Public Procurement 2024 Year in Review

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Procurement law in 2024 saw a number of major strides forward in caselaw and policy. This includes a complete overhaul of the federal integrity regime, and the initiation of a preferential procurement system for Ontario businesses. Courts and tribunals have also been active, with several critical cases circumscribing the scope of both substantive obligations of purchasers, as well as remedies available to aggrieved bidders.

We have prepared a practical guide to important developments in procurement law over the past year in this Public Procurement 2024 Year in Review. In particular, we review the key changes in procurement policies and methods by Canadian public purchasers, as well as provide an in-depth analysis of new decisions from procurement related administrative tribunals/the Federal court, as well as various provincial courts.

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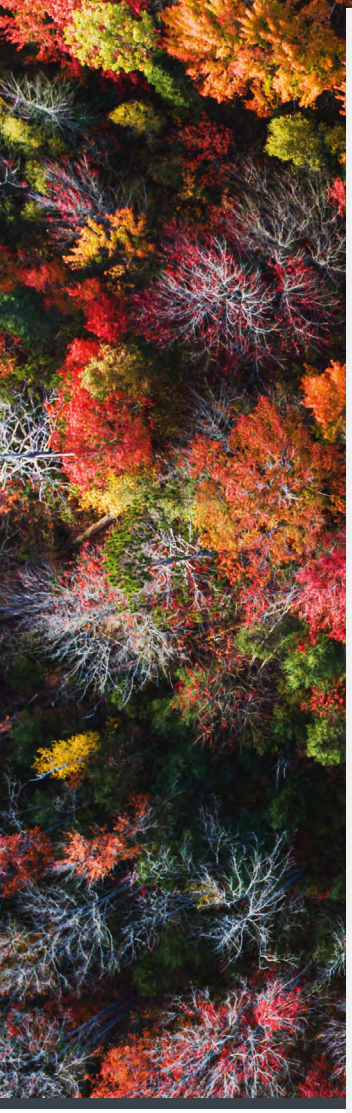

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Key Developments at the Federal Level

This year was one of significant developments (and some rebalancing) at the federal level. A new debarment policy increases risks for suppliers, whereas Canada received reminders from the Federal Court of Appeal and the Canadian International Trade Tribunal (the "Tribunal") that it cannot act with high-handed impunity. On the other hand, groundbreaking jurisprudence regarding the national security exemption in the *Canada Evidence Act* reminds bidders that they are not necessarily entitled to all bid information in the context of a bid challenge.

CANADA'S NEW DEBARMENT POLICY

On May 31, 2024, a suite of changes to Canada's Integrity Regime came into force. The federal government established a new Office of Supplier Integrity and Compliance (the "OSIC") to administer a revised Ineligibility and Suspension Policy ("Policy"), which forms the core of the commitments and obligations of suppliers to maintain certain ethical standards.

The new Policy captures two competing dynamics – it is at once more flexible but also far broader than the previous policy. With regard to flexibility, the Policy provides the Registrar with considerable flexibility to find a supplier ineligible, which compares to the earlier Integrity Regime approach of strict and mandatory debarment for set periods of time with little consideration or discretion to allow Public Services and Procurement Canada ("PSPC") to vary such ineligibility.

The new approach provides the Registrar with guidelines on the maximum debarment period for various offences, and then considerations for how the period should be set based upon:

— The seriousness of the conduct, including the role of the supplier in the misconduct, the extent to which senior management participated, gains the supplier realized, the complexity and degree of planning/forethought, association with organized crime, the cost of enforcement by the authorities and whether the supplier is a repeat offender.

— Remediation efforts, including disciplinary action taken against individuals involved; independent internal investigations and implementation of remedial measures; any civil or criminal compensation paid to the government and/or any parties injured in the wrongful conduct; adoption of or improvements to compliance regimes; and a strong culture of compliance from management.

However, in conjunction with this flexibility, PSPC has greatly increased the scope of what potential charges or convictions may result in debarment. The prior policy was focused on provisions specifically related to certain elements of public integrity. This included fraud against His Majesty under both the *Criminal Code* and *Financial Administration Act*, bribery and corruption offences under the *Criminal Code* and *Corruption of Foreign Public Officials Act*, *Competition Act* offences related to bid rigging and conspiracies, forgery-related offences and lobbying offences. The newly listed offences include:

- Sections 83.02, 83.03 or 83.04 (Financing of terrorism), section 123 (Municipal corruption), section 279.01 (Trafficking in persons), section 279.011 (Trafficking a person under 18 years), subsection 279.02(1) (Material benefits/trafficking), subsection 279.02(2) (Receiving benefit to facilitate child trafficking), subsection 279.03(1) (Withholding/destroying identity Documents to Facilitate Adult trafficking), and subsection 279.03(2) (Withholding/destroying identity Documents to facilitate child trafficking) of the *Criminal Code*.
- Section 463 (Attempts, Accessories), section 464 (Counselling Offence That is Not Committed) and section 465 (Conspiracy) of the *Criminal Code*, each solely to the extent that it relates to an offence listed under paragraph (1)(b)(i) of the appendix of Material Events provided in the Debarment Policy.
- Section 52.01 (False or misleading representation) of the *Competition Act*.
- Paragraphs 497(2)(a) (making contribution while ineligible); 497(2)(d) (exceeding contribution limits); 497(2)(e) (circumventing contribution rules); 497(2)(f) (concealing source of contribution; 497(2)(h) (entering into prohibited agreement); 497(2)(k) (making indirect contribution); 497(2)(l) (exceeding cash contribution limit); 497(2)(n) (making illegal loan); and 497(2)(o) (making indirect loan) of the *Canada Elections Act*.
- Paragraph 80(1)(b) (Defraud His Majesty) and section 81 (Bribes Offered or Accepted) of the *Financial Administration Act*.
- Section 117 (Organizing entry into Canada) and 118 (Trafficking in persons) of the *Immigration and Refugee Protection Act*.
- Any offence under Part I or Part II of the *Canada Labour Code*.

One particular note is that one of the listed offences has been expanded rather than added. Previously, the Integrity Regime debarred suppliers for fraud convictions under section 380 of the *Criminal Code*, but only where the fraud was committed against the Crown. Under the revised policy this scope now catches *all* fraud, regardless of whether it was committed against His Majesty or any other person.

The new Policy also includes a number of new "Material Events" that are not explicitly linked to charges or convictions. These include situations where a supplier:

- Makes certain misleading statements that are of a "material respect," a term that is not defined or discussed in the Policy;
- Committed a similar provincial offence in the past three years;
- Is a designated or listed person under the *United Nations Act*, *Special Economic Measures Act*, the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* or the *Freezing Assets of Corrupt Foreign Officials Act*, or is owned or controlled by such a person;
- Has engaged in any activity prohibited under above sanctions legislation;
- Lacks business integrity or honesty in the judgment of the Registrar such that contracting with them would bring the procurement system into disrepute;

— Has within the past three years been convicted of an offence that resulted in being listed on the Environmental Offenders Registry;

— Has within the past three years received a poor performance evaluation pursuant to Public Works and Government Services Canada's ("PWGSC") Vendor Performance Management Policy; or

— Has an owner, trustee, director, manager or senior officer that, in the past three years, has been convicted of or pleaded guilty to a listed offence.

Of particular are two specific new triggers. The first revolves around Canadian sanctions: it is now considered a Material Event if a supplier is a designated or listed person under the *United Nations Act, Special Economic Measures Act* ("SEMA"), the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* or the *Freezing Assets of Corrupt Foreign Officials Act,* or is owned or controlled by such a person. This can become a more prominent issue given the expansion to the definition of "owned or controlled" under SEMA and the Magnitsky Act, both of which carry the concept of "deemed ownership" in a relatively broad fashion.

