Canadian
Law Update

Critical Trends

The Procurement Office

Focus on
Ethics and
Accountability

Feature Case Study

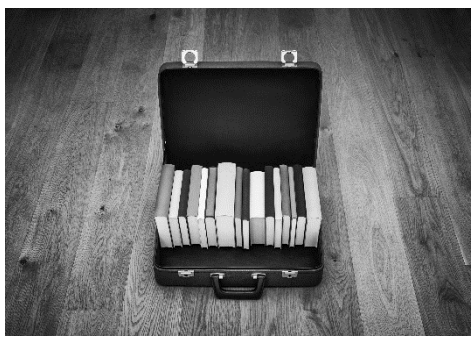
Former Clerk of BC's Legislative Assembly Guilty of Breach of Public Trust

Fraud Leads to Imprisonment

In its May 2022 decision in *R. v. James*, the British Columbia Supreme Court found the defendant guilty of breach of public trust and fraud under $5,000 for improper clothing expenses claimed while serving as the Clerk of the House for British Columbia's Legislative Assembly. While the Court dismissed many of the charges in relation to other claimed expenses, it ruled that the defendant made improper expense claims in relation to certain clothing that was claimed as work-related "chamber attire".

The Court subsequently imposed a sentence of imprisonment for a period of three months, to be served in the community, including one month of house arrest, two months of overnight curfew, and travel restrictions outside of the province, along with a restitution order of $1,886.72 and a $200 victim fine surcharge.

As this case illustrates, the misuse of public funds, even in relatively small amounts, can result in criminal sanctions against public officials.



Lessons Learned: Recent rulings serve as wake up call for public institutions to bolster their procurement governance practices.

Senior-Level Infractions: In recent years, Canadian public institutions have seen multiple procurement-related prosecutions involving senior officials and other government staff.

Quarterly Feature Article

Governance Lapses Trigger Prison Terms

Procurement Irregularities Lead to Prosecutions

There is an increasing public perception that those who hold high office are free to violate public procurement rules with impunity due to weak enforcement mechanisms.

While Canada's Prime Minister and Canada's Minister of Trade were both recently found in breach of the federal conflict law and suffered the resulting public censure, the weak enforcement mechanisms under that statute meant that both remained in office without even being fined the equivalent of a speeding or parking ticket. This may lead some to believe that senior public officials can breach government contracting rules with impunity.

However, while weak enforcement mechanisms may encourage the normalization of improper conduct, recent case studies reveal that public contracting irregularities can result in successful criminal prosecutions against high-level officials who break the rules.

Since senior officials often fail to lead by example, public institutions need to build stronger institutional governance practices so that we do not have to rely on the criminal law as the means of enforcing ethics and accountability in the public procurement process.

Training Certificate

Leveraging Lessons Learned

Procurement Training Office

We will be running our open enrolment Governance and Project Execution Certificate in a month-long format starting December 2023.

Governance 2.0

Policy | Protocols |Templates

Procurement Law Office

We are pleased to announce our new 2.0 Policy and Protocols and 5.0 Annotated RFx Templates.

RFx Drafter v. Training

Software or Deeper Learning?

Procurement Advisory Office

In 2023, Orbidder 2.0 goes head-to-head with our 5.0 Annotated RFx Templates and Platinum Training Program.

Paul Emanuelli

Former Senior Advisor to PM Sentenced

Guilty of attempting to improperly influence government spending decisions

In its March 2018 decision in *R. v. Carson*, the Supreme Court of Canada upheld the conviction of a former senior advisor to the Prime Minister of Canada for influence peddling. As the evidence showed, during the year following his departure from his position as senior advisor to Prime Minister Stephen Harper, Bruce Carson entered into an agreement with H2O, a water treatment company, to use his government contacts to promote the sale of the company's water treatment systems to First Nations communities in exchange for commissions to be paid to his girlfriend.

Carson defended the charges by arguing that the contracts in question were not government contracts since they were between First Nations and the water treatment company, and that the *Criminal Code* provisions therefore did not apply to his activities.

