Political Interference in Public Procurement

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About the Author

Paul Emanuelli is the General Counsel and Managing Director of the Procurement Law Office. He has been ranked by *Who’s Who Legal* as one of the ten leading public procurement lawyers in the world and his firm was selected by *Global Law Experts* and *Corporate INTL* as Canada’s top public procurement law firm. Paul’s portfolio focuses on major procurement projects, developing innovative procurement formats, negotiating commercial transactions and advising institutions on the strategic legal aspects of their purchasing operations. Paul also has an extensive track record of public speaking, publishing and training. He is the author of *Government Procurement, The Laws of Precision Drafting*, *Accelerating the Tendering Cycle* and the *National Tendering Law Update*. Paul hosts the *Procurement Law Update* webinar series and has trained and presented to thousands of procurement professionals from hundreds of institutions across Canada and internationally.
Political Interference in Public Procurement
Serving the Public Interest?

Recent newsreel highlights include premiers resigning over spending scandals, senators suspended over expense claims, municipal councils mired in conflict of interest lawsuits, and former cabinet ministers, MPPS, mayors and political operatives facing charges or serving sentences for breach of trust and influence peddling. These headlines raise a critical question: Is the public interest served when politicians are entrenched in the tendering cycle? This webinar will explore the inherent risks of politicizing the procurement process and explain how to properly navigate the slippery slope between political oversight and political interference.
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Politicizing the Procurement Process

“...as a general rule there should be no political involvement in government contract award decisions.”

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Premier Redford Toppled by Spending Scandal

On March 19, 2014 the National Post reported on the spending scandal that led to the downfall of Alberta premier Alison Redford. As the story stated, “The crises sparked by her travel habits brought her down Wednesday night, and she only had herself to blame” after news of “an expense claim that revealed the Alberta premier spent $16,353.71 to visit Chicago and Toronto in December, 2012, with an aide — for three nights” which was in addition to the “$45,000 bill Ms. Redford racked up — and begrudgingly paid back at the barrel end of a caucus revolt — travelling to South Africa despite the federal government’s offer to take her there for free.”

On March 30, 2014 CTV news reported on a recent controversy in New Brunswick over the lack of transparency in backbencher constituency spending. While the reporting rules require the disclosure of the total amount spent by a constituency office, they do not require the disclosure of what those funds are spent on. In the story Keven Lacey of the Canadian Taxpayers Federation was quoted as stating that “MLA expenses in New Brunswick have been in the dark ages for years,” and that while “other provinces have modernized their systems, New Brunswick has failed to and has been left years behind as a result.”

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Politicians Sentenced in Atlantic Spending Scandals

A February 15, 2011 story in All Headline News reported that Nova Scotia provincial politicians faced charges relating to allegedly inappropriate spending practices:

The government of Nova Scotia filed criminal charges Monday against four politicians over a spending scandal. The charges are the result of a nine-month investigation by the Royal Canadian Mounted Police. Nova Scotia Auditor General Jacques Lapointe approved the filing of 52 charges of fraud, theft, forgery and breach of trust... Among the items without receipts were a $5,500 laptop, $700 coffeemaker, $8,000 home generator, airline tickets for friends of the legislators, MP3 players, cameras and a flatscreen TV.”
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Politicians Sentenced in Atlantic Spending Scandals

An April 19, 2012 Globe and Mail story subsequently reported on the sentencing of a former politician in relation to the spending scandal:

A former Nova Scotia politician was sentenced Thursday to nine months in jail for defrauding the public of nearly $61,000 in the province's legislative spending scandal. Dave Wilson, who pleaded guilty last September to fraud, breach of trust and uttering forged documents, was also ordered to repay the public purse. “I feel ashamed,” Mr. Wilson told the provincial court in Sydney. “I acknowledge the harm I have caused others.”
The Crown told the court that Mr. Wilson defrauded the Nova Scotia government of $60,995 from January 2006 to December 2009 by falsely claiming he paid five people for constituency work when he actually deposited the money in his own account…Judge Peter Ross said Mr. Wilson used his position to take advantage of the public's trust. “Mr. Wilson used his public office to bilk the taxpayers,” Judge Ross said. “People who make the law must uphold it as well.” The constituency expense scandal in Nova Scotia came about five years after one that erupted in Newfoundland and Labrador five years earlier. In that province, four politicians, a senior civil servant and a businessman were jailed. Nova Scotia's NDP government has implemented changes to the constituency allowance system, such as publicly posting politicians' expenses, in a bit to improve transparency.”

On July 15, 2014 CBC news reported that “Joe Fontana, the former mayor of London, Ont., who was convicted of fraud-related offences from his time as a federal Liberal cabinet minister, was sentenced Tuesday to four months of house arrest and 18 months of probation.” The story also stated that “The judge said earlier Tuesday that, normally, a $1,700 fraud by a 64-year-old businessman would not make it to trial, but what makes this case more serious is the breach of trust, committed by Fontana as a member of Parliament.”

On July 3, 2014 the Toronto Star reported that Brampton city council was shocked over the amount of “non-compliant” contract awards at city hall:

The City of Brampton has broken its own rules for purchasing and procuring goods or services 302 times since 2007. In total, $4,627,027 worth of contracts violated the city’s own bylaws going back seven years, according to city documents. In one case, an $854,000 job in 2013 to renovate offices inside city hall was handed to a company without any competitive bidding. In March 2012, a new purchasing bylaw came into effect that requires any contracts that violate any rules be reported to council. But councillors say the new reporting is still too lax and is only done after the rules have already been broken.

In a follow up story on July 17, 2014 the Toronto Star reported that Brampton Mayor Susan Fennel challenged the accuracy of the original news story and asked the paper for a retraction. The story also stated that city council recently “voted to hire a new integrity commissioner, Robert Swayze, who also serves in the same role for Mississauga.”

In another parliamentary spending controversy, on July 11, 2014 the National Post reported that the federal NDP launched a legal challenge after being ordered by the House of Commons Board of Internal Economy to repay the cost of its allegedly partisan mail outs. As the story stated:

The NDP has officially turned to the courts to quash an order from a secretive Commons board that the party repay $1.17 million for partisan mailings. The party has asked the Federal Court for a judicial review of a decision by the House of Commons Board of Internal Economy.

An April 18, 2014 report in the National Post noted that existing senate rules permit serious potential conflicts of interest between the official public duties of senators and their private business dealings:

While ministers in the House of Commons must put their business assets in a blind trust, senators, who can stall, alter or even quash proposed laws, are under no such obligation. The scrupulous ones try to segregate their personal business from their political power. But in many cases, drawing a hard line between the two spheres of interest is not as simple as recusing oneself from a Senate discussion, committee or vote. This raises the question: can a public representative serve two masters, particularly when work for one could seriously affect work for the other?
“It’s shocking” senators are allowed to join corporate boards, says Richard Leblanc, associate professor of law, governance and ethics at York University in Toronto. “I think a reasonable person would conclude that this doesn’t make sense. That a politician that makes laws can sit on the board of a company that is affected by laws. I think this has fallen through the cracks.”

The report also noted that “at least 34 of the current 96 Senators (the Senate count includes the suspended Senators) also sit on the boards of public and private companies.”

T. Tedesco and J. Gerson, “‘Private interests’ in the Senate: How business conflicts are everywhere in Canada’s top legislative body,” National Post, April 18, 2014.
On June 22, 2014 the National Post reported sticker shock in the Senate over a $220,000 bill from the auditor general for the cost of the senate spending audit. As the story stated:

A sweeping probe of senators’ spending by the auditor general will cost the red chamber more than double what was initially anticipated. Senators on the internal economy committee — tasked with oversight of Senate spending — learned recently that the Senate must find about $120,000 in extra costs to help support auditor general Michael Ferguson’s teams as they pore through claims, receipts and other spending documents.

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RCMP Throws the Book at Mike Duffy

On July 17, 2014 the Ottawa Citizen reported that a “staggering 31 criminal charges were laid against Sen. Mike Duffy Thursday for fraud, breach of trust and even bribery – a legal and political haymaker that will reverberate through the office of Prime Minister Stephen Harper between now and the 2015 federal election.”