It is also a debarment offence to engage in any activity prohibited under these sanctions laws. It is important to note that this is **not** rooted in any requirement for a guilty plea or conviction – if PSPC is satisfied the illicit activity has occurred it can classify the actions as a Material Event. Most importantly, this signifies that debarment can occur even if a supplier lacks the requisite *mens rea* to ground a conviction.

The second major new Material Event relates to agreed statements of fact. Most often found in plea or settlement agreements or Remediation Agreements/ Deferred Prosecution Agreements, PSPC may now draw conclusions based upon such facts to determine if they disclose an offence which may lead to debarment. It is therefore crucial that suppliers that are planning on entering into such an agreed statement of facts (or which have affiliates considering doing so) be aware of this fact and consider if they must communicate with the OSIC or Registrar concurrently to negotiate either no (or a shorter) debarment period.

CANADA (ATTORNEY GENERAL) V. ELLISDON CORPORATION[1] – DAMAGES FOR LOSS OF OPPORTUNITY ARE WITHIN THE REMIT OF THE TRIBUNAL

The Federal Court of Appeal upheld a landmark decision by the Canadian International Trade Tribunal (the "Tribunal") to award a bidder compensation for lost opportunities on third-party contracts arising from the government's severe mismanagement of the procurement process, which had led the bidder to be improperly awarded the contract for a period. During this period, EllisDon was under a stop work order but was contractually required to be ready to start work at any moment and so was unable to bid on other projects.

The root of the issue was caused by PWGSC improperly processing bid documentation submitted by another bidder, Pomerleau, and thereby removing its hyperlinks and

1 2024 FCA 200.

invalidating its data. The contract was awarded to EllisDon on the basis that Pomerleau's bid was not compliant as its e-bond was not verifiable. Pomerleau objected and asked that the process be suspended in order to undertake an investigation. Although PWGSC determined that it did have a verifiable e-bond, it did not acknowledge any error and maintained the award on the basis that the bond submitted was non-verifiable at the tie of bid opening (although this was in fact the fault of PWGSC) – but issued a stop work order to EllisDon on the same day it sent the contract (six days after the award).

The Tribunal found that the procurement process was replete with errors, including the improper award of the contract to EllisDon despite having all the information and documentation required to identify and correct its own error at that time; holding EllisDon "hostage" regarding the performance of the contract by issuing a suspension order; PWGSC's statement to Pomerleau that the bid was not verifiable at bid closing although PWGSC knew or ought to have known that this error was due entirely to its own mishandling of the bid; and PWGSC's inexplicable delay of weeks post bid close before notifying the bidders that it might have made a mistake, although it had been in possession of this information for months. As such, the Tribunal recommended that PWGSC compensate EllisDon for its lost opportunity cost for the months it was held hostage, awarded a contract it had to remain in readiness to perform.

The Federal Court of Appeal found that the Tribunal had reasonably held that PWGSC's conduct concerned the procurement process, rather than contract performance; that the statutory scheme allowed for the grant of lost opportunity compensation for third-party contracts; and that this was an appropriate remedy within the circumstances.

CANADA (ATTORNEY GENERAL) V. NAVANTIA S.A.[2] – RELEVANCE IS NOT ENOUGH

In this case, the Attorney General invoked section 38 of the *Canada Evidence Act* to shield from production redacted portions of 48 documents relating to a Canadian Surface Combatant ("CSC") project request for proposal ("RFP") and bid evaluation process, on the basis that the redactions contained sensitive information or potentially injurious information.

The documents at issue related to (1) Lockheed Martin's successful bid (which the Attorney General asserted included sensitive and injurious information about the capabilities of the CSCs under construction) and (2) Navantia's unsuccessful bid, which included information or elements provided directly by third-party foreign subcontractor to the Canadian bid evaluation team in accordance with the government-to-government protocols in the RFP. Navantia, the unsuccessful bidder, sought production of these two categories of information as part of its challenge to the procurement process, on the basis that they were relevant to the joint decision by PWGSC and Irving Shipbuilding Inc. that its bid was non-compliant. After outreach from Canada, one foreign partner ultimately provided its consent to disclosure of certain documents to Navantia on strict and specific terms and conditions.

The Court conducted a careful analysis of the section 38 issue with respect to the remaining documents, assisted by the appointment of an *amicus curiae* ("amicus") on consent of the parties, as well as the submissions of the parties. The documents at issue were provided to the Court and to the amicus in unredacted form for their review, while an extensive redacted record was provided to Navantia.

The Court split the documents based upon these factors. For one set of documents, largely related to the first set of documents, the Court held that the position of the partner country, and the relevance of the documents, warranted disclosure. For the second set of documents, it ultimately determined that, without the clear consent of foreign partners to disclose their information, their disclosure (even on strict terms and conditions) would be injurious to international relations and in violation of bilateral agreements. On the other hand, while minimally relevant (insofar as it they involved bid information), the redacted information would not assist Navantia in making out its allegations that Canada improperly evaluated its bid. As such, the public interest in disclosure of the information did not outweigh the public interest in prohibiting disclosure of the information.

CHANTIER DAVIE CANADA INC. AND WÄRTSILÄ CANADA INC.[3] – A CRY FOR SUBSTANCE OVER FORM IN THE DEBRIEFING PROCESS (OR, THIRD TIME IS THE CHARM)

The Tribunal expressed its frustration with this ongoing procurement saga (being the third complaint by Chantier Davie and Wärtsilä in reference to a PWGSC procurement of ship propulsion systems) with significant criticism of the

2 **2024 FC 929**.
3 **2023 CanLII 81853** (CA CITT).

ways in which government institutions participate – or, rather, do not participate – in the debriefing processes.

In particular, the Tribunal noted that "strict adherent" to the requirements of article 516 of the *Canadian Free Trade Agreement* ("CFTA") "allows government institutions to entertain the unfortunate belief that they can essentially just tell losing bidders to go away and leave them alone."[4] This, in turn, forces bidders to bring speculative complaints – and then be turned away by the Tribunal for engaging in a fishing expedition.[5] The Tribunal recognized the irony of this situation, noting that the Tribunal "might have to ask itself how a complainant can be expected to bring evidence of an issue that it had to make a guess about, for lack of the government institution's willingness to engage regarding its accountability vis-à-vis its procurement award decision."[6]

The Tribunal further noted that, by hewing to the narrow requirements of the CFTA, Canada was treating domestic suppliers less favourably than foreign suppliers who benefited from broader and more explicit protections under international trade agreements.

The Tribunal specifically rebuked PWGSC, noting that it showed no openness to providing Chantier Davie and Wärtsilä with any information that would have allowed them to ascertain whether they had rightfully lost the bid. As the Tribunal underlined, this approach "ignores the fact that losing bidders undoubtedly ought to be able to know what was procured at the end of a procurement process with some detail."[7]

4 **2023 CanLII 81853** (CA CITT) at para. 65.
5 As is precisely what occurred in *Chantier Davie Canada Inc. and Wärtsilä Canada Inc.*, **2023 CanLII 6265 (CA CITT)**, and addressed in our **2023 Year-in-Review**.
6 **2023 CanLII 81853** (CA CITT) at para. 65.
7 **2023 CanLII 81853** (CA CITT) at para. 63.

