

Gomery: prequel and sequel Gomery, préambule et actes suivants

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Résumé de l'article

Le texte suivant commence par brosser un portrait détaillé du « scandale » des commandites, pour par la suite discuter des conséquences que créent les événements de références sur la nature de l'enquête. Mon point de vue est que, bien que l'objectif initial de la Commission était de démontrer que tout va bien dans une démocratie transparente, la reconstruction ex post de l'événement a plutôt entraîné la résurgence sélective de vieilles plaintes et indignations. La télédiffusion en direct des travaux et le sensationnalisme du traitement médiatique ont cristallisé la colère publique en réduisant les enjeux à la dimension financière (gaspillage de fonds publics) et à la corruption au sein du Parti libéral du Canada (« culture du tout-m'est-dû »). La conduite de l'enquête, ainsi définie, n'a pas permis la prise en compte d'éléments plus significatifs qui auraient notamment pu d'établir des liens entre les procès criminels et civils dont font l'objet certains de ses acteurs principaux. Pire encore, les travaux de la Commission créèrent au sein du public l'impression que la corruption politique au cœur du « scandale », dont elle martelait sans cesse la dimension partisane (libérale), aurait pu être arrêtée à plusieurs reprises par la simple vigilance d'un ou plusieurs hauts fonctionnaires. Plus spécifiquement, le déroulement de l'enquête a privilégié une démarche sélective d'appel, de comparution et d'appel à nouveau de certains témoins, au détriment d'autres. De même, le juge en chef de la Commission fut le premier à reconnaître ses connaissances limitées eu égard au gouvernement responsable, aux institutions politiques et administratives, ainsi qu'au niveau du droit public. Conséquemment, il dû compter sur le soutien continu de conseillers sur le système politique dont il ne pouvait mettre en doute ni l'expertise, ni les biais personnels...



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The thesis of this article is that the Committee of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Inquiry), was built of crooked timber, to echo Isaiah Berlin's famous remark about human nature, and therefore it could not succeed. The inquiry itself was a blow to Canadian democracy, for by the time of its second report, the sponsorship events as played by the politicians and media had dominated two federal general elections and drained the energies of the public service at the expense of progress on other public policy. The inquiry design alone was enough to preclude it from getting to the nature of the events. Then, in the recommendations stage, instead of staying close to sponsorship's defining features, the Commissioner, Mr. Justice John Gomery, and his advisers attempted an astonishingly wide reform of the federal representative institutions, putting at risk central lines of control of responsible government.

There was also the prior problem of whether establishing a judge-led inquiry was even a sensible thing to think about initiating as late as 2004. All the personnel involved in the events that had begun at the beginning of the 1990s had moved on. Many had retired. One central figure was dead. The federal police force, the RCMP, had been called in a couple of years earlier, some criminal charges had been laid and others were contemplated. One can have no doubt that the justice system itself would eventually have reaped the public acclaim for uncovering the extent of political involvement; few of the accused were going to go down alone in criminal actions. Civil actions were about to be launched to recover unearned payments. The Public Accounts Committee's investigation under a reference from the government had ended in bitter partisanship, but over two sessions starting in 2002, it had systematically interviewed senior officials in the Privy Council Office (PCO), Treasury Board Secretariat (TBS), Office of the Auditor General (OAG) and Public Works and Government Services Canada (PWGSC), some not recalled by the inquiry. Even the government of Mr. Paul Martin that established the inquiry was, throughout the inquiry's course, independently devising and implementing an eventual 200-plus individual reforms, reforms that the judge would take into account in making his recommendations.

The following text will first characterize the sponsorship scandal and then review the consequences for the shape of the inquiry created by its terms of reference. My view is that although the intent of establishing the inquiry was to demonstrate that all was well in an open democracy, the event itself, pulled out of the past, selectively refreshed grievance and outrage. The televised proceedings followed by daily headlines so inflamed the general public with the repetitive detailing of money losses that the public came to understand sponsorship's root evil as only financial waste, and only Liberal Party corruption ("entitlement"). The inquiry as it was conducted thus forestalled more significant conversations that might have filled in between the criminal and civil trials. Worse, the inquiry created a view that the political corruption it emphasized, which it was at pains to emphasize as "partisan," could have been almost casually forestalled at any point by ordinary levels of vigilance on the part of senior public servants.¹ More specifically, the terms of reference either forced or normalized a selective approach to calling, questioning and recalling witnesses. Further, the judge the government of Prime Minister Paul Martin chose to lead the inquiry was the first to acknowledge that he lacked understanding of responsible government, political institutions and public law. He therefore was swiftly provided with advisers on the political system whose qualifications and settled views he was in no position to know of or weigh.²

A recent history of sponsorship

The "sponsorship scandal" and/or "adscam" have become the summary references to misuse of public money in the federal government's sponsorships of community, cultural and sporting events and in advertising activity. That misuse took a variety of forms. Among them were inflated invoices, even payments to agencies for nothing, and routing of money to federal crown corporations to pay for their participation by passing the money through advertising agencies for a commission. The events that were put into question arose from a decision of the then-Prime Minister Jean Chrétien to continue an existing policy of the former Conservative government to countering the growing separatist support in Quebec by promoting the visibility of the federal presence in that province. Between 1991 and 1996, a special reserve fund to promote Canadian unity was part of the budget; a reserve can be drawn on, but monies drawn are not clearly shown in the Estimates of Expenditure. When Mr. Chrétien was elected prime minister in 1993, "Canada word mark" advertising activity was already well established in Public Works and Government Services Canada, and Mr. Charles (Chuck) Guité, who would become the manager of an eventual sponsorship program, was already involved in

contracting for advertising, partly overseen by the previous Conservative government's Cabinet Committee on Communications. In 1994, the new Liberal cabinet approved a policy to add more rigour to advertising expenditures, and the Treasury Board Secretariat put that policy into effect (Appendix Q) but clearly did not monitor it.

