup>206</sup> and also debate about which people and instruments played the most important roles.<sup>207</sup> The Charbonneau Commission acknowledged New York City's success when it invited two leaders of the New York City integrity system to give evidence before the commission. It was the only jurisdiction so invited.

### **3.5 THE PERSISTENCE OF CORRUPTION**

One of the oddities, in studying corruption, is that more effort than ever before is being directed at reducing corruption, and yet the results of that effort are, at best, difficult to

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<sup>203</sup> Evidence of Rose Gill Hearn to Charbonneau Commission at 43 (7 October 2014).

<sup>204</sup> Ibid at 94-95.

<sup>205</sup> Ibid at 96.

<sup>206</sup> For example, John Jacobs (with Coleen Friel and Robert Radick) in *Gotham Unbound: How New York City Was Liberated From the Grip of Organized Crime* (New York: New York University Press, 1999) details the story of mafia control of six industries in New York City, including construction.

<sup>207</sup> The Jacobs book cited in the previous footnote gives considerable credit to Rudy Giuliani (both in his role as district attorney and later as mayor) for loosening mafia control. This account is contested by Louis J. Kern in his review of the Jacobs book in 3 *Regional Labour Review* 36-38 (Fall 2000).

discern. To put it bluntly, nobody seems too sure of what is working, and what is wasted or even counter-productive effort.

Here are a few very recent examples of the (apparent) persistence of corruption:

- Transparency International’s news release on the 2013 Corruption Perceptions Index opens with these words: “Transparency International’s Corruption Perceptions Index 2013 offers a warning that the abuse of power, secret dealings and bribery continue to ravage societies around the world.”
- Speaking in December 2013, the president of the World Bank, Jim Yong Kim, referred to corruption as “public enemy number one” in the developing world.<sup>208</sup>
- Two economists wrote in 2011 that “Despite the efforts made to curb corruption, it has reached epidemic proportions and is becoming one of the major challenges for management thought and practice in the 21st century.”<sup>209</sup>

Laurence Cockcroft, one of TI’s founders, sums up his recent (2012) book this way:

*This book will show that, in spite of some progress, all forms of action in combating corruption have a long way to go. The international community needs to recognize that reform of corruption to date has been extremely limited, that momentum needs to be maintained, and that the challenges of this century can only be met successfully if the corruption dimension is built into policy and action. Without this, action to combat it at country level will be flawed, and progress on the issues of the twenty-first century will be hostage to the many and burgeoning forces of corruption.*<sup>210</sup>

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<sup>208</sup> “Remarks by World Bank Group President Jim Yong Kim at ‘Speak Up Against Corruption’ Event,” available online at <<http://www.worldbank.org/en/news/speech/2013/12/19/world-bank-group-president-jim-yong-kim-corruption-event>> (13 December 2013).

<sup>209</sup> Tabish and Jha, note 35 above, at 22, citing C.L. Pearce, H.P. Sims Jr, and C.C. Manz, “The roles of vertical and shared leadership in the enactment of executive corruption: implications for research and practice” (2008) 19 *The Leadership Quarterly* 353–9.

<sup>210</sup> Laurence Cockcroft, *Global Corruption: Money, Power, and Ethics in the Modern World* (Philadelphia: University of Pennsylvania Press, 2012) at 9.

These are strong words—“ravage”, “public enemy”, “epidemic.” And yet reform of corruption has been “extremely limited.” How can it be that so much effort is being directed against corruption, and yet so much remains?

As is the case with stories about rising crime, more than one explanation is possible. Perhaps corruption “continues to ravage societies around the world” because more attention is being paid to it, and it is being reported better than before. Perhaps anti-corruption measures really are making a difference, and the ravages of corruption would be significantly worse without them. Or maybe the current array of anti-corruption measures are ineffective, and are, like corruption itself, a waste of precious public resources.

At the very least, the persistence of corruption, in the face of unprecedented efforts to stamp it out, should serve as a warning to lawmakers: there are no easy answers, and more legislation may well be counter-productive.

### **3.6 SUMMARY**

There is a vast and growing literature on how to fight corruption. There is little agreement in the literature about what corruption is, other than the fact that it is a complex phenomenon. Neither is there agreement in the literature about which steps are most likely to reduce or eliminate corruption. If there is agreement, it is only that there is no simple answer, and that there is a need for co-ordination of the various anti-corruption initiatives around the world.

The most sophisticated players in the anti-corruption industry around the world are the World Bank, the OECD, and the European Union. Each has produced an impressive body of work. The World Bank is the leader on sanctions, and most recently has emphasized the need for international co-ordination of rather fragmented anti-corruption efforts. The OECD is writing candid reports about its members’ efforts to enforce its Anti-Bribery Convention. The EU administers its procurement directives, and believes

that its legislative efforts have gone far enough, and that the focus should shift to implementation and enforcement of existing rules.

From an enforcement perspective, the U.S. Foreign Corrupt Practices Act (FCPA) is vigorously enforced. Management practices are affected indirectly, by way of attempts to forestall an FCPA prosecution, or mitigate an FCPA punishment. The vigorous enforcement of the FCPA has created a burgeoning compliance industry. In comparison, enforcement of Canada's obligations under the OECD Anti-Bribery Convention, specifically the Corruption of Foreign Public Officials Act (CFPOA), has been almost non-existent.

The fuzzy international picture becomes clearer, though perhaps only a little, when the focus narrows to corruption specifically in public-sector procurement. There is agreement that large-scale construction projects are particularly prone to corruption, both because of the large amounts of money involved, and because a large construction project is such a complex undertaking that there are many points at which corruption can enter and be hidden.

New York City offers a particularly sophisticated and close-to-home example of how to tackle a thoroughly corrupt construction industry. The 1990 report of the Organized Crime Task Force resulted in process changes that made New York City a leader in the field of anti-corruption in public procurement.

Given everything that has been written to this point, an evidence-based law-making process might reasonably be expected to see Quebec's lawmakers consider at least the following questions:

- Definition of the problem: What is the nature of the corruption in Quebec's public procurement?

- Outline of the legal context: What is the existing legal context (international and national anti-corruption instruments) for corruption in public-sector procurement, and how does a new law fit in that context?
- Survey of the literature: What guidance is provided by the existing academic and non-academic literature on fighting corruption in public-sector procurement?
- Survey of practical experience: What guidance is provided by practical experience in fighting corruption in other jurisdictions, such as the World Bank, the OECD, the EU, and New York City?
- Evaluation of effectiveness: Assuming the approach embodied in Bill 1 is supported by context, the literature, and experience, how will the operation of the new law be monitored, and how will success be measured?

In the next chapter, we reach the heart of this thesis: What did Quebec's lawmakers actually do?

## **CHAPTER 4      QUEBEC'S BILL 1 AS A CASE STUDY OF ANTI-CORRUPTION LAW-MAKING**

### **4.1    SOME FUNDAMENTALS OF THE LAW-MAKING PROCESS IN CANADA**

Every Canadian legislature works roughly the same way. Each is based on a Westminster model of procedure.

Anyone can propose a new law in the form of a “bill.” The bill can do something new, or it can amend or repeal an existing law. In order to become a law, a bill must go through three stages. These are called “readings,” but the bill is not literally read aloud. The introduction of the bill is “first reading.” The bill’s sponsor stands and reads the title. The bill is then copied and distributed to all members. Approval in principle is “second reading.” That’s when most of the debate occurs. During second reading debate, any member can stand to argue for or against the bill. If a bill passes second reading, it moves on to a committee that hears from the public and examines the bill clause by clause. Final approval is “third reading.” And once a bill passes third reading, it becomes law when the Lieutenant-Governor signs it (“Royal Assent”). It enters into force on Royal Assent, unless the bill specifies a different date or permits the government to choose a date. There are small variations in this procedure across Canada, especially at the committee stage, but the general scheme is the same.<sup>211</sup>

The reality is that most bills with any chance of adoption are proposed by the government. Government bills have a sponsoring minister, whose department is responsible for the background policy work and the drafting instructions. Regardless of whether the House has a majority or minority government, there is always a ministry responsible for a government bill, and always a sponsoring minister. Other members

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<sup>211</sup> This paragraph is a paraphrase of Graham Steele, *What I Learned About Politics* (Halifax: Nimbus, 2014) at 24-26. The legislative process in Quebec is summarized on the Quebec government website at <<http://www.assnat.qc.ca/fr/abc-assemblee/projets-loi.html#CheminementPublic>>.

may propose a bill, of course, but they are not government bills. They are referred to as “private members’ public bills.”

Another reality is that there is, in Canada, tight party discipline on voting. A government bill is very likely, almost certain, to be supported by every member of the government caucus. If the government caucus has a majority of members in the House, then the sponsoring minister, effectively, controls and speaks on behalf of them all.

It is for this reason that the courts, if they accept Hansard evidence at all, are most likely to cite only excerpts from the sponsoring minister’s second reading speech (approval in principle).<sup>212</sup> That minister’s intention comes closest to representing, or at least being a proxy for, the intention of a majority of members of the House.

But in a minority government, the sponsoring minister cannot claim to be the directing mind of a majority of the House. This was the situation in Quebec at the time of Bill 1’s passage. The standings in the House after the 2012 election were: Parti Québécois (PQ) 54, Parti Libéral du Québec (PLQ) 50, Coalition Avenir Québec (CAQ) 19, Québec Solidaire (QS) 2.

#### **4.2 BILL 1: THE LEGISLATIVE PROCESS**

As its name implies, Bill 1 was the first bill introduced by the PQ government in its first legislative session after forming the government in September 2012. The PQ ministry was sworn in on September 19, 2012. According to Minister Bédard, he and a team of lawyers, principally from the Conseil du trésor [translation: Treasury Board], immediately set to work on Bill 1, and devoted long hours to getting it ready for the fall sitting of the National Assembly, which started only six weeks later.

Second reading (approval in principle) was given on November 20, 2012. The bill was referred to the National Assembly’s Commission des finances publics [translation:

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<sup>212</sup> See section 1.2.1 above.



Standing Committee on Public Finance, hereafter “Standing Committee”), which held four days of public hearings. The Standing Committee held a further eight sessions of clause-by-clause study, at which dozens of amendments were introduced, debated, and voted upon.

Bill 1 received third reading in the National Assembly on December 7, 2012, and the Lieutenant Governor gave Royal Assent later the same day. Most of Bill 1 entered into force on Royal Assent.<sup>213</sup>

Because the PQ formed a minority government, Bill 1 could not pass through the National Assembly unless the government attracted the support of at least one of the major opposition parties (i.e. either the PLQ or the CAQ; Québec Solidaire, with only two seats, was too small to matter). This turned out not to be a problem, as Bill 1 received unanimous support.

Every person and organization appearing before the Standing Committee, and all three opposition parties, were at pains to point out that they supported the goal of rooting out corruption. It would have been difficult, politically, for any of the opposition parties to oppose the PQ’s signature piece of anti-corruption legislation. As Sam Hamad, chief spokesperson for the Liberals on Bill 1, said in his closing comments to the Commission des finances publiques, “personne n’est contre l’intégrité” [translation: “nobody’s against integrity”]. The Liberals were still under a cloud of corruption and so could not oppose it, lest their public image be further tainted. The CAQ could not oppose it for a different reason: they had gone full tilt against Liberal corruption, and had attracted anti-corruption crusader Jacques Duchesneau, a former Montreal police chief, as a star candidate. Duchesneau was elected for the CAQ in Saint-Jérôme and led the debate on Bill 1 on

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<sup>213</sup> Section 102 of Bill 1 reads as follows: “102. This Act comes into force on 7 December 2012, except sections 3, 4, 5 and 9, paragraph 6 of section 13, sections 14 and 16, paragraph 1 of section 18, sections 23, 24, 31 to 39, 43 to 45, 47, 48, 51, 52, 56, 69, 71 to 75, 78, 79, 81 and 82, which come into force on the date or dates to be set by the Government.”

behalf of the CAQ. Duchesneau thought there were gaps in Bill 1, and wanted to make it stronger, but evidently did not believe that was reason enough to vote against it.