Key Developments in Ontario

2024 in Ontario was marked by a retrenching of local procurement efforts with the enactment of a "Buy Ontario" regime and a significant new energy procurement for the province. Jurisprudence clarified to whom the duty fairness and duty good faith are owed in the procurement context, and the Divisional Court's decision in *Thales* was overturned, indicating that, contrary to recent Superior Court of Justice jurisprudence,[1] the use of judicial review to challenge trade treaty breaches by Ontario entities may not be appropriate until other avenues are exhausted.

"BUY ONTARIO"

Ontario has enacted the ***Building Ontario Business Initiative Act* ("BOBIA")**, which enforces a "Buy Ontario" mandate on public procurement practices. The new rules mandate that public sector entitles, like hospitals and schools, give preference to Ontario businesses in the procurement of goods and services.

These changes mandate sourcing for Ontario projects from Ontario entities. The BOBIA applies to all government entities in Ontario, including those designated as broader public sector organizations such as hospitals, school boards and universities. This creates a sweeping new requirement for procurement, and one of major concern to non-Ontario based suppliers.

However, it is important to note the restrictions on the BOBIA. First, there are certain services that are excluded – including services procured pursuant to a standing offer/vendor of record arrangement, services of lawyers, paralegals and notary public, and services not available from Ontario businesses.

Second, there are strict monetary thresholds that align with Ontario's obligations under the *Canadian Free Trade Agreement* and the other free trade agreements which bind Ontario entities (such as the *Comprehensive Economic and Trade Agreement* between Canada and the European Union). Presently these thresholds are:

— For government entities: C$30,300 for goods and C$121,200 for services.

— For broader public sector entities: C$121,200 for either goods or services.

Entities are required to consider all reasonably foreseeable option costs and the total procurement cost they will pay. This means they can exclude any payments that will be derived from third parties over the time span of the contract. For example, if a university will pay C$100,000 up front, and then over the course of the contract students will pay a certain sum over the course of the contract, the university only needs to account for the amount it pays when determining if the threshold is met.

ONTARIO'S AMBITIOUS ENERGY PROCUREMENT

On August 28, 2024 , the Ontario government launched the largest competitive energy procurement in the province's history. The Independent Electricity System Operator ("IESO"), in collaboration with the Ministry of Electricity and

1 See, e.g., *Transdev Canada Inc. v. the Regional Municipality of York*, **2023 ONSC 135**.

Electrification, has begun the procurement process, the timeline for completion being forecasted for February 2026.

Following an IESO report showing a 75% increase in demand for electricity by 2050, the original goal of procuring 5,000 megawatts of energy was increased recently to a goal of 7,500 megawatts. To that end the province is undergoing its second long-term procurement ("LT2").

The province intends that the LT2 procurement will be transparent and fully competitive. It will also be technology-agnostic, to secure the lowest cost energy sources. However, the province has also specifically asked IESO to consider and report on two distinct option types. The first is focused on long-lead-time projects that require extensive resources before generating returns down the line. The second is for short-term and small-scale projects meant to provide for immediate relief and supply.

The Ontario government has also specifically highlighted the need to include advanced nuclear assets – notably the ongoing work by Bruce Power, the small modular reactors being built at Darlington and the refurbishing of the Pickering Nuclear Generating Station. It is clear that the Ontario government will build on Canada's long time commitment to nuclear energy and being at the forefront of nuclear development and implementation.

THALES DIS CANADA INC. V. ONTARIO (TRANSPORTATION)[2] – THINK TWICE ABOUT JUDICIAL REVIEW AT AN EARLY STAGE

In a decision released just before New Year's Eve 2023, the Court of Appeal for Ontario overturned the Divisional Court's decision to grant Thales' application for judicial review of a "made in Canada" requirement added to a request for bids to produce identification cards shortly before the bid submission deadline, pursuant to which Thales' bid was disqualified. Leave to appeal the Court of Appeal's decision was denied by the Supreme Court of Canada in October 2024.

The Court of Appeal allowed the appeal and dismissed Thales' judicial review on two primary bases. First, it found that the Divisional Court had failed to properly conduct its review on a reasonableness standard. Instead, it had effectively applied a correctness standard, conducting a *de novo* review and deciding the issue afresh. Second, the Court of Appeal held that the request for bids was not actually subject to judicial review as Thales had failed to first avail itself of the process under the *Canada-European Union Comprehensive Economic and Trade Agreement* to review the decision.

CANADA FORGINGS INC. V. ATOMIC ENERGY OF CANADA LIMITED[3] – THE DUTY OF FAIRNESS STOPS AT THE EDGE OF THE TENDER

The Court of Appeal for Ontario has affirmed that purchasers do not owe a duty of fairness to a bidder's suppliers or subcontractors, and that the limitation period for claims based on the procurement law duty of fairness begins to run when the alleged fairness is discoverable.

In anticipation of securing a contract for Bruce Power, in September 2004, AECL issued a call for tenders to three machine shops that could supply end fittings, each of which was responsible for arranging its own suppliers and subcontractors. Canada Forgings ("CanForge") had previously sent quotes (two of which were unsolicited) for end fitting forgings directly to these machine shops, and updated two of these quotes in advance of the deadline for bids under the tender. Its main competitor ("Patriot") sent fresh quotes to all three shops. Ultimately, the lowest technically compliant bid came from a shop that included Patriot as a supplier, but not CanForge. AECL did not issue any tender for end fitting forgings directly to either CanForge or Patriot.

2 2023 ONCA 866.
3 2024 ONCA 677.

CanForge framed the issue on appeal as whether the respondent, AECL, had steered end fitting forgings work away from it towards Patriot in a breach of an alleged duty of fairness under Contract A. However, this was not the issue before the trial judge, who considered whether any Contract A had formed in the first place. While these issues were ultimately found to be limitation barred, the trial judge found that, because the appellant had not been a party to the original tender, being a supplier of certain bidders, it would not have been a party to any Contract A formed in that tender process. As such, AECL owed CanForge no duty of fairness, implied or otherwise.

1401380 ONTARIO LTD. V. WASAYA AIRWAYS LP, 1401380 ONTARIO LTD. V. REMOTES ONE REMOTE COMMUNITIES[4] – THE DUTY OF GOOD FAITH TO THE COUNTERPARTY IS PARAMOUNT

This decision acts a reminder that a party's good intentions or actions taken for the benefit of third parties, or in adherence to statutory duties, do not exempt them from their duty of good faith towards the other contracting party.

Hydro One Remove Communities Inc. ("Remotes") is required by legislation to provide electricity to isolated communities in Northern Ontario not connected to Ontario's electricity grid, most of which are First Nations communities. Remotes tendered two RFPs for the primary and secondary supply of diesel fuel by air to certain remote First Nations communities ("Primary Communities" and "Secondary Communities"). 1401380 Ontario Limited ("Wilderness"), a charter airline, was the successful proponent for both; a First Nations owned carrier, Wasaya Airway LP ("Wasaya") was entirely unsuccessful. Certain First Nations included in the RFP awards to Wilderness, displeased with this result, issued Band Council Resolutions ("BCRs") confirming that they would not permit anyone other than Wasaya on their land for diesel fuel delivery purposes.

Remotes advised Wilderness that, in light of the BCRs, it would no longer be using its services for four of five of the Primary Communities and cancelled its purchase orders. Wasaya was awarded one of these contracts, with the rest going to an entity in which three of the communities had an interest ("Cargo North"). The primary supplier of the Secondary Communities (four of which had interests in Wasaya), Cargo North, released Remotes from any contractual obligation with respect to fuel delivery for these communities and contracted with Wasaya instead of Wilderness.