It is worth a short diversion to point out the variety of dates in play to indicate the start of wrongdoing, because the dates reflect the struggle between players to control the public's perceptions. Justice Gomery's Fact Finding Report says the origins of the sponsorship program were in the election of a new government (Chrétien) in November, 1993. In the summary section of the Fact Finding Report, he starts the program proper in 1994-95, when the advertising section of PWGSC, under Guité's direction, drew from PWGSC funds about \$2 million for prominent displays of federal advertising. The judge does fairly state that before the defeat of the Conservatives in 1993, government advertising was already being managed by Mr. Guité for Public Works and Government Services Canada,³ but does not lay blame. Arthur Kroeger, who was a federal deputy minister for 17 years, said of Mr. Guité's work for the Conservatives: "It has been documented that Chuck Guité was as dismissive of the rules when he handled advertising for Conservative Senator Lowell Murray in 1992" as when working with Mr. Gagliano.⁴ (Mr. Guité was reported on CTV as saying that the system was even more political under the Conservatives.)

The terms of reference given by the Martin government in February to its Special Counsel for Financial Recovery, Me André Gauthier, were the 721 sponsorship files from 1997 to 2001. These were the same dates used by the Office for its investigation and report of November 2003, in which it used the new Communications Co-ordination Services Branch (CCSB) as the first bookend. The OAG dates were used by the Public Accounts Committee (PAC) in its Tenth Report of March 20, 2003. The PWGSC website contains a chronology of the scandal with a start date of 1996, despite the earlier draw for "special programs." Another marker is that in April 1996, when PWGSC asked for \$17 million to fund "sponsorships," a line for what had been ongoing activity was finally established in the federal budget.

CBC Newsline, however, explicitly chooses the unity challenge as the start; October 1995, at the end of the Quebec referendum.⁵ In December 1994, a draft referendum bill on sovereignty was tabled in the Quebec National Assembly. When the Quebec referendum was held the following October, the sovereignty side lost by about half of one percent of votes. From that point forward, the federal visibility program gained Cabinet support and became the primary method to build unity, constitutional talks with the provinces having amply and traumatically failed.

Beginning around 1996, Mr. Guité was meeting fairly frequently with Jean Pelletier, chief of staff to Mr. Chretien and the top official in the Prime Minister's Office (PMO). As the contemporary Clerk of the Privy Council and Secretary to Cabinet said in his testimony before the inquiry, this was legal, but "dangerous." Suggestions, or perhaps even direction, as to which events should be sponsored were also received from the ministers for whom Mr. Guité worked. The exception was Diane Marleau. She refused to deal with Mr. Guité in either sense of that word. She would not provide the direct advice on choice of events that he requested, nor would she investigate and put an end to his approach to his assignment. Mr. Alfonso Gagliano, who was minister and Chair of the Cabinet Committee on Communications, would later and rather inexplicably be singled out by Justice Gomery as the minister uniquely "responsible."

Scrutiny of any of Mr. Guité's activity by the department through the decade of the 1990s was very light and it would seem fair to say that this was not accidental. As early as 1994, Allan Cutler, whose job was to manage contracts, was trying to improve the sketchy documents his boss sent to him. By 1996, Mr. Cutler was squarely refusing to sign contracts. At the same time, he documented his findings for senior management. These attempts to force Mr. Guité into normalizing his management practices led Mr. Guité to punish Mr. Cutler by first demoting him and then, more seriously, declaring his position surplus. Guité's action against Cutler was apparently accepted by senior management at the time. But in 1996, the small complement of PWGSC internal auditors who had survived the downsizing of the internal audit function across government under program review were finally able to find \$35,000, a minor sum for such work, to engage the major consulting firm, Ernst and Young, to perform the first internal audit of the work of Mr. Guité's unit. The three young women who did the audit would later be pushed by PWGSC personnel into changing the tenor of their executive summary, but not the report contents - these noted essentially the same problems that audits far in the future would document. The Department's audit and review committee did not make the Guité unit a priority because of the Ernst and Young revelations: another internal audit would have to wait until 2000. Even when that audit revealed the situation had not changed, the assistant deputy minister in place at the time specified that the problems noted in the 1996 consultants' report should not be brought forward in the new study.

Treasury Board Secretariat and the Public Service Commission (PSC) likewise appeared relaxed. In 1993, Mr. Guité was an EX-1. By 1998, he would be an EX-4. In the five years of this rise, he had had one formal evaluation from his superior officer (as EX-1, "fully satisfactory"). TBS followed up this faint praise with reclassification of essentially the same job. TBS and the PSC also allowed the transfer of Mr. Gagliano's former executive assistant, Pierre Tremblay, directly from ministerial exempt staff to the public service proper to serve as Mr. Guité's successor, to work closely with Mr. Gagliano, a move that should have struck some as a conflict of interest.

Perhaps most inexplicably, the external auditor, the Office of the Auditor General of Canada, which had never investigated advertising in the decade despite the previous government's scandals in the early 1990s, first looked at

sponsorship only because it was invited by the Chrétien government in March, 2002, to look at three GroupAction contracts funded from 1997 to 2001.⁶ The Globe and Mail newspaper provided more timely service to the Canadian public's interest in honest government. Its use of Access to Information legislation in the fall of 1999, and its subsequent follow-up in early 2000 with a request for all records for sponsorships from 1994-1995 onward, may have allowed the PWGSC internal audit group to undertake its second audit, and may also have spurred the government into considering its position.