Quebec has also faced ongoing public procurement issues:

“In the past two years, the government has lurched from one scandal to the next, from political financing to favouritism in the provincial daycare system to the matter of Charest’s own (long undisclosed) $75,000 stipend, paid to him by his own party, to corruption in the construction industry. Charest has stymied repeated opposition calls for an investigation into the latter, prompting many to wonder whether the Liberals, who have long-standing ties to Quebec’s construction companies, have something to hide. (Regardless, this much is true: it costs Quebec taxpayers roughly 30 per cent more to build a stretch of road than anywhere else in the country, according to Transport Canada figures.)”

“Quebec: The most corrupt province. Why does Quebec claim so many of the nation’s political scandals?” Martin Patriquin, Macleans.ca, September 24, 2010
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Drive-By Bidding

On December 5, 2012 the Montreal Gazette reported on testimony from the Charbonneau Commission that revealed how public bid openings can be exploited by unscrupulous parties to facilitate bidder intimidation and stifle open competition:

The list of construction contractors who claim they were relentlessly stalked, intimidated and even physically assaulted after attempting to bid on public contracts in Montreal grew at the Charbonneau Commission on Monday, with two more entrepreneurs surfacing to tell their stories.
A Commission witness alleged that he was driven off the road on the way to submitting a bid by an aggressive competitor:

Piero Di Iorio, the former head of Excavation D.P. Ltd., stunned the ongoing public inquiry during the afternoon session with the allegation that another construction boss once went so far as to intentionally slam into Di Iorio’s truck in the Ville Marie tunnel to prevent him from getting to city hall on time to submit a bid. The driver of the other vehicle was Johnny Piazza, the witness said, brother of local construction boss Joey Piazza. “He crushed me against the wall of the tunnel,” said Di Iorio, who recently left the world of construction after more than three decades in the industry.
The witness claimed that charges were never laid after his father was paid a visit by two “unnamed men”:

He was able to climb out of his mangled truck’s window, he testified, then an off-duty RCMP officer drove him the rest of the way downtown, where he dropped off his bid as planned. Di Iorio pressed charges against Piazza, he said, but was forced to drop the complaint at the request of his father after the elder Di Iorio met with two unnamed men in his office.

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Montreal Mayor Toppled by Corruption Charges

On June 18, 2013 a CBC News story reported that the mayor of Montreal resigned after being arrested and charged with 14 fraud and corruption-related offences:

The province and the majority of municipal councillors have said the city should select an interim mayor to serve until the next municipal election in November, rather than placing the city under trusteeship or advancing the date of the municipal election. The resignation is the latest in a long run of public officials who have been forced from office over the Quebec municipal construction scandal, which recently led to the city of Laval being placed under provincial trusteeship.

On June 3, 2013 the Montreal Gazette reported that the Quebec government has taken direct control over the city of Laval, Quebec’s third-largest municipality, in the wake of an ongoing and escalating procurement scandal involving the construction industry and municipal government procurement:

The measure was imposed after the latest in a string of corruption allegations levelled against the city administration in the suburb north of Montreal. Laval’s former mayor is accused of running city hall like a criminal racket and he now faces gangsterism charges, after having resigned in scandal.
Now, the new interim mayor is alleged to have also taken part in illegal party financing. Alexandre Duplessis has denied that allegation, levelled last week in testimony at the Charbonneau inquiry. However, Duplessis requested trusteeship for the city after the provincial government had already publicly raised it as a possible solution.

Municipal Affairs Minister Sylvain Gaudreault told a news conference in Quebec City that the trusteeship was in the best interests of the city. “The decision follows a series of exceptional events that have marked the administration of the City of Laval and also seriously weakened the confidence of the citizens of Laval with regard to their local government,” he said Monday.
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Quebec Cabinet Approves Laval Takeover

The story noted that for an indefinite period, a provincially appointed three-member panel will be responsible for approving all city council decisions and budgets and that these trustees will also have final say over hiring and firing staff.

“Quebec premier: Laval trusteeship is ‘terrible, disheartening, sad’,”
On May 9, 2013 CTV News reported that the former mayor of Laval was one of dozens of individuals arrested by Quebec’s anti-corruption squad as part of the province’s expanding municipal corruption scandal:

Gilles Vaillancourt, the former mayor of Laval, is among a group of 37 facing a slew of charges ranging from fraud to gangsterism after a series of arrests by Quebec’s anti-corruption squad early Thursday. Vaillancourt, who appeared in a Laval court Thursday afternoon, faces two charges of gangsterism, including one related to directing a criminal organization, which carries a maximum penalty of a life sentence.
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Mass Arrests in Quebec Construction Scandal

The list of 37 people picked up by police Thursday includes other politicians, political aides, lawyers and people with ties to the construction industry, including embattled construction magnate Tony Accurso who is already facing charges of fraud, conspiracy and corruption.

The story also noted that the former Laval mayor proclaimed his innocence and vowed to fight the charges laid against him.

A March 19, 2013 article in the Montreal Gazette detailed the history of changes in city processes that led to Montreal’s current culture of political interference in contract awards:

Until the mid-1990s, a Montreal city councillor wasn’t allowed to phone a municipal civil servant, much less step foot inside a bureaucrat’s office. The separation between the political branch of the city and the civil service was as sacrosanct as the separation between church and state, says “Carl,” a long-serving Montreal civil servant who retired while that division, which had existed for decades, was still in force during the 1990s.
Once the buffer between elected officials and city staff was removed, the floodgates soon opened:

But things changed in December 1994, when the newly elected mayor at the time, Pierre Bourque, and the Quebec government quietly discarded the provision amid a slew of amendments to the city charter. “Now you see where that has brought us,” said Carl — not his real name — referring to what witnesses at the Charbonneau Commission have described as incestuous relations between municipal employees, Montreal politicians and city contractors who enjoyed regular direct contact during the mid-2000s.

On March 11, 2014 CBC news reported that the federal Competition Bureau raided the offices of over a dozen Montreal-area construction firms in an attempt to gather evidence of bid rigging:

The Competition Bureau of Canada seized evidence from several Montreal-area construction firms Tuesday as part of a probe into allegations of bid-rigging and collusion in various public contracts. The bureau said it is looking into allegations of an anti-competitive agreement among construction firms, but a spokeswoman stressed the investigation is in its infancy.
“Today, what we’re doing is gathering evidence and this will be analyzed,” Gabrielle Tasse said in a phone interview. “But there is no conclusion of wrongdoing at this time and no charges have been laid.” There are reports that more than a dozen firms are being raided, but Tasse says she can’t say how many are being targeted. Tasse said the contracts in question involve the building of public parks and squares and the repair of sidewalks, pipes, streets and sewers. Bid-rigging and inflated contracts in the construction industry have been the subject of previous testimony at Quebec’s corruption inquiry. The bureau has previously said it has been keeping tabs on testimony at the Charbonneau Commission and would not hesitate to investigate when necessary.

In a March 24, 2014 report in the Toronto Star, former Montreal police chief Jacques Duchesneau warned separatists against making the Charbonneau hearings a political issue on the campaign trail since neither the Liberals or the PQ have clean hands in the scandal. Duchesneau was quoted as stating that the “mandate of the commission goes back to 1996”, covering the 1996 to 2002 period when the PQ held power and that “If the PQ thinks it’s only a Liberal problem they’re making a big, big mistake…”

A. Woods, “Quebec’s Charbonneau inquiry poses risks for both Liberals and PQ, former anti-corruption czar says,” Toronto Star, March 24, 2014
A February 19, 2014 report in the Toronto Star stated that the OPP’s anti-rackets squad executed a search warrant in an attempt to retrieve deleted power plant cancellation emails from the government’s technology service provider:

Ontario Provincial Police have executed a search warrant on a Mississauga data storage company looking for evidence in the probe of deleted power plant emails by staff in the office of former premier Dalton McGuinty. The search, identified by the Ottawa Citizen as taking place at an office of Atlanta, Ga.-based Recall Corporation, comes eight months into the investigation by the OPP’s anti-rackets branch. “There was a search warrant that was executed,” OPP Sgt. Carolle Dionne said Wednesday. “We can’t divulge any details because this is an ongoing investigation.”
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Wynne Under Siege in Power Plant Scandal

While the OPP declined to provide further comment, others were less restrained, with the opposition taking aim at the government over what the Ontario Auditor General previously reported to be over a $1 billion in politically motivated project cancellation costs. The story notes that opposition critics “said the warrant shows the investigation is narrowing after the premier’s office was visited by detectives last year when Premier Kathleen Wynne took power following McGuinty’s resignation.”