While the trial court agreed with this argument and dismissed the charges, the Court of Appeal for Ontario overturned that decision and found Carson guilty as charged. Carson appealed to the Supreme Court of Canada, but the Supreme Court upheld the conviction, finding that: (i) the contracts in question fell within the scope of the *Criminal Code* provisions since they were based on funding from the federal department of Indian and Northern Affairs Canada; and (ii) Carson had lobbied officials in that department in relation to those contracts.

As the Supreme Court noted, for the influence peddling offence to apply to the contracts, there needs to be a nexus between the contract in question and the government that the offender is attempting to influence in exchange for a payment.

Given the important public policy objectives of maintaining the integrity of government procurement, the Supreme Court ruled that "government business" should be interpreted broadly beyond specific contracts to also include government decisions made to change or expand government spending programs.

The Supreme Court concluded that Mr. Carson was guilty of influence peddling contrary to s. 121(1)(d) of the *Criminal Code* and remitted the matter to the trial judge for sentencing. In July 2018, the trial court sentenced Mr. Carson to "a suspended sentence with a period of probation of 12 months during which time Mr. Carson shall undertake 100 hours of community service." (see Former PM Advisor Convicted of Influence Peddling)

Under the Radar: The contract-splitting scheme took advantage of a lack of controls over low-value contracts to rig bids at a Canadian military base for mulitple awards totalling approximately $2 million.

Paul Emanuelli

"March Madness" at Nova Scotia Military Base

Prison Terms for Contract-Splitting Scheme

In its September 2019 decision in *R. v. Ross*, the Nova Scotia Supreme Court found that two government employees, along with a supplier operating under different companies, conspired to defraud the government through a long-running contact-splitting and bid-rigging scheme at a Canadian military base in Nova Scotia.

That scheme resulted in the award of hundreds of contracts to the supplier, which were often made at inflated prices during year-end "March Madness". As a kickback, the supplier gave one of the government employees a company bank card to make repeated withdrawals from a cash machine in a local tavern. (see Contract-Splitting Used in Bid-Rigging Scheme).

Paul Emanuelli

Orillia Councillor Breaches Code of Conduct

Improper Disclosures

In its October 2022 decision in *Fallis v. Orillia (City)*, the Ontario Superior Court of Justice – Divisional Court dismissed a municipal councillor's judicial review application which sought to overturn an integrity commissioner's ruling.

That prior ruling found the councillor in breach of a municipal code of conduct for disclosing closed session documents and internal legal advice relating to a waterfront development RFP when the councillor sought personal legal advice about the process. The integrity commissioner recommended that the city council suspend the councillor's pay for 30 to 44 days. The court agreed that the disclosures breached the code of conduct.

As this case illustrates, public officials, including elected officials, should avoid disclosing confidential information relating to a public procurement process. While elected officials may exercise an oversight function in relation to a public institution, that oversight role typically remains subject to confidentiality and due process duties.

Paul Emanuelli

Bid-Rigging in Federal Technology Tender

Multiple Parties Charged

Guilty Pleas: While three defendants pleaded guilty, a former federal civil servant avoided conviction after the prosecution failed to prove financial gain to the defendant or financial harm to the government.

In its June 2018 decision in ***R. v. Shum***, the Ontario Superior Court of Justice found a federal civil servant not guilty of charges under the *Financial Administration Act* after concluding that the employee's manipulation of a bidding process did not result in financial harm to the government.

The case dealt with a bidding process for information technology project support services at Library and Archives Canada for task-based informatics professional services. Three other individuals involved in that bidding process, including two external contractors and a federal employee, pleaded guilty to charges under the *Financial Administration Act* and *Competition Act*. Charges were also laid against a second federal government employee, Barney Shum, who was also involved in the same bidding process.