The Liberal government acknowledged in 2000 that there were fundamental problems with its "Canada wordmark" activity that had been endorsed in Cabinet as the Massé Committee Report in 1996, thus about four years after Cabinet had endorsed it. It took until 2002 for the government to drop agencies as intermediaries in the sponsorship of events. The privileged advertising executives had amassed small fortunes in profits and in clear fraud.⁷ Money had been paid to favoured Quebec advertising agencies for distributing at events articles like small Canada flags, t-shirts, nylon briefcases or jackets embroidered "Canada" - or without deliverables. Administrative records on deliverables, verification of their receipt by government, and analysis of events were all but absent, a practice defended by Mr. Guité as a strategy to keep information from falling into the hands of the opposing forces. A former vice-president of Jean Brault's firm, Jean Lambert, appearing as a witness in Jean Brault's trial in spring 2006, quoted Guité as having counselled Brault, "If there are questions, we'll say we threw away the documents and destroyed the mockups."⁸

The sums documented and alleged are enough to make a voter's heart leap, and make it difficult to relate to the lack of engagement by appointed officials, including the Auditors General (AG) of the eventful period (Mr. Denis Desautels and Mrs. Sheila Fraser). For this reason it is important to remember that in the context of the total budget of the PWGSC, even though it was undergoing massive operational cuts under program review in the period, the sums involved in sponsorship were perceived to be minor. The sponsorship funds were never large enough to be "material" to even that single department's accounts. In other words, even if the total annual budget for sponsorships had been lost, that sum would be well within what one can think of as error variance in PWGSC's summary financial statements. The size of a potential loss is a significant factor in the risk analyses used in scheduling activities for investigation but this criterion is not always benign. Provided Mr. Guité's activity did not become notorious in the public eye, the PWGSC summary financial statements would be passed over without question by the AG's employees. Mr. Guité's long run of impunity is similar to that of the former Privacy Commissioner, whom the AG had never looked at until invited, and who she treated with similar late and dramatic outrage.

In summary, an analysis of a richer list of risk factors than money alone for the crucial decade 1990 to 2000 could have flagged enough factors to encourage investigation of the Guité organization well before the decade's end:

- Guité had been responsible, indispensable perhaps, for awarding advertising contracts since 1990;
- Guité was three times reclassified in essentially the same job, the first time, to EX-2 as early as 1995;
- Guité's counterpart in 1990 was Alan Cutler who was even at that time responsible for negotiating the terms of the contracts - this long association indicated Cutler should have been believed when he gave voice because his silence would have implicated him;
- there were specific administrative complaints from the Director of Internal Audit, Norm Steinberg, in addition to those made by Cutler;
- there had been scandals in advertising contracting under the Conservative government in 1992-93 that contributed to the fall of that government;
- there was high turnover of ministers of PWGSC from 1990-2000 - Elmer Mackay, Paul Dick; David Dingwall, Diane Marleau, Alfonso Gagliano;
- Presidents of the Treasury Board (TB) also moved along - Robert de Cotret at the turn of the decade 1989-1990, Gilles Loiselle from 1990 to 1993, Jim Edwards in 1993; Art Eggleton from 1993 to 1996, Marcel Massé from 1996 to 1999, Lucienne Robillard from 1999 to 2003;
- PCO clerks were likewise moving more quickly in that decade than in the previous one - Paul Tellier, Glen Shortliffe, Jocelyne Bourgon, Mel Cappe;
- the turnover of TBS secretaries in the eventful period did not match that for ministers of PWGSC or TB presidents, but was still quite high - Ian Clark from 1989 to 1994, Bob Giroux for the interim year, Peter Harder from 1995 to 1999, followed by Frank Claydon for 2000 - 2002;
- Interim Prime Minister Kim Campbell put into motion in 1993 what turned out to be a massive reorganization of government, in which 32 departments were reduced to 23 (creating PWGSC as a new department) and more than 75 percent of the public service workforce was affected;
- the following Liberal government next launched a full program review in 1994-1995, cutting about 45,000 jobs from the public service, with senior management deliberately placing these cuts disproportionately in administrative services and the internal audit function to spare public services as politicians had requested; and

- ▶ The Office of the Auditor General (OAG) continued in its bubble as a super-authoritative think-tank dedicated to improving management, a path it had chosen in the mid-seventies, finding savings from its budget by reducing financial and compliance testing so it could increase its performance studies (formerly called value-for-money and/or outcomes and results audit, multi-method reviews that are also variously called operational audit and management audit).

In this list, one would Mr. Guité's stability in the midst of rapid change and some changes in the realities of probity audit coverage whose combined significance may not have been taken into account by management.

One last and qualitatively different factor on the scene should also be recalled: the Bloc Québécois' formation in 1990, and the provisions under the Canada Elections Act that allowed this purely regionally-focussed political party to contest seats in federal general elections. The Bloc did contest in 1993, and it took enough seats in Quebec that the split between the Conservative Party and the Alliance enabled the Bloc to become the Official Opposition in the federal Parliament.

The high politics of the tragically inept

It was not until Mr. Justice John Gomery moved his inquiry to Quebec to question the firms involved with Mr. Guité's organization that the broad public could share with him what he famously called "the juicy bits". These were kickbacks from certain of the advertising executives to finance the Liberal party of Quebec to contest the sovereigntist Parti Québécois.

These elements - corruption in an administrative organization, kickbacks from the beneficiaries to political parties to finance the high politics of territorial integrity, and the unveiling of these events in criminal charges - lead to a less flippant description of the judge's subject matter. The scandal follows the pattern of a classic "dirty hands" scenario. A dirty hands situation is one in which the actors and authors endorse Machiavelli's stance that, in the somewhat purple summarization by Martin Hollis, "... there [exist] evil persons who do not wish the good of the people and who do not keep faith; and that they can only be thwarted by marshalling the apparatus of legitimacy [the state] against them; and that this apparatus has to be used dishonestly."⁹

The federal government, either knowingly or misbelieving that somehow the departmental organizational framework could have regulated Guité to ensure both probity and secrecy, would fight Quebec separatism in secret and free of constraints. On the surface, Cabinet decided to buy federal visibility in the province. Just under the surface, it was apparently decided somewhere in the federal government to overpay advertising executives for kickbacks to finance electoral competition in by-elections that the Quebec Liberal party could not otherwise finance. The Montreal Superior Court judge who sentenced Brault qualified the financial scandal and the provision of illicit funding to the Liberal Party in Quebec as "industrial" in financial scale,¹⁰ although I personally believe that at least the documented percentage the agencies kicked back was cheap in proportion to their gains. Alain Gagnon rightly says that the strategy was insulting to Quebecers.¹¹

