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**Rooting out Corruption and the Use of Public Inquiries (the Honourable Simon Ruel, Court of Appeal of Quebec)<sup>1</sup>**

**GENERAL CONTEXT – PUBLIC INQUIRY COMMISSIONS**

Public commissions of inquiry are executive legal instruments used by governments to investigate and review matters of serious public controversy and propose recommendations for change.

In Canada, they have been created to inquire into and report on a multitude of subjects of public interest, including: financial mismanagement, conflicts of interest involving public officials, wrongful convictions, national security issues, law enforcement matters (e.g., use of Taser weapons, investigation of historical abuse allegations against young people), transportation catastrophes (e.g., terrorist plane bombing, bridge collapse), and public health matters (e.g., tainted blood).

The decision to create a public inquiry is political and multifaceted. The use of a public inquiry as a policy option should be measured against its alternatives. Those alternatives may include departmental investigations, regulatory investigations (e.g., privacy commissioners), coroners, complaints commissioners and ombudsmen, legislative or parliamentary committees, and criminal investigations and prosecutions when criminality is at the heart of the matter.

The creation of a public inquiry is an exceptional measure, and only matters of very significant public importance should be entrusted to commissions of inquiry. The following circumstances may justify the creation of a public inquiry by governments:

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<sup>1</sup> The author wishes to acknowledge the contribution of Ms. Alyson Mace-Reardon, research counsel for the Court of Appeal of Quebec.

- When facing a difficult and large-impact event, situation or problem, having serious or wide-ranging legal, policy or political consequences, which may detrimentally affect public confidence in public institutions;
- When an investigative tool is needed, devoid of the rigidity of judicial procedures, that can review all the angles of the problem independently, without partisanship, publicly, and with a view to making policy recommendations for change.

Public inquiries have advantages:

- They operate independently, in a nonpartisan way and free from institutional impediments of governments;
- They play a social role of information and education, allowing the public to be apprised of the conditions of worrisome problems of public importance and the inner functioning of public institutions;
- They may assist in restoring public confidence in the public institution or industry to be investigated;
- They can devote time, resources and expertise to study a problem in a holistic way – factual, historical, international – and can develop tailored policy-oriented recommendations;

Public inquiries also have disadvantages:

- If the terms of reference are too wide and encompassing, there may be a loss of focus, lengthy delay and massive costs;
- There are real risks of complicating, delaying or jeopardizing anticipated or ongoing parallel legal processes, e.g., criminal investigations, prosecutions, disciplinary proceedings, civil proceedings;
- As they only make recommendations and are not designed to punish, there may be a disconnect between public expectations and the actual results of a public inquiry – a commission of inquiry will produce no ultimate accountability;
- There is a possibility of stonewalling and delaying the adoption of necessary policy, legislative or regulatory changes by the government.

## COMMISSIONS OF INQUIRY AND CRIMINALITY

### Constitutional division of powers and focus on crime

A decision to create an investigative commission of inquiry should be based on broad objectives, such as the review of systemic issues or problems, the safeguarding of the integrity of public institutions or some overarching public interest or public policy question.

Investigative inquiries should not have as their sole purpose identifying individual wrongdoing or misconduct. Other and better options are available for this purpose, such as police investigations or disciplinary, civil or criminal proceedings.

The focus of a commission of inquiry on individual wrongdoing is problematic in many ways: constitutional barriers, whether the commission is *de facto* conducting a law enforcement investigation and whether it will be making legal findings of criminal or civil responsibility, which it does not have the jurisdiction to do.

This question, from a constitutional division of powers perspective, was addressed by the Supreme Court of Canada in *Starr v. Ontario (Commissioner of Inquiry)*.<sup>2</sup> The case concerned an Ontario commission of inquiry into allegations of illegal contributions to various provincial public officials.

A police investigation into the same facts was taking place at the same time as the commission proceedings were unfolding. The central question before the Supreme Court was whether the terms of reference of the inquiry fell within the federal criminal law power and were therefore unconstitutional.

The Supreme Court found that the commission of inquiry was in “pith and substance” a substitute police investigation and a preliminary inquiry into specific criminal offences alleged to have been committed by individuals named in the terms of reference.

According to the Court, it was the combined and cumulative effect of the inquiry's terms of reference containing names of individuals, together with the incorporation of the wording of a *Criminal Code* offence, that rendered the inquiry *ultra vires* of the jurisdiction of the province.<sup>3</sup> The Court also noted the apparent absence of a broad policy basis for the inquiry.<sup>4</sup>

Consequently, in Canada, a provincial commission of inquiry cannot be used, either purposely or through its effect, as a means to investigate and determine the criminal responsibility of specific individuals for specific offences, which is a criminal law matter.

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<sup>2</sup> *Starr v. Houlden*, [1990] 1 S.C.R. 1366.

<sup>3</sup> *Starr v. Houlden*, [1990] 1 S.C.R. 1366, p. 1402 (Lamer J.).

<sup>4</sup> *Starr v. Houlden*, [1990] 1 S.C.R. 1366, p. 1403 (Lamer J.).

The legality of a federal public inquiry mandated to investigate crime as its main focus could also be *ultra vires* of the federal *Inquiries Act*, which allows the federal Government to "cause an inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of part of the public business thereof", if the matter is not already regulated by "special law" (which likely includes criminal law).<sup>5</sup>

Therefore, from a constitutional division of powers standpoint, a public commission of inquiry must have a broad basis and be anchored in provincial heads of constitutional powers, including the administration of justice and policing, public health or municipal matters.

A public commission of inquiry should in principle be mandated to review and report on systemic, institutional or organizational matters, rather than on individual conduct or failures.