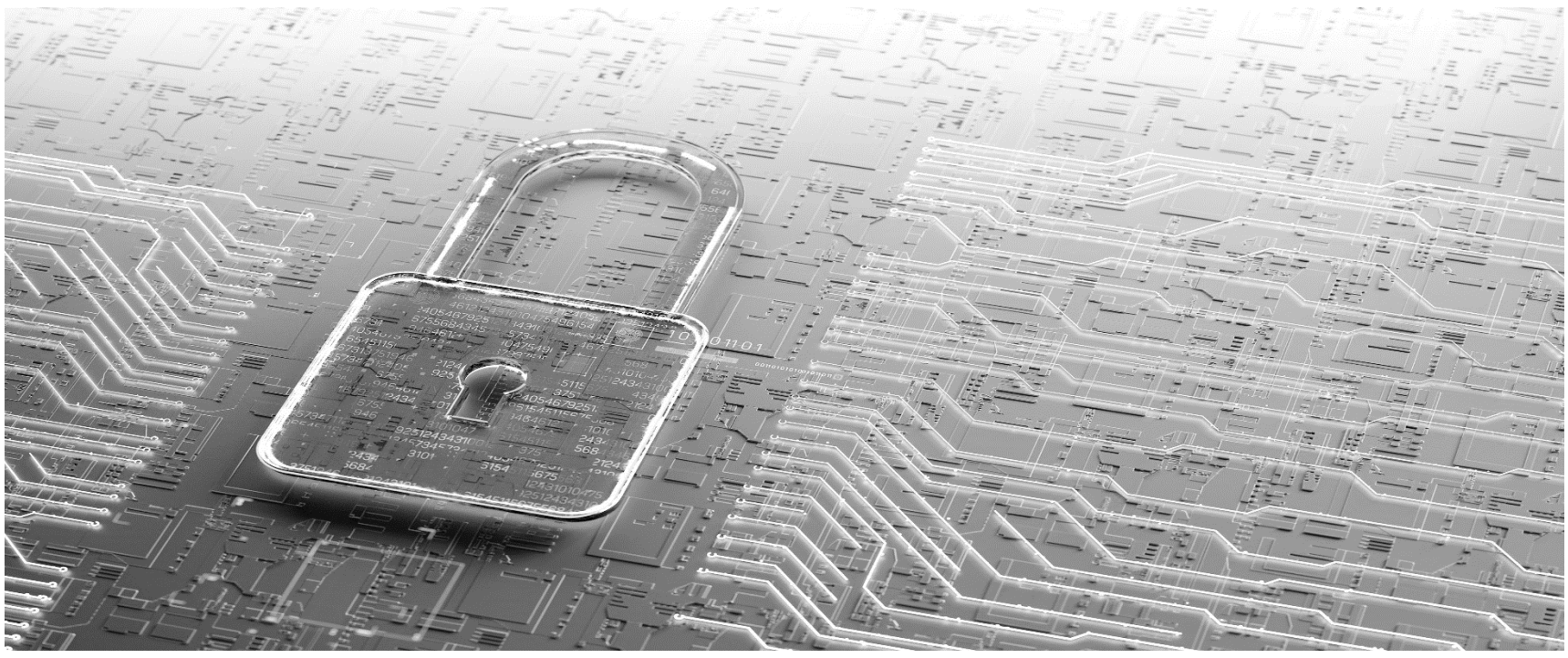
In considering the evidence, the Court ultimately concluded that the defendant was not a credible witness and that he was less than fulsome in his testimony. The Court also concluded that the defendant crossed the legal line in providing pre-bid information to the individuals who were involved in the bid-rigging scheme. However, the Court ultimately found that the defendant did not gain financially from the arrangement and dismissed the charges. (see Federal Employee Charged in Bid Manipulation Case)

Paul Emanuelli

Collusion in Ontario Highway Tenders

Defendant Admits to Collusion

In its May 2020 decision in ***R. v. Charpentier***, the Ontario Superior Court of Justice found the defendant not guilty of fraud in his role in a bid-rigging kickback scheme that involved government projects. The defendant admitted that he colluded with his employer, who owned a construction company, in an ongoing bid-rigging and price-fixing scheme involving other bidders vying for work on Ontario Ministry of Transportation construction projects. The defendant also admitted that he then colluded with a subcontractor on 43 of those projects to receive inflated sub-tenders, awarding $6.5 million in work to that subcontractor at inflated prices, and then received kickbacks exceeding $3.2 million from that same subcontractor. However, the defendant beat the fraud charges because the Crown failed to prove that the defendant's employer suffered "deprivation", as required to prove the offence. (see Are You a Soft Target for Purchasing Scams?).