Dirty hands approaches represent lapses back into primitive political life - the entire prospect of constitutional democracy is either missing in such episodes, or defied. Denis Thompson has developed a concept he calls "mediated corruption," to describe episodes in which politicians filter wrongdoing through practices and organizations that might be or clearly are, in other uses, legitimate.¹² Mediated corruption is wrong because it subverts both public institutions and deliberation - Thompson presents mediated corruption as a moral offence against the political system itself. Moral offences are normally thought to be aimed at autonomous moral actors by other autonomous moral actors: Thompson is saying that the constitutional order constitutes a moral good, a formal and understood way of doing things. Actions that hijack agreed practices are properly understood as offences against a structure that is there to ensure decency and predictability, and some opportunity for influence of government policy by the electorate. Therefore, in my opinion, the profit-taking from the sponsorship activities in PWGSC, part of the "apparatus of legitimacy" of the Canadian state, the subsequent offering of inexpensive goods and events mostly to Quebecers that allowed or encouraged advertising agencies to accumulate the profits to provide for kickbacks to the Liberal party, and the last stage of financing electoral competition with what amounts to stolen public money, constitutes a moral offence not only against Quebec but against the Canadian constitution and all Canadians.

That the Liberal Party of Quebec was so broke that an elaborate scheme of kickbacks was needed to allow it to contest by-elections is not a trivial fact in Canadian political life. There is no way of knowing what discussions could have occurred had the broad Canadian and Quebec publics known of its absolute penury. Even Quebec separatists seemed to have been a little stunned by the equanimity with which Canada outside Quebec accepted the Bloc Québécois not only as a federal political party contesting seats in the federal Parliament in the 1993 election, but also as the Official Opposition in the resulting Parliament. In other words, Canada had earned some credit in Quebec because of the way the Bloc was accepted into the federal framework and the political dialogue, but wasted it.

Terms of reference for the inquiry: how unlimited?

Then-Prime Minister Paul Martin had announced the inquiry into the sponsorship events as having "limitless scope." However the terms of reference provided by Mr. Martin's government directing the judge, under the Inquiries Act, are tight: "... to investigate and report on questions raised, directly or indirectly, by chapters 3 and 4 of the November 2003 Report of the Auditor General to the House of Commons."

These two AG chapters examine 1) the sponsorship program and 2) the advertising activities of the government of Canada. The terms of reference as cited by the Fact Finding Report continue to specify the topics as follows:

- I. the creation of the sponsorship program,
- II. the selection of communications and advertising agencies,
- III. the management of the sponsorship program and advertising activities by government officials at all levels,
- IV. the receipt and use of any funds or commissions disbursed in connection with the sponsorship program and advertising activities by any person or organization, and
- V. any other circumstance directly related to the sponsorship program and advertising activities that the Commissioner considers relevant to fulfilling his mandate ...

Justice Gomery then notes that he has also been instructed "to make recommendations, based on the factual findings made according to the preceding paragraphs [my italics], to prevent mismanagement of sponsorship programs or advertising activities in the future, taking into account certain initiatives which were adopted by Cabinet Those initiatives and my recommendations will be the subject of a second report; the present report will restrict itself to reporting on my factual findings made with reference to what is cited above in my terms of reference." He also specifically notes that there is nothing in the TOR instructing him to inquire into policy or political decisions.¹³

One can conclude that Justice Gomery is to make recommendations based on his own investigations into sponsorship, and he is not given a policy mandate.

These terms of reference are, on the face of it, clearly limited to the two OAG sponsorship reports and any matter the judge believes to be directly related to sponsorship. Perhaps the most immediate effect is that the OAG's program of work is not itself put up for examination. Most generally, the device of rooting the Gomery Inquiry in these two chapters largely steered the fact-finding stage of the enquiry away from the general causes of the events noted earlier to events and details occurring near the end of the run of the scandal.

Even accepting that it was a good idea to use the OAG reports of 2003 as the basis for a public inquiry, one can note the exclusion of chapter five of the same year, 2003, "Management of Public Opinion Research." The government gave no reason for excluding chapter five, but it was known that management of public opinion research was a troubled area. The main point of the excluded chapter is that the government had in some cases paid for syndicated research that monitored voting behaviour and political party image. Another finding was that many departments subscribed to the same surveys and paid for them individually, inflating their own costs and agencies' revenues. As the Public Accounts Committee's inquiry revealed - whose terms of reference did include the sensitive chapter - there was a lead to Mr. Martin through the firm, Earnscliffe, in this topic. When the judge did try to go into the forbidden chapter, the Martin government objected and the judge allowed the objection to stand.

Why this judge in these political circumstances?

The Canadian Judicial Council has created an obligation for federally-appointed judges to consult before accepting to lead inquiries for government. Its guidelines, which were approved by the Council in 1998,¹⁴ state that government would consult with the senior judge having administrative responsibility for the court to which the desired federally-appointed judge belongs. However, Justice Gomery, a judge in the Quebec Superior Court, allowed his own report and press releases to create the impression that he was invited, accepted, and announced as the head of the inquiry in one day.¹⁵

The guidelines presume that the Judicial Council will receive a request from government, including the proposed inquiry's terms of reference, and that time should be provided for a full discussion between the Council and the judge whose services are requested. In the absence of extraordinary circumstances, the Judicial Council's position is that no federally-appointed judge should accept such an appointment until the Chief Justice and the judge in question have met and are satisfied that acceptance will not impair the work of the court or the future work of the judge. One assumes that impairing the reputation of the judicial system would also be a concern.

The guidelines set out the salient factors that would decide whether or not participation in the inquiry by a federally-appointed judge is necessary and useful:

- › is the subject matter public policy or does it involve issues of a partisan nature?
- › does it involve an investigation into the agencies of the appointing government?