However, jurisdiction or actions of a commission of inquiry will not be constitutionally invalid or illegal in Canada because it incidentally reviews or uncovers potentially criminal misconduct when discharging its larger mandate.

A particular line of inquiry which, alone, could be considered as a review of criminal conduct, will not affect the legality of the actions of a commission of inquiry if the matter is otherwise relevant and necessary to the broader mandate of the inquiry.

### **Risks of compromising criminal investigations or prosecutions**

Provided the terms of reference of a commission of inquiry are valid, and that it does not stray from them, significant risks may nonetheless exist if the inquiry incidentally investigates criminality.

Commissions of inquiry are created under public inquiry statutes: the *Inquiries Act* federally in Canada, and similar legislation at the provincial level. Public inquiry statutes are most often backbone legislative instruments that grant considerable leeway to the executive branch in creating a public investigative commission of inquiry.

Typically, such inquiries operate under minimal legal constraints, provided they respect the rules of procedural fairness. Public inquiries are not trials and are not bound to apply criminal or civil rules of evidence, although they must uphold legal evidentiary privileges.

The test for compelling evidence and witnesses at public hearings before a commission of inquiry is minimal – relevance to the terms of reference. Witnesses are compellable and in principle cannot invoke the protection against self-incrimination for refusing to testify.

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<sup>5</sup> *Inquiries Act*, R.S.C., 1985, c. I-11, s. 2, 3.

As Mr. Justice Peter Cory of the Supreme Court of Canada wrote in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*,<sup>6</sup> there is “the risk that commissions of inquiry, released from many of the institutional constraints placed upon the various branches of government, are also able to operate free from the safeguards which ordinarily protect individual rights in the face of government action”.<sup>7</sup>

A person who has been or is likely to be accused criminally and is called to unpack incriminating admissions in public before a commission of inquiry is in a situation presenting significant problems regarding self-incrimination and the right to a fair trial:

- Protections exist under the *Canadian Charter of Rights and Freedoms*, including the right of the accused not to be compelled to be a witness in his own trial,<sup>8</sup> and the protection from subsequent use at a criminal trial of evidence previously given in other proceedings, which would include testimony before a commission of inquiry;<sup>9</sup>
- Residual constitutional protection also exists against the use of derivative evidence obtained from parallel processes, that is “evidence which would not be discovered by the authorities ‘but for’ the earlier compelled testimony of the witnesses”;<sup>10</sup>
- Despite the protections against self-incrimination, a person subject to criminal proceedings may not be compelled to testify before a public commission of inquiry if the predominant purpose is to obtain incriminating evidence against the person;<sup>11</sup>
- A public commission of inquiry cannot be, with or without the cooperation of law enforcement, “in reality, a criminal investigation carried out under the guise of a commission of inquiry”.<sup>12</sup> A commission of inquiry has subpoena powers. The police do not have such powers, and a commission of inquiry

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<sup>6</sup> That case concerned a provincial commission of inquiry into the circumstances surrounding an underground explosion at the Westray Coal Mine in the province of Nova Scotia, which killed 26 miners. Criminal charges were laid against mine managers in relation to the disaster and criminal proceedings were expected to run concurrently with those of the Westray Mine Public Inquiry.

<sup>7</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 65 (Cory J.).

<sup>8</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, subs. 11(c).

<sup>9</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 13.

<sup>10</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 92 (Cory J.).

<sup>11</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, paras. 82 to 86 (Cory J.).

<sup>12</sup> *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, para. 52.

should not be used to circumvent criminal law guarantees, and build cases for law enforcement;

- In this context, a commission of inquiry cannot "have either penal or civil consequences" and its determinations "cannot be findings of civil or criminal responsibility";<sup>13</sup>
- Further, if the accused establishes that there is a real and substantial risk of an irreparable harm to his right to a fair trial<sup>14</sup> because of the extensive publicity of his compelled appearance before a commission of inquiry, he may also be exempted from testifying publicly;<sup>15</sup>
- This may arise if juries are likely to be unduly influenced by explosive evidence which will not be available at trial,<sup>16</sup> or by evidence, or detrimental findings and conclusions,<sup>17</sup> that may leave lasting impacts in the minds of the jurors;<sup>18</sup>
- In truth, the fact that the "primary purpose [of a public inquiry] is not to assign responsibility or blame is not always recognized by the public [and] in the eyes of most citizens, a public inquiry has many of the characteristics of a criminal trial";<sup>19</sup>
- However, fair trial risks may be mitigated at the inquiry level by the adoption of confidentiality measures, such as *in camera* hearings, and publication bans, which may be lifted in part after the testimony, that are tailored to the protection of truly prejudicial evidence;<sup>20</sup>
- In addition, fair trial risks caused by the proceedings of a public inquiry may also be mitigated before the criminal court at the jury selection stage,<sup>21</sup> or by giving appropriate instructions to the jurors, e.g., they must disregard any

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<sup>13</sup> *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, para. 34.

<sup>14</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, subs. 11(d).

<sup>15</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, paras 82 to 86, 108, 111 (Cory J.).

<sup>16</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 120 (Cory J.).

<sup>17</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, paras 121 to 124 (Cory J.).

<sup>18</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 125 (Cory J.).

<sup>19</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 124 (Cory J.).

<sup>20</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 134 (Cory J.).

<sup>21</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 134 (Cory J.).

outside publicity about any matter related to the trial, and base their judgment only and exclusively on the evidence given at trial;

- The publicity of the proceedings of a commission of inquiry may also significantly complicate and eventually compromise the investigative activities of law enforcement agencies, e.g., giving tips to suspects that an investigation may be ongoing, potential destruction of evidence, impairing the capacity of the police to conduct surveillance, use wiretaps or execute search warrants;
- The proceedings of a public inquiry may also reveal and expose the details of law enforcement methods or strategies that are not already in the public domain;<sup>22</sup>
- Those risks may be mitigated, in part, by the adoption of confidentiality measures by the commission of inquiry, at the request of law enforcement.