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Cops Allege Criminal Cover Up in Premier’s Office

A March 28, 2014 story in the Ottawa Citizen reported on police allegations that David Livingston, the chief of staff to former Ontario premier Dalton McGuinty, provided high-level remote access to a political operative who was directed to wipe clean two dozen computers in the premier’s office to destroy emails connected to the government’s controversial mid-campaign power plant cancellation decision.
While Livingston, who faces criminal breach of trust charges, denied any wrongdoing, the scandal increased the risk that the minority government would be forced into an early election. As the story stated, “Not technically criminal” isn’t a slogan you want to run on.”

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Premier Threatens Opposition With Libel

As reported by CBC News on March 30, 2014, Ontario premier Kathleen Wynne threatened to sue official opposition leader Tim Hudak for libel if he did not retract his “false, misleading and defamatory” accusations regarding her “alleged involvement related to the gas plant scandal.” As the story explains, Hudak stated that “We now know that the coverup and criminal destruction of documents and emails took place in Kathleen Wynne’s office under her watch as premier,” and that she “possibly ordered the destruction of documents.”
The premier acknowledged that the OPP’s criminal coverup allegations were “very disturbing” but insisted that those alleged events took place under the watch of her predecessor Dalton McGuinty during the transition period and did not involve members of her staff. While that may be technically true, it could ultimately be difficult to determine who knew what when after two dozen computers were allegedly wiped clean of key email communications about the controversial gas plant cancellation decision.

“Kathleen Wynne threatens Tim Hudak with legal action,”
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Scandals Topple Ontario Government

After propping up the minority Liberals for two successive budgets, the NDP finally pulled the plug on Ontario’s scandal plagued government in the spring of 2014. In her official press release, NDP leader Andrea Horwath cited the long litany of scandals and the general loss of confidence of Ontarians in their government as the final cause of her non-confidence move:

Andrea Horwath, Leader of Ontario’s New Democrats, says she has lost confidence in the Liberal government amid mounting scandal and waste and that it’s time for change. “The Liberal budget is a mad dash to escape scandal by promising the moon and the stars,” said Horwath.
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Scandals Topple Ontario Government

Horwath also cited the government’s failure to follow through with the implementation of commitments from last year’s budget, noting in particular the failure to create the promised Financial Accountability Office which would have provided more oversight over government spending. The NDP’s non-confidence announcement prompted premier Kathleen Wynne to immediately call a provincial election for June 12, thereby avoiding an inevitable non-confidence vote in the legislature.
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Scandals Topple Ontario Government

The official opposition PCs, who had already announced their intention to vote against the budget, issued a press release just prior to the government’s collapse that called on the government to preserve all records relating to the costly and controversial power plant cancellation decision. The alleged destruction of records relating to the power plant cancellation was the last chapter in the long line of spending scandals that ultimately led to the government’s collapse.
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Spending Scandal Rocks Prime Minister’s Office

Case Study
An election was imminent. The opposition was on the verge of seizing key seats in Ontario and Quebec. The government was under threat of losing its grip on power. It was in desperate need of campaign funds. A private company made a generous $360,000 contribution to the campaign war chest that helped bankroll the government’s successful re-election bid. After the election that company was awarded a lucrative government contract.
A scandal erupted when news of the deal became public. With the details appearing in the opposition-friendly papers, the Prime Minister was in damage control mode. He struck a royal commission to investigate the matter. It was too late: the damage was done and the deal fell through. The government was forced to resign.
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Spending Scandal Rocks Prime Minister’s Office

Identify the Prime Minister and scandal in question:

a) Stephen Harper and the F-35 Sole Source Controversy;
b) Paul Martin and the Sponsorship Scandal;
c) Brian Mulroney and the Airbus Affair;
d) John Turner and the Patronage Appointment Boondoggle;
e) Joe Clark and the Minority Budget Impasse;
f) Louis St. Laurent and the TransCanada Pipeline Crisis;
g) Sir Charles Tupper and the Naval Yard Imbroglio; or
h) Sir John A. Macdonald and the Pacific Scandal.
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Spending Scandal Rocks Prime Minister’s Office

The government contract in question was the railway construction deal awarded to the Canadian Pacific Railway Company. The year was 1873. The Prime Minister was John A. Macdonald. As the Pacific Scandal illustrates, government procurement controversies can bring down the best of them. Even the Fathers of Confederation were not immune.
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Spending Scandal Rocks Prime Minister’s Office

The paramount importance of good government is firmly entrenched in our political fabric. Reactions to spending improprieties run as deep in our political psyche as the memories run long. Public officials who run on the wrong side of these rules do so at their peril. In fact, these matters can still bring down a government and impact election outcomes.
A January 12, 2012 CTV News report announced that a major federal contract was awarded without political interference:

HALIFAX - The next fleet of navy ships will contain components designed by Canadians, Prime Minister Stephen Harper said Thursday as he announced an agreement in principle in Halifax to begin building the vessels under the $35-billion federal shipbuilding program. Harper made the announcement before several hundred workers at the Irving shipyard in the port city, three months after it won the lion's share of the largest military procurement in Canada's history.
...The Irving shipyard will build 21 combat vessels under its $25-billion deal. The Seaspan Marine Corp. shipyard in Vancouver -- where Harper made a related announcement later Thursday -- will construct seven vessels under its $8-billion contract for non-combat ships...The Harper government promised to keep politics out of the process by having four senior bureaucrats evaluate the bids, and hiring a fairness monitor and an accounting firm to ensure an unbiased selection process.

Seaspan CEO Jonathan Whitworth told the crowd of politicians, business leaders and Seaspan workers that the bidding process was an outstanding example of how to manage a procurement process of this size and magnitude. The process was meant to be fair, open and transparent without any political interference, he said. "To many people's surprise, this is exactly what happened," he said.
Harper said he would like to see that bidding process used as a template for other projects.

"This is obviously the biggest single example of that and is really unprecedented, because as you know in the past -- particularly in this industry -- these decisions tended to be highly politicized." Harper said one of the things that first got him involved in politics was the "very political" decisions around awarding of such contracts that put companies in the West at a disadvantage.”

“Harper Details $25B Irving Shipbuilding Deal”
A July 27, 2012 CBC News story reported that a former aid to the Prime Minister was charged with influence peddling:

A former senior adviser to Prime Minister Stephen Harper has been charged with one count of influence peddling following an investigation by the RCMP. Bruce Carson, 66, has a history of fraud convictions and had been facing accusations of influence peddling and illegal lobbying after it was alleged that he told Ottawa-based water purification company H20 Pros that he could use his connections to arrange deals with First Nations communities.
As the CBC reported, the RCMP detailed the charges in a news release:

In a news release issued Friday, the RCMP's A Division said Carson is "alleged to have accepted a commission for a third party in connection with a business matter relating to the government." The investigation began in March last year after RCMP received a referral from the Prime Minister's Office (PMO). When asked about the charge against Carson, cabinet minister John Baird said "we brought in the Federal Accountability Act to set the bar high, and we hope it's enforced with the full force of the law."
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Prime Minister’s Former Aid Charged With Influence Peddling

The official opposition was not impressed by the staffing decisions in the PMO’s office:

…NDP ethics critic Charlie Angus said he welcomed the RCMP's "diligent work" in investigating Carson's activities, but he also said the Official Opposition still had questions for the PMO. "The prime minister still hasn’t explained, or taken any responsibility, for how his inner circle included someone with previous criminal convictions for fraud — who then went on to allegedly use his political connections to take advantage of impoverished First Nations communities for a quick buck," said Angus in a written statement.
The government quickly distanced itself from the accused:

In a statement to CBC News, Andrew MacDougall, director of communications for the PMO said that "immediately after being informed of these allegations last year, our government referred the matter to the RCMP commissioner, the ethics commissioner and the lobbying commissioner. Carson has had a history of financial problems and was convicted of five counts of fraud going back to the 1980s and 1990s before he was hired as an adviser to Harper. In April 2011, Harper said he didn't know the extent of Carson's criminal record or that Carson had received court-ordered psychiatric treatment before working for him.”