- › is the inquiry an investigation of whether particular individuals ... have committed a crime or a civil wrong?
- › who chooses commission counsel and staff?
- › is the proposed judge suitable for the inquiry - does he or she have the particular knowledge or experience required? (Would a retired judge be just as good or better?)
- › if the inquiry does require a legally-trained commissioner, should the court feel obliged to provide a judge or would a senior lawyer do?

Justice Gomery, to be sure, was very close to retirement, but it is clear that there are warning signals in the Council's guidelines. He is eminent enough as a Queen's Counsel, and a member of the Quebec Superior Court for the district of Montreal. But his expertise and experience lie in family law, bankruptcy law and commercial law. The Council would or should have recognized the importance of a background in public law, and in the public sector, to the conduct of the inquiry.

The inquiry was an incitement to partisanship between political parties because the sponsorship events were useful to the opposition parties, to sovereignists and federalists, and was also partisan in the ongoing civil war inside the Liberal Party between Mr. Chrétien and Mr. Martin. Here, enough background in current affairs would be required to allow a Commissioner to understand the extent to which the arbitrary choice of criteria for choosing dates could affect protagonists, as would be a magisterial understanding of responsible government and the constitution. The inquiry, to be less limited, absolutely needed to consider the behaviour of the "appointing prime minister," because Mr. Martin was finance minister and second only to the prime minister in Cabinet when the Unity Fund was established. The Judicial Council guidelines question the wisdom of a judge-led inquiry if salient persons have committed a criminal or civil wrong. Nevertheless, Justice Gomery would decide who was "responsible," although there was much lawyerly back and forth about not jeopardizing the criminal and civil actions in which some of the protagonists were already involved. Indeed, the judge's introductory segment, "Major Findings," of the first report is almost a reverse template of the Judicial Council's cautions.¹⁶

Rodney Brazier, one of Britain's foremost contemporary constitutional scholars, expresses serious reservations in his *Ministers of the Crown* about the use of senior judges for commissions of inquiry. On the "for" side, he notes that "judges are trained to ascertain facts in complex issues, to preside over inquiries ... and are seen as impartial, and will take the responsibility for an inconvenient result." Brazier however cautions that "Ministers should be slow to use judges in this way" because, to paraphrase, there is a clear danger that the actors losing in the inquiry will allege a whitewash or a wrong-headed report and a judge will then become openly associated with one of the parties. Such an association, Brazier notes, casts into doubt the impartiality of the judiciary in general.¹⁷

Another factor weighing against the use of a judge is that the public is likely to misunderstand the nature of the judge's findings of "fact" in the same way that the performance studies of the Federal Office of the Auditor General are misunderstood by the public as "audit" and thus factual in a technical accountancy sense. In a judicial inquiry, "the facts" are chosen from a welter of contradictory testimony from more and less attractive and articulate witnesses and then arrayed by the judge. Standards for attribution of blame are considerably less stringent than in a criminal case. While Justice Gomery is thorough in his disclaimers as to what he is not doing (not working to criminal or civil standards), the simple but judgmental language he uses for the "assignment of responsibility," leaves little room for doubt that responsibility constitutes blame.

He was the first to admit that he knew little of politics and had no experience in public administration. Thus Justice Gomery required a special advisor on institutions of government all through the inquiry and the writing of his report. He really needed a dispassionate expert in machinery of government and public law within the scope of Westminster forms - a public lawyer who could say with authority, for example, whether the Financial Administration Act does have a "settled philosophy" on whether that Act is conferring "vested," and "direct" powers on public servants and thus a firm duty to account to Parliament independently of the minister, or whether the Act is simply delegating powers owned by Treasury Board to officials.

The advisor the judge did welcome to mount his research program was Donald Savoie. A political studies professor with an intense interest in the Canadian political executive, and a long-time Ottawa insider who came to the inquiry from a year of advising the President of the Treasury Board. Dr. Savoie has published a very well-received book that says the Canadian prime minister is far too powerful, in some respects intentionally and avoidably, at heavy cost to Canadian democratic politics. The theme would become useful to Mr. Martin in various ways, including Martin's famous question, "Who do you know in the PCO?"¹⁸ The contracted researchers largely represented political studies, with a couple of law academics, some holding well-known views about where the weaknesses of Canadian representative institutions lie. Most had already conducted research for at least two royal commissions. Many of the contracted researchers were assigned to write in their areas of publication, while others were assigned topics new to them.¹⁹ Justice Gomery says at one point that he had wanted clearly opposing arguments in the products of the research, as occurs in the adversarial judicial process. Whatever he got, it did not achieve parallelism and the field of coverage was incomplete in at least two major aspects (below).

The judge's lack of background in government showed early in statements that the private sector handled accountability very much better, forgetting Enron and WorldCom and the US "savings and loans" scandal, among other events, in which trillions of dollars were taken from the American economy and individuals' pensions and shares. A preoccupation with public perception of his capacity to take on the inquiry and his lack of appreciation for the upheaval in government in the early 1990s seemed to show in his conduct. For example, there were events like rough treatment of the three women auditors from Ernst and Young who had conducted the internal audit of 1996 and had softened their executive summary - the judge felt on familiar territory with an audit and would not concede that the consultants could have forgotten a minor piece of work for which their company had been paid \$35,000 ten years earlier.

Both lack of appropriate experience and lack of seriousness were apparent in Justice Gomery's enjoyment of his celebrity: in an interview with the National Post of December 5, 2004, he made a number of indiscreet remarks that fed various lawyers' contentions that his mind was made up. More revealing, in my view, he foretold that he was "just getting to the juicy part," as he moved to Montreal to take testimony from the advertising executives, and described his position as the best seat at the best show in town. Thus, in Justice Gomery, we had a person who had wanted the assignment and accepted it immediately although he did not have the knowledge to negotiate and win less-twisted terms of reference, who liked the limelight, and who was capable of describing the forthcoming self-destruction of the Liberal Party, one of Canada's two parties of government dating from confederation, as an entertainment. Such a bavure naturally led the defence lawyers to invite Justice Gomery to recuse himself, which he declined.