Therefore, as a matter of principle, the review of individual conduct of a criminal nature should primarily belong to law enforcement authorities and the criminal justice system.

As the Ontario Court of Appeal wrote in *Re Nelles and Grange*, which concerned a commission of inquiry into mysterious baby deaths at the Hospital for Sick Children in Toronto: “A public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes [...]. Such an inquiry is a coercive procedure and is quite incompatible with our notion of justice in the investigation of a particular crime and the determination of actual or probable criminal or civil responsibility”.<sup>23</sup>

Therefore, considering the legal risks, when criminal activity is central to the matter to be potentially investigated, governments will often tend to wait for the completion of all criminal investigations and proceedings.

After the completion of criminal processes, a public inquiry may then be launched to review any aspect of the administration of justice or any remaining issue of public importance not dealt with or satisfactorily addressed in the criminal proceedings.

However, this may not always be possible. The public importance, urgency and scope of a situation or catastrophe may dictate the immediate creation of a public inquiry, even though some of the aspects under review may be subject to criminal investigations or proceedings.

In any case, complex criminal investigations and prosecutions may take many years to conclude. A government may not have the luxury of waiting and, faced

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<sup>22</sup> See the Terms of Reference of the Queensland Organized Crime Commission of Inquiry, s. 7.

<sup>23</sup> *Re Nelles and Grange* (1984), 46 O.R. (2d) 210.

with public outrage, political realities may compel the immediate creation of a public inquiry to obtain answers.

In some circumstances, the hearings of a public commission of inquiry may so inevitably compromise criminal investigations and prosecutions that stays of proceedings may be likely.

As Mr. Justice Cory wrote in the Westray Mine case: “[...] proceeding with the public inquiry may so jeopardize the criminal trial of a witness called at the inquiry that it may be stayed or result in important evidence being held to be inadmissible at the criminal trial [...]”.<sup>24</sup>

In such a situation, the executive branch should make an informed decision to proceed or not with a public inquiry. To a large extent, this is a question of choice. Once again quoting Mr. Justice Cory in the Westray Mine case [my emphasis]:

[...] the government must, and undoubtedly has, carefully considered the choices open to it. If it chooses to proceed with the Westray Inquiry and to endow the Commissioner with an unlimited power to subpoena, then it runs the risk that the criminal trials of the accused managers may possibly be irreparably compromised either because much of the evidence given at the Inquiry may prove to be inadmissible testimony or derivative evidence at the criminal trial, or because excessive publicity will make a fair trial impossible. On the other hand, if the government wishes to take every possible precaution to ensure that there is no risk to the criminal trials, then it could choose to halt, delay, or limit the powers of the Inquiry. To follow this latter course, however, involves the inevitable risk that the public will lose faith both in the government's ability and willingness to get at the truth and in the political system as a whole. Whatever route is selected, the courts must, as a general rule, respect the government's choice. [...]

[...] the Attorney General of Nova Scotia acknowledged the risks in proceeding immediately with a full inquiry. He nonetheless stated that his government considered the immediate resumption of the Inquiry to be of such overriding importance to the community that it is willing to accept the risk that the criminal prosecutions may be adversely affected or even stayed as a result of the Inquiry proceedings. The government is almost certainly better placed than the courts to assess the need for and value of the Inquiry. It is best able to calculate and weigh the risks and benefits to the public of proceeding with the Inquiry. In the absence of demonstrated misconduct on the part of government, such as a refusal to enforce the criminal law in a manner that amounts to a flagrant impropriety, courts should not interfere with the choice it has made.<sup>25</sup>

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<sup>24</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, para. 151 (Cory J.).

<sup>25</sup> *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, paras 97, 98 (Cory J.).

## Minimizing and managing the risks

Public inquiry legislation may specifically provide that a commission of inquiry shall not rule or determine a person's civil or criminal liability.<sup>26</sup>

In any event, the terms of reference of public commissions of inquiry will often include measures designed to limit impacts on upcoming or ongoing criminal investigations or proceedings:

- Directing the commissioners to investigate broad-based public interest matters, systemic matters<sup>27</sup> or stratagems,<sup>28</sup> instead of inquiring into specific issues which may have criminal connotations;
- The terms of reference may include a provision stating that the commission shall ensure that it will not interfere with, compromise<sup>29</sup> or jeopardize<sup>30</sup> any ongoing criminal investigation or judicial proceedings;
- Such a provision may be interpreted as meaning either that the commission should refrain from reviewing specific conduct that is the subject of such criminal investigation, or that the commission must adopt confidentiality measures, such as *in camera* hearings or publication bans, or other measures to ensure non-interference with criminal investigations or proceedings;
- The terms of reference may be more directive, in stating that the commission shall not inquire into any matter which is currently the subject of ongoing judicial proceedings,<sup>31</sup> or that it “shall not report on any individual cases that are, have been, or may be subject to a criminal investigation or proceeding”;<sup>32</sup>

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<sup>26</sup> *Inquiries Act 2005* (U.K.), c. 12, s. 2.

<sup>27</sup> See the Terms of Reference of the National of Inquiry into Missing and Murdered Indigenous Women and Girls (federal, Canada), para. a; Terms of Reference of the Inquiry into Pediatric Forensic Pathology in Ontario (provincial, Ontario), para. 4.

<sup>28</sup> See the Terms of Reference of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (provincial, Quebec).