“Ex-Harper aide Bruce Carson charged with influence peddling”
CBC News Online, July 27, 2012
On March 10, 2014 the National Post reported that Bruce Carson faced a new wave of allegations that tie him to “a top Trudeau advisor”. The story stated that:

According to a recent court filing by the Royal Canadian Mounted Police, Mr. Carson, 68, illegally lobbied for the Energy Policy Institute of Canada (EPIC), an industry-funded interest group currently headed by Daniel Gagnier, the Liberal Party of Canada’s national campaign co-chairman.

The story noted that Carson’s lawyer denied the allegations.

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Sponsorship Scandal Revisited

The influence peddling allegations raised memories of the Sponsorship Scandal that ultimately brought down the prior Liberal government:

The sponsorship scandal tainted members of the Liberal Party and politics in Quebec....It all started with rumours and whispers about a fund that had been set up in the wake of the 1995 referendum on Quebec sovereignty to help promote federalism. The money was supposed to be used to raise Canada's profile in Quebec. But it wasn't clear how the money was handed out...No one at Public Works or the company could explain it.”

In fact, that scandal made new headlines in a December 13, 2013 report in The Gazette which confirmed that an eleven year RCMP investigation finally led to charges against what police described as the “central figure” in the misappropriation scheme:

MONTREAL – The RCMP announced Friday that charges have been laid against a businessman who was described as the “central figure” in the federal sponsorship scandal and was a close associate of ex-prime minister Jean Chretien. Jacques Corriveau, a longtime federal Liberal organizer, is facing charges of fraud against the government, forgery and laundering proceeds of crime. He is to appear in court on Jan. 10.
The charges come after a wide-ranging investigation that was triggered nearly 11 years ago and is still underway. Police say, however, they are finished with the now 80-year-old Corriveau. The Mounties allege that Corriveau set up a kickback system on contracts awarded during the sponsorship program, using his Pluri Design Canada Inc. to defraud the federal government.

Corriveau was the sixth person charged in relation to the sponsorship scandal. The RCMP maintained that some of the funds that he allegedly misappropriated ended up going to the Liberal Party of Canada. The Conservative government called on the Liberal Party to repay the misappropriated funds.

“Where were the parliamentarians?” It was a fair question, one that identified a key failure in the management of the Sponsorship Program: the failure of Parliament to fulfill its traditional and historic role as watchdog of spending by the executive branch of the Government.”

Justice Gomery

Excerpt from the “Introduction” to Gomery Report – Phase 2
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The Paradox of Oversight vs. Interference

“I asked why it is that we have a system of responsible government, yet no one is prepared to accept responsibility for the abuses committed in the administration of the Sponsorship initiatives. No one has provided an answer.”

Justice Gomery

Political Interference in Public Procurement
The Paradox of Oversight vs. Interference

“The Sponsorship Program, and procurement generally, lie toward the end of the spectrum requiring more independence. While political direction may create a sponsorship program, for example, it is difficult to imagine appropriate political intervention in the decision as to which advertising agency to award a contract.”

Excerpt from “Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and Its Implication for the Accountability of the Public Service” by University of Toronto Law School Professor Lorne Sossin, Gomery Report – Phase 2
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The Paradox of Oversight vs. Interference

Notwithstanding the warnings contained within the Gomery Report, an April 11, 2011 Global News story raised new allegations of pork-barrel projects being directed to the riding of a prominent federal cabinet minister:

The Conservative election campaign is scrambling to deal with the fallout of a bombshell draft report from the auditor general rife with concern about pork-barrel largesse, dubious spending and misinforming Parliament. The confidential draft by Sheila Fraser concludes the government misinformed Parliament to win approval for a $50-million G8 fund that lavished money on questionable projects in Industry Minister Tony Clement's riding.

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The Paradox of Oversight vs. Interference

The scandal renewed concerns over a lack of transparency in the legislative budget approvals process and in the delegation of resulting contract awards:

The confidential report analyzed the $1-billion cost of staging last June’s G8 summit in Huntsville, Ont. and the G20 summit in Toronto. In November 2009, the Conservatives requested $83 million for a Border Infrastructure Fund aimed at easing congestion at border crossings. Though Huntsville is nowhere near the Canada-U.S. border, $50 million of that money was funneled into a G8 legacy fund to finance G8 infrastructure projects.”

“Projects funded by the G8 legacy fund,” Global News, April 11, 2011
Turning to municipal news, an April 4, 2013 article in the Toronto Star reported on Mayor Ford’s intervention in a bidding process for the award of a city concession contract:

Following almost three hours of sizzling debate, city council voted 22-16 Wednesday to honour a tender process that saw the Toronto-based chain win a five-year contract to operate a snack bar in the refurbished square. Councillors overruled government management committee members who, in February, turned up their nose at Hero, saying a $51-million overhaul of the square should produce more diverse, high-end offerings. Mayor Rob Ford made the issue a council “priority item” and told colleagues it’s vital they respect the procurement process, lest businesses decide it is not worth their time and effort to bid on city contracts.
Political Interference in Public Procurement

Ford Backs Burger Bid

“If people had concerns about the food, they should have identified those issues before we put out the RFP, not after,” Ford said, adding some were confusing the 407-square-foot snack bar with a sit-down restaurant that will soon be tendered.

As this story illustrated, the failure to properly plan RFP evaluation and award procedures prior to posting a solicitation can lead to significant post-bid disagreements between decision makers.

The City of Toronto was previously the focus of its own high-profile spending scandal, which resulted in a public inquiry and the far-reaching Bellamy Report:

The judge appointed to probe a computer-leasing scandal in Toronto criticized participants for greed, mismanagement and lying. Justice Denise Bellamy investigated how a $40-million computer contract between the City of Toronto and MFP Financial Services swelled to over $100 million. "Some people disgraced themselves, failed in their duty to their City, lied, put self-interest first, or simply did not do their jobs," she wrote.

“Inquiry judge: 'People disgraced themselves' in Toronto scandal,”
CBC News Online, September 12, 2005
Political Interference in Public Procurement
What Happened to the Bellamy Recommendations?

“...it is widely recognized that public officials have a greater responsibility to uphold ethical standards to protect the ‘public interest.’”

“...universally, experts offered the view that ethics-related values and principles are the essential foundation of public sector procurement in leading jurisdictions.”

Justice Bellamy

Excerpted from, “Conflict of Interest: Volume 1”, Bellamy Report – Part 2 – Good Government
Political Interference in Public Procurement
What Happened to the Bellamy Recommendations?

“According to the experts, politicians do not always support fair and open competition, particularly when constituents are involved, i.e. not understanding that their direct intervention on behalf of a constituent would affect the fairness and equity of the process for other bidders.”

Justice Bellamy

Excerpt from, “Procurement: Volume 1”, Bellamy Report – Part 2 – Good Government
Political Interference in Public Procurement

What Happened to the Bellamy Recommendations?

The Bellamy Report cited numerous examples of inappropriate political interference in municipal public procurement, including instances where elected officials:

- become involved in the development of specifications;
- review documents outside the formal approval process;
- meet with bidders and lobbyist during a tendering competition;
- attempt to have staff waive mandatory requirements; and
- directly entertain bidder complaints instead of directing such complaints to the appropriate office.

Excerpt from “Procurement: Volume 1”,
Bellamy Report – Part 2 – Good Government
Political Interference in Public Procurement

What Happened to the Bellamy Recommendations?