The fact that the PQ had only a minority in the National Assembly also meant that they did not control the Standing Committee. The composition of the National Assembly's standing committees roughly reflects the composition of the assembly. During the PQ government in 2012-14, the Standing Committee had nine members, with four from the PQ side, four from the PLQ, and one from the CAQ.<sup>214</sup> Thus Minister Bédard had to receive the support of either the PLQ or the CAQ to adopt any amendment he favoured, or to reject any amendment he did not favour. Even when he did not favour an amendment, the two major opposition parties could combine to outvote the government members. It did not happen often, and not on any major point, but it did happen.<sup>215</sup>

Because of the numbers, the Standing Committee debates were real debates, and the government had to do a lot more explaining than usual. For example, on December 3, 2012, there is a very extended debate between Jacques Duchesneau for the CAQ and Minister Bédard on whistleblower protection. Minister Bédard had to persuade Duchesneau to drop his amendment, or get the Liberals to vote with him to defeat it. (In the end, Duchesneau dropped it.) This kind of extended debate would not happen under a majority government. The governing party would, as quickly as possible, listen to the opposition argument, call for a vote, defeat the amendment, and move on to the next proposed amendment.

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<sup>214</sup> MNA Amir Khadir from the two-member Québec Solidaire also participated from time to time, though not regularly. He did not have a formal seat on the Standing Committee and therefore could not propose amendments, and neither could he vote.

<sup>215</sup> There is one such example that occurred on November 26, 2012. In cases of urgency, a government unit can award a contract to a contractor lacking an authorization from the AMF, but the unit has to report the fact to the Treasury Board. The original Bill 1 said it had to be reported within 30 days. Over Minister Bédard's objection, the opposition parties amended it to say 15 days. This is obviously not a major point, but it reinforces that the government could not always get its own way, as it would in a majority situation.

In addition to the speeches in the National Assembly itself, the transcripts of the Standing Committee run to nearly 400,000 words. Studying these transcripts is the key to the research methodology underlying this chapter.<sup>216</sup>

### **4.3 BILL 1: A SUMMARY OF ITS KEY FEATURES**

Minister Bédard, in his opening remarks to the Commission des finances publiques, on November 12, 2012, identifies the core of Bill 1 this way:

*L'habilitation. C'est le coeur du projet de loi, que les entreprises soient habilités à traiter avec l'État.*

*[translation: Pre-authorization. That's the heart of the bill, that businesses should be pre-authorized when contracting with the state.]*

Elsewhere in the same speech, he puts it this way:

*...c'est indicateur de notre volonté, nous plaçons l'intégrité au-dessus même du processus d'adjudication des contrats. C'est la base, c'est l'esprit du projet de loi. Oui, nous devons avoir un bon processus d'adjudication, de bons devis en termes techniques, mais, à la base, nous devons contracter et chercher à contracter qu'avec des gens qui sont honnêtes, qui ont des pratiques honnêtes.*

*[translation: It's indicative of our intention, we're putting integrity above even the process of adjudicating contracts. That's the foundation, that's the spirit of the bill. Yes, we have to have a good adjudication process, good quotes in technical terms, but, at bottom, we have to contract and seek to contract only with people who are honest, who have honest practices.]*

The explanatory notes to Bill 1, which do not form part of the bill's official text but which are prepared on behalf of the government, summarize the bill this way:

*This Act amends the Act respecting contracting by public bodies to enhance integrity in public contracts.*

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<sup>216</sup> For more on methodology, see section 1.2.

*To that end, it proposes a system under which audits will be conducted to ascertain that enterprises wishing to enter into contracts with public bodies or municipalities meet the required conditions as regards integrity.*

*To enter into such a contract, an enterprise must first obtain an authorization from the Autorité des marchés financiers (the Authority). The Authority will examine the integrity of the enterprise and of its shareholders, partners, directors or officers and of any person or entity that has direct or indirect legal or de facto control over the enterprise.*

*To ensure that the Authority has all the relevant information it needs to make decisions as regards authorizations, it is empowered to mandate the Associate Commissioner for Audits appointed under the Anti-Corruption Act to conduct the audits the Associate Commissioner considers necessary. The factors to be considered by the Authority in making such decisions are specified in this Act.*

*An authorization will be valid for a period of three years and is renewable.*

*The scope of the Act respecting contracting by public bodies is broadened in order to extend the concept of “public body” to include other State entities and thus bring them under that Act.*

*Other amendments are made for more effective enforcement of the Act respecting contracting by public bodies.*

All of Bill 1 consists of amendments to existing legislation. At the time, Quebec already had an impressive list of anti-corruption laws.<sup>217</sup> Part of the backdrop to Bill 1 was the idea, shared by both government and opposition, that previous anti-corruption laws had been too easy to get around. The daily drip of news from the Charbonneau Commission was evidence enough that corruption in public-sector procurement was, despite the statutory framework, still thriving.

The bulk of Bill 1 is amendments to the *Loi sur les contrats des organismes publics* [translation: *An Act respecting contracting by public bodies*], which take up twenty-two

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<sup>217</sup> See section 2.4 above.

pages of the bill's thirty-six pages. These provisions are contained in s 10 of Bill 1, which adds Chapter V.2, "Prior Authorization for Public Contract or Public Subcontract".

Fifteen other statutes are amended. None of these other amendments is substantive. They consist largely of extending the reach of the Act respecting contracting by public bodies, for example to reach every municipality (ss 46, 49, 53); and giving officials the authority they need to implement the Act, for example by giving the UPAC search powers (s 61).

The requirement for pre-authorization is in a new s 21.17:

*An enterprise that wishes to enter into a contract with a public body involving an expenditure equal to or greater than the amount determined by the Government must obtain an authorization for that purpose from the Autorité des marchés financiers (the Authority). ...*

*An enterprise that wishes to enter into a subcontract that involves an expenditure equal to or greater than that amount and that is directly or indirectly related to a contract described in the first paragraph must also obtain such an authorization. ...*

The criteria for pre-authorization are in sections 21.26 and 21.27. There is a significant difference between these two provisions: the former is automatic, the latter is discretionary. Section 21.26 reads as follows:

*21.26 The Authority refuses to grant or to renew an authorization, or revokes an authorization, if*

*(1) the enterprise has, in the preceding five years, been found guilty of an offence listed in Schedule I;*

*(2) any of the enterprise's shareholders holding 50% or more of the voting rights attached to the shares that may be exercised under any circumstances has, in the preceding five years, been found guilty of an offence listed in Schedule I;*

*(3) any of the enterprise's directors or officers has, in the preceding five years, been found guilty of an offence listed in Schedule I;*

*(4) the enterprise has, in the preceding five years, been found guilty by a foreign court of an offence which, if committed in Canada, could have resulted in criminal or penal proceedings for an offence listed in Schedule I;*

*(5) the enterprise has been found guilty of an offence under section 641.2 of the Act respecting elections and referendums in municipalities (chapter E-2.2), section 221.1.2 of the Act respecting school elections (chapter E-2.3) or section 564.3 of the Election Act (chapter E-3.3), and the prohibition prescribed by that section in connection with the offence has not expired, unless a judge has suspended the prohibition;*

*(6) the enterprise has, in the preceding two years, been ordered to suspend work by a decision enforceable under section 7.8 of the Act respecting labour relations, vocational training and workforce management in the construction industry (chapter R-20); or*

*(7) the enterprise has, in the preceding two years, been ordered by a final judgment to pay an amount claimed under subparagraph c.2 of the first paragraph of section 81 of that Act.*

*A finding of guilty must be disregarded if a pardon has been obtained.*

The criteria laid out in s 21.26 for refusal or revocation are objective, or what Minister Bédard referred to as “automatismes” [translation: non-discretionary provisions]. Importantly, they leave the decision-making about whether there has been a conviction (paragraphs 1-5) or an order (paragraphs 6 and 7) to the competent authority. If there is such a conviction or order, refusal or revocation is automatic.

In contrast to the automatic nature of s 21.26, s 21.27 is more subjective:

*21.27. The Authority may refuse to grant or to renew an authorization or may revoke an authorization if the enterprise concerned fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract or subcontract.*<sup>218</sup>

(Emphasis added.)

It is not hard to see the legal questions embedded in this startlingly subjective criterion: What is “integrity”? What are “the high standards of integrity”, and who determines their content? Who is “the public”? How could we know what the public “is entitled to expect”? None of these is a legal term of art.

The inquiry mandated by s. 21.27 is very broad, as is made clear by the first paragraph of s. 21.28:

*21.28. For the purposes of section 21.27, the integrity of an enterprise and that of its directors, partners, officers and shareholders as well as that of other persons or entities that have direct or indirect legal or de facto control over the enterprise may be examined.*

The government must have known that it was entering difficult waters. The rest of s. 21.28 is an attempt to structure the inquiry raised by s. 21.27:

*To that end, the Authority may consider such factors as*

*(1) whether the enterprise or a person or entity referred to in the first paragraph maintains connections with a criminal organization within the meaning of subsection 1 of section 467.1 of the Criminal Code (Revised Statutes of Canada, 1985, chapter C-46) or with any other person or*

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<sup>218</sup> In Bill 1 as introduced, the section that eventually became s 21.27 was worded differently: “21.25. The Authority may refuse to grant or to renew an authorization or may revoke an authorization if, in its opinion, public confidence in the enterprise concerned is undermined on account of a lack of integrity on the part of the enterprise, any of its partners, directors or officers or another enterprise that has direct or indirect legal or de facto control over the enterprise.” This clause was amended in committee on November 26, 2012, at the government’s request.

*entity that engages in laundering of proceeds of crime or in trafficking in a substance included in any of Schedules I to IV to the Controlled Drugs and Substances Act (Statutes of Canada, 1996, chapter 19);*

*(2) whether the enterprise or a person or entity referred to in the first paragraph has been prosecuted, in the preceding five years, for any of the offences listed in Schedule I;*

*(3) whether an enterprise, any of its directors, partners, officers or shareholders or a person or entity that has direct or indirect legal or de facto control over the enterprise has direct or indirect legal or de facto control over the enterprise seeking or holding an authorization and was, at the time an offence listed in Schedule I was committed by another enterprise, a director, partner, officer or shareholder of that other enterprise or a person or entity that had direct or indirect legal or de facto control over that other enterprise, provided the other enterprise was found guilty of the offence in the preceding five years;*

*(4) whether the enterprise is under the direct or indirect legal or de facto control of another enterprise that has, in the preceding five years, been found guilty of an offence listed in Schedule I or whether any of the directors, partners or officers of that other enterprise or a person or entity that had direct or indirect legal or de facto control over that other enterprise was under such control at the time the offence was committed;*

*(5) whether the enterprise or a person or entity referred to in the first paragraph has, in the preceding five years, been found guilty of or prosecuted for any other criminal or penal offence committed in the course of the enterprise's business;*

*(6) whether the enterprise or a person or entity referred to in the first paragraph has repeatedly evaded or attempted to evade compliance with the law in the course of the enterprise's business;*

*(7) whether a reasonable person would conclude that the enterprise is the extension of another enterprise that would be unable to obtain an authorization;*

*(8) whether a reasonable person would conclude that the enterprise is lending its name to another enterprise that would be unable to obtain an authorization;*

*(9) whether the enterprise's activities are incommensurate with its legal sources of financing; and*



*(10) whether the enterprise's structure enables it to evade the application of this Act.*

*For the purposes of section 21.27, the Authority may also consider whether a person in authority acting on behalf of the enterprise has, in the preceding five years, been found guilty of or prosecuted for an offence listed in Schedule I.*

*A finding of guilty must be disregarded if a pardon has been obtained. The facts and circumstances surrounding an offence for which a pardon has been obtained may nevertheless be taken into consideration.*

*For an enterprise that is a public corporation, a person holding 10% or more of the voting rights attached to the shares of the enterprise is a shareholder.*

With these provisions, the Marois government entered into new legislative territory. Nobody in Canada had tried anything like this before. And indeed, there is no obvious precedent for it anywhere in the world.