<sup>29</sup> See the Terms of Reference of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (provincial Quebec).

<sup>30</sup> Such language is included in the terms of reference of most Canadian federal public inquiries; see the Terms of Reference of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, para. k; Terms of Reference of the National of Inquiry into Missing and Murdered Indigenous Women and Girls (federal Canada), para. q; Terms of Reference of the Commission of Inquiry into Money Laundering in British Columbia (provincial, British Columbia), para. (4).

<sup>31</sup> See the Terms of Reference of the Queensland Organized Crime Commission of Inquiry, s. 8.

<sup>32</sup> See the Terms of Reference of the Inquiry into Pediatric Forensic Pathology in Ontario (provincial, Ontario), para. 4; although the Commissioner interpreted the terms of reference of the Inquiry as permitting the Commission to call limited evidence on completed criminal cases where parents had been charged with criminal offences related to the abuse of their children based on the evidence of a forensic pathologist (which the Commission ultimately found to be flawed and

- If the commission may reveal information that is the subject of a covert operation, or may compromise the rights of a witness in the criminal context, the terms of reference may direct that the evidence be received *in camera*, under a publication ban or subject to other confidentiality measures;<sup>33</sup>
- The terms of reference may direct that the commission is not to publicly disclose investigative or intelligence collection strategies or methods;<sup>34</sup>
- With respect to the report writing stage, as the Supreme Court of Canada wrote in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*: "[...] the conclusions of a commissioner should not duplicate the wording of the *Code* defining a specific offence [and] efforts should be made to avoid language that is so equivocal that it appears to be a finding of civil or criminal liability";<sup>35</sup>
- Therefore, the terms of reference may direct commissioners to perform their duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization.<sup>36</sup>

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biased), to the extent that such evidence is necessary to establish a factual basis to conduct a systemic review of the practice of forensic pediatric pathology in Ontario, see: Final Report of the Inquiry into Pediatric Forensic Pathology in Ontario, The Honourable Stephen T. Goudge, Commissioner, Volume 2: Systemic Review, p. 46, 47.

<sup>33</sup> See the Terms of Reference of the Queensland Organized Crime Commission of Inquiry, s. 6.

<sup>34</sup> See the Terms of Reference of the Queensland Organized Crime Commission of Inquiry, s. 7.

<sup>35</sup> *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, para. 52.

<sup>36</sup> Such language is included in the terms of reference of most Canadian federal public inquiries; see the Terms of Reference of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, para. k.

## **THE CASE OF THE QUEBEC COMMISSION OF INQUIRY ON THE AWARDING AND MANAGEMENT OF PUBLIC CONTRACTS IN THE CONSTRUCTION INDUSTRY**

### **Context leading to the creation of the Commission**

Governments have, in the past, used public inquiries to investigate corruption as a matter of public interest, most recently in the Province of Quebec, Canada.

In 2007, allegations began to surface publicly in Quebec on stratagems and conflicts of interest related to the granting of public contracts by the City of Montreal to engineering firms.

In 2009, investigative journalists revealed improprieties in the management of municipal construction contracts, including that the president of the executive committee of the City of Montreal sojourned on the luxurious private yacht of a Quebec construction tycoon as the latter's construction firm was bidding on a large municipal contract.

Further allegations were revealed to the effect that a group of construction companies, the "Fabulous Fourteen", had colluded to share public construction contracts within the City of Montreal and its vicinity.

In response to the allegations in the construction industry, the Government created a special squad within the provincial police,<sup>37</sup> the "Opération Marteau". The provincial legislature also enacted legislation broadening the scope of criminal offences justifying the refusal of a construction license.

Despite those measures, the allegations of criminal activity in the construction industry continued to grow, extending to other municipalities and to the provincial Transportation Department, including allegations of infiltration by organized crime and the use of employees by construction or engineering firms to cover corporate political financing, which is illegal under Quebec legislation.

At the end of 2009, the provincial Auditor General released a report documenting shortcomings to detect collusion in public construction contracts within the provincial Transportation Department.

Shortly thereafter, the Government created a special anti-collusion squad, the "Unité anticollusion" tasked to monitor the construction market, detect fraud, collusion and wrongdoing, and make reports to the police squad in charge of the "Opération Marteau".

Other measures were adopted in 2010, including:

- Compelling municipalities to adopt contractual management policies, including rules to prevent bid-rigging, conflicts of interest and corruption;

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<sup>37</sup> The "Sûreté du Québec".

- Broadening the powers of the provincial Municipal Affairs Department to allow for verifications and investigations into the affairs of municipalities and the issuance of directives;
- Enacting legislation compelling municipalities to adopt codes of ethics for their elected officials and employees;
- Tightening elections financing legislation to forbid indirect corporate contributions, lowering individual contributions from \$10,000 to \$3,000, increasing fines and broadening the investigative powers of the Chief Electoral Officer.

Despite the adoption of these measures, allegations continued to swirl and public support for the creation of a public inquiry grew.

The Government initially resisted, publicly stating that criminal activities should be first investigated by law enforcement.

In that context, in February 2011, the Government created a permanent provincial anti-corruption police squad, the “Unité permanente anticorruption” (“UPAC”), which brought together the previously created “Opération Marteau” and the “Unité anticollusion”. The structure and powers of UPAC were clarified and set out in a newly enacted *Anti-Corruption Act*.<sup>38</sup>

In the fall of 2011, the “Unité anticollusion” published a report outlining many flaws in the public contracting process within the provincial Department of Transportation, concluding that “[TRANSLATION] an evil empire is consolidating its place within the road construction industry: the taps are open and public funds are being squandered with relative indifference”.<sup>39</sup>

### **The creation of the Commission**

The Government bent to public pressure and, on October 19, 2011, created the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry.<sup>40</sup>

The Commission had a wide and comprehensive mandate. Under its terms of reference, the Commission’s mandate was three-fold:

- 1) Investigate the existence of stratagems involving possible activities of collusion and corruption in the granting and management of public contracts within the construction industry, and possible links to political financing;

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<sup>38</sup> *Anti-Corruption Act*, CQLR, c. L-6.1.