Wilderness claimed against Remotes for, among other things, breach of contract, and breach of the duty of honest performance, and against Wasaya for inducing breach of contract. Remotes argued that its primary duty was to provide electricity according to its statutory mandate and that, to fulfill this purpose it was required to exercise its discretion in a manner that would ensure that the contract could be fulfilled safely. Given the BCRs, and consequent inability of Wilderness to safely deliver fuel to the relevant communities, Remotes argued that it was reasonable, and not in bad faith, to terminate the purchase orders issued to Wilderness and award contracts to Wasaya and Cargo North.

The Court agreed with Wilderness, holding that Remotes' exercise of discretion was unreasonable and that Remotes did not act in good faith to its contractual counterparty, Wilderness. The Court ruled that while Remotes' motives and conduct vis-à-vis the First Nations were honourable in wanting to respect the BCRs, Remotes exercised its contractual discretion in a manner inconsistent with the purpose for which the discretion was granted.

4 2024 ONSC 4701.

Québec: Summaries of Case Law Decisions on Calls for Tenders

AGENCE MÉTROPOLITAINE DE TRANSPORT V. SINTRA INC., 2024 QCCA 500

In *Agence métropolitaine de transport v. Sintra inc.*, the Court of Appeal overturned a **judgment rendered by the Superior Court in 2022**. The Court of Appeal concluded that, in accordance with the instructions to bidders ("Instructions") issued by the Agence métropolitaine de transport ("AMT"), Sintra Inc. ("Sintra"), as a bidder, had the obligation to raise any perceived ambiguities or contradictions in the tender documents to the AMT.

In 2016, Sintra submitted a bid in response to a call for tenders issued by the AMT for two projects: the construction of a dedicated highway bus lane, and the resurfacing of a portion of the same highway. For certain items of the work that were to be carried out for both projects, the tender documents required the bidders to submit the same unit price in the price schedule of each project for those items. Indeed, Sintra had not submitted the same unit price for four of the 27 items for which it was required. As a result, the AMT awarded the contract to the second-lowest bidder. Sintra then sued the AMT for loss of profits caused by the bid's rejection.

At trial, Sintra argued that the alleged non-compliance of its bid was caused by ambiguities in the tender documents. Sintra also claimed that it was not possible to meet the unit price requirements without unbalancing its bid. Alternatively, Sintra claimed that the alleged non-compliance were minor. The AMT argued that Sintra's non-compliance constituted a major irregularity resulting in the disqualification of its bid. The Superior Court ruled in favor of Sintra, stating that the tender documents were ambiguous and contradictory and that the AMT should have awarded the contract to Sintra given that it was the lowest bidder.

The Court of Appeal overturned the decision, and concluded that, pursuant to the Instructions, Sintra had the obligation to raise any ambiguities or contradictions found in the tender documents to the AMT. This obligation, which was not taken into consideration in the Superior Court judgement, aims to allow the contracting authority to eliminate any ambiguities or contradictions that could lead to a disqualification or a pricing error by bidders, and is recognized by case law. Thus, regardless of the possibility that the allegedly ambiguous and contradictory requirement in the tender documents might have had the effect of unbalancing Sintra's bid, the Court concluded that this did not justify Sintra's decision to ignore it. The evidence demonstrated that the irregularity in Sintra's bid was due to a known requirement that they chose not to consider instead of raising the ambiguity to the AMT. The Court emphasized that the AMT treated all bidders equally in rejecting Sintra's bid, because if the second-lowest bidder had also ignored the unit price requirement, it could have also presented a more competitive bid.

CONSTRUCTION DE DÉFENSE CANADA V. GROUPE ATWILL-MORIN INC., 2024 QCCA 319

(application for leave to appeal dismissed by the Supreme Court of Canada)

In *Construction de défense Canada v. Groupe Atwill-Morin inc.*, the Court of Appeal confirmed the **judgment rendered by the Superior Court in 2022**, which ordered Construction de Défense Canada ("CDC") to pay damages to Groupe Atwill-Morin Inc. ("GAM") for rejecting its bid in a call for tenders due to a minor irregularity.

In 2018, CDC issued a call for tenders for the restoration of roofs, masonry, and soffits. The instructions to bidders (Instructions) specified that the bid had to include a digitally verifiable bond, ''signed and sealed digitally through the use of a third-party service provider.'' Instead, GAM submitted a bond in PDF format. Although it presented the lowest proposal, CDC rejected GAM's bid on the ground that it did not meet the tender requirements described above relating to the bond format. GAM then filed a lawsuit seeking damages for loss of profits against CDC due to the rejection of its bid.

At trial, GAM essentially argued that its bid was rejected due to a minor irregularity, that the tender requirement invoked by CDC was not of a public order or essential to the tender, and that CDC should have allowed the correction of the irregularity or overlooked it, in light of its discretionary power. The Superior Court ruled in favour of GAM and ordered CDC to pay C$646,156 to GAM. The Court concluded that CDC was at fault for refusing to exercise its discretion to allow GAM, the lowest bidder, to correct a minor irregularity.

The Court of Appeal Court of Appeal confirmed the trial judge's decision and concluded that the ambiguous content of the Instructions, particularly the interchangeable use of the terms "digital" and "electronic," did not support the conclusion that submitting a bond in PDF format constituted a breach of an essential condition of the call for tenders. Ultimately, the Court concluded that without a peremptory rejection clause in the tender documents or a legislative constraint limiting CDC's discretion in that regard, CDC's representatives should have used their discretion to overlook GAM's minor irregularity and award them the contract, considering they had submitted the lowest bid.

CONSTRUCTION RIC (2006) INC. V. PROCUREUR GÉNÉRAL DU QUÉBEC, 2024 QCCS 474

In *Construction Ric (2006) inc. v. le Procureur général du Québec*, the Superior Court dismissed the compensation claim filed by Construction Ric (2006) inc. ("Construction Ric") against the Ministère du Transport du Québec ("MTQ") for additional work carried out in the context of a fixed-price contract, because Construction Ric had not followed the claims procedure set out in the tender documents.

In 2015, the MTQ issued a call for tenders for the replacement of steel culverts on Route 138. The contract was awarded to Construction Ric for a fixed price of C$3,962,597.43. Following the completion of the work,

Construction Ric sued the MTQ, claiming C$1,772,059.08 for additional work allegedly caused by an early start to construction imposed by the MTQ, difficult weather conditions causing delays and additional work that was not included in the scope of the contract. Construction Ric also claimed payment of a contractual holdback of C$60,000.

The Court held that Construction Ric did not comply with the deadlines set out in the claims procedure provided under section 8.8 of the *Cahier des charges et devis généraux* ("Booklet"), and therefore rejected the claim, including for the payment of the contractual holdback. The Court pointed out that, in principle, in a fixed-price contract, section 2109 of the *Civil Code of Québec* provides that the price remains unchanged even if the terms and conditions of performance have changed. However, the parties may agree otherwise. In this case, section 8.8 of the Booklet stipulated that if a contractor encountered difficulties during the performance of the contract, it first had to submit a notice of its intent to claim compensation to the MTQ, within 15 days of the start of the encountered difficulties. Afterwards, in the absence of an agreement between the parties, the contractor could submit a claim, which had to be received by the deputy minister no later than 120 days after substantial completion of the work. The failure to respect these deadlines was considered a waiver of the contractor's rights to submit a claim.

In that case, Construction Ric notified the MTQ of its intention to file a compensation claim on September 28, 2015, which was eight days before the substantial completion of the work and outside of the maximum 15-day period since the difficulties leading to the claim occurred. Moreover, the Court held that Construction Ric had submitted its claim to the deputy minister 519 days after the substantial completion of the work, thus well exceeding the 120-day deadline. This decision highlights the importance of respecting the claims procedure set forth in the tender documents, and the drastic consequences of failing to do so.