The inquiry's failure of due diligence

The OAG noted in a recent annual report that it spends less than \$5 million of its budget on financial and compliance audit in departments. This is a small portion of its budget. Departments however are headed by politicians, and the major scandals of the past ten years have come from late traditional financial and compliance audits. Part of Treasury Board Secretariat's 2005 corrective action for management policy and guidelines, to avoid harsh notice by the Gomery Inquiry, was its creation of a unit of accredited accountants to conduct cyclical financial and compliance audits of small departments and agencies to forestall more scandals like that in the Office of the Privacy Commissioner. Thus it seems fair to say that political materiality or potential harm to the credibility of the political system - as opposed to materiality to Canada's public accounts - is not part of the OAG's strategic audit planning. Political materiality only belatedly enters as a criterion for conducting an audit or review of an area once a scandal has been uncovered and is of partisan interest to Parliamentarians. The AG's responsibility is "to close the loop" on supply, because no (new) supply should be granted before grievances falling out of the last round have been heard. The Auditor General Act states that each report of the Auditor General shall contain observations about "accounts that have not been faithfully and properly maintained," and whether "essential records have not been maintained or the rules and procedures applied have been insufficient to safeguard and control public property."²⁰ The AG is responsible for allocating the Office's budget such that its tasks can be faithfully and reasonably accomplished.

It does not seem to have occurred to Justice Gomery to delve into the OAG's lack of interest in the generic sponsorship machinery from its inception. He only called a panel from the OAG and the current AG twice, although the AG who led the Office during the decade of the sponsorship events is in good health. He could have been asked directly why the Office was absent throughout his mandate, which spanned the 1990s.

Mr. Boudria's March 2002 request to the then-AG, Sheila Fraser, was in comparison a small one: could her Office look at three contracts awarded the advertising firm, GroupAction, led by Jean Brault?²¹ The Office completed the work for the government on the three GroupAction files on May 8, then presenting her report to the Public Accounts Committee on May 30, 2002. In her prepared remarks for the committee, she noted the lack of documentation on the three files, "major shortcomings at all steps of the contract management process" by public servants, reported on its referral of the matter to the RCMP and that a criminal investigation had been opened, and announced that her Office would itself at last begin a study. She closed with the following observation, "The Financial Administration Act and government contracting regulations are rules that apply to public servants and not to contractors. Senior public servants broke just about every rule in the book [my emphasis]."²² The fact that the government had to invite the OAG is documented in the Chronology of the Fact Finding Report. (Nevertheless, the chapter on internal audit in the research volumes says that the AG "...undertook her own investigation into three advertising contracts".²³)

The government guardian of spending, Treasury Board Secretariat, also got off the hook easily. TBS was present once as a panel of current officials. TBS from 1990 to 2000 had been responsible for accepting the Unity Fund in the Estimates of Expenditure, for approving disbursements from it to PWGSC, and for functional direction for internal audit in departments. The secretary in place at the height of the sponsorship program is still in government, in good health and could have been called.

The current Clerk of the Privy Council, Mr. Himelfarb, was called twice. The judge scoffed at Mr. Himelfarb's statements that he had not briefed Prime Minister Chrétien in detail on the contents of the explosive AG report that would be tabled in 2004. The previous incumbent, Mrs. Jocelyn Bourgon, was brought to Canada from Europe to talk about her memoranda warning then-Prime Minister Chrétien, but Mrs. Bourgon was not directly asked if she had heard

of operational irregularities in the sponsorship activities and why she had not contacted the Deputy Minister of PWGSC to discuss her concerns about the requirement for a program structure for disbursement of sponsorship funds. Marcel Massé, who was called as a witness, had served as Clerk prior to his political career and then as President of Treasury Board, was not asked about advertising practices in Quebec or the role of the Clerk in giving advice to the prime minister. Further, there was no interest expressed in the role of the Cabinet Committee on Communications or the various ministers who had sat on it. It was no secret that GroupAction made "a direct cabinet pitch" to the Cabinet Committee on Communications, then chaired by Mr. Gagliano, in July 1998. In February 2004, Conservative MP, Grant Hill, even called on the Martin government to release documents from this committee, which were never forthcoming.²⁴

There are other examples of lack of due diligence in the research program undertaken. We find that although the PMO, and Mr. Chrétien's chief of staff in particular, were named among "responsible" parties in the Fact Finding Report, the research program did not commission a chapter on the PMO. Thus the research opportunity of a lifetime was lost to provide a companion chapter to that on the PCO. In short, although the PMO was "responsible," the Commission would recommend reforms to the PCO instead. Second, as already noted, Justice Gomery was initially most fascinated by the lack of timely audit. From this interest came the research chapter in volume two of the Recommendations Report, a study of internal audit's weaknesses in PWGSC. But, as noted, there is no significant examination of how TBS, the functional leader for internal audit, performed during the run of the abuses. Worse, there is no chapter providing a case study of the decisions or biases in the OAG's business lines that kept it out of the advertising function for the decade. In short, the OAG gets a free pass in one of the very few occasions in recent Canadian history in which the Office's programs, diligence, timeliness and courage could have been looked at by a genuinely independent party.

The reports: "Who is responsible?" (three volumes) and "Restoring accountability" (four volumes)

It would be unfair to say the reports are without value. The history portions of the first report, "Who is Responsible" - excluding the attributions of responsibility - are useful to any scholar with an interest in administration. So is the documentation brought forward of interest. The chronology of events and index of names (unhappily without page numbers) are handy.