#### **4.4 BILL 1: WHAT WERE THE OBJECTIVES?**

The primary objective of Bill 1 was laid out by Minister Bédard in his second reading speech to the National Assembly :

*Nous avons un objectif qui est clair: ramener la probité en matière de contrats publics pour faire en sorte qu'être honnête au Québec, ça doit être payant pour tout le monde ...*

*[translation: We have a clear objective: restore probity in public contracts, so that being honest is profitable for everybody...]*

The most basic element of public procurement—that a public contract should be awarded to the bidder submitting the best bid, without fear or favour—was in doubt in Quebec, and the government's main objective was to rectify that problem.

The government was at pains to point out that Bill 1 was only the first part of a broader anti-corruption agenda. Over the course of the debate, Minister Bédard referred many times to a “trilogy” of anti-corruption measures. Bill 1 was the first part of the trilogy, with parts two and three still to come. This is how Minister Bédard explained the trilogy, in his second reading speech :

*On vise les contrats publics actuellement. Il y aura d'autres phases. Il y aura une phase qui va toucher plus à l'interne, comment on s'assure aussi qu'au niveau de ceux et celles qui donnent des contrats on ait une préoccupation aussi par rapport à cette probité-là. Et la troisième, c'est au niveau des règles contractuelles, de revoir l'ensemble des règles contractuelles au Québec pour viser à harmoniser ces règles-là, d'avoir des bonnes pratiques, d'intégrer les meilleures pratiques et de disqualifier les mauvais entrepreneurs sur une base qui est autre que celle de la probité mais qui est plutôt des gens qui exécutent mal des contrats, qui sont des mauvaises... je vous dirais, des mauvais partenaires contractuels.*

*[translation : ...We're looking at public contracts right now. There will be other phases. There will be one phase that deals with more internal matters, how do we make sure as well with those who give out contracts that we have the same concern about probity. And the third is at the level of contractual rules, to review all the contractual rules in Quebec to try to harmonise them, to have good practices, to integrate best practices and to disqualify bad business people on a basis other than probity, like people who perform contracts poorly, who are bad...I might say, bad contractual partners.]<sup>219</sup>*

In a different speech, on third reading, Minister Bédard reiterated the trilogy, but stated that in his opinion Bill 1 was the most important of the three.<sup>220</sup>

But there was more to Bill 1 than restoring integrity to the public procurement process. There was, in particular, another objective, a more political one; and it is this other

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<sup>219</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012).

<sup>220</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (6 December 2012) : "C'est la première, et je ne vous cacherai pas que c'est la plus importante." [Translation : "It's the first, and I won't hide the fact that it's the most important".]

objective that may explain some of the problems with Bill 1 that will be identified later in this chapter.

In the debates on Bill 1, Minister Bédard returns repeatedly to the theme of restoring public confidence. In fact, the “public confidence” objective is written right into the statutory objectives of the Act respecting public contracts:

*2. Section 2 of the Act [the Act respecting contracting by public bodies] is amended by inserting the following subparagraph before subparagraph 1 of the first paragraph:*

*“(0.1) public confidence in the public procurement process by attesting to the integrity of tenderers;”.*

Section 55 of Bill 1 also amends the Anti-Corruption Act by adding, to the existing statutory objectives in that Act, the following words: “and to enhance public confidence in the public procurement process.”

It should be pointed out that “re-establish[ing] public confidence” is a significant *and different* objective from restoring integrity. One can restore integrity to public procurement without restoring public confidence (i.e. the system is clean, but the public does not believe it). Equally, one can restore public confidence in public procurement without restoring integrity (i.e. the public believes the system is clean, but it is not). This is not to suggest that the objectives of integrity and public confidence are totally unrelated to one another. A system with demonstrable integrity is more likely to win public confidence. But what matters, with respect to public confidence, is whether the public *believes* there is integrity.

#### **4.5 BILL 1: WHAT WERE THE OBJECTIONS?**

Everyone, including both major opposition parties and all presenters to the Standing Committee on Public Finances, expressed support for Bill 1. This support is not

surprising, given the context in Quebec at the time. For example, MNA Hamad, speaking for the Quebec Liberal Party, made the following remark at the Standing Committee on November 22, 2012:

*...tout le monde ici, à l'Assemblée nationale, nous sommes tous pour l'intégrité, c'est clair. On est contre la collusion et la corruption et on veut adopter la meilleure loi dans les circonstances que nous avons aujourd'hui...*

*[translation: ...everybody here, in the National Assembly, we're all for integrity, clearly. Everybody's against collusion and corruption and we want to adopt the best law for the present circumstances...]*

At a different point in the discussion, on December 4, 2012, MNA Hamad makes the same point in the opposite way: “personne n'est contre l'intégrité” [translation: “nobody is against integrity”]. There was therefore no question that the bill would pass, and pass unanimously. The only question was what the bill would say.

There were four principal objections raised by presenters at the Standing Committee:

- the bill was being pushed too quickly through the National Assembly;
- the key legal concepts were too subjective;
- the institutional actors responsible for enforcement did not have the necessary resources; and
- Bill 1, even if it worked on its own terms, would be ineffective in containing corruption.

#### 4.5.1 Speed

A recurring theme, in all of the debate on Bill 1, is the speed at which the government is acting.

There were only six weeks between the swearing-in of the new government and the introduction of Bill 1 to the National Assembly. The PQ government was elected on September 4, 2012; the new ministry was sworn in on September 19, 2012; the National Assembly was called into session on October 30, 2012; and Bill 1 was introduced on November 1, 2012.

In the course of debate, Minister Bédard refers several times to the long hours put in by the drafting team. His intention is to praise them, but of course it also underlines the tight timeframes within which the drafters were working :

*Évidemment, je salue les collègues de la commission qui vont me donner un bon coup de main là-dessus, le personnel du Conseil du trésor, évidemment, qui ont travaillé, depuis notre arrivée, à faire en sorte que ce projet de loi corresponde aux attentes de la population. Nous l'avons fait avec toute la compétence qu'on peut déployer. Évidemment, je serais peut-être un peu mesquin de ne pas mentionner les légistes des autres ministères aussi qui ont eu à travailler avec Mme Julie Blackburn qui m'accompagne ici, actuellement. Donc, quatre contentieux ont travaillé d'arrache-pied pendant un mois et demi pour livrer ce projet de loi, et j'en suis particulièrement fier.<sup>221</sup>*

*[translation : Of course, I thank the members of the Standing Committee who are going to give me a hand [with Bill 1], the staff of the Treasury Board, of course, who have worked, since our arrival, so that this bill will match the public's expectations. We've done it with all resources we could muster. Of course I would be remiss not to mention the lawyers from other ministries who also worked with Julie Blackburn, who's here with me now. So four lawyers worked tirelessly for a month and half to prepare this bill, and I'm particularly proud of them.]*

Minister Bédard stated firmly that the government's wish was to pass the bill before the end of the legislative sitting. In his brief remarks on first reading, Minister Bédard indicates the government's wish to pass the bill "before Christmas"<sup>222</sup> (he was speaking

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<sup>221</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (12 November 2012).

<sup>222</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (1 November 2012): "Vu les délais qui nous sont impartis -- vous le savez, nous souhaitons l'adoption avant Noël -- nous ferons vite et bien." [translation: "Given the time available — you

in early November). In his second reading speech, Minister Bédard says, immediately after laying out the bill’s objectives,

*... et j'espère que les partis d'opposition sentent la même urgence que moi quant à réaliser cet objectif.*

*[translation: ...and I hope the opposition parties sense the same urgency as I do as far as realizing that objective goes.]*

Indeed, in the course of his second reading speech, the minister uses the word “rapidly” (or cognates or synonyms) thirteen times.<sup>223</sup>

A number of the presenters at the Standing Committee noted that they had limited time to pull together a submission.<sup>224</sup> One witness, from the Quebec Association of Consulting Engineers, cautioned the government against moving too quickly:

*Nous comprenons l'empressement du gouvernement à légiférer pour assurer l'intégrité des marchés publics. Toutefois, il nous apparaît important que le contexte de crise actuel ne pousse pas l'État à mettre des entreprises et des emplois à risque sur la seule base de perception exacerbée par les révélations entendues quotidiennement devant la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction.*<sup>225</sup>

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know, we want this passed before Christmas — we’ll do it [consultation] good and quick.”

<sup>223</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012).

<sup>224</sup> For example, Jean Pouliot of the Association de la construction du Québec (ACQ), in response to a question from Minister Bédard about what concrete changes the association was proposing, said “Bien, vous savez, étant donné le très peu de temps que nous avons eu pour étudier le projet de loi... Donc, ça va très, très vite. On a été convoqués en fin de semaine” [translation: “Well, you know, given the very short time we had to study the bill... Well, it’s going very, very fast. We were called on the weekend”]: Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (12 November 2012)

<sup>225</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (12 November 2012).

*[translation: We understand the readiness of the government to legislate to ensure integrity in public procurement. Nevertheless, it seems to us important that the context of the current crisis not push the government to put businesses and jobs at risk on the sole basis of a perception, highlighted by the revelations heard daily at the [Charbonneau Commission].]*

The opposition members also complained, at various times, about the speed at which Bill 1 was being moved through the legislative process. Sam Hamad, in his closing comments to the Standing Committee, put it this way:

*En fait, si on compte le nombre d'amendements, on était rendus à 86 amendements apportés au projet de loi. C'est la démonstration claire et nette que nous avons bonifié le projet de loi et aussi, en même temps, c'est la démonstration que le projet de loi, tel qu'il a été présenté, n'était pas prêt pour être adopté et pour enrayer la collusion et la corruption.*

*[translation: In fact, if you count the number of amendments, we got to 86 amendments to the bill. That's a very clear demonstration that we improved the bill, and at the same time, it's a demonstration that the bill, as presented, wasn't ready to be passed and to put an end to collusion and corruption.]<sup>226</sup>*

Jacques Duchesneau, in his closing comments on behalf of the CAQ, expressed the same complaint, but in different terms:

*Bref, sans que ça soit une critique négative, je trouve que ça s'est fait vraiment rapidement. Je comprends les contraintes parlementaires, mais disons que chaque article finalement a presque été retouché, et, si on avait eu plus de temps, on aurait... en tout cas, dans mon cas... m'aurait permis de mieux comprendre.*

*[translation: In short, without it being a negative criticism, I think it was done really fast. I understand parliamentary constraints, but let's just say that almost every clause has been fixed up, and, if we'd had more time, we could... or anyway, I could... have understood it better.]<sup>227</sup>*

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<sup>226</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (4 December 2012).

<sup>227</sup> Ibid.