J.F. SABOURIN ET ASSOCIÉS INC. V. VILLE DE GATINEAU, 2024 QCCS 1647

In *J.F. Sabourin et Associés inc. v. Ville de Gatineau*, the Superior Court held that, pursuant to section 573.3.3 of the *Cities and Towns Act* (the "CTA"), Ville de Gatineau (the "City") could negotiate with the sole remaining bidder, *J.F. Sabourin et Associés inc.* ("J.F. Sabourin"), to lower the bid price, since it had submitted the only compliant bid following the call for tenders, and that there was a significant difference between the bid price and the City's price estimate.

In 2019, the City launched a call for tenders for professional engineering services. Only two bids were received, and following its bid analysis, the City concluded that J.F. Sabourin had submitted the only compliant bid. Due to a significant gap between the price proposed by J.F. Sabourin and the City's estimate, the City exercised its rights provided under section 573.3.3 of the CTA, which allows a municipality to conclude a contract at a lower price when only one compliant bid is received. J.F. Sabourin agreed to lower its price, and the gap between the initial price and the City's estimate was reduced by 11.58%.

After completing the services under the contract, J.F. Sabourin claimed to have discovered that the other bidder's submission was also compliant, and that the City could not exercise the right to negotiate the price provided at section 573.3.3. of the CTA. J.F. Sabourin therefore claimed an amount of C$114,952.01 to the City, which represented the difference between the initial price and the negotiated price. The City maintained that J.F. Sabourin had submitted the only compliant bid and that it could negotiate the price.

The Court ruled in favour of the City. The evidence demonstrated that the City's analysis of the bids involved a two-stage process governed by the CTA. The first stage involves a qualitative analysis of the bids by a selection committee, and the second stage involves a value for money analysis of the bids that obtained a minimum of 70 points during the first stage. However, before the bids were submitted to the selection committee, a preliminary analysis of certain administrative requirements was conducted by the procurement department, and both bids were held to be compliant following that preliminary analysis.

Following the qualitative analysis conducted by the selection committee, it was concluded that the other bidder's bid did not meet certain requirements relating to human resources for the project, which were essential considering the nature of the project. In the Court's opinion, the City was well founded to reject the other bid considering that human resources were essential, and its analysis was neither irrational nor arbitrary nor marked by bad faith. Given that there was only one compliant bid, the City could therefore exercise its right to negotiate the price with J.F. Sabourin provided in section 573.3.3. of the CTA.

CONSTRUCTION SOCAM LTÉE V. SOCIÉTÉ DU PARC JEAN-DRAPEAU, 2024 QCCS 604

In *Construction Socam ltée v. Société du parc Jean-Drapeau*, the Superior Court determined that Construction Socam ltée ("Socam") was entitled to compensation for the extension of the duration of the construction work caused by the Société du Parc Jean-Drapeau ("SPJD").

In 2014, the SPJD issued a call for tenders for the demolition and renovation of facilities located in the Parc Jean-Drapeau, and a fixed-price contract was awarded to Socam. At the end of the work, Socam claimed C$659,931.10 to the SPJD for construction delays, unpaid additional work, as well as troubles, inconveniences and abusive behaviour.

At trial, the evidence demonstrated that according to the initial schedule, the contract was to be executed in two phases: Phase I lasting four months, followed by Phase II lasting six and a half months. Additionally, the work was supposed to take place from January 5 to October 15, 2015. However, in reality, the acceptance of the work only occurred on March 29, 2016. Moreover, throughout the performance of the contract, there were 121 change requests or directives, and 20 change orders ("COs"), which resulted in a 24% increase of the initial contract amount for which Socam was seeking compensation.

The Court found that there had been a 101-day extension of the construction timeline caused by the SPJD. The Court concluded that these delays were in fact caused by the various complaints made by Socam against the SPJD and its professionals, including the grouping of the COs, the lack of precision in SPJD's plans, which generated 230 technical questions/answers, and the excessive delays in receiving responses to technical questions. For this 101-day period, the Court granted to Socam an indemnity of C$2,946.85 per day mostly for labour costs and ordered the SPJD to pay Socam the additional work performed.

Furthermore, the Court ordered the SPJD to pay C$10,000 for its abusive behaviour and the troubles, annoyances and inconveniences caused to Socam. In particular, the Court emphasized that it was reprehensible for the SPJD to let Socam perform the work while it knew that the financial resources it had planned for the project were insufficient to cover the associated additional costs. More specifically, the evidence supported that the SPJD failed to inform Socam about a contingency it had before the end of the work, allowing Socam to continue to pay its subcontractors during the performance of the contract while being well aware that a financial impasse would ultimately occur. This amount of C$10,000 awarded to Socam took into consideration its own failure to provide revised schedules on a monthly basis.

Western Canada

BRITISH COLUMBIA

There were no big shake-ups in the British Columbia procurement landscape in 2024, but British Columbia's new BC Procurement Plan, which succeeds the 2018 Procurement Strategy, supports prioritizing the best interests of the people of British Columbia, local communities and economies, and the environment through a procurement framework designed to promote change through an equitable, accessible and sustainable economy within the parameters of existing procurement policies, laws and trade agreements. The British Columbia Construction Association issued an industry alert that raised potential red flags regarding certain procuring entities removing "Contract A," but we see no cause for alarm.

BC Procurement Plan 2024

On February 21, 2024, the Government of British Columbia ("British Columbia") released its **BC Procurement Plan 2024** (the "Plan"), laying out the framework for British Columbia's procurement practices with the intention to responsibly help drive change towards a more equitable, accessible and stable economy. The Plan intends to use procurement as a strategic lever for change to improve social and environmental outcomes and promote innovation. The Plan is the successor to the original British Columbia Procurement Strategy released in 2018.

British Columbia sees the Plan as an opportunity to leverage government spending to address some of the biggest priorities, such as:

— Reconciliation with Indigenous Peoples,

— Tackling climate change,

— Supporting jobs and training,

— Ensuring public safety, and

— Keeping services affordable.

The Plan establishes three strategic missions: 1) leverage purchasing power, 2) increase supplier access and 3) build capacity.

Mission 1: Leverage purchasing power

The Plan establishes the mission to use British Columbia's purchasing power to advance reconciliation with Indigenous Peoples, improve social and environmental outcomes, and promote innovation. The Plan requires British Columbia buyers to follow the **Environmentally Responsible Procurement Guidelines** which, when feasible and cost effective, encourages buyers to acquire products and services that are environmentally responsible. For purchasing services under $75,000, the **Social Impact Purchasing Guidelines** apply, and they recommend that a portion of the total points (no more than 5%) for the evaluation of proposals be reserved for purchaser commitment to supplier diversity and workforce development. Note that social impact criteria will be considered desirable and not mandatory.

To achieve this mission, the Ministry of Citizens' Services (the "Ministry") is working to expand the availability of Indigenous-specific corporate supply arrangements across government, continue to work with the Indigenous Procurement Initiative's External Advisory Committee to co-develop a plan to identify and address gaps faced by Indigenous vendors, and continue to work with ministries to identify and support procurement processes for better social and environmental outcomes.

Mission 2: Increase supplier access

British Columbia remains committed to making it easier for vendors of all sizes and types to participate in procurement opportunities. British Columbia buyers must engage with vendors through requests for information and other events, and provide early notice to the marketplace of significant upcoming planned procurements to give all potential suppliers adequate time to prepare. In an effort to increase participation by diverse businesses and communities, buyers must collaborate across government to identify gaps and opportunities to increase participation and use **BC Bid**, British Columbia's online marketplace for procuring goods and services, to provide transparency in purchases.