Scrubbing the Record: The Court found that the defendant deliberatly directed the destruction of computer records relating to a controversial contract decision.

Destroying Procurement Records a *Criminal Code* Violation

Premier's Former Chief of Staff Convicted

Spotlight on Transparency

In its January 2018 decision in ***R. v. Livingston***, the Ontario Superior Court of Justice found David Livingston, the former chief of staff to Ontario Premier Dalton McGuinty, guilty of unlawfully destroying government records. The controversy involved the deletion of records from computers in the Premier's Office during an ongoing legislative committee probe into the government's decision to cancel gas plant construction projects in Mississauga and Oakville, Ontario.

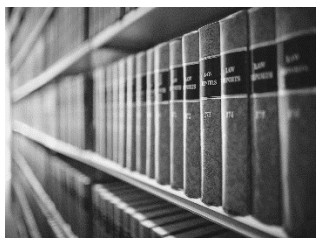
Livingston was sentenced to four months imprisonment, followed by 12 months' probation and 100 hours of community service.

As this case study illustrates, the failure to follow government record-keeping practices can result in significant adverse consequences, since the courts put a high premium on the transparency of government decision-making. Public institutions should establish and enforce formal policies and procedures to ensure proper record retention practices for major procurement projects. (see Former Chief of Staff Convicted for Deleted Records).

Restoring Trust: Ontario judge raises concerns over major governance gaps in Ontario's municipal procurement practices and calls for more thorough procurement training.

Transparency and the Public Trust

Report of the Collingwood Judicial Inquiry



In his *Report of the Collingwood Judicial Inquiry*, Ontario Associate Chief Justice Frank N. Marrocco found serious procurement irregularities in two controversial transactions at the Town of Collingwood.

To address the systemic weaknesses revealed in the inquiry findings, Justice Marrocco made a series of wide-reaching recommendations, ranging from statutory reforms at the provincial level to training programs at municipal council and staff levels.

In response to those findings, his report called for widespread governance reforms, including statutory reforms at the provincial level, as well as bylaw and administrative reforms at the municipal level. While the report focused on conflicts of interest and bidding irregularities at the Town of Collingwood, the findings are symptomatic of broader governance gaps across Ontario municipalities that remain unresolved years after Justice Bellamy made similar recommendations in her September 2005 *Toronto Computer Leasing Inquiry, Toronto External Contracts Inquiry* report.

By way of background, Justice Marrocco's report focused on the actions of the Town's deputy mayor, mayor's brother, and the Town's executive director (who oversaw the Town's electric utility) in relation to two controversial transactions. The report found major irregularities in the Town's sale of 50 percent of its electric utility through a tainted RFP process and in the Town's subsequent sole-source award of a construction contract for a new recreational facility.

Justice Marrocco concluded that both transactions were tainted by undisclosed conflicts, unfair bidding practices, and a lack of transparency, which undermined public confidence in the municipality's governance and underscored the need for system-wide reforms in municipal procurement.

> "When trust is lost, the relationship between the public and its municipal government may never be the same."
>
> - Ontario Associate Chief Justice Frank N. Marrocco

As his report stated, the municipal CAO should have "the mandate and resources to provide ethical education programs and materials to staff" and that this training should "be mandatory and occur at regularly scheduled times". Justice Marrocco also recommended that procurement staff should be provided "comprehensive and regular training on the procurement bylaw, procurement policies and practices, and relevant codes of conduct" and that this training "should be mandatory and should include ethical issues that arise in the procurement process." (see Ontario Inquiry Calls for Conflict Reforms).