Rather than micro-managing specific projects and specific contract award decisions, the Bellamy Report suggested that the proper approach to ensuring accountability is to establish clear governing frameworks and support mechanisms for procurement staff.
Case Study

Alternate Bids Debate at City Council
The municipal parks and recreation department recently issued a tender call for soccer field sodding and seeding services. It received a low bid based on a creative alternate approach. Rather than cutting and tearing out the old sod, a bidder has proposed bypassing that step and simply laying new sod on top of the old sod. This will save considerable time and costs.
Case Study

The parks and recreation department is recommending an award based on this alternate proposal since the total costs savings city-wide could amount to $250,000. However, a competing bidder has retained a lawyer who has written to the municipal council and has threatened to sue if the award proceeds based on a change to the originally tendered specifications:
Case Study

...we believe firmly that it was most improper for the Tendering Committee to recommend and for City Council to consider the deletion of one of the phases of work in the bid package without first giving all tenderers the opportunity to re-submit bids and tender addenda according to new contract specifications.

This unilateral decision of the City is not supported in law and is not supported in the general practice of the construction industry. Neither is there any authority within the contract for an entire phase of the bid package to be deleted, and the tenders reconsidered accordingly. The award of the contract under these circumstances is most improper. Failing any reasonable compromise from the City I have been instructed to pursue legal proceedings to rectify this kind of action which brings unfairness and uncertainty to the tendering process for all bidders.
City council wants to know what to do and seeks your advice. Is it acceptable to award a contract based on a creative solution or does the law of tenders prohibit this type of creativity?
In its November 1984 decision in *Ben Bruinsma & Sons Ltd. v. Chatham (City)*, the Ontario High Court of Justice held that a privilege clause did not permit the city to make substantial alterations to the tendered contract after receiving bids. The case involved a tender call for sodding or seeding services for the Thames Campus Soccer Fields. As the court noted, “After the tenders were opened the Chatham Tendering Committee recommended to City Council that considerable savings could be made by deleting the cost of the item of cutting, rolling and placing sod …”.

**Duty to Run a Fair Process – Alternate Bids**
The city then pursued this cost saving strategy and made material changes to the arrangement before awarding the contract to one of the plaintiff’s competitors. The plaintiff’s lawyer wrote to the city and challenged the post-bidding scope change. Notwithstanding the spectre of litigation, the city awarded the contract with the changed terms. A day after the contract was awarded the plaintiff successfully brought an interlocutory injunction which restrained the performance of the contract until trial. As the motions judge stated:
My reasons for granting the injunction begin with the fact that in deleting an item from the tender council was not making merely a minor alteration but rather a very substantial amendment. It might have been perfectly proper for a minor amendment to have been made unilaterally by council after the receipt of tenders but in my opinion it was not open to council at that point to make a substantial alteration retroactively to the invitation to tender. That, in my opinion, is what it amounted to. The fact that all the tenders received were revised similarly in the sense that the deleted item was deleted from all tenders is, in my opinion, no justification for the deletion in the first place.
Court Orders Injunction to Stop Alternate Bid Award

*Ben Bruinsma & Sons Ltd. v. Chatham (City)*

Ontario High Court of Justice

The motions judge was critical of the post-bidding scope change, stating that such a practice could have an adverse impact on the integrity of the bidding process:

If a recipient of tenders can unilaterally, without notifying the tenderers and giving them an opportunity to revise their tenders to take into account a substantial deletion from the specifications, then there would not appear to be any reason why the recipient could not go further and delete other items and this practice in my opinion could easily make a mockery of the customary tendering procedure.

Duty to Run a Fair Process – Alternate Bids
Court Orders Injunction to Stop Alternate Bid Award

Ben Bruinsma & Sons Ltd. v. Chatham (City)

Ontario High Court of Justice

By altering the ground rules after the event and without giving an opportunity to tenderers to revise their bids the council has, in my opinion, distorted the tendering procedure in such a way as to make the tenders unresponsive to the specifications. In other words the council has changed the tenders significantly into tenders for a different prospect than that upon which the bidders tendered. In my opinion tenderers must be entitled to rely upon the specifications remaining substantially unaltered before any bid is accepted.

In its trial decision, the court agreed with these findings and held that post-bidding scope changes amounted to serious interference with the tendering process:

Duty to Run a Fair Process – Alternate Bids
Court Orders Injunction to Stop Alternate Bid Award

Ben Bruinsma & Sons Ltd. v. Chatham (City)
Ontario High Court of Justice

Viewing the tender and contract documents as a whole, and relying on the case just quoted, The Queen v. Ron Engineering Construction Ltd., it is my view that the tender and contractual documents do not permit Chatham to delete items from the tender before acceptance. Rather, Chatham has the obligation to accept or reject a tender as submitted. Its right to delete major items of the tender will arise after the construction contract is made, and then only upon payment of compensation for deletion of any major items. In my view any other interpretation would lead to unfairness in tendering.

Duty to Run a Fair Process – Alternate Bids
The practice adopted by Chatham could permit public bodies to accept items from a tender that appeared to them to be favourable and reject the balance; and then to call for new tenders on the items deleted — all without compensation to the tenderers and without consent. In my opinion this was a serious interference with the tendering process and one not permitted by the tender and contract documents.

The court noted that the tender call contained a privilege clause stating that the “Council reserves the right to reject any or all tenders or to accept any tender should it be deemed in the interest of the Council so to do”.

Duty to Run a Fair Process – Alternate Bids
Court Orders Injunction to Stop Alternate Bid Award

Ben Bruinsma & Sons Ltd. v. Chatham (City)

Ontario High Court of Justice

It found that the city could rely on the clause to cancel the process if the bids were too high. However, the city could not rely on its privilege clause to make substantial post-close changes to the contract:

In this case Chatham was free to reject all of the tenders if (as was the case) it decided that the cost of the cutting and rolling, etcetera, of the sod was too expensive. It did not purport to do that, but rather deleted the one item from all the tenders and then purported to accept the F.M. tender. In my opinion that was a breach of contract or a breach of duty on the part of Chatham within the contractual relationship with the plaintiff and all the tenderers.

Duty to Run a Fair Process – Alternate Bids
Court Orders Injunction to Stop Alternate Bid Award

*Ben Bruinsma & Sons Ltd. v. Chatham (City)*

Ontario High Court of Justice

Such conduct was seen to be a breach of the Contract A fairness duty owed to the bidders. The court found that the city could not make changes to the scope of the tendered contract after the submission of tenders since this could result in unfairness by allowing a purchaser to cherry pick the favourable parts of a tender while rejecting the balance of a tender. As this case illustrates, tenders typically crystallize at the tender submission deadline. A purchaser has limited latitude after closing time to making material changes to the contract it ultimately awards.

Duty to Run a Fair Process – Alternate Bids
Case Study

Snow Removal Services
Your municipality just received a number of bids for snow removal services. After considering undisclosed factors including corporate capability, equipment availability, equipment quality and anticipated service levels, the operations department wants to rely on the “lowest or any tender not necessarily accepted” clause in the Invitation to Tender to reject to the lowest bid and recommend to Town Council that it award to the highest bidder. What advice do you provide to help inform Council’s decision?
In its December 1993 decision in *Murphy v. Alberton (Town)*, the Prince Edward Island Supreme Court found that a privilege clause allows a purchaser to reject a low bidder for *bona fide* reasons but does not allow the purchaser to award to a higher bidder based on undisclosed criteria. The case involved a municipal tender call for snow removal services. As the court noted, the town had bypassed the low bidder due to undisclosed criteria:
P.E.I. Council Liable for Hidden Preferences

Murphy v. Alberton (Town)
Prince Edward Island Supreme Court

In seeking and hiring a new snow removal contractor, the Town’s primary concern was service for its citizens; price was a subordinate consideration. This criteria was not disclosed to the bidders in the bidding process. The Town council assessed the bids on a comparative basis based on what it considered to be relevant considerations that would serve the best interests of the Town. It considered operator capability, equipment availability and quality, and the anticipated level of service of the bidders. The Town then awarded a contract to O’Meara, the highest bidder. The Town did not give Murphy any reason for rejecting his low bid.
The court acknowledged that a purchaser can set its own criteria for determining contract awards. However, in order to protect the integrity of the bidding system, the court stated that privileges must be clearly reserved and undisclosed preferences should be avoided:

Hidden Preferences Breach Bidding Rules
P.E.I. Council Liable for Hidden Preferences

Murphy v. Alberton (Town)

Prince Edward Island Supreme Court

… it is my view that the courts should pursue the policy objective stated by the Supreme Court in *Ron Engineering*: to protect the integrity of the bidding system where under the law of contracts it is possible to do so. A balanced approach of promoting this objective while adhering to established principles of contract law is to recognize that: 1) the parties are at liberty to contract on whatever terms that they choose; 2) to the extent that an owner wishes to reserve privileges, he must do so in clear terms; and 3) an owner is not entitled to rely upon secret or undisclosed preferences, or to proceed arbitrarily, and thereby choose from among the bidders.