But the attributions of responsibility lack a consistent system. In the case of Mr. Chrétien, the concept of role responsibility by virtue of the political power he held in his position as head of government seems to be the only operative factor in the judge's mind. In the case of Jean Pelletier and Alfonso Gagliano, while role responsibility operates, there is also the issue of their many meetings with Mr. Guité, and thus a "guilty mind" factor is brought into consideration. The deputy minister of the era, Ran Quail, is handled under role responsibility. Like Mr. Chrétien, he had failed to maintain the honour of the government. But former ministers of PWGSC, under whose role responsibility the sponsorship abuses had unfolded in much the same way, were absolved, even though David Dingwall would have met the "guilty mind" criterion because he had arranged for the criterion of price to be removed from decision making on contracting in the areas the scandal touched. Diane Marleau was exonerated on grounds of ignorance, as was the then-Finance Minister Paul Martin. Mr. Martin had been present at the Cabinet meeting at which the visibility strategy had been approved, but he had been absorbed in other work. No guilty mind.

The reader is sometimes led. The judge writes clearly and indulges in colour. Thus some segments begin with character studies, as in the case of Jean Lafleur, whose chapter includes a section, "Culture of Entitlement."

In regard to the second report, "Restoring Accountability," it is difficult to find anything of lasting value outside some research papers. The gaps in the research program have already been noted: no investigation of the OAG or study of PMO despite the centrality of audit and political interference to the judge's views. Likewise the near-catastrophic administrative situation of the time is not taken on as a subject in itself, nor are the high politics of the situation Mr. Chrétien faced. Although there are allusions to the solidity of basic financial controls in the federal public sector by the incumbent auditor general and the judge throughout both reports, "Restoring Accountability" passes lightly over and apparently endorses the reforms to internal audit and the 200-plus other measures initiated during the Martin government by the then-President of the Treasury Board, Reg Alcock. One wants to ask, "Which is it? Is basic financial control good or is it bad?"

As for the recommendations, they seem to fall into three main categories. The most radical includes the recommendations that would have created professional independence from elected government for higher-level public servants in departments, agencies and crowns (argued as holding statutorily entrenched powers in their own right under the Federal Administration Act). One could conclude that officials would govern. In this group of recommendations is a version of the British Accounting Officer. There is a second group of recommendations that deals with improving resources to the House of Commons. Most odd in my view is a recommendation to give the Public Accounts Committee sufficient resources that, had these dozen or so backbenchers had such resources earlier, the Committee could have uncovered the illegal activity and stopped the sponsorship scandal sooner. (The PAC, in theory, has always had an audit resource, and it is called the Office of the Auditor General.) There is then a group of recommendations to improve probity, including one on lobbyists and another on exempt staff in general. While some

of the recommendations might be implemented, only the accounting officer recommendation directly addresses inappropriate ministerial involvement in areas that should be managed impartially. Taken alone, an adaptation of this single recommendation might be workable. However, added to the recommendations empowering officials, it would be just one element in the loss of responsible government.

Conclusion

Jeffrey Simpson in an article on Canadian patronage in 2002 said that, by the standards of Canadian history, the scandals of the Chrétien government are laughably small.²⁵ Our recent scandals are equally minuscule, if no longer laughable to us, by the standards of major nations including Britain, the United States and France. In Britain, a police file was opened for Prime Minister Tony Blair in April 2006 because very large sums of money were accepted as loans (not made public, whereas gifts are) to the political party he heads from business figures who would later be listed for seats in the House of Lords. The United States in 2006 is embroiled in a series of lobbying scandals, plus the favourable treatment in contracting of the company (Halliburton) previously presided over by the Vice President, among other purely money events. France is at the moment, it might be said, “just waiting” for Jacques Chirac to finish his term as President which offers him immunity from prosecution for “affaires.”

In the sponsorship events, the Canadian public was defrauded of something between \$40 and \$100 million, of which an unknown amount was returned to the Liberal Party of Quebec for elections. We then watched, without blinking, as the inquiry spent approximately \$80 million more and occupied the time and energy of much of the senior levels of the public service. In Justice Gomery’s recommendations, he should have followed the sponsorship trail with more diligence, staying within the general constitutional context. He seemed to ignore the value to citizens of living under settled political institutions, meaning, in this context, responsible government. One constructive goal could have been to consider what precise administrative safeguards might be sensibly possible in the next round of Canada’s protracted unity struggle. The judge should clearly not have allowed his research program and recommendations to be directed to the whole span of pan-governmental management policy and intra-executive relations.

If Mr. Martin had been re-elected, he would have implemented the Gomery recommendations in full. One judge, one or two insider academics, an informal advisory group to the judge, and a handful of regional focus groups of worthy citizens - plus unnamed “Canadians” who chose to write to the inquiry (as opposed to a prolonged public and political debate) - would have revolutionized both our management systems and our constitution. At time of writing, we face the substitute Financial Accountability Act (Bill C-2) of the new minority Conservative government, which likewise has elements of disturbing constitutional importance.

We are seated together in a leaky constitutional boat. We face a set of reforms that have not been sufficiently examined, to be implemented together against the logic of experimentation; a political system that few of our politicians understand or appreciate and thus do not honour and protect; and our tradition of political compensation for electoral support that now constitutes almost the entirety of our political discourse. We also have systems of external audit and internal audit that have evolved in such paradoxical ways that it is difficult to have confidence that financial management is as good as it was when the Liberal government of 1974 first plucked a management consultant from the private sector to devise a system of management controls that would prevent all future money scandals. All reform is ideological and political, because its outcomes cannot be known, and because means condition ends. All management reform - whether empowering deputy ministers in their own right, or increasing the powers of the non-elected “officers” of Parliament - seriously affects the living constitution and the political space open to electoral influence.

1 In the AG’s words, “The government’s own contracting policies articulated quite clearly the steps that public servants were to follow. Yet public servants consistently failed to follow the rules.” As quoted in the Inquiry’s first report, Who is responsible? Fact Finding Report, Ottawa, PWGSC, 2005, p. 490, paragraph 3.117. The OAG has long been on record that there should be a firm distinction between duties of political and bureaucratic actors, a change that would allow it to make definitive attributions of accountability, but which would change the character of our form of government.