<sup>39</sup> Final Report of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, France Charbonneau and Renaud Lachance, Volume 1, p. 8.

<sup>40</sup> *Décret 1029-2011 concernant la constitution de la Commission d’enquête sur l’octroi et la gestion des contrats publics dans l’industrie de la construction*, (2011) G.O.Q. II, 4767.

- 2) Identify the possible infiltration by organized crime within the construction industry, and
- 3) Make recommendations to prevent collusion, corruption and infiltration of organized crime within the construction industry.

The mandate covered public construction contracts, at the provincial, municipal and government corporation levels, for a period of fifteen years prior to the creation of the Commission.

Fearful that a public inquiry would jeopardize ongoing criminal investigations and eventual prosecutions, the Government did not initially grant the Commission subpoena powers under Quebec's *Act respecting public inquiry commissions*.<sup>41</sup>

This proved untenable and, shortly thereafter, the chairperson of the Commission told the Government that it could not execute its mandate if it was not granted the full powers of a public inquiry commission.

On November 9, 2011, the Government acquiesced and formally constituted a public inquiry commission under the *Act respecting public inquiry commissions*,<sup>42</sup> which meant that the Commission would have subpoena and enforcement powers,<sup>43</sup> and the commissioners would be granted the full immunity of a superior court.<sup>44</sup>

The chairperson further requested and was endowed with additional powers under special provincial legislation. On June 6, 2012, the Legislative Assembly passed Bill 75, *An Act to confer certain powers of inspection and seizure on the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, which granted the Commission:

- 1) The power to enter into any place to inspect, examine, make copies or seek the production of registers, accounts, records or documents relevant to the Commission's mandate, along with hefty fines for the refusal to comply;<sup>45</sup> and

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<sup>41</sup> *Act respecting public inquiry commissions*, CQLR, c. C-37.

<sup>42</sup> *Décret 1119-2011 concernant la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction*, (2011) G.O.Q. II, 5261.

<sup>43</sup> *Act respecting public inquiry commissions*, CQLR, c. C-37, s. 9 to 12.

<sup>44</sup> *Act respecting public inquiry commissions*, CQLR, c. C-37, s. 16 and 17.

<sup>45</sup> *An Act to confer certain powers of inspection and seizure on the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, S.Q. 2012, c. 17, s. 3 and 10.

- 2) Search and seizure powers, on an *ex parte* request by the Commission to a justice of the peace.<sup>46</sup>

### **The risks of the Commission investigating crime and mitigation measures**

The Commission was largely focussed on identifying schemes or stratagems of a penal or criminal nature, e.g., electoral statutory offences, fraud, breach of trust by public officials (*Criminal Code*<sup>47</sup>), conspiracy and bid-rigging offences (*Competition Act*<sup>48</sup>).

This presented obvious constitutional division of powers concerns, which were, to a large extent, alleviated by the systemic perspective of the Commission's mandate.

The Commission stayed within the bounds of its mandate and presented a sample of representative cases to illustrate the phenomenon it had observed.

Further, the Commission examined the public processes related to the planning, tendering, granting, execution, surveillance and payment of public contracts in the construction industry, and, more broadly, it examined various governmental measures, at the federal, provincial and municipal levels, to prevent collusion and corruption in public contracts.

Other major concerns included possible interference with other ongoing criminal investigations, the potential for law enforcement to benefit from evidence collected by the Commission under its civil powers in a manner that would circumvent criminal law guarantees, and the possible violation of constitutional guarantees for targets of criminal investigations, including the right to a fair trial.

To diminish those concerns, the terms of reference provided that the Commission had to ensure that it would not compromise ongoing investigations carried out under the *Anti-Corruption Act*.

However, few investigations were ongoing and being carried out by UPAC; to a large extent, the Commission was clearing the ground, investigating and revealing potentially criminal conduct that was not necessarily yet being investigated.

Considering those pitfalls, one might have assumed that the Commission would have been reluctant to rely on law enforcement personnel to fulfill its mandate. It did precisely the contrary, as the Commission hired investigators (on leave) drawn from active police forces (provincial and municipal), with considerable experience in complex criminal investigations involving organized crime.

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<sup>46</sup> *An Act to confer certain powers of inspection and seizure on the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, S.Q. 2012, c. 17, s. 4 to 9 and 11.

<sup>47</sup> *Criminal Code*, R.C.S. 1985, ch. C-46.

<sup>48</sup> *Competition Act*, R.S.C. 1985, ch. C-34.

Those investigators were tasked with identifying potential lines of inquiry, gathering documentary evidence, meeting potential witnesses and identifying those who would testify in public. The Commission also retained the services of commission counsel, most of them very senior with considerable experience in public prosecutions.

The hiring of active law enforcement investigators and counsel with a criminal law background likely facilitated the obtaining of relevant information from law enforcement agencies, e.g., police records of discontinued or closed investigations, or contextual information obtained during investigations.

When facing opposition, the Commission was successfully able to compel documents from law enforcement agencies. For example, the Quebec Superior Court confirmed a subpoena issued by the Commission to the Royal Canadian Mounted Police (the Canadian federal police force, or "RCMP") for documents obtained in a large-scale investigation targeting the Italian Mafia, between 2002 and 2006 ("Opération Colisée"), including thousands of wiretaps, surveillance videos, and photos.<sup>49</sup>

It must be noted that a number of criminal prosecutions arising from "Opération Colisée" had concluded with guilty pleas from the most senior mafia bosses and the confiscation of close to \$3 million.