The response of Minister Bédard was, in the main, to brush aside complaints about speed on the grounds that the public expected quick action.

#### 4.5.2 Subjectivity

The core concept in Bill 1 is the concept of “integrity”. It is in the title of the bill, and it is the heart of the authorization provisions:

*21.27 The Authority may refuse to grant or to renew an authorization or may revoke an authorization if the enterprise concerned fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract or subcontract.*

As we have seen earlier, in section 2.1 of this thesis, “integrity” is a contested concept. Although it has antecedents in law, including Quebec law, it is not well fleshed out as a legal term of art. In the end, it may be no more than the opposite of “corruption”, which is itself a contested concept.

The same might be said of the concept of “public confidence”. One commentator put it this way:

*La notion de «confiance du public» contenue dans la loi 1 n'est pas un critère particulièrement objectif - par opposition à une condamnation d'un tribunal, par exemple.*

*La loi énumère une série de critères pour encadrer ce pouvoir, c'est vrai. Par exemple: un actionnaire qui entretient des «liens» avec une «organisation criminelle» affecte cette confiance. Si le président va échanger des billets avec le parrain, c'est assez facile à régler. Mais on peut imaginer mille autres scénarios bien plus ambigus, et dont l'entreprise n'a pas connaissance.*

*Pour plusieurs avocats, ce cadre est flou et potentiellement inconstitutionnel en vertu de la théorie de l'imprécision. Une loi doit être suffisamment claire, un pouvoir administratif suffisamment balisé pour être valide.*



*Dans le climat anticorruption qui existe pour les excellentes raisons qu'on connaît, aucun parlementaire ne semble avoir soulevé le problème.*<sup>228</sup>

*[translation: The notion of “public confidence” contained in Bill 1 is not a particularly objective criterion—as opposed to a court conviction, for example.*

*The law does set out a series of criteria to give this power a framework. For example, a shareholder who has “links” to a “criminal organization” affects this confidence. If the CEO wants to exchange notes with the godfather, it’s easy to sort out. But you can imagine a thousand other, more ambiguous scenarios, and of which the business isn’t aware.*

*For several lawyers, this framework is fuzzy and potentially unconstitutional because of its imprecision. A law has to be sufficiently clear, an administrative power sufficiently mapped out, to be valid.*

*In the anti-corruption climate that currently exists, for very good reason, no parliamentarian seems to have raised this problem.]*

A witness at the Standing Committee, speaking on behalf of the Quebec Association of Consulting Engineers, put it this way:

*Une loi efficace ... doit reposer sur des notions claires et objectives. Malgré notre accord avec l'esprit du projet de loi n° 1, certains éléments du projet de loi tel que présenté nous semblent difficiles à appliquer et sujets à interprétation. Par exemple, l'article [21.27] mentionne que l'autorité pourra ... refuser d'accorder une autorisation si elle considère que la confiance du public est affectée en raison du manque d'intégrité de l'entreprise. Cette notion de confiance du public, prise seule, sans description de critères objectifs permettant à l'AMF et aux entreprises d'identifier les comportements traduisant un tel manque d'intégrité, peut donner lieu à un large éventail d'interprétations susceptibles de provoquer des erreurs et éventuellement une multiplication des contestations judiciaires.*

*Compte tenu des conséquences importantes que peut avoir sur une entreprise le retrait du privilège de contracter avec l'État, il nous apparaît souhaitable d'éviter qu'un tel retrait résulte de l'utilisation de*

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<sup>228</sup> Yves Boisvert (opinion), “Ce que cachent ces démissions d’ingénieurs”, La Presse+, January 26, 2014 [translation: “What Those Engineers’ Resignations are Hiding”].

*notions subjectives. Entre autres, les notions de contrôle de facto, comportement répréhensible, personne raisonnable et de perception, qui doivent guider les décisions de l'autorité, laissent place à des interprétations multiples.*<sup>229</sup>

*[translation: An effective law ... has to be based on clear, objective ideas. Despite our agreement with the spirit of Bill 1, certain aspects of the bill as presented seem difficult to apply and subject to interpretation. For example, section [21.27] says the Authority can ... refuse to grant an authorization if it believes public confidence is affected because of the company's lack of integrity. This idea of public confidence, by itself, without objective criteria that would allow the AMF and companies to identify the behaviours demonstrating this lack of integrity, could lead to a wide range of interpretations that are likely to lead to errors and eventually to a multiplicity of judicial reviews.*

*[Given the heavy consequences for a company if its privilege of contracting with the government is removed, it seems to us desirable to avoid a situation where that removal results from the use of subjective ideas. Among other things, the ideas of control de facto, reprehensible conduct, reasonable person and perception, that are supposed to guide the Authority's decisions, leave the door open to multiple interpretations.]*

In his closing comments to the Standing Committee, Jacques Duchesneau for the CAQ refers to “des standards ambigus” [translation: “ambiguous standards”].

In reply, Minister Bédard states that the discretionary nature of the provisions is an important element of the law. He draws a distinction between “discretionary” and “arbitrary”, and asserts that Bill 1 falls on the right side of the line:

*Donc, ne doutons pas que cette discrétion qu'on donne doit être encadrée, doit avoir des critères d'évaluation, mais elle demeurera à la base discrétionnaire, pas arbitraire. La différence entre l'arbitraire puis le discrétionnaire, c'est que la discrétion peut être encadrée. L'arbitraire, c'est de décider à partir de ce qu'on pense, dans la vie, ce qui est le meilleur, là, ou ce qui est le moins bon, peu importe. Nous ne sommes pas dans l'arbitraire. Donc, il y a des automatismes prévus à la*

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<sup>229</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (12 November 2012).

*loi et il y aura en même temps certaines modifications pour encadrer les décisions discrétionnaires de l'Autorité des marchés financiers et en même temps de l'avis qui est donné par l'UPAC.<sup>230</sup>*

*[translation: We can be sure that this discretion that we're given must be structured, must have criteria, but at its root it remains discretionary, not arbitrary. The difference between "arbitrary" and "discretionary" is that discretion can be structured.*

*[To be arbitrary means to decide according to what you think, in life, what's the best, or what's less good, it doesn't matter. We're not in the arbitrary. There are non-discretionary provisions in the law, and at the same time there will be amendments to structure the discretionary decisions of the AMF and also the advice given by the UPAC.]*

In other words, Minister Bédard equated subjectivity and discretion, and was of the view that enough structure was being supplied to the discretionary provisions to reduce concerns about too much subjectivity. As we will see shortly, in section 4.5.4, Minister Bédard believed the discretion would enable Bill 1 to succeed where other anti-corruption laws had failed.

### 4.5.3 Institutional Capacity

Another set of objections concerned whether the institutions charged with making pre-authorization work—principally the AMF and the UPAC—had the resources to carry out their new statutory responsibilities.

Pre-authorization for public-sector procurement contracts is a new responsibility for the AMF, and indeed, new in Canada for securities commissions. Nevertheless, Minister Bédard believes the AMF is the right choice:

*Ce qu'on a constaté, c'est que les choix qu'on a faits, pour l'organisation, tout d'abord, qui a à avoir la responsabilité de l'habilitation, ça a été un choix qui était réfléchi et qui nous a permis de conclure que l'AMF était*

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<sup>230</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012).

*l'autorité toute choisie pour donner ces habilitations. Et, l'ensemble des consultations, peu de gens ont remis en cause ce choix-là. Au contraire, ils nous ont appuyés par rapport à l'organisation choisie, son indépendance, ses compétences, l'autorité dont elle bénéficie actuellement.*<sup>231</sup>

*[translation: What people realized is that the choices we made, for the organization that would have the responsibility for authorization, was a considered choice and that we concluded the AMF was the right body to give the authorizations. And in all the consultations, few people questioned that choice. To the contrary, they supported us in our choice of organization, its independence, its skills, the powers it currently holds.]*

Minister Bédard notes that other organisms were considered for the pre-authorization role:

*Il y a une réflexion aussi, des fois, qui a précédé certains choix -- et j'en ai parlé au député de Louis-Hébert -- par exemple, pourquoi on exclut la Régie du bâtiment, pourquoi on s'est tournés vers l'AMF, pourquoi on a exclu l'Agence du revenu. Ce n'est pas qu'on n'y a pas pensé. Au contraire, ça faisait partie des éléments qu'on a identifiés dès le départ, qu'on a... et sur lesquels on a mis des critères sur lesquels on voulait aboutir: d'efficacité de la loi, de rapidité en termes d'application, d'indépendance, de structure, de mandat. Tout ça a été évalué case par case. Et on s'est dit: Bon, ça, non; ça, oui.*

*Même le Commissaire au lobbying a été évalué -- seulement pour vous dire -- le Vérificateur général. Alors, on a passé au crible tout ce qui avait de l'indépendance ou était capable de relever ce défi qu'on pose aujourd'hui aux organisations étatiques, de faire en sorte que ces habilitations puissent se donner le plus rapidement possible. Donc, le choix s'est porté sur l'efficacité, avec un caractère d'indépendance clair et un mandat qui était lié à la fonction que... ou à la responsabilité qu'on lui donnait, donc de ne pas partir à zéro avec une organisation, bien qu'elle soit existante. Il fallait qu'ils aient déjà les équipes.*<sup>232</sup>

*[translation:] There was a thought process, sometimes, that preceded certain choices—and I've talked about it with the member for Louis-Hébert—for example, why we excluded the Building Authority, why we turned to the AMF, why we excluded the Revenue Agency. It's not*

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<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

*because we didn't think about it. On the contrary, that was among the elements we identified from the start, that we...and on which we put criteria on which we wanted to end up : efficiency of the law, speed of application, independence, structure, authority. All of that was looked at case by case. And we said to ourselves : Okay, this one, yes ; that one, no.*

*Even the Lobbyist Commissioner was looked at—just to let you know—the Auditor General. So we sifted through everybody that was independent or that was capable of meeting the challenge that we're putting to the public entities, to get these pre-authorizations done as quickly as possible. So the choice was made based on efficiency, with clear independence, and a mandate linked to the function that...or to the responsibility we were giving it, so not to start from scratch with an organization, even if it already existed. It had to have the teams in place already.*

In the end, the AMF and the UPAC were selected because it was already well-equipped to carry out the task of pre-authorization:

*Et l'AMF rencontrait ces conditions. C'est des centaines de personnes. C'est un contentieux très fort. C'est un lien avec les services policiers qui existe déjà parce qu'ils font de l'habilitation au niveau des services monétaires. Donc, ils connaissent cette réalité. L'organisation a, je pense, une autorité dans la population et une confiance qui est réelle. Elle s'est bâtie cette confiance suite aux réactions qu'elle a eues par rapport à de grands scandales financiers qu'on connaît. Elle a réussi, au contraire, à renforcer son organisation, et personne ne doute de cette organisation actuellement. Même chose pour l'UPAC, Mme la Présidente, donc.<sup>233</sup>*

*[translation: And the AMF met those condition. It's hundreds of people. It's a strong litigation department. It's an existing link with police forces because it's doing authorization for financial services. So, it knows that reality. The organization has, I think, an authority among the population and a confidence which is real. It built that confidence following its reaction to the big financial scandals that we saw. In fact it succeeded in reinforcing its organization, and nobody questions that organization now. Same thing for the UPAC, Madame Speaker.]*

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<sup>233</sup> Ibid.