The Ministry will develop a framework to help buyers include measures for buying local in their purchasing criteria where appropriate and lead a pilot project to make procurement and contract documents more accessible, including the use of plain language.

Mission 3: Build capacity

The Plan will build greater capacity for procurement in the British Columbia public service through enhanced career planning, training and support. The Plan establishes that British Columbia must require all public servants involved in procurement and contract management to have baseline procurement and contract management knowledge through training. Government buyers will be supported to receive up-to-date procurement and contract management skills training, and collaboration across government will identify opportunities and gaps, and help build good procurement practice standards.

The Ministry, along with the BC Public Service Agency, will create and promote clear career pathways in procurement to recruit and retain public procurement professionals, update procurement training, support and tools, and develop operational policy, guidelines and resources and improve tools and templates to create consistency in the way procurement professionals purchase goods and services.

What to Expect

One of the most tangible aspects of the plan is the implementation of the **Social Impact Purchasing Guidelines** for purchasing services under $75,000. Smaller B.C. government purchasers may be seeking to include criteria related to supplier diversity (creating opportunities for diverse suppliers such as Indigenous peoples and employment equity seeking groups which could impact people with disabilities and other traditionally underrepresented groups) and workforce development (offering apprenticeships, skills training and other developmental support to employees, contracts or volunteers, including diverse supplier groups). Smaller vendors should be prepared to explain how they satisfy these social value criteria to increase their chances of winning projects. The Ministry intends to recommend that social, Indigenous, environmental and economic guidelines are established for purchases exceeding $75,000, so suppliers for larger procurements should also keep these criteria in mind.

Public procurement continues to be a powerful tool to advance social policy objectives. Advancing supplier diversity and workforce development may be an additional strategic tool for suppliers looking to be successful in winning bids moving forward.

Keep Calm and Contract On: The Removal of "Contract A"? No Cause for Alarm

Ron Engineering Recap

In 1981, the Supreme Court of Canada released its decision in Ron Engineering,[1] fundamentally reshaping the tendering landscape in Canada by establishing the legal framework of two distinct contracts: Contract A and Contract B. Both of these contracts clarified the obligations and rights of parties involved in the tendering process. Contract A is formed when a contractor submits a bid, creating a binding commitment to hold the bid price for a specified irrevocability period. Contract B, in contrast, is the formal contract awarded to the successful bidder.

This landmark decision ensures that contractors honour their bids and promotes fairness in the bidding process. By preserving the integrity of the tendering system, Ron Engineering has remained a cornerstone of Canadian procurement, construction and contract law.

An Industry Alert

Given the significance of Ron Engineering, it is no wonder that the British Columbia Construction Association's ("BCCA") industry alert published on June 18, 2024 ("Industry Alert") raised some red flags. Through the **industry alert**, the BCCA notified stakeholders of the practice by certain BC public sector entities to remove Contract A in their procurement processes and documents.

The Industry Alert claims that the traditional safeguards ensuring fairness and adherence to procurement terms would be absent without the Contract A framework:

In the opinion of BCCA, the removal of "Contract A" is the most significant violation of public sector procurement processes that the construction industry has seen to date. It means that those who work in the construction industry cannot proceed on the assumption that procurement is "business as usual" where "Contract A" is removed. With the removal of "Contract A," combined with other poor or eroding procurement practices, the construction industry can no longer assume they are participating in fair, transparent and competitive procurement.

The BCCA recommends that the industry actors proceed with extreme caution in the face of this unprecedented legal landscape, as contractors would have no legal recourse for being treated unfairly without Contract A. Moreover, the Industry Alert posits that there would not be any enforceable rules in a tendering process that does not utilize a Contract A framework.

Alternatives to Contract A

Negotiable requests for proposals ("NRFPs") have been, for many years, an increasingly popular alternative to the Ron Engineering framework in the procurement landscape. NRFPs are designed to make the procurement process more efficient and less risky for both purchasers and suppliers. Under this approach, purchasers solicit proposals not as firm offers that lead to binding agreements, such as traditional binding requests for proposals ("RFP"), but rather as invitations to negotiate potential contracts. This distinction allows all parties to engage without the stringent legal consequences associated with Contract A.

A key feature of NRFPs is the absence of irrevocability. Suppliers have the flexibility to walk away from negotiations without fear of breach of contract claims, allowing them more freedom to propose innovative or unconventional solutions. Likewise, purchasers benefit from increased flexibility in structuring procurements, avoiding common law obligations such as the implied duties of fairness inherent in Contract A. Moreover, since there is no Contract A, the ability for suppliers to claim damages for breach is effectively eliminated, which reduces litigation risks for purchasers.

1 *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 111.

However, even in an NRFP scenario, parties may inadvertently form a Contract A, even with explicit disclaimers, through purchaser actions or communications with suppliers. To mitigate this risk, purchasers must avoid ambiguities in their solicitation documents, include clear disclaimers and ensure their actions are consistent with not forming a Contract A contract. The following disclaimer was found to be clear the parties did not intend a response to the RFP to create a contractual obligation in the nature of Contract A:

"This RFP is not a call for tenders or a request for binding offers and no contractual or other legal obligations shall arise between the District and any Proponent as a result of the issuance of this RFP or the submission of any Proposal in response to this RFP, until and unless the District and a Proponent enter into a contract for the services sought by the District under this RFP. For clarity and without limiting the foregoing, this RFP does not commit the District in any way to treat Proponents in any particular manner, to select a Proponent, to proceed to negotiations with any Proponent or to enter into any contract and the District may reject any and all Proposals, re-issue a new RFP or end this RFP process at any time, at its sole discretion."[2]

No Cause for Alarm

Concerns regarding the potential impact of removing Contract A on procedural fairness in British Columbia's public procurement processes merit consideration but may be overstated. While Contract A traditionally offers a structured framework for fairness and transparency, its absence does not inherently undermine these principles. Public sector purchasers utilizing NRFPs remain subject to obligations of procedural fairness and are accountable through legal mechanisms such as judicial review.

Public sector entities continue to operate within established regulatory and procedural safeguards. This ensures that transparency and accountability are upheld despite any shift in procurement methodologies. Notably, NRFP processes provide increased flexibility, allowing both purchasers and suppliers to negotiate and collaboratively adapt solutions, free from rigid constraints imposed by binding tender terms. This flexibility can facilitate innovative approaches to complex procurement challenges while minimizing litigation risks.

Although the transition away from Contract A by some B.C. public sector owners is a departure traditional practices, it reflects a deliberate modernization of public procurement aimed at balancing efficiency, fairness and adaptability. By adhering to rigorous standards of procedural fairness and maintaining judicial oversight, newer frameworks still provide a stable foundation for public procurement while addressing evolving industry needs.

2 *Murray Purcha & Son Ltd v Barriere (District)*, 2019 BCCA 4.

ALBERTA

The need for procurement process improvements was back in the spotlight, along with social procurement initiatives, including a desire to support regional businesses. Supporting local suppliers was a trend, not only in Alberta but across Canada, in the public procurement space.

AG Report on Highway Maintenance Contracts Sees Room for Process Improvements

Highway Maintenance Contracting

Each year, the Department of Transportation and Economic Corridors (the "Department") spends over $320 million to keep over 64,000 lane-kilometres of Alberta highways safe and in good driving condition. The Department contracts highway maintenance to third-party contractors and oversees results. Highway maintenance includes a wide range of winter and summer activities, which include, but are not limited to winter maintenance (e.g., snow clearing and ice control), surface work (e.g., pavement and pothole patching), and traffic control (e.g., guardrails and highway lighting). In 2019, the Government of Alberta introduced performance-based contracts and limited the number of maintenance areas that any single contractor could hold, resulting in less reliance on any one contractor. As such, the Department needs effective systems to ensure contractors do the work they are paid for and extra work given to the contractors follows its procurement policies.