According to the Superior Court, in the RCMP matter, the mandate of the Commission was anchored in the provincial constitutional jurisdiction over the administration of justice, and its object was not the investigation of the workings of a federal agency.

The use of the subpoena power by the Commission was found to be valid, and the Court dismissed concerns expressed by the RCMP on the protection of sensitive information, because it had already reviewed or redacted problematic information, and because the protection of remaining sensitive information could be raised on a case-by-case basis, if needed.

In anticipation of the public hearings, the Commission also granted standing (participant or intervenor status) to law enforcement, prosecutorial and disciplinary authorities, including the Chief Electoral Officer, the provincial Attorney General, the Order of Engineers, the provincial Director of Criminal and Penal Prosecutions and the Cities of Montreal and Laval.

Those participants or intervenors had the right to access documents collected by the Commission and to obtain will-says of anticipated testimony, and they had the right to a seat at a counsel table for the public hearings. They were therefore able to coordinate the presentation of evidence with Commission counsel to minimize potential impacts on ongoing criminal investigations or prosecutions.

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<sup>49</sup> *Canada (Procureur général) c. Charbonneau*, 2012 QCCS 1701.

The Commission deliberately chose not to pursue certain lines of investigation that would be too sensitive criminally. It also heard evidence *in camera*, or issued publication bans on documents or testimony, to diminish the likelihood of interference with investigations or prosecutions. These orders were generally adopted temporarily, e.g., up to and until the end of the judicial proceedings.

In other cases, the Commission imposed confidentiality measures, including protecting witnesses' identities, allowing witnesses to testify behind screens and allowing them to use voice altering mechanisms.

### **Key evidence presented before the Commission**

Surprisingly, the Commission was able to obtain the cooperation of key repentant witnesses, who laid the ground for the identification of criminal schemes or stratagems within the construction industry. The Commission also presented information obtained from law enforcement, e.g., police surveillance videos. For example, as regards the City of Montreal, the evidence revealed the following:

- A major construction contractor described the operations of a construction cartel, in which it actively participated, involving about ten construction companies and engineering firms,
- Public construction contracts in the City of Montreal and surrounding municipalities were closed to outsiders. The members of the cartel would rig the bids, and collude to present the lowest bid, alternating among themselves;
- The cartel had accomplices within the City of Montreal's public works division. According to the construction contractor, one of those employees, an engineer within the public works division, was paid 1% of the value of every rigged contract;
- The engineer admitted before the Commission receiving cash kickbacks of \$736,000 from the construction companies, members of the cartel, between 2000 and 2009;
- The engineer, who was remorseful and affected by the burden of his illegal actions, gave up \$122,800 in cash as unspent illegal kickbacks, which the Commission publicly confiscated;
- The engineer and another colleague within the public works division also admitted having accepted various gifts from members of the cartel over the years, including expensive bottles of wine, meals, professional hockey tickets, and fully-paid trips, including a golfing trip to the Dominican Republic, in which the alleged new godfather of the Italian Mafia participated;

- The members of the cartel acted with the blessing and under the protection of the Italian Mafia. In exchange for those services, 2.5% of the value of every rigged contract had to be paid to the Mafia, in cash;
- Video surveillance at the Café Consenza in Montreal, the gathering place of Italian Mafia bosses, obtained by the RCMP during “Opération Colisée” showed Montreal construction contractors frequently going to the Café. Videos showed an intermediary between construction contractors and the Mafia bringing and leaving large amounts of cash at the Café. In one video, he is seen leaving a bundle of cash with the alleged Mafia godfather, who places the bundle in his socks;
- On the political front, the members of the cartel also had to pay a 3% commission, in cash, to the political party of the sitting mayor, “Union Montréal”;
- According to a witness who was the business development director with a large construction firm, the president of the City of Montreal’s executive committee requested that the firm, and other engineering firms, make large political donations (only individual contributions were legally permitted) to the party “Union Montréal” for the upcoming City of Montreal election, with the expectation of receiving municipal contracts. The party eventually won the 2001 election;
- Witnesses from engineering firms admitted making large illegal political contributions to municipal political parties with the hope of receiving public contracts;
- A political operative and campaign financing director within the party “Union Montréal” was identified as being the “transmission belt” between construction and engineering firms, on the one hand, and the City of Montreal administration, on the other, and would approve the sharing of contracts;
- The political operative eventually enlisted (outside of regular channels and processes) the representative of an engineering firm who became a spokesperson for all the firms that were part of the cartel;
- The representative testified that he coordinated the sharing of contracts with the firms, identified those who would be awarded contracts, and transmitted the information to the political operative who would coordinate with the tender selection committees.

## **Systemic findings made by the Commission and root causes**

The Commission revealed the existence of the following corruption and collusion schemes or stratagems:

- Collusion schemes within the construction industry involving construction companies, suppliers, service providers, and engineering firms, particularly the control, sharing and elimination of competition, and bid-rigging, including the rotation of contract winners, fake bids and compensation for losers;
- Corruption activities, including political corruption and corruption of municipal public servants, e.g., cash payments, benefits;
- Links to political financing activities, e.g., illegal corporate political financing, organization of “turnkey” elections, with direct links (actual granting) or indirect links (expectation) to the granting of construction contracts;
- Infiltration of organized crime within the construction industry, including: direct control of construction companies; involvement in controlling territories; mediation, intimidation and enforcement services, subject to the payment of kickbacks; control of capital for construction projects; involvement with unions representing construction employees.