It is mentioned at the beginning of the November 12th session of the Standing Committee, and Sam Hamad mentions again on November 13th, that the three principal agencies whose responsibilities are enlarged by Bill 1—namely the UPAC, the AMF, and the RBQ—have all declined to appear before the Standing Committee, but that all have said they were consulted on the drafting of Bill 1. Hamad asks that their advice be tabled with the committee. Minister Bédard replies:

*Bien, écoutez, là, entendons les gens, là. Les lettres ont été déposées, effectivement, par les différents groupes. Vous avez vu, les trois groupes ont déposé les lettres en question. Je n'ai pas d'avis en soi. On a eu des discussions, donc, tout simplement pour s'assurer de l'opérationnalité de la loi. Voilà.*<sup>234</sup>

*[translation: Mr. Bédard : Well, listen, let's hear the people. The letters were tabled, really, by the different groups. You've seen, the three groups have tabled the letters in question. I don't have advice as such. We had discussions, simply to make sure the law could be operationalized. So that's it.]*

This complaint of the opposition, that the AMF (and other government entities implicated in Bill 1) should have been heard by the Standing Committee, is expressed several times.<sup>235</sup> The purpose of hearing from them was to probe whether they had the ability to carry out the mandate confided to them by Bill 1.

The opposition were not the only ones who worried about the AMF's institutional capacity. André Bergeron of the Corporation des maîtres mécaniciens en tuyauterie du Québec (CMMTQ) [translation: Association of Master Pipe Mechanics of Québec<sup>236</sup>], in his presentation to the Standing Committee on November 13, 2012, put it this way:

*Sur un plan plus général, il est évident que le projet de loi confère à l'AMF une large discrétion puisqu'elle peut refuser à une entreprise*

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<sup>234</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (13 November 2012).

<sup>235</sup> For example, MNA Duchesneau on December 4, 2012; MNA Gautrin on November 28, 2012.

<sup>236</sup> More simply, it is Québec's association of heating and plumbing contractors.

*l'autorisation requise, si elle considère que la confiance du public est affectée en raison du manque d'intégrité de l'entreprise ou de l'un de ses administrateurs ou dirigeants. Nous nous questionnons sur l'à-propos d'une telle discrétion qui peut ouvrir la porte à l'arbitraire. La réponse n'est pas simple, et nous laisserons le soin aux juristes d'en débattre.*

*La CMMTQ insiste cependant sur le fait que l'AMF devra développer l'expertise nécessaire pour exercer judicieusement ce pouvoir discrétionnaire et, du même souffle, demande au gouvernement de lui donner les ressources nécessaires pour ce faire. Les situations qui devront être évaluées feront appel à des compétences complètement différentes de celles qui relèvent présentement de l'AMF. Pour nous, le véhicule utilisé pour délivrer les autorisations de contracter avec l'État importe moins que la façon dont les demandes seront traitées.*

*[translation: On a more general level, it's clear that the bill confers on the AMF a large discretion, because it can refuse a company the required authorization, if it believes that public confidence is affected because of the lack of integrity of one of its managers or directors. We question the appropriateness of such a discretion, which can open the door to arbitrariness. The answer isn't simple, and we'll leave that debate to the lawyers.*

*[Nevertheless, the CMMTQ insists on the fact that the AMF has to develop the expertise necessary to exercise this discretionary power judiciously and, at the same time, asks the government to give it the necessary resources. The situations that will have to be assessed will call for skills completely different from those the AMF currently has. For us, the vehicle used to deliver the authorizations for contracting with the government are less important than the way in which those applications will be treated.]*

In a speech given in May 2013, the AMF official leading the pre-authorization initiative, Eric Stevenson, admitted that the AMF was, when the new law entered into force, barely ready to meet its new responsibilities.<sup>237</sup> At the time, it was estimated that the \$40 million threshold would require 250 companies to be cleared, and the number would rise to 700 when the threshold was lowered to \$10 million.

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<sup>237</sup> “Intégrité dans les contrats publics: l'AMF fait fi des critiques”, *Le Soleil* (31 May 2013). [Translation: “Integrity in public contracts: the AMF dismisses its critics”].

At a colloquium organized in May 2014 by the Conseil du patronat du Québec [translation: Quebec Business Council], the key civil servant at the Treasury Board, Julie Blackburn, estimated that the November 2013 reduction in the threshold to \$10 million (from the original \$40 million) would affect 400 companies, and that a further reduction to \$5 million (“prochainement” [translation: shortly]) would affect 850 companies.<sup>238</sup> Since the law applies to major shareholders, all members of the board, all senior executives, the number of verifications quickly rises to the many thousands. Ms Blackburn is quoted as stating that the eventual goal was to lower the threshold to \$100,000, perhaps within three to four years, but that the decision whether to do so, and when, belonged at the political level. These remarks were made shortly after the change of government in Quebec in 2014, as the Marois government was defeated and the Liberals, under new leader Philippe Couillard, returned to office.

#### 4.5.4 Effectiveness

The fourth objection to Bill 1 was perhaps the most significant and yet it received the least attention in the overall examination of the bill. It was often expressed more as a question than an assertion: will it work?

The minister wants the pre-authorization process to work:

*... ce que je veux m'assurer, c'est que l'effet désiré n'ait pas l'effet pervers de faire en sorte d'engager beaucoup de ressources pour pas de résultat, donc. Et c'est notre objectif, et c'est pour ça qu'on s'est gardé une grande base discrétionnaire par l'article 21.25, 21.26, pour permettre de travailler vraiment auprès de ceux et celles qui... je vous dirais, pour qui*

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<sup>238</sup> “Un mandat élargi pour l’AMF?”, *Le Devoir* (15 May 2014). [translation: “An enlarged mandate for the AMF?”] The article does not record whether these numbers are additive or cumulative (in other words, whether a reduction of the threshold to \$5 million would cover 850 companies in total, or 850 more than were already covered). The threshold was indeed lowered to \$5 million for tender calls issued on or after October 24, 2014: Government of Quebec, news release (16 September 2014).



*l'habilitation est une véritable défi en soi, donc, et c'est pour ça... C'est une concentration des ressources.*<sup>239</sup>

*[translation: ...what I want to be sure of, is that the desired impact doesn't have the perverse effect of committing a lot of resources for no purpose. And that's our goal, and that's why we kept a lot of discretion with section 21.25, 21.26, to allow ourselves to really work with those who ... I should say, so that pre-authorization is a real challenge in itself, and that's why ... There's a concentration of resources.]*

At the same time, Minister Bédard seems aware that the authorization process, in itself, may weed out very few people or companies:

*Nous sommes conscients que la plupart des organismes... plutôt, des compagnies, sociétés, machin, vont passer les tests d'habilitation, et on souhaite à la limite que tous puissent le faire.*<sup>240</sup>

*[translation: We're aware that most entities ... rather, companies, corporations, whatever, will pass the pre-authorization test, and in the end that all of them will be able to.]*

Another recurring theme in Minister Bédard's speeches in the National Assembly, and interventions in Standing Committee, is the government's desire to have the law obeyed, and to avoid the problem of having people do an end-run around the laws. Minister Bédard asserts that the existing set of anti-corruption laws has been ineffective. Nevertheless, his analysis of why existing legislation failed to stem corruption is not extensive, and is captured in this passage from his second-reading speech :

*...je pense que je ne surprendrai personne en disant que nous allons conserver l'esprit du projet de loi, qui est celui de garder une latitude à ceux et celles qui vont émettre l'habilitation. Nous ne nous enfermerons pas dans des automatismes qui donnent en même temps la voie de sortie ou la voie de contournement de ceux et celles qui ne veulent pas se soumettre à la loi. Et ça a été l'erreur, d'ailleurs, des dernières*

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<sup>239</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (4 December 2012). Note that the reference to sections 21.25 and 21.26 are to what became, in the final version, sections 21.27 and 21.28.

<sup>240</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (3 December 2012).

*législations. On donnait le mode d'emploi très facile, très simple à ceux et celles qui veulent contourner la loi. Et ils l'ont fait allègrement, d'ailleurs, avec des procédés on ne peut plus simples: créer une compagnie à côté puis avoir le même contrat. Donc, c'en était presque ridicule. Et c'est ce qui fait que notre action, à ce moment-là, se décrédibilise auprès de la population.*<sup>241</sup>

*[translation: ...I don't think I'll surprise anyone by saying that we're going to maintain the essence of the law, which is to keep a certain latitude for those who will grant the pre-authorization. We won't box ourselves in with automatic provisions, which at the same time gives a path to avoid or do an end-run around the law to those who don't want to obey the law. Because that was the mistake of previous legislation. They gave a simple, easy method to those who wanted to do an end-run around the law. And they did it happily, taking steps that could not have been simpler: create a side-company then win the same contract. It was almost ridiculous. And that's why our action, back then, lost credibility among the population.]*

This hardly amounts to a deep analysis of why Bill 1 is likely to succeed. The Liberal opposition, no doubt anxious to defend its record in office, wanted to see Bill 1 more as a continuity in the anti-corruption fight, rather than a different direction.<sup>242</sup> Their spokesperson, former minister Sam Hamad, noted “very humbly” that it was wrong to believe that a law would solve the problem of corruption.<sup>243</sup>

There is only one MNA who persistently raised questions about whether the bill would actually work: Jacques Duchesneau, MNA for Saint-Jérôme and spokesperson on Bill 1 for the CAQ. Duchesneau's objections are grounded in his career as a police officer and anti-corruption investigator.

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<sup>241</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012).

<sup>242</sup> Ibid.

<sup>243</sup> Ibid: “...il est faux de penser, je pense, très humblement, qu'une loi va régler tous les problèmes.” [Translation: “...it is wrong to believe, I think, very humbly, that a statute will solve every problem.”]

Duchesneau's basic objection was that it was not clear that Bill 1 was getting to the root of the problem. In his second reading speech, on November 20, 2012, he says:

*La grande question qu'on doit se poser: Est-ce que ce nouveau processus va venir régler le problème? Malheureusement, je ne partage pas l'optimisme du président du Conseil du trésor quant à la façon de voir le projet de loi n° 1, qui est un élément pour s'attaquer au problème, mais surtout pas la panacée à cette situation.*<sup>244</sup>

*[translation: The big question that we have to ask: Is this new process going to solve the problem? Unfortunately, I don't share the optimism of the Treasury Board chair in terms of how to see Bill 1, which is an element in attacking the problem [of corruption], but definitely not a panacea for the situation.]*

He points out that the bill does not contain any “diagnosis” of the corruption problem, and therefore it does not answer the question of how bad governance became so engrained in the awarding of contracts.<sup>245</sup>

In his closing remarks to the Standing Committee, on December 4, 2012, Duchesneau says:

*Il y avait aussi peu de mesures, dans le projet de loi tel qu'il est actuellement, même une fois les amendements adoptés, qui permettraient de détecter de la collusion ou de la fraude.*

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<sup>244</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012).

<sup>245</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012): “...un bon médecin fait d'abord un diagnostic, et après ça on tente de trouver un remède quelconque. Alors, ici, il n'y a pas, justement, de diagnostic qui est fait... Quelles sont les causes de la mauvaise gouvernance? Rien, dans le projet de loi n° 1, ne nous permet de faire ce constat et de trouver des solutions à cette question.” [Translation: “...a good doctor does a diagnosis first, and afterwards you try to find some sort of remedy. Now, here, there isn't really a diagnosis that's been done... What are the causes of poor governance? Nothing, in Bill 1, allows us to know the answer to that and to find solutions to that question.”]