Audit Results and Recommendations

In November 2024, the **Highway Maintenance Contracts Performance Audit** was released by the Auditor General of Alberta (the "Report") which found that the processes used by the Department to monitor the performance of its highway maintenance contractors and support the contract structure were delinquent in multiple areas.

The Report found that the Department:

— Did not have evidence or adequate reporting from third-party contractors demonstrating how all contract requirements were being met;

— Did not always reduce payment for materials that did not meet specifications nor had enough information to determine whether work orders passed or failed quality control tests;

— Did not always comply with its sole-sourcing policy when it gave extra work to contractors and failed to document why it treated work as extra instead of tendering a new contract; and

— Lacked controls for pricing and approving all extra work and frequently failed to follow the guidance regarding the minimum number of quotes when pricing extra work.

The Auditor General recommended that the Department improve its monitoring processes to ensure contracts meet requirements and to improve its guidance and processes to administer extra work. The Report did not specify how

to meet these recommendations and has left it to the discretion of the Department to determine how it will implement these recommendations.

Innisfail Council Examines Procurement Policy in Effort to Support Local

The Town of Innisfail (the "Town") is in the process of **examining** its **procurement policy** (the "Procurement Policy") in an attempt to include a social procurement provision to support locally owned businesses.

Innisfail Procurement Policy and Local Preference Provision

This examination stems from a conversation that took place relating to a procurement agenda item during the Town's **regular council meeting** held on March 11, 2024 (the "Council Meeting"), where the Town's director of operations, Steven Kennedy (the Operations Director), requested the following:

- purchase of four pickup trucks (totalling $216,732.00) from a dealership in the Town;
- purchase of two emergency services pickup trucks (totalling $151,460.00) from a dealership in Edmonton; and
- purchase of a wheeled skidsteer (totalling $84,241.76) from a dealership in Red Deer.

The vendor dealerships were decided by the Operations Director pursuant to Requests for Quotations issued on **Alberta Purchasing Connection**, with quotes scored based on, among other things, price and warranty. Although these requests were ultimately approved, there was hesitancy from the Town's council (the "Council") to not purchase the emergency services pickup trucks and wheeled skidsteer from local vendors, who had marginally lower scores. The Council questioned the flexibility of its Procurement Policy and whether they could amend it to make it more supportive towards local businesses. The Procurement Policy outlined a procedure for tendering and procuring, in addition to obligations under specific trade agreements to which the Town is a party. The discussion led the Council to carry a motion directing the Town's administration to provide further details regarding its Procurement Policy (which was last updated on January 25, 2016) and applicable requirements in trade agreements, in an effort to support local businesses.

The Procurement Policy currently has a local preference provision that provides that if a local supplier submits a tender that is equal to or better than a non-local supplier, but of a higher price, the Town can accept the local supplier's submission subject to: (a) the maximum price variance in giving preference to a local supplier is 5%, and (b) the value of the procurement is less than $75,000 for goods and services or $200,000 for construction, after the price variance is applied. On April 1, 2024, at the **Town's Agenda & Priorities Meeting**, the Town's director of corporate services, Erica Vickers, presented on the Town's Procurement Policy and domestic trade agreements it is subject to, specifically the **New West Partnership Trade Agreement** ("NWPTA") and the **Canadian Free Trade Agreement** ("CFTA"). The summary below is a helpful primer regarding NWTPA and CFTA obligations.

Overview of Domestic Trade Agreements

The western Canadian provinces are all members of the regional NWPTA, a trade agreement created in 2010 that seeks to integrate the economies of Alberta, British Columbia, Saskatchewan and Manitoba, rather than provide unfair advantages for local economies. The NWPTA

establishes an interprovincial barrier-free marketplace and a framework for cooperation among the western provinces to boost their economies.

Federal, provincial and territorial governments are all members of the CFTA, a trade agreement entered into force on July 1, 2017, that seeks to "secure an ambitious, balanced and equitable agreement that would level the playing field for trade and investment in Canada." The CFTA commits these governments to a robust set of free trade rules designed to eliminate trade barriers within Canada, enable free movement, and achieve a competitive economic union for Canadians.

The NWPTA and CFTA (collectively, the "Domestic Trade Agreements") provide obligations and frameworks within which government procuring entities are obliged to function. These Domestic Trade Agreements generally apply to: (a) federal entities; (b) provincial entities; (c) publicly funded "MASH" entities, which include municipalities, academic institutions, school boards, and health and social services agencies; and (d) Crown corporations (collectively, the "Procurement Entities"). The following types of procurements are covered by the Domestic Trade Agreements: (a) all goods (with narrow exceptions); (b) specific services; and (c) procurement by any contractual means (collectively, the "Procurements").

There are specific value thresholds when the obligations under these trade agreements are triggered for Procurements. With respect to a MASH entity, obligations under the NWPTA are triggered when a MASH entity is procuring: (a) goods above $75,000, (b) services above $75,000, and (c) construction above $200,000; obligations under the CFTA are triggered when a MASH entity is procuring: (a) goods above $100,000, (b) services above $100,000, and (c) construction above $250,000 (collectively, the "Covered Procurements"). There are four general procurement obligations (the "General Obligations") under the Domestic Trade Agreements for Covered Procurements: openness, non-discrimination, non-circumvention and transparency.

The New West Partnership published **guidelines** in 2022 (the "Guidelines") relating to procurement obligations of domestic and international trade agreements, including the NWPTA and the CFTA. The Guidelines provide a list of practices
that would offend the General Obligations, some of which include:

— extending a preference for local or domestic Covered Procurements;

— imposing conditions on an invitation to tender, registration requirements, or qualification procedures based on the location of the supplier's place of business;

— creating unnecessary obstacles to trade; and

— using price discounts or preferential margins to favour particular suppliers.

Notably, the NWPTA and CFTA do contain some carve-outs relating to regional economic development.

Other Efforts to Support Local

While the Town is still in the process of examining its Procurement Policy in an attempt to include a social procurement provision to support locally owned businesses, this reflects a trend among procurement entities across Canada to examine their own procurement policies and the Domestic Trade Agreements in an effort to maximize the success of local suppliers.

Regional Municipality of Wood Buffalo and Lac La Biche County Advocate for the Abolishment of the NWPTA:

At the Alberta Municipalities' **2023 Convention & Trade Show**, the Regional Municipality of Wood Buffalo and Lac La Biche County submitted a **resolution** (the "Resolution") that Alberta municipalities advocate for the Alberta government to abolish the NWPTA, as it would permit greater opportunities for local sourcing. The Resolution provides that the NWPTA is restrictive in terms of procurement policies and process, as the monetary thresholds to be subject to the trade agreement, are less than under the CFTA. According to the Resolution, this creates an advantage for public bodies and contractors outside the western Canadian provinces, while disadvantaging municipalities and contractors within the western provinces. The Resolution was subsequently adopted.

The Alberta government's Minister of Jobs, Economy and Trade (the "Minister of Trade") responded by way of a **letter** in December 2023, expressing support for the NWPTA and a desire to recruit more provinces to join the trade agreement. The Minister of Trade did, however, raise the possibility of discussing the monetary thresholds with the other provinces, and noted that all parties to the NWPTA would need to consent to adjust the threshold.

The Resolution is currently active, and Alberta Municipalities will monitor the actions of the Alberta government to see if changes to the monetary thresholds are made.