The causes of the problems identified by the Commission took many forms, and included:

- Poor organizational culture, including tolerance of ethical deviations at the highest level of public organizations and deficient management of conflicts of interest;
- Back and forth movement of elected officials or public servants from and to the private sector, and vulnerability of municipal elected officials to pressures from the public sector;
- Centralization of decision-making authorities, lack of transparency and too much discretion in the tendering and contract award processes;
- Lack of internal technical or engineering expertise within public institutions, which made it necessary to rely on the private sector actors, e.g., for project design, surveillance;
- Incapacity to properly assess the cost of public construction projects;
- Inadequate on-the-ground surveillance of public construction contracts;
- Fragmentation of responsibilities among various public bodies for the oversight of the construction industry and tendering processes;

- Obstacles to whistleblowing and fear of reprisals;
- Lack of resources for regulatory and law enforcement – police forces, Competition Bureau, professional bodies, Chief Electoral Officer, Revenue Agency, construction licensing Board.

With respect to the infiltration of organized crime within the construction industry, the following causes were identified:

- The large monetary value of public construction contracts, which was liable to attract criminal actors;
- Vulnerability of the construction sector due to the industry's lack of sophistication and the workforce's lack of qualifications;
- Lack of surveillance by public authorities, e.g., construction licences;
- A complex contractual chain, which provides opportunities for abuse, e.g., use of fake invoices, overcharging and presence of a black market;
- Difficulties experienced by construction companies in borrowing funds from financial institutions;
- Construction sector unions vulnerable to crime infiltration.

The Commission concluded that collusion and corruption in public construction contracts had significant economic costs. It mentioned that those illegal activities could have increased the City of Montreal's contracting costs by 30-35%.

The Commission also concluded that those activities were contrary to the public interest, breached democratic principles, constituted a threat to the rule of law and eroded public confidence in public institutions.

### **Key recommendations made by the Commission**

The Commission made several recommendations, many of which were implemented by the Government, including:

- Establishing a provincial Public Contracting Authority (the Government accepted this recommendation):<sup>50</sup>
  - The Authority is an independent body that is the sole gateway for the oversight of public sector procurement, including government corporations and the municipal sector. It oversees compliance with tendering and contracting legislation, regulations and processes;

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<sup>50</sup> *Act respecting the Autorité des marchés publics*, CQLR, c. A-33.2.1.

- The Authority is also responsible for issuing authorizations to contract to companies wishing to contract with public bodies, which involves verifying if the company “fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract or subcontract”, including if the company or its officers, directors or significant shareholders were found guilty or accused of listed crimes, or have links to organized crime;<sup>51</sup>
- Strengthening the public tendering rules and processes, e.g., better ensuring the confidentiality of strategic information, such as the identity of members of selection committees and of those who obtained the tendering documents;
- Adopting contract adjudication rules adapted to the nature of the work to be performed, which, in some cases, places too much emphasis on price;
- Adopting measures to increase competition for certain types of contracts, e.g., asphaltting contracts, particularly outside urban areas, by using mobile asphaltting plants, instead of relying on a few local construction companies;
- Increasing internal construction and engineering expertise within government, municipal and other public organizations, to diminish reliance on the private sector to prepare, manage and supervise construction tendering processes and contracts;
- Better protecting whistleblowers (the Government accepted this recommendation):
  - The *Act to facilitate the disclosure of wrongdoings relating to public bodies*<sup>52</sup> contains mechanisms to facilitate the disclosure, in the public interest, of wrongdoings committed or about to be committed in relation to public bodies, and establishes a general protection regime against reprisals;
- Granting more independence to the Anti-Corruption Commissioner responsible for UPAC, who should be appointed for a term of seven years and only be removed for cause (the Government accepted this recommendation):
  - Pursuant to the *Anti-Corruption Act*, after a rigorous selection process, the Anti-Corruption Commissioner is appointed by a two-thirds majority of the members of the Legislative Assembly, on a motion of the Prime Minister, for a non-renewable seven-year term.

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<sup>51</sup> *Act respecting contracting by public bodies*, CQLR, c. C-65.1, s. 21.27 ff.

<sup>52</sup> *Act to facilitate the disclosure of wrongdoings relating to public bodies*, CQLR, c. D-11.1.

The Commissioner can only be removed by the Assembly, for cause, with the approval of two thirds of its members.<sup>53</sup>

- Offering better immunity to police informers and repentant witnesses in the context of criminal or competition investigations and prosecutions;
- Better preventing the infiltration of organized crime within the construction industry, including expanding the scope of criminal or penal infractions justifying the revocation of a construction licence, e.g., drug offences, fraud, money laundering;
- Strengthening the fight against collusion and corruption within public prosecution offices, lengthening statute of limitation periods for certain regulatory offences applicable to the construction industry;
- Ensuring that political financing is protected from undue influence, e.g., better training; ensuring the disclosure of volunteer activities; disclosure by all political contributors of their employer (to discourage indirect corporate contributions).

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<sup>53</sup> *Anti-Corruption Act*, CQLR, c. L-6.1, s. 5 to 5.2.1.