*[translation: There were few measures, in the bill as it is presently, even as amended, that would permit detection of collusion and fraud.]*

Duchesneau also returned several times to the need for greater whistleblower protection:

*Vous m'avez entendu maintes et maintes fois parler de la protection des dénonciateurs. C'est une chose à laquelle je crois. Quiconque a déjà enquêté sur des activités criminelles le sait, la vérité est souvent révélée par des individus qui ont vu de près ce qui s'est passé ou même participé à des activités illégales.<sup>246</sup>*

*[translation: You've heard me over and over again talk about whistleblower protection. It's something I believe in. Anyone with experience investigating criminal activity knows that the truth is often revealed by individuals who saw up close what happened or even participated in criminal activity.]*

Duchesneau also notes that the government has not been able to state in any detail what the next steps of the “trilogy” will be. He wonders how one can judge if Bill 1 is a good law, if it's not known how it will fit with the other laws.

#### **4.6 BILL 1: WAS IT EVIDENCE-BASED LAW-MAKING?**

Chapter 3 concluded with the following questions, derived from our study of the concept of corruption (Chapter 2), existing national and international anti-corruption instruments (Chapter 3), and the anti-corruption literature (Chapter 4):

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<sup>246</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (4 December 2012). In “Protéger les dénonciateurs, une préoccupation commune”, *La Presse+* (27 August 2014) [translation: “Whistleblower protection: a common concern”], it is noted that that a theme in the written public submissions to the Charbonneau Commission is the need for better whistleblower protection. This also suggests that the existing whistleblower protection in the *Anti-Corruption Act* is ineffective.

- Definition of the problem: What is the nature of the corruption in Quebec’s public procurement?
- Outline of the legal context: What is the existing legal context (international and national anti-corruption instruments) for corruption in public-sector procurement, and how does a new law fit in that context?
- Survey of the literature: What guidance is provided by the existing academic and non-academic literature on fighting corruption in public-sector procurement?
- Survey of practical experience: What guidance is provided by practical experience in fighting corruption in other jurisdictions, such as the World Bank, the OECD, the EU, and New York City?
- Evaluation of effectiveness: Assuming the approach embodied in Bill 1 is supported by context, the literature, and experience, how will the operation of the new law be monitored, and how will success be measured?

These are the questions that we would expect to be addressed in Quebec’s lawmaking process, if it were evidence-based. We now turn to an examination of the extent to which each was addressed.

#### 4.6.1 Definition of the problem

Quebec’s lawmakers did not spend much time defining the nature of the corruption that they are tackling with Bill 1. They seem to take it for granted that there is a common understanding of the problem, based on reports in the media and from the Charbonneau Commission.

Fairly typical would be this passage from Minister Bédard’s second reading speech:

*...on fait en sorte que les Québécois, oui, vont reprendre confiance dans leurs institutions, mais en même temps on va s'assurer que les Québécois paient pour leurs travaux les bons coûts, qu'ils s'assurent que les travaux soient faits dans des situations contractuelles qui sont acceptables. Et ce qu'on voit actuellement à la commission Charbonneau est de nature à*

*briser cette confiance, d'où la réponse du gouvernement, je pense, qui est à la hauteur des attentes de la population.*<sup>247</sup>

*[translation: ...we're doing it in a way that, yes, Quebecers will regain confidence in their institutions, but at the same time we want to reassure them they're paying the right price for their public works, that the public works are being done on acceptable contractual terms. And what we're seeing right now at the Charbonneau Commission is enough to break that confidence, and thus the government's response which is, I think, in line with the public's expectations.]*

In this passage we see Minister Bédard sum up the mischief to be remedied as “what we’re seeing right now at the Charbonneau Commission.”

As we saw in section 2.1.2 of this thesis, corruption in public-sector procurement can take many forms, and can occur at any stage of the project process, including project identification, planning, financing, design, tender, execution, operation and maintenance. Different kinds of corruption would call for different kinds of remedies. Yet the Bill 1 debate is devoid of any real diagnosis of why or where the corruption is occurring.

We might at least have expected that there would be some analysis of how Bill 1’s pre-authorization mechanism, if it had been in place previously, would have prevented the corruption that was being targeted. Yet nowhere, in all the voluminous debates on Bill 1, does Minister Bédard attempt to justify Bill 1 in these terms.

#### 4.6.2 Outline of the legal context

One of the most surprising results of my research is that, in the voluminous debates around Bill 1, there is not a single mention of any of the international and national anti-corruption instruments, apart from the Criminal Code of Canada.

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<sup>247</sup> Quebec, National Assembly, *Journal des débats*, 40th Leg, 1st Sess (20 November 2012).

There is no mention of the UNCAC, the OECD Anti-Bribery Convention, the CFPA, or the CFPOA. It is as if Quebec's MNAs, including Bill 1's sponsoring minister, are not aware of their existence.

As we saw in section 3.3.1.4 of this thesis, the EU, one of the leading jurisdictions in the world when it comes to fighting corruption in public-sector procurement, has recently come to the conclusion that the fight will not be advanced with more legislation. The existing legislative instruments, says the EU, are enough. The focus now is on enforcement. Although there are few jurisdictions in the world as advanced as the EU, the EU's stance is a useful reminder that one question lawmakers should ask themselves, before undertaking more legislation, whether legislation is, in fact, the best way forward.

There is more awareness on the part of MNAs, and more discussion, of Quebec's existing anti-corruption legislation. Indeed, the Standing Committee debates include many examples of MNAs discussing how Bill 1 fits within existing provincial law.

But if existing law was not working, or not working as intended, one might have expected someone to ask: if the existing legislation isn't working, why is more legislation the answer? In all of the National Assembly debate on Bill 1, this question is not raised by anyone.

#### 4.6.3 Survey of the literature

Just as there is no mention of the international and national anti-corruption instruments, there is not a single reference in any of the National Assembly debates to any of the vast anti-corruption literature, whether academic or non-academic. Neither is there any indication in the transcripts that the Treasury Board team reached out to experts in the field for advice.<sup>248</sup>

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<sup>248</sup> Contrast this, for example, with the process adopted by the EU in 2006 when it was considering amendments to its public-procurement remedies directives: "Adoption of the proposal was preceded by consultation of Member States' representatives, contracting

It is possible that experts were consulted, and the literature surveyed; the point is that there is no evidence of it in the transcripts.

The procedure of the National Assembly does not encourage the presentation of expert evidence. The National Assembly, like every other Westminster parliament, does not itself hear from expert witnesses. The Standing Committee on Public Finance is open to any citizen (including expert) who wishes to come forward, but it does not proactively seek expert evidence to comment on bills. The Standing Committee did receive eighteen formal submissions, but almost all were from Quebec-based professional associations. One was from an expert on Quebec contract law, who appeared on his own initiative. None was from an expert on corruption.

#### 4.6.4 Survey of practical experience

There is no specific reference, in any of the transcripts, to anti-corruption precedents anywhere else in the world.

The closest reference to reliance on precedent is the following quotation from Minister Bédard, at the opening of the public consultations by the Commission des finances publics on November 12, 2012:

*Cette approche est nouvelle. Elle s'est inspirée de certaines autres législations à travers le monde, mais je vous dirais qu'on a fait beaucoup de débroussaillage dans cette façon de faire, et elle se caractérise par le fait que nous souhaitons agir en amont, donc, au départ, de créer cette habilitation.*

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authorities, economic operators, lawyers, non-governmental organisations and experts such as academics and practitioners on the operation of and possible improvements to the Remedies Directives”: Liisa Koskinen, “Reform of Public Procurement Remedies: A First Look at the Commission Proposal for an Amending Directive”, 2006/3 EIPASCOPE 19-24 at 19.



*[translation: This approach is new. It was inspired by certain other laws around the world, but I would say to you that we've done a lot of simplifying (literally, "brush-clearing") in this way of doing things, and it's characterized by the fact we want to be pro-active, at the beginning, in creating this pre-authorization.]*

On May 27, 2014, I wrote to the Treasury Board in Quebec, quoting this passage, and asking if they could direct me to the "certain other laws around the world" to which the minister referred.<sup>249</sup>

On June 2, 2014, I received a reply from the communications branch of the Treasury Board secretariat. Omitting formalities, the answer was brief:

*Nous aurions aimé être en mesure de vous aider, d'autant plus que votre sujet de maîtrise est en lien avec la Loi sur l'intégrité en matière de contrats publics. Malheureusement, après vérification, nous ne possédons pas cette information.*<sup>250</sup>

*[translation: We would have liked to be able to help you, especially because the subject of your master's is connected to the Act respecting integrity in public contracts. Unfortunately, after checking, we do not have that information.]*

The only other possible reference to precedent that I could find is the following passage, also from Minister Bédard and also from the Standing Committee, but this time from the opening of the clause-by-clause working sessions, on November 22, 2012:

*Mais, à ce moment-ci, vous me permettez de rappeler les principes qui nous guident dans le cadre de ce projet de loi: de ramener l'intégrité dans l'octroi des contrats publics, de rétablir la confiance du public, de punir les contrevenants et dissuader les malhonnêtes et encourager les bonnes pratiques et surtout, à ce moment-là, récompenser l'honnêteté. Tel est notre objectif, qui est une nouvelle approche, vous le savez, M. le Président, qui est celle de l'habilitation, qui a fait ses preuves. Et on a constaté, effectivement, que ça avait reçu un accueil presque unanime*

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<sup>249</sup> Personal correspondence by e-mail from author to Julie Blackburn, Government of Quebec, Treasury Board Secretariat (27 May 2014).

<sup>250</sup> Personal correspondence by e-mail from Government of Quebec, Treasury Board Secretariat, Communications (no name given), to author (2 June 2014).

*auprès de ceux et celles qui sont venus nous voir. Donc, cette approche est, selon nous, la bonne.*<sup>251</sup>

*[translation: Now you will permit me to recall the principles that are guiding us in the context of this bill: to restore integrity in the awarding of public contracts, to re-establish public confidence, to punish wrongdoers and dissuade the dishonest and encourage good practices and especially, right now, to reward honesty. That's our objective, which is a new approach, you know, Mr. Chair, which is pre-authorization, which is a proven approach. And everyone realizes, actually, that it has received almost unanimous support among those who came to see us. So that approach is, in our opinion, the right one.]*

(Emphasis added)

In the underlined passage, the minister claims that pre-authorization is “a proven approach,” but he does not say then, nor anywhere else in the transcripts, where it has been proven. No member of the opposition asks.

With respect to New York City,<sup>252</sup> the transcripts contain only one minor, indirect reference. It comes not from Minister Bédard or any of the other MNAs, but from the testimony to the Standing Committee by Pierre Hamel of the Association de la construction du Québec [translation: Quebec Construction Association]. In answer to a question from MNA Sam Hamad about whether Mr. Hamel believes the Régie du bâtiment is absent from Bill 1, Mr. Hamel replies as follows:

*Absolument pas... bien, c'est-à-dire que oui et non. C'est-à-dire qu'essentiellement le projet de loi n° 73 et le projet de loi n° 35 ont fait en sorte de mettre les règles beaucoup plus sévères au niveau des entrepreneurs. Et les entrepreneurs avaient à la fois le régime du RENA et le régime des licences restreintes. Et 35 a rendu les amendes encore plus sévères, etc., faisant en sorte que, depuis 2009 ou 2010 -- c'était à la fin 2009 -- on a un... voyons, un formulaire de demande de licence dans lequel on doit déclarer les antécédents judiciaires au niveau de l'actionnaire, de l'administrateur, du dirigeant et des prêteurs. Et on doit, pour tous ces gens-là, déterminer les infractions fiscales, les*

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<sup>251</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (22 November 2012).

<sup>252</sup> See section 3.4 above.