Hidden Preferences Breach Bidding Rules
The court found that the town could not rely on a general privilege clause that stated that “the lowest or any tender not necessarily accepted” to apply undisclosed preferences when it awarded a contract:

In my view, the use of the boiler plate privilege clause alone, in the words of the expert Johnston, allows the owner to decline to enter into a contract with any of the bidders for good or bona fide reason, eg. all tenders higher than the owner’s budget, intervening events resulting in the owner deciding not to proceed with the work, or deciding to substantially change the work; or in the words of the expert witness Coles, allows the owner to reject an unqualified bidder.
P.E.I. Council Liable for Hidden Preferences

*Murphy v. Alberton (Town)*

Prince Edward Island Supreme Court

It does not entitle the owner to arbitrarily reject the low qualified bid and award the work to a higher bidder based on terms or criteria undisclosed in the invitation or bid documents; and it does not allow the owner to arbitrarily and without giving a reason reject all bidders.

The prejudiced plaintiff was therefore entitled to its lost profits. As this case illustrates, a purchaser is entitled to take into account factors other than price when it is making a contract award, but it needs to disclose those factors in its tender call in order to better ensure a defensible process.

Hidden Preferences Breach Bidding Rules
Case Study

Bridge Project Bids
Your institution just received a low bid on a major bridge construction project from an out-of-province bidder and things have quickly gone political. The provincial cabinet has informed your institution that it wants to exercise an executive override and apply an unstated 10% local preference so that the award can go to an in-province bidder. What do you advise the senior decision makers?
In its September 1991 decision in *Kencor Holdings Ltd. v. Saskatchewan*, the Saskatchewan Queen’s Bench held that the government could not rely on undisclosed criteria to bypass a low bidder. The case dealt with a tender call issued by the Government of Saskatchewan for the construction of a bridge. As the decision explains, Saskatchewan took the position that its general privilege clause allowed it to bypass the low bidder based on an undisclosed local preference policy:
In the tender documentation the following privilege clause appears:
1200-1 …
The Minister may refuse to accept any tender, waive defects or technicalities, or subject to Section 13 of the Highways Act accept any tender that he considers to be in the best interests of the Province. [emphasis added]

Section 13 of *The Highways and Transportation Act*, R.S.S. 1978, c. H-3 reads:
13 Where the minister deems it inexpedient to let the work to the lowest bidder, he shall report the matter to and obtain the authority of the Lieutenant Governor in Council before awarding the contract to any other than the lowest bidder. [emphasis added]
Court Overrules Cabinet Low Bid Bypass  
*Kencor Holdings Ltd. v. Saskatchewan*  
Saskatchewan Queen’s Bench

According to the Government, the combination of these two clauses permitted it to decline the lowest bid and to approve the more expensive one.

The low bidder sued, arguing that these clauses did not give Saskatchewan the right to rely on undisclosed criteria, maintaining that “in the exercise of its discretion respecting tenders, the Government may not consider policy which is unknown to bidders”.

Hidden Preferences Breach Bidding Rules
The court agreed, noting that there “was no indication in the tender documents that preference might be extended to Saskatchewan bidders, and the plaintiff was unaware of this possibility”. The court found that in the interest of maintaining the integrity of the bidding process, evaluation factors should be clearly disclosed:
To maintain the integrity of the tendering process it is imperative that the low, qualified bidder succeed. This is especially true in the public sector. If governments meddle in the process and deviate from the industry custom of accepting the low bid, competition will wane. The inevitable consequence will be higher costs to the taxpayer. Moreover, when governments, for reasons of patronage or otherwise, apply criteria unknown to the bidders, great injustice follows. Bidders, doomed in advance by secret standards, will waste large sums preparing futile bids. The plaintiff here for example, spent $23,000.00 on its abortive tender.
The plaintiff was awarded lost profit damages on account of the government’s improper reliance on undisclosed selection criteria. As this case illustrates, whenever purchasers intend to rely on factors other than best price in making their contract award decisions, those factors should be clearly disclosed to all bidders.
Case Study

The Cape Breton “Substantial Savings” Case

The provincial government issues a tender call for a bridge construction project. The original specifications call for a concrete bridge. After heavy lobbying from the steel industry, the specifications are amended to allow for a structural steel alternative if such a bid leads to “substantial savings” over a concrete bridge. The contract is eventually awarded to a steel bid that is $151,000 lower than the best concrete bid even though a provincial engineer advises that the cost savings are insufficient to offset the higher long term maintenance costs of the steel bridge. An unsuccessful concrete bidder sues.
Case Study

If you were the judge would you:

a) dismiss the case since the provincial government has the right to select whatever building materials it deems appropriate; or

b) award lost profit damages to the unsuccessful concrete bidder on account of the government’s improper contract award.
In its September 1993 decision in Zutphen Brothers Construction Ltd. v. Nova Scotia (Attorney General), the Nova Scotia Supreme Court found that the government unfairly evaluated the plaintiff’s tender when it failed to apply the evaluation criteria stated in the tender call. The case involved a project for the construction of a bridge at the Barra Strait Crossing in Cape Breton. Originally, Nova Scotia planned to limit the materials to pre-stressed concrete.
Lost Profits Awarded Over Lobbied Process
Zutphen Brothers Construction Ltd. v. Nova Scotia (Attorney General)
Nova Scotia Supreme Court

However, as the Court noted “…the steel industry lobbied the Department to permit them to bid on the final phase of the construction and eventually it was agreed that parties be permitted to tender on a steel alternative.” The province inserted the following provision into the tender call document:

Barra Strait Crossing, Phase III, Contract 91-001, which indicates “Bidders on this contract are hereby advised that they will be permitted to submit an alternate bid based on a structural steel type of superstructure if they so desire”. The last portion of that information to bidders states: “To be acceptable a structural steel alternative must show a substantial saving over the precast, prestressed concrete design”.

Hidden Preferences Breach Bidding Rules
Lost Profits Awarded Over Lobbied Process  
*Zutphen Brothers Construction Ltd. v. Nova Scotia (Attorney General)*  
Nova Scotia Supreme Court

Against staff advice, the contract was awarded to a bidder that submitted a $7.3 million bid for a structural steel alternative. In the opinion of the engineer advising the Deputy Minister, the $151,000 savings from the structural steel bid over the best concrete bid was insufficient to constitute a substantial savings in light of the higher future maintenance costs. However, the Deputy Minister wrote the Minister stating that the steel alternative represented a substantial savings and recommending a contract award to that bid.
The Court noted that the Deputy Minister’s conclusion in the recommending memo was not supported by any analysis and that it failed to mention contrary staff recommendations. The Court concluded that the contract was improperly awarded and that the integrity of the bidding process had been violated:

… on the facts before the court the Province did not realize a substantial savings, that the Deputy Minister ignored all recommendations from his Department and, in fact, decided arbitrarily in the face of all advice to award the contract to Maritime Steel and, subsequently, did not apprise his Minister fully of the situation. The integrity of the bidding system was violated. The defendant is liable to the plaintiff damages for breach of contract.