## **CONCLUSION AND VIEWS ON THE USE OF PUBLIC COMMISSIONS OF INQUIRY TO ROOT OUT CORRUPTION AND COLLUSION**

- In Canada, a public inquiry is an instrument used very exceptionally to inquire and report on controversies of significant public importance;
- Public inquiries allow the public to better understand the complexities of a scandal or tragedy, but provide no accountability: no one is charged, no one is punished, and everyone walks free from a public inquiry – the public may not understand this;
- Ultimate accountability for criminality resides in criminal prosecutions;
- Public inquiries should not be tasked with investigating criminality. They cannot have for their sole purpose the identification or wrongdoing and they cannot make legal findings, including findings of criminal guilt;
- They cannot be used as a substitute law enforcement investigation, in contravention of legal and constitutional guarantees available to the accused under the criminal law;
- Public inquiries may pose a real risk of jeopardizing criminal investigations and prosecutions, re: self-incrimination issues, use of administrative powers to bifurcate criminal processes, protection of the right to a fair trial;
- To diminish such risks, public commissions of inquiry should be mandated to review and report on systemic, institutional or organizational matters, with a strong policy development underpinning, remembering that the focus of public commissions of inquiry should be prospective: understand what happened to propose changes to prevent reoccurrence;
- A public inquiry into corruption obviously poses very significant challenges. The risks are more acute if investigations and prosecutions (particularly before juries) are ongoing;
- In appointing such a commission of inquiry, the Government should define its mandate to inquire into risks, vulnerabilities and the existence of schemes or stratagems, with a view to making recommendations for change;
- The Government could minimize legal risks by including limitations in the terms of reference, e.g., the commission shall not inquire into any matter subject to ongoing judicial proceedings, or the commission shall ensure that it will not interfere with, compromise or jeopardize any ongoing criminal investigation or judicial proceedings;

- A range of measures may be adopted at the operational level by a commission of inquiry to minimize the risk of impacts on criminal investigations or prosecutions, e.g., avoiding certain subjects; issuing confidentiality orders or publication bans; avoiding conclusions in the final report that may be interpreted as a legal finding; making better use of descriptive language;
- Despite mitigation measures, a public inquiry focusing on corruption will still very likely pose risks and potentially interfere with or jeopardize criminal investigations or prosecutions. In the end, this is a political judgment call;
- The Quebec Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry exemplifies that with the appropriate safeguards, a public inquiry can be a very useful public policy tool to root out and prevent collusion and corruption;
- In that case, there were many public allegations, but few criminal investigations had been initiated concerning collusion and corruption in the construction industry. To a large extent, the Commission was opening the way;
- Internal limitations were included in the terms of reference – the Commission had to ensure that it would not compromise ongoing investigations and prosecutions;
- The Commission was not successfully challenged on division of powers grounds and stayed within the bounds of its terms of reference;
- The Commission hired professional and experienced active police investigators, which allowed ongoing communications with law enforcement agencies to avoid or minimize interference with current investigations and prosecutions;
- There is nothing wrong in principle if a commission of inquiry passes on information to law enforcement if it has reasonable grounds to believe that information obtained during the inquiry may reveal the existence of crimes;<sup>54</sup>
- However, clear processes should be adopted so that the commission does not become a substitute police investigation applying lower legal standards, re: risk of contaminating criminal investigations and prosecutions;
- The Quebec Commission granted standing (participant or intervenor status) to law enforcement, prosecutorial and disciplinary authorities, which

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<sup>54</sup> See the Terms of Reference of the National of Inquiry into Missing and Murdered Indigenous Women and Girls (federal Canada), para. r; Terms of Reference of the Commission of Inquiry into Money Laundering in British Columbia (provincial, British Columbia), para. (3).

- allowed coordination of the presentation of evidence that would not jeopardize ongoing investigations or prosecutions;
- The Commission was successful in obtaining the cooperation of key players within the Quebec construction industry who admitted criminal activity – out of remorse or possibly in the hope of obtaining immunity for cooperating with law enforcement;
  - Those witnesses described the various collusion and corruption stratagems within the Quebec construction industry, particularly at the municipal level;
  - The testimony of these witnesses likely opened the way for law enforcement to investigate leads, and some witnesses who testified before the Commission subsequently cooperated with law enforcement;
  - Some high-profile criminal prosecutions successfully proceeded concurrently with or following revelations that were made before the Commission;
  - For example, the Commission heard evidence concerning the City of Laval (437,000 inhabitants, just north of Montreal), as charges were simultaneously laid (including gangsterism) against the former mayor and other acolytes in relation to corruption in the awarding of construction contracts by the City,
  - The report of the Commission, released in November 2015, concerning the City of Laval was largely blacked out to avoid interfering with the public prosecution;
  - In December 2016, the mayor of the City of Laval pleaded guilty to various charges of breach of trust and fraud. He admitted to receiving millions of dollars in kickbacks. He was sentenced to six years of prison and ordered to repay the City of Laval \$8 million of funds illegally funnelled to offshore accounts;
  - So far, to a large extent, the benefits of a commission of inquiry into corruption in the Quebec construction industry seem to have outweighed the risks, although the full picture is not completely known, as investigations may still be on the way;
  - The public hearings of the Commission started in May 2012 and concluded in November 2014. The report was issued in November of 2015. The hearings were broadcast live on the Commission's website, and extensively followed by all French and English media in Quebec, and nationally, and generated considerable public interest;

- The Commission was criticized for missteps, including treating some witnesses harshly, and failing to establish a link between illegal political financing at the provincial level and the actual granting of public contracts, the commissioners having disagreed on this factual issue;
- However, it can fairly be said that the Commission had a major impact in sanitizing the construction industry in Quebec and shedding light on illegal schemes, favoritism, conflicts of interest, collusion, corruption and the vulnerabilities of public institutions;
- The Commission made key recommendations for change, many of which were implemented by the Government, including legislatively. Other reforms were made before or as the Commission was accomplishing its mandate;
- So, with clear boundaries and appropriate safeguards, both in the terms of reference and at the operational level, it appears possible to successfully investigate large scale corruption schemes, with a view to making recommendations for reforms.