*infractions pénales aux différentes lois comme telles, un formulaire qui est en annexe, qui a 22 pages et qui est pratiquement la même chose que ce qui est demandé par la ville de New York pour la vérification.*

*Alors donc, essentiellement, la Régie du bâtiment, pour l'industrie de la construction, c'est l'organisme qui, déjà, détermine ces éléments-là. Ce que fait le projet de loi, c'est que ces demandes-là, ces vérifications-là s'étendent à tous les fournisseurs de l'État. Mais l'industrie de la construction, on a déjà été en bonne partie enlignés vers ça comme tel.*<sup>253</sup>

*[translation: Absolutely not... actually, yes and no. That is to say that essentially Bills 73 and 35 had the effect of putting in place rules that were much more severe for business owners. And business owners had at the same time the RENA regime and the regime of limited licenses. And 35 made fines heavier, etc., so that since 2009 or 2010—it was the end of 2009—we had a... a license application form in which we had to declare any judicial proceedings for the shareholder, management, directors, and lenders. And we had to, for all these people, figure out any tax violations, penal violations of all these different laws, a form with an appendix, that had 22 pages and which is practically the same as what New York City was asking for verification.*

*[So essentially, the RBQ, for the construction industry, was the body that already was looking at those things. What the bill does, is it takes those questions, those verifications, and extends them to all public-sector contractors. But in the construction industry, we were already pretty much headed in that direction.]*

In 2014, the Charbonneau Commission invited two witnesses from New York City to speak, in detail, about corruption in that city's construction industry, and the efforts made to fight it. One had been the commissioner of the Department of Investigations for ten years, ending in 2013.<sup>254</sup> In their testimony, neither mentions having been consulted by the Quebec government in 2012 as Bill 1 was being prepared.<sup>255</sup> One of the witnesses, Toby Thacher, emphasized in his testimony that the system of pre-authorization is only one small component of a much broader anti-corruption system, and that it could not

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<sup>253</sup> Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (12 November 2012) (evidence of Pierre Hamel).

<sup>254</sup> Note 203 above.

<sup>255</sup> Neither Ms Gill Hearn nor Mr Thacher was specifically asked the question about whether they had been consulted, so it is possible one or both had been consulted, but did not think to mention it in the course of their testimony.

work on its own, and indeed might on its own have the perverse effect of increasing costs by reducing the pool of eligible bidders. It seems unlikely, then, that New York City was consulted as Bill 1 was being developed, since Bill 1 does exactly what Mr. Thacher says will not work as a stand-alone measure.

We are left to wonder whether the PQ government did, in fact, have a model or models from which it was copying. Because there is little or no explicit reference in the transcripts to anti-corruption efforts elsewhere, the government could not meet opposition objections with the reassurance that the pre-authorization system embodied in Bill 1 was proven to have worked elsewhere. On the one occasion when Minister Bédard did make that claim, he did not say where he was referring to, and nobody in the opposition asked.

#### 4.6.5 Evaluation of effectiveness

As we have seen, some opposition MNAs and Standing Committee presenters questioned the institutional capacity of the AMF to carry out the mandate confided to it by Bill 1. The AMF did not appear before the committee, apparently at the government's direction. Consequently, members of the Standing Committee had to accept Minister Bédard's assurances that the AMF had the necessary capacity.

Although Bill 1 calls for the preparation of an annual report from the AMF on its operations under Bill 1, the report is to be delivered to the Treasury Board. It is not clear that the report will be made public. On November 28, 2012, at the Standing Committee, MNA Gautrin sparred with Minister Bédard over s. 28 of Bill 1, adding a new s. 43.2 to the *Loi sur l'autorité des marchés financiers* [translation : Financial Markets Authority Act] to require that an annual report be delivered by the AMF to the Treasury Board. MNA Gautrin wanted the report to be tabled in the National Assembly. Minister Bédard refused, and the amendment did not pass.

## 4.7 SUBSEQUENT EVENTS

Following the adoption of Bill 1, there were media reports of management shuffling within the construction industry, apparently in response to Bill 1.<sup>256</sup> Other media reports included the following:

- A former executive of an urban planning company was convicted under Quebec election law, but that the Director-General of Elections withdrew charges against the company itself. The company can therefore continue to bid on public contracts.<sup>257</sup>
- Dessau, a large consulting engineering firm, was blacklisted by the City of Montreal after admitting it had engaged in corrupt practices. This led to criticism that co-operating companies like Dessau were being punished, while those who maintained silence were being rewarded for their silence.<sup>258</sup>
- Even though Dessau was blacklisted, one of its subsidiaries was eligible to bid on contracts.<sup>259</sup>

Two large engineering firms, SNC-Lavalin and WSP Global (formerly Genivar), received their integrity authorizations on February 5, 2014.<sup>260</sup> Both firms had figured in the

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<sup>256</sup> For example, Yves Boisvert, “Ce que cachent ces démissions d’ingénieurs”, *La Presse+* (26 January 2014) [translation: “What Those Engineers’ Resignations are Hiding”]; “Joel Gauthier quitte Investissements Hexagone », *La Presse+* (2 June 2014). Gauthier was a former CEO of the Agence métropolitaine de transport (AMT) [translation : Metropolitan Transportation Agency] and later a shareholder and board member of a company associated with construction entrepreneur Tony Accurso. The company announced that Gauthier had cut all ties with it. Although the company did not say so, the reporters refer to Bill 1, leaving the implication that Gauthier’s departure was linked to Bill 1.

<sup>257</sup> “Un ex-dirigeant de la firm IBI/DAA plaide coupable”, *LaPresse+* (22 May 2014) [translation: “Former executive of IBI/DAA firm pleads guilty”].

<sup>258</sup> François Cardinal, « Incitation au silence », *La Presse* (30 April 2013). The thesis of the article is summed up in this sentence: “Le message est aussi clair que pernicieux: celles qui avouent seront condamnées, celles qui mentent seront graciées” [translation: “The message is as clear as it is pernicious: those who confess will be condemned, those who lie will be absolved.”]

<sup>259</sup> “Une filiale de Dessau conserve le droit de soumissionner”, *La Presse+* (3 July 2013) [translation : “A subsidiary of Dessau keeps its right to bid.”]

testimony before the Charbonneau Commission. SNC-Lavalin, which was also implicated in corruption scandals in Bangladesh and Libya, had been debarred by the World Bank for ten years.<sup>261</sup> This case illustrates well a key difference between the Bill 1 model and the World Bank model. Under the Bill 1 model, it did not take long for SNC-Lavalin to get its pre-authorization. Meanwhile, the World Bank process introduces an element of punishment and deterrence.

The provincial government, in co-operation with the City of Montreal, enacted a law creating the post of Inspector General.<sup>262</sup> The first Inspector-General, Denis Gallant, was hired away from the Charbonneau Commission, where he was one of the commission counsel. There were some criticisms that the law governing the Inspector General was not strong enough.

In the political arena, there have been calls for the dollar limit in Bill 1 to be lowered for engineering firms, just as it had been lowered for construction firms.<sup>263</sup>

In drafting Bill 1, the Marois government received no guidance from the Charbonneau Commission. The original deadline for the Charbonneau Commission's report was October 19, 2013. The Marois government could perhaps have waited for the commission's report, in order to ensure that its reforms were in keeping with the commission's findings and recommendations. During the debates on Bill 1, Minister

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<sup>260</sup> "SNC-Lavalin, WSP green-lit to bid on public contracts in Quebec," CBC News mobile (5 February 2014).

<sup>261</sup> World Bank, news release, "World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years" (17 April 2013), available online <[www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years](http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years)>.

<sup>262</sup> "Coderre recrute à la commission Charbonneau", *La Presse+* (14 February 2014) [translation: "Coderre recruits from the Charbonneau Commission"]. The story concerned the hiring by the City of Montreal of a "star" commission lawyer, Denis Gallant, to the newly-created position of Inspector-General.

<sup>263</sup> "Pressions pour resserrer la Loi sur l'intégrité", *La Presse+* (23 May 2014) [translation: "Pressure to tighten the Integrity Act"].

Bédard had indicated the government's view was that there was no need to wait.<sup>264</sup> Well after Bill 1 was passed and began operations, the Commission continued to receive recommendations on how to clean up public-sector procurement.<sup>265</sup>

Although the 2013 Order in Council extending the Commission's deadline asked for an outline, in the interim report, of possible solutions to the problem of corruption, the Commission judged that it was premature, and declined to do so.<sup>266</sup> In its interim report, issued in January 2014, the Commission gave few hints about the solutions it would propose, saying it was premature even to try.<sup>267</sup> In a phrase that could well be taken as a critique of the government's approach, the commissioners write that they are trying to avoid "que les recommandations ne soient qu'une succession de remèdes ponctuels visant chacun à contrer un problème spécifique, sans justifications appropriée ni cohérence d'ensemble" [translation: "that the recommendations are nothing more than a series of targeted remedies seeking to deal with a specific problem, but without appropriate justification nor overall coherence"].<sup>268</sup>

In any event, the Charbonneau Commission was proceeding more slowly than anticipated. The committee wrapped up its hearings in the fall of 2014. In late January 2015, the commission requested another seven-month extension to its deadline. The request was granted, pushing the new deadline out to November 2015.

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<sup>264</sup> For example, in an exchange with Gisèle Bourque of the Association des constructeurs de routes et grands travaux du Québec (ACRGTQ) [translation: Association of Road and Infrastructure Builders of Quebec], Quebec, National Assembly, *Journal des débats de la Commission des finances publiques* (12 November 2012).

<sup>265</sup> For example, the Corporation des entrepreneurs généraux du Québec [translation: the General Contractors Corporation of Quebec] submitted a brief to the Charbonneau Commission on May 28, 2014, with sixteen recommendations to improve the awarding and management of public contracts.

<sup>266</sup> This chronology, apart from the 2015 extension request, is based on the chronology of the commission's interim report: Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction, *Rapport d'étape* (Montreal, 2014)

<sup>267</sup> Ibid at 10-11.

<sup>268</sup> Ibid at 10.

Meanwhile, at the international level, anti-corruption efforts continue to unfold. In January 2014, an initiative was announced to develop a global data standard for public procurement.<sup>269</sup> Recently, an international focus has been on banning “anonymous shell companies,” which disguise true ownership.<sup>270</sup>

The most significant subsequent event took place on April 7, 2014: the PQ government was defeated in a general election. It was a calamitous defeat for the PQ. The Liberals were returned to power with a majority, winning 70 of the 125 seats in the National Assembly. The PQ dropped to 30 seats. Premier Pauline Marois even lost her own seat, and resigned as PQ leader very shortly afterwards. Stéphane Bédard, the PQ’s point man on Bill 1, was re-elected in Chicoutimi. He became interim leader of the PQ after Marois resigned.

With the defeat of the PQ government, the anti-corruption “trilogy” about which Minister Bédard so often spoke was never enacted. A related bill (Bill 61), designed to make it easier for the Quebec government to recover funds lost to procurement corruption, was introduced on November 13, 2013, but did not pass before the PQ government fell. Another bill (Bill 68), to establish a Quebec Transportation Agency to oversee the awarding and management of contracts in the transportation sector, was introduced on December 4, 2013, but proceeded no further, and died on the order paper when the National Assembly was dissolved for the election.

The new Quebec government, led by Premier Phillippe Couillard, has indicated it will engage in some contracting reforms.<sup>271</sup> It has not, however, indicated how it feels about the PQ’s anti-corruption project. In particular, there has been no word on the Liberal

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<sup>269</sup> “New data standard to help shine light on public procurement,” *Reuters* (21 January 2014).