Lost Profits Awarded Over Lobbied Process
Zutphen Brothers Construction Ltd. v. Nova Scotia (Attorney General)
Nova Scotia Supreme Court

Hidden Preferences Breach Bidding Rules
Minister Wants to Cancel Deal Due to Bad Press

After issuing a dialysis services RFP and selecting a proponent for contract negotiations, your project team is contacted by the office of the Minister of Health over unfavourable articles about the selected proponent’s parent company that have recently appeared in the New York Times. You are told that the Minister is concerned about optics and wants to engage in damage control to avoid negative publicity.
You are told that the Minister is concerned about optics and wants to engage in damage control to avoid negative publicity. While the Minister’s office doesn’t want to be seen to be interfering, it tells the project team to cancel the process and then re-issue a new RFP after the heat dies down.

How do you advise?
Court Orders Ministry Back to Bargaining Table

Ottawa-Carleton Dialysis Services v. Ontario (Minister of Health)

Ontario Divisional Court

In its August 1996 decision in Ottawa-Carleton Dialysis Services v. Ontario (Minister of Health), the Ontario Divisional Court found that the Government of Ontario unfairly rejected the winning bidder and allowed the prejudiced bidder’s application for judicial review. The case involved an RFP issued by the Ministry of Health for dialysis services. The applicant was selected for contract negotiations, but the process was cancelled after unfavourable articles about its parent company were published in the New York Times.
Court Orders Ministry Back to Bargaining Table  
*Ottawa-Carleton Dialysis Services v. Ontario (Minister of Health)*  
Ontario Divisional Court

The bidder brought an application for judicial review. The Divisional Court found that this remedy could apply since the government was exercising a statutory power when it conducted its procurement process:

In the case at bar, I am satisfied that the Minister of Health was exercising his statutory power when he cancelled the RFP. The Independent Health Facilities Act provides a scheme for the issuing of RFP’s. It calls for a review of the proposals and the selection of short-list bidders. It then provides for negotiations for a period of 60 days, with the goal of reaching an agreement, and then issuing a license.
The Ministry of Health had completed Stage 1 which was the Request for the Proposals, pursuant to the provisions of the Independent Health Facilities Act. The applicants responded with their proposals and were selected as the short-list bidder. The Ministry then invited the applicants as short-list bidder to begin negotiations with the Ministry for the purpose of concluding a satisfactory agreement with the Ministry to enable them to direct the issue of a license for the Dialysis centres. It was after the invitation to negotiate that the Ministry cancelled the RFP (95-035) and issued a new RFP (96-012). The Minister was exercising his powers under the Independent Health Facilities Act.
Court Orders Ministry Back to Bargaining Table

Ottawa-Carleton Dialysis Services v. Ontario (Minister of Health)

Ontario Divisional Court

The Divisional Court found that the Minister had acted arbitrarily and had not acted in good faith when it cancelled and re-issued its RFP. The Divisional Court allowed the government the opportunity to resume its negotiations with the prejudiced bidder, failing which it would order the new RFP quashed.
Case Study

Toronto Mayor’s Conflict of Interest
The Mayor of Toronto secretly contracts to purchase, at a discount, a large amount of city debentures which are contemplated under a future by-law of the City Council. The Mayor then actively participates in establishing the by-law to authorize the sale of the debentures.
If you were the judge, would you:

a) dismiss the case since there is no common law legal principle that would allow the municipality to stop the Mayor from profiting from the debenture scheme; or

b) find that the Mayor was serving as a trustee for the benefit of the City and order that the profits from the debenture sale be returned to the City.
In its October 1854 decision in *The City of Toronto v. Bowes*, the Upper Canada Court of Chancery found that the Mayor was serving as a trustee for the City and had to account for the profit he derived from the transaction. As the Court stated, “If the defendant can be brought to account, it must be, I think, because as a member of the Council he was agent for the city in the management of its affairs, and so a trustee for whatever interests of the city he might, in that capacity, have to deal with.”
Toronto Mayor Ordered to Repay Proceeds of Conflict

The City of Toronto v. Bowes

Upper Canada Court of Chancery

This principle was reaffirmed by the Supreme Court of Canada in 1975 in Edmonton (City) v. Hawrelak. While the Supreme Court split on whether the defendant mayor in that specific case was liable for his role in a land transaction, it re-affirmed the general principles long recognized in Bowes.
As the dissenting judgment noted, elected municipal officials owe a fiduciary duty to a municipality:

In matters municipal, these principles are found more particularly in Bowes v. The City of Toronto, the judgments of the various Courts being found respectively in 4 Gr. 489; 6 Gr. 1; 11 Moo. P.C. 463, 14 E.R. 770. For nearly one hundred and twenty-five years, the law has stood thus and I see no reason to dilute it as we enter the last quarter of the 20th century. Indeed, there is every reason to reaffirm it in all respects and even to give it further strength.
The dissenting judgment noted and adopted the following five principles from the trial decision:

1. A member of a Municipal Council is an agent or trustee accountable to the Municipality whose affairs he administers, and accordingly his duties are of a fiduciary nature.

2. No-one entrusted with duties of a fiduciary nature may enter into any transaction in which his personal interest is or may be in conflict with the interests of his principal.
It is immaterial to the application of the rule whether the principal did or did not suffer any injury by reason of the dealing of the agent.

It is immaterial to the application of the rule whether or not the agent or trustee acted in good faith.

Any gain or advantage arising out of such a transaction must be considered as accruing to the principal.
That judgment also stressed the significant public policy reasons behind such duties:

Confidence in our institutions is at a low ebb. This statement is not very original but unfortunately is unchallengeable. Many factors have brought about this crisis and unconscionable conduct by public officials is only part of the story. Still, if we are to regain some of the lost ground, we have to start somewhere. To reaffirm the requirements of highest public morality in elected officials is a major step in that direction. To speak of civil liberties is very hollow indeed if these liberties are not founded on the rock of absolutely unimpeachable conduct on the part of those who have been entrusted with the administration of the public domain.
Case Study

City of Victoria Alderman’s Conflict
A municipal alderman owns an interest in a company that bids on a contract for the municipality. The alderman casts the deciding vote in favour of awarding the contract to that company.
Case Study

If you were the judge, would you:

a) allow the contract award to proceed but order the alderman to surrender any profits back to the municipality; or

b) prohibit the municipality from carrying out the illegal contract.
In its August 1893 decision in *Coughlin & Mayo v. Victoria (City)*, the British Columbia Supreme Court found that an alderman was in a conflict of interest because he owned an interest in a company that was involved in the City’s bidding process and cast the deciding vote to award the contract to that company.
The Court found that the alderman was in an ongoing conflict of interest, noting that his personal interest could undermine his ability to properly discharge his public duties in the event that a contract dispute arose between the City and the successful bidder.
Court Cancels Contract Due to Conflict of Interest

*Coughlin & Mayo v. Victoria (City)*

British Columbia Supreme Court

Having found that there was a conflict of interest, the Court then concluded that the tendering process had been tainted with illegality:

Upon every principle of justice, the Council should be prohibited from in any way furthering what was thus illegally done. Not only the plaintiffs, but the ratepayers at large, are deeply interested in seeing that all contracts, and especially for those for public works, should be entered into on the fairest principles.