2 Donald Savoie, Special Advisor (Research) does disclose in inquiry documents that he arrived to that position directly from a role as special advisor to the president of the Treasury Board, who was at the time deeply involved in preparation of the 200-plus reforms he initiated to tighten control of the public service, including changes to internal audit such that it would take over the financial audit that the OAG should be doing.

3 Fact Finding Report, p. 59.

4 Arthur Kroeger, Speech to the Ontario Federal Council, December 8, 2005.

5 CBC Newslines, “In depth: Sponsorship Scandal”, May 5, 2006.

6 Kroeger, op. cit., says that what was going on in advertising was more or less normal in Canadian politics for as

long as anyone could remember. Governments directed advertising and other contracts to its political friends.

7 Paul Coffin of Coffin Communications was the first of the executives to be tried in criminal court. He had padded his expenses by about \$1.6 million. The Superior Court sentenced him to two years less a day of community service in 2005, this sentence being appealed and replaced with 18 months of prison. Jean Brault was sentenced in the first week of May 2006 to 30 months of prison after pleading guilty to fraud totaling \$1.2 million from a base of contracts valued at \$61 million. In sentencing Brault, the judge justified the comparative severity by reference to Brault's kickbacks to the PLC-Q, to build business, whereas Mr. Coffin had not subverted the political process. Brian Miles, "Jean Brault condamné à 30 mois de prison," *Le Devoir*, le 6 et 7 mai, 2006, p. A4.

8 Tu Thanh Ha, "Guité told him to lie, ad executive testifies," *The Globe and Mail*, May 6, 2006, p. A5. Anthony King, an expert in parliamentary government who served as a member of the British Committee on Standards in Public Life under its first Chairman, Lord Nolan, has said that "...the oddest thing about the Canadian experience is that people thought they could get away with it. No Brit ...would imagine for a moment that they could bring it off." Brian Stewart, "Handling Scandal: How Canada measures up," *CBC News Online*, April 5, 2004.

www.cbc.ca/printablestory.jsp

9 Martin Hollis, "Dirty Hands," *British Journal of Political Science* 12 (1982), p. 396.

10 *Le Devoir*, op. cit.

11 Alain Gagnon, "Administrative Tinkering and Sharing the Blame: How the First Gomery Report Let us Down," *Globe and Mail*, November 2, 2005, p. A23.

12 Dennis F. Thompson, "Mediated Corruption: The Case of the Keating Five," *American Political Science Review* 87 (1993), p. 369-81.

13 Fact-Finding Report, pp. 1- 3.

14 On the first page of the preface of the Fact Finding Report he says that he was invited to become the commissioner on February 10, 2004. On the first page of Chapter 1, the Introduction, he states that on February 10, 2004, the Auditor General's report was tabled in the House (this had been held over from 2003) and the Prime Minister announced that he would be appointing Mr. Justice Gomery to lead the inquiry. Mr. Gomey states "I really did not know what I was getting into." Incredible though the close timing appears, it appears that Prime Minister Martin still had not finally made up his mind as late as February 9, 2004, awaiting only the AG's report and further discussion of whether an inquiry would risk the criminal inquiries underway at the time. See Joel-Denis Bellavance, "Martin songe à une enquête publique," *La Presse*, 9 février 2004.

15 See the Canadian Judicial Council Website.

16 Commission of Inquiry into the Sponsorship Program and Advertising Activities, Who is Responsible? Summary, Ottawa: PWGSC, 2005, pp. 5-7.

17 Rodney Brazier, *Ministers of the Crown*, Oxford: Clarendon Press, 1979, p. 179.

18 See for example, Donald J. Savoie, "The Federal Government: Revisiting Court Government in Canada," in Luc Bernier, Keith Brownsey and Michael Howlett, *Executive Styles in Canada*, Toronto: University of Toronto Press, pp. 17-46; and *Governing from the Centre: The Concentration of Power in Canadian Politics*, Toronto: University of Toronto Press, 1999. Unlike James Ross Hurley, Dr. Savoie does not centrally emphasize the significance of power conferred on the Canadian prime minister's power by the method of choosing the leader: election by the party convention, as opposed to the parliamentary caucus, or to the PM's right to sign the nomination papers of all candidates for election as members of the party. When Mr. Martin was engineering the eventual open split on the floor of the House of Commons between his supporters and those of Mr. Chrétien, he took up a number of Dr. Savoie's themes in a romantic speech to Osgoode Hall about the "democratic deficit." See Paul Martin, "Address," Osgoode Hall Law School, York University, <paulmartin.ca/doc/speech-e> [archived] and discussed in S.L. Sutherland, "Federal House Committee Reform: Mindless Adversarialism Well Done," *Constitutional Forum*, 13, 2 (Fall 2003), pp. 50-63.

19 I wrote the chapter on the Clerk of the Privy Council and the Privy Council Office, found in volume three of the research studies. I had never before looked into the area systematically, and it is an area about which little is published.

20 Auditor General Act, Consolidated Statutes and Regulations, current to February 5, 2006, S7.(2), Department of Justice Website.

21 Justice Gomery's initial view of internal audit as a turning point in the scandal led to the research chapter, Liane Benoit and Ned Franks "For the Want of a Nail: the Role of Internal Audit in the Sponsorship Scandal," whose title is its message. The chapter is in the Inquiry's *Restoring Accountability: Research Studies*, Volume 2, Ottawa: PWGSC, 2005: pp. 233-304.

22 Minutes of Evidence, Standing Committee on Public Accounts, May 30, 2002, at 15:30, electronic version.

23 Ibid., p. 259.

24 Daniel Leblanc, "GroupAction made direct cabinet pitch," The Globe and Mail, March 9, 2004, from globeandmail.com.

25 Jeffrey Simpson, "Roll out the pork barrel", The Globe and Mail, May 28, 2002, from globeandmail.com.