<sup>270</sup> Transparency International, news release, “European Parliament takes step toward ending secret company ownership” (2 March 2014); “European Parliament Urged to Ban ‘Anonymous Shell Companies’,” available online at <[www.tax-news.com](http://www.tax-news.com)> (7 February 2014), reporting on an initiative by Global Financial Integrity, a Washington-based NGO.

<sup>271</sup> “Le mode d’attribution des contrats publics sera révisé”, *Le Soleil* (27 May 2014) [translation: “Process for awarding public contracts to be amended”].



government's stance towards the "trilogy" that had been repeatedly emphasized by Minister Bédard, but which was cut short by the PQ's election defeat.

## CHAPTER 5 CONCLUSION

The objective of this thesis has been to take seriously, as an object of legal study, the proceedings of an elected assembly as it develops anti-corruption legislation. The spotlight has been thrown on one anti-corruption law in one province in one country, namely Bill 1, introduced in the Quebec National Assembly on November 1, 2012.

The research question is not so much “Will this law work?” or “What should the law have said?”, because the answer to those questions, given the state of uncertainty in the anti-corruption literature, would inevitably be some version of “We don’t know” or “It’s too early to say.” Rather, the research question is “Did Quebec’s lawmakers believe Bill 1 would have an impact on corruption in public-sector procurement, and if so, what was the basis for that belief?”

The minority status of the Quebec government in 2012, plus the availability of verbatim transcripts of all proceedings of the Quebec National Assembly and its committees, makes Bill 1 a promising case study for this kind of research. The government had to be unusually transparent in its thought process and arguments, because it could not pass the bill without support from one or the other of the two main opposition parties.

The purpose of this kind of research is to assist participants in the law-making process—lawmakers, lobbyists, law reformers, and citizens—to understand better the process by which statute law is actually made.

What we have seen is that Quebec’s lawmakers did hold a sincere belief that they were tackling corruption in public procurement. We have also seen, however, that they had almost no objective evidence to support that belief.

There was, at the time Bill 1 was moving through the Quebec National Assembly in November and December 2012, a substantial international and national context for fighting corruption— the UNCAC, the OECD Anti-Bribery Convention, the CFPA, the

CFPOA, and an array of anti-corruption initiatives, some supporting these instruments, some independent of them. There was also a very extensive literature, both academic and non-academic, concerning the theory and practice of fighting corruption. There was also a substantial amount of practical experience in jurisdictions, like the EU and New York City, that have put significant effort into fighting procurement corruption.

In an ideal world, one would expect Quebec lawmakers to have borrowed from, and built on, the “state of the art” in anti-corruption efforts. What we have in fact seen, in the journey of Bill 1 through the legislative process, is an almost total lack of connection between Bill 1 and the “state of the art.” There is no reference, anywhere in the almost 400,000 words of the transcripts, to the international or national anti-corruption instruments, or to the anti-corruption literature, or the practical experience of other jurisdictions. That is the significant factual finding of this study.

The centrepiece of Bill 1—referred to by its sponsoring minister as “the heart” of the law—is the pre-authorization for companies wishing to do business with the government. The sponsoring minister said this approach is “inspired by” legislation elsewhere, but nowhere in the transcripts does he state what other legislation inspired him. My query to the Treasury Board office in Quebec City produced no result. It is possible that the Quebec government was looking to New York City, which has a form of pre-authorization, but we cannot say. There is no reference in the transcripts to New York City, so any link to the public procurement system there is speculative.

If Bill 1 was divorced from the international and national anti-corruption context, what was driving it? Bill 1 appears to have been driven by two factors unrelated to any analysis of effective anti-corruption law-making.

First, there was a consensus that corruption in public procurement was, and continued to be, a serious problem. In the whole legislative process, there is not a single person who raises their voice in opposition to the passage of Bill 1. All presenters before the Standing Committee, and indeed the members of the Standing Committee, were at pains

to state their support for the principle of the bill. Nobody questioned whether more legislation, in the form of Bill 1 or otherwise, was the best response or an effective response. Quebec's lawmakers were encouraged in the idea that a legislative response was appropriate.

The second principal driver that influenced all aspects of the Bill 1 debate was speed—the very plain desire on the part of the government to pass Bill 1 quickly. Bill 1 was put together quickly, in about six weeks, and the government wanted to pass it quickly, in another six weeks. The government wanted to regain public confidence in public procurement, while underlining the contrast between it and the defeated Liberal government. But those are political objectives, not policy objectives, and they are not directly related to whether the law would actually work to reduce corruption.

Within the context of these two principal drivers, the emphasis in the debate is on building an edifice that sounds like it *might* work to stem corruption, rather than examining the evidence, in the literature and precedents from around the world, for what was *likely* to work. Because there was so little information about the external context, the debate in the National Assembly and in the Standing Committee on Public Finance was focused mainly on the internal logic of the pre-authorization system created by Bill 1.

Nobody can say with certainty that Bill 1 will not work. The inherent difficulty in measuring corruption, and the difficulty of measuring the impact of anti-corruption laws, means that Bill 1's impact cannot be proven or disproven. And when a law's impact cannot be proven or disproven, it is subject to partisan claims, such as the PQ government's claim in late 2013 that its anti-corruption measures had saved taxpayers \$240 million on roadwork contracts in the first ten months of 2013.<sup>272</sup>

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<sup>272</sup> “Anti-corruption measures saved Quebec \$240-million on road work, minister says”, *Globe & Mail* (12 November 2013).

All things considered, there has to be a serious doubt whether Bill 1 represents a sustainable anti-corruption agenda, to use the phrase introduced by EU Commissioner Malmstrom.<sup>273</sup> As we saw in Chapter 3, other jurisdictions with a more advanced anti-corruption agenda, such as the EU or New York City, recognize that legislation is too easy, and that the most effective response lies in enforcement, measurement, reporting, and correction. In the absence of any reference to international standards and the anti-corruption literature, it appears that Quebec has followed a path of unsustainability.

A law that is not carefully designed can be counter-productive, and can actually make corruption worse. To give just one example from the Charbonneau Commission, the City of Quebec had some work it wanted done in 2004. It suspected collusion among engineering firms, so it divided the work into five pieces, and said no company could have more than one piece. As an engineer testified, this actually eliminated competition, rather than increasing it. This was the beginning of collusion among Quebec City engineering firms. An anti-collusion measure had the perverse effect of encouraging collusion.<sup>274</sup>

It is conceivable, then, that Bill 1 could make things worse. It could make things worse by drawing resources away from more effective anti-corruption measures. It could make things worse by inefficiently eliminating competition, thus driving up prices. It could make things worse by bolstering an illusion that corruption is under control, when it is not.

Even if Bill 1 does not make things actually worse, it could still have negative effects. Considerable administrative effort will likely be expended by the UPAC and the AMF. There likely will be complaints about processing delays. There likely will be reports about individuals or companies with dubious pasts who nevertheless receive their pre-authorization. There likely will be reports about individuals or companies with clean

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<sup>273</sup> See section 3.3.1.4 above.

<sup>274</sup> “De la collusion entre les firmes de génie-conseil à Québec depuis 2004”, *Le Soleil* (3 September 2013) [translation: “Collusion among engineering consulting firms in Quebec since 2004”].

pasts whose business is ruined by a mysterious failure to obtain their pre-authorization. A compliance industry of lawyers, accountants, and compliance professionals will likely spring up. There may be fewer prominent cases of corruption in public-sector procurement, in which case Bill 1 will be declared a success, but it may be only because corruption has moved to other industries, or because corruption finds ways to hide in a web of hidden ownership structures. It is likely that no future government will repeal Bill 1, for fear of being criticized for laxity, unless it is replaced by a different anti-corruption regime.

The possible futility of legislation, and perhaps even its counter-productiveness, is not a new phenomenon. Here, for example, is historian Doris Kearns Goodwin writing about the impetus for the Interstate Commerce Act in the US:

*Responding to the public outcry that followed the Wabash decision, Congress filled the regulatory void in 1887 by passing the Interstate Commerce Act, which created an Interstate Commerce Commission (ICC) to ensure that railroad rates were “reasonable and just.” The practice of granting rebates to favored big shippers, which essentially destroyed smaller competitors, was outlawed. But the legislation did not authorize the commission to set specific rates, a fatal omission that allowed railroad barons to challenge the ICC rulings in the courts at every turn, thereby rendering the law largely ineffective. In time, railroad executives actually found the law useful. “It satisfies the public clamor for a government supervision of railroads,” one corporate lawyer, Richard Olney, wrote, “at the same time that the supervision is almost entirely nominal.”<sup>275</sup>*

In the same manner, it is worth asking whether Bill 1 met “the public clamor” in Quebec to clamp down on procurement corruption, while having an almost entirely nominal effect.

That could be the end of the inquiry there, but there is yet another set of questions raised by the analysis in this thesis.

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<sup>275</sup> Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft and the Golden Age of Journalism* (New York: Simon & Schuster, 2013) at 192.

When I began this study, I did not expect to find that Quebec's lawmakers would so comprehensively have ignored the legal context in which they were working. They did not refer even once to existing international or national anti-corruption instruments, apart from incorporating various provisions of the Criminal Code into the list of infractions for which pre-authorization could be denied; they did not refer even once to the vast anti-corruption literature; they did not refer even once to practical anti-corruption experience from the OECD, the EU, or New York City. Instead, Quebec's lawmakers appear to have been driven by two political imperatives: the desire to show the public that something was being done; and the desire to act quickly.

Perhaps I should not have been surprised, since it accords broadly with my experience as a lawmaker in Nova Scotia's House of Assembly. Lawmakers do not typically have the time, the interest, or the resources to delve into the context of a law which is before them. Since the way they will vote has been determined before debate begins, there is not much political gain to be had in spending time on research. The lawmaking process has a context and an impetus all of its own. Public perception and timing are important elements of that context.

If we accept that Bill 1's passage into law was driven by factors other than objective evidence that it would work to stem corruption, there are important implications for those who wish to influence the legislative process. In a law-making context driven as much or more by politics (e.g. public perception, speed) than legal knowledge (e.g. instruments, literature, precedent), what is the role of the expert? What is the role of the law reformer? What is the role of the legal scholar?

The analysis in this thesis suggests that much advocacy and law reform effort can be wasted if the advocates and reformers do not understand the legislative dynamic. To illustrate the point, suppose a world-renowned anti-corruption academic had appeared before the Standing Committee on Public Finance, to lay out the international and national anti-corruption context, to plead for co-ordination with existing efforts, to sketch

out the lessons from the literature, and to offer lessons from practical experience in jurisdictions like the EU and New York City. Would it have made any difference? Probably not, because the driving forces behind Bill 1 were political (i.e. do something, and do it quickly) and not substantive (i.e. how can we ensure this particular anti-corruption law is as effective as possible?).

By the time Bill 1 got to the Standing Committee, it was a done deal in principle, though perhaps not in every detail. The new government had led its legislative agenda with Bill 1. Backing down, or even slowing down, could have been contrary to non-policy factors that were driving the PQ government forward.

To be effective, an expert would have had to get involved right from the start, from the first day that Stephane Bédard sat down with Julie Blackburn after the 2012 election and started talking about an anti-corruption bill. Perhaps something like that did happen; but if so, there is no hint of it in the transcripts. Despite the façade that law-making was happening in the open, in the National Assembly, the truth is that the essentials of Bill 1 were written behind the scenes, in rooms where an independent observer could not go.

The National Assembly's lawmakers may have been sincere in their expressed desire to fight corruption, but the political context was such that they were limited in their knowledge, their resources, and their willingness to find the most effective legislative response to corruption in Quebec's public-sector procurement.

And now the government that sponsored Bill 1 has been defeated, and Quebec's lawmakers have moved on to other business.



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