Fiduciary Duty of Elected Public Officials
Court Cancels Contract Due to Conflict of Interest
*Coughlin & Mayo v. Victoria (City)*
British Columbia Supreme Court

After finding that the contract award process had been unfair and illegal on account of the conflict of interest, the Court prohibited the City from carrying out the contract. The Court concluded that such an order did not interfere with the City’s rights or privileges since “to do wrong is not the right or privilege of any man or body of men.”
Case Study

Thunder Bay Conflict of Interest
An elected member of municipal council takes an interest in bidding on a property that was seized by the municipality for tax arrears. He votes to approve the tendering process and ultimately submits the winning bid. A competing bidder files an application under the Municipal Conflict of Interest Act seeking a declaration that the councillor has breached the statute and seeking restitution for financial loss arising out of that breach.
Case Study

If you were on the court would you:

a) reject the application since the individual in question is no longer on the municipal council and the competing bidder suffered no financial loss;

b) find the elected official breached the statute and (i) ban him from office for four years; and (ii) decline restitution but order him to pay the other bidder $20,000 in court costs.
In its December 2010 decision in *Moudoux v. Tuchenhagen*, the Ontario Superior Court of Justice found that an elected municipal official had breached the *Municipal Conflict of Interest Act* by participating in a council vote to approve a tendering process for the sale of property on which he intended to bid. The case dealt with vacant property that had been seized by the City of Thunder Bay due to tax arrears and was to be put up for sale by public tender.
The respondent was, at the material time, an elected official who had served on the municipal council for twelve years. He took an interest in acquiring the property in question and ultimately submitted the winning bid. Rather than recusing himself from council’s approval process, he participated in the council vote that authorized the city to proceed with the tendering process.
Former Politician Banned from Running for Office

*Moudoux v. Tuchenhagen*

Ontario Superior Court of Justice

A neighbour of the relevant property submitted the only other bid on the property and, after losing the bidding process, launched an application under the *Municipal Conflict of Interest Act* seeking a declaration that the councillor had breached the statute and seeking restitution for financial loss arising out of that breach. The court determined that the respondent knew he would be bidding on the property in question, should have disclosed this intention to council and should have recused himself from the vote when council approved the tendering process for the sale of the land in question.

Fiduciary Duty of Elected Public Officials
After determining that the respondent had breached the statute by failing to follow the prescribed disclosure and recusal protocols, the court then considered whether the statutory breach could be excused as having been made through inadvertence or by reason of an error in judgment. The court concluded that it could not be excused on those grounds. After finding the respondent in breach of the statute, the court noted that the statute required that the councillor’s seat be declared vacant.
However, since the respondent was no longer serving on council, the court ordered that he be disqualified from holding municipal office for four years, which effectively barred him from running in the next election.

The court denied the applicant’s request for damages for restitution, finding that the applicant had failed to prove that the respondent had made a profit from the transaction in question or had caused the applicant to suffer a financial loss.

Fiduciary Duty of Elected Public Officials
As this case illustrates, the failure to adhere to statutory conflict of interest disclosure and recusal protocols can have significant consequences on elected officials. Where that conflict causes a loss to other affected parties, restitution may also be available as a legal sanction. In this instance, the former councillor was barred from running in the subsequent election and, while no financial restitution was awarded, the former councillor was subsequently ordered to pay the applicant $16,750 in court fees plus $3,568.68 in related disbursements.
Case Study

Mayor of Moncton’s Conflict Scandal
After receiving advice from the City Solicitor and the New Brunswick Department of Justice, the Mayor of Moncton signs the same contract as Mayor on behalf of the municipality and as a signing officer on behalf of the contractor. The Mayor makes no attempts to conceal signing the contract on behalf of both parties.
If you were the judge, would you:

a) allow the contract since proper legal advice was obtained and the contract was signed in a fully transparent fashion; or

b) order that the Mayor be removed from office on account of conflict of interest.
Supreme Court Ousts Conflicted Moncton Mayor

*New Brunswick v. Wheeler*

Supreme Court of Canada

In its March 1979 decision in *New Brunswick v. Wheeler*, the Supreme Court of Canada determined that the Mayor of Moncton should be removed from office on account of a conflict of interest. The Court noted that there had been no attempt to conceal the conflict and that the Mayor had proceeded on the advice from the City Solicitor and the New Brunswick Department of Justice.
Supreme Court Ousts Conflicted Moncton Mayor

*New Brunswick v. Wheeler*

Supreme Court of Canada

However, the Court found that the conflict of interest could not be addressed simply through disclosure and that high standards had to be maintained in public office:

As I have indicated, qualifications for the election to and the holding of high office in all levels of government are a matter of considerable importance in the functioning of the democratic community. The sanctity of these offices and the strict adherence to the conditions of occupying those offices must be safeguarded if democratic government is to perform up to design.
Conclusion

Key Points for Future Reference

- The integrity of the procurement process can become compromised when decision-making becomes politicized, is open to the influence of lobbying activities or is otherwise impacted by factors other than the objective application of predetermined transparent criteria.
Institutions should establish transparent practices which include clear rules aimed at protecting the integrity of the procurement process by addressing issues such as conflict of interest, unfair advantage and the lobbying of public officials to influence contract award decisions.
Institutions should establish a clear and comprehensive set of roles and responsibilities for their procurements that include a clear division of roles between: (i) elected officials; (ii) senior management officials responsible for establishing and enforcing compliance with procurement rules; and (iii) front-line procurement professionals responsible for running specific projects.
Procurement staff should have a clear understanding of the scope of their delegated discretion to make tactical planning decisions and should also be sequestered from inappropriate direct or indirect political interference.
National Tendering Law Update

Our free National Tendering Law Update newsletter is released three to four times annually and includes updates on the latest Canadian tendering case law, newsreel highlights from across Canada and around the world, and commentary articles written by our legal team highlighting the latest legal trends in the procurement field. We also offer our newsletter subscribers access to our free Procurement Law Update webinars, highlighting the latest cross-Canada developments dealing with public sector procurement treaties, statutes, regulations, directives and best practices. Since last summer, we have been offering free monthly one-hour webinars on specific topics for our subscribers. The upcoming webinar line-up is below.

› November 12, 2014, 1 pm EST, A State of Peril: How Failed Projects are Undermining Government Operations
› December 10, 2014, 1 pm EST, Political Interference in Public Procurement
› January 7, 2015, 1 pm EST, 2014 Year in Review
› January 20, 2015, 1 pm EST, Orbiddner Launch

Please subscribe at the link above to receive the National Tendering Law Update and webinar invitations, and other office news including announcements of upcoming seminars, events and service offerings.
Procurement Law Update Webinar Slides

Through the Procurement Law Update Webinar Series, we offer free monthly webinars on procurement issues to our National Tendering Law Update newsletter subscribers. The webinar series includes our popular “Year in Review” webinars, highlighting cross-Canada developments in procurement law and news. To receive invitations to future webinars, please subscribe to the National Tendering Law Update.

Please click the links below to download the webinar materials in PDF format. (Tip: If the PDF does not open in your browser, try right-clicking on the link and selecting “Save As” to save the PDF directly to your computer.) Materials for upcoming sessions will be made available the day before the session.

- Political Interference in Public Procurement (December 2014)
- A State of Peril: How Failed Projects are Undermining Government Operations (November 2014)
- Cooperative Purchasing at a Crossroads (with additional slides from the NJPA) (October 2014)
- Negotiated RFPs and Judicial Review (September 2014)
- The Privilege Clause Paradox (June 2014)
Papers and Other Resources

Research and Policy Papers

This White Paper on Group Purchasing commissioned by the National Joint Purchasing Alliance and released in July 2014 provides an in-depth overview of the industry practices and related legal rules that apply to cooperative purchasing across Canada.

This Report to Lethbridge City Council was prepared for the City of Lethbridge in April 2014 to assist them in assessing and evaluating a proposal by members of the public that the City’s real estate department be transformed into a licensed brokerage.

This Local Preference White Paper by Paul Emanuelli was commissioned by the Ontario Public Buyers Association and presented on March 31, 2009, to help inform the issue of Canadian content and local preference as it impacts public procurement in the Ontario municipal sector.

This paper, Defending the Public Interest, was commissioned by the Ontario Public Buyers Association to provide a public sector perspective in response to the assertions raised in the September 2009 paper published by the Residential and Civil Construction Alliance of Ontario entitled “Towards a Fair and Balanced Approach: A RCCAO Commentary on Government Procurement of Construction in the GTA”.

Other Resources

This presentation, titled “State of Peril: Navigating Major Project Risks” will be presented at the CPPC Forum Under Public Scrutiny in Montreal in October 2014.

This slide presentation titled “Cooperative Purchasing at a Crossroads” was presented at the OPBA’s Conference, London Links: Bringing Purchasing Together in September 2014.