Newfoundland and Labrador Introduces Two New Procurement Strategies:

On February 5, 2024, the government of Newfoundland and Labrador **announced** the introduction of two new procurement strategies, the **Newfoundland and Labrador First Procurement Strategy** and the **Sustainable Procurement Strategy** (collectively, the "Newfoundland Procurement Strategies"). The Newfoundland Procurement Strategies aim to maximize the success of local suppliers in obtaining government contracts, support local supplier development, and increase sustainable practices in purchasing. Notably, the Newfoundland and Labrador First Procurement Strategy focuses on local supplier procurement success by maintaining a provincial preference discount and promoting the use of exemptions under trade agreements.

The Newfoundland Procurement Strategies stem from a local preference provision that was added to the province's **Public Procurement Regulations**[1] in 2020, that provides for an allowance of 10% for provincial suppliers for procurements under certain monetary thresholds. The 10% allowance is the maximum permitted under the CFTA.

Ontario Publishes Regulations Providing Preference to Ontario Companies:

On April 2, 2024, the government of Ontario **announced** a new **regulation**[2] (the "Ontario Regulation") implemented under the ***Building Ontario Businesses Initiative Act, 2022***[3] The Ontario Regulation, which came into force on April 1, 2024, aims to give businesses in Ontario access to more government and public sector procurement opportunities. The Ontario Regulation provides that Ontario's public sector must give preference to Ontario businesses when conducting certain low-value procurements, under applicable trade agreement thresholds.

Alberta Union Challenges Transit Outsourcing Reasons for Decision

In April 2024, the Alberta Labour Relation Board ("ALRB") issued **Reasons for Decision** in the case of *Amalgamated Transit Union, Local 569 v. City of Edmonton*, which addressed the outsourcing of on-demand transit services. The union argued that the new operator's employees should be covered by the City's collective bargaining agreement, which applied to the City's internal municipal transit workers. The union claimed it was a related activity to the main ETS transit system and that the City had the potential to control or direct the new operator's employees, as embodied in the collective bargaining agreement. In the ALRB's ruling, it determined that the City did not exercise "common control and direction" over the contractor, the on-demand transit services included some operational integration with the core transit services, but this did not justify recognizing the new operator's employees as part of the City's collective bargaining agreement, and the outsourcing did not affect the number of existing City staff who operated the City's core transit system. Therefore, the ALRB concluded that there was no basis to extend the City's collective bargaining agreement to the external operator's new on-demand drivers.

This ruling highlights the importance of considering collective bargaining agreements during procurement planning by emphasizing that contracting out is a fundamental management prerogative that is presumptively valid unless restricted by protections in a collective agreement. The case underscores the union's concern over whether employees would enjoy the terms of the current collective agreement or need to negotiate a new one, and the union's efforts to ensure existing agreements apply. Procuring bodies should assess potential collective bargaining impacts and ensure bidders are informed of any flow-through impact that collective bargaining agreements, or employment commitments more generally, could have on newly awarded contractors who bid to take over work that was previously performed internally, or by a prior external service provider, for that public institution. Conversely, unions can protect bargaining rights by negotiating specific prohibitions against contracting out in the collective agreement.

1 NLR 13/18.
2 O Reg 422/23.
3 SO 2022, c 2, Schedule 2.

SASKATCHEWAN

$10 Million Lawsuit Against Government of Saskatchewan Over Alleged Breach of Procurement Contract

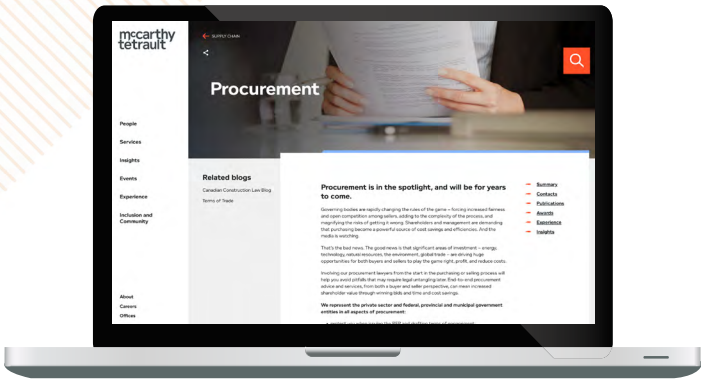
On November 8, 2024, Shercom Industries ("Shercom"), a Saskatoon-based rubber manufacturer, initiated a $10-million lawsuit in the Saskatchewan Court of King's Bench against the Government of Saskatchewan ("GoS"). The lawsuit alleges breach of contract related to the GoS's public procurement process and injurious falsehoods allegedly perpetrated by the Tire Stewardship of Saskatchewan ("TSS"), a provincial regulatory body overseen by the Ministry of Environment, and TSS's CEO, Stevyn Arnt.

Shercom's statement of claim asserts that the GoS made specific commitments in 2017 regarding Shercom's future operations. The GoS allegedly committed to providing a long-term contract for Shercom, ensuring a supply of scrap tires, and offering Shercom input in the future of the industry ("Government Commitments"). These commitments allegedly led Shercom to rebuild its facility after it was destroyed by a fire in 2016. Shercom's lawsuit centers on a 2021 **request for proposal** ("RFP") issued by the TSS. The RFP sought a second tire recycler, ostensibly to operate in southern Saskatchewan. Shercom, the Province's sole scrap tire recycler since 1993, alleges that TSS's RFP criteria were ambiguous – seeking a "second processor" rather than simply a "second location." Shercom claims this ambiguity unfairly excluded the company from participating in the tender process and that the contract was predetermined to favour Crumb Rubber Manufacturers Co. ("CRM"), a U.S.-based competitor who was ultimately **awarded** the contract in December of 2022. In late 2023, Shercom partnered with the Emterra Group to participate in a bid relating to an RFP for a northern tire recycling plant, which was ultimately rejected by the TSS.

Shercom alleges that the TSS's decision to award CRM the southern processing facility contract in December 2022 and the rejection of its 2023 bid disrupted market stability and fragmented the tire recycling industry, constituting a breach of contract in relation to the GoS's 2017 commitments to Shercom. These actions, Shercom claims, led to the loss of 40% of its market share, the shutdown of its processing plant in the spring of 2023, and the layoff of 60 employees, with an additional 79 layoffs announced for December 2024. Shercom is seeking punitive damages of $10 million from the GoS for breach of contract and/or promissory estoppel, and additional damages from TSS or Mr. Arnt for alleged "injurious falsehoods" stemming from various public comments made by the TSS and Mr. Arnt. Additionally, Shercom seeks punitive damages due to TSS's conduct, described in Shercom's statement of claim as "arrogant, high-handed, […] shocking, and callously indifferent to the economic harm it has caused Shercom."

The lawsuit has drawn attention to the importance of transparency in public procurement processes and tendering documents. These concerns have been amplified by claims of former provincial politicians engaging in lobbying activities related to public procurement contracts and RFPs within the Province. Consequently, there appears to be mounting political and public pressure to ensure transparency, fairness and accountability in the context of public procurement processes.

We are closely monitoring this case and its potential implications for public procurement and RFP processes in Saskatchewan and beyond and will provide updates on developments as they arise.



FOR MORE INFORMATION, PLEASE CONTACT THE PROCUREMENT GROUP AT McCARTHY TÉTRAULT

About McCarthy Tétrault's Public Procurement Group

Our Public Procurement Group consists of more than 25 lawyers nationally. Our principal areas of practice include project development, Technology, Energy, Infrastructure, International Trade & Investment, Tax, and Public Law. Our procurement lawyers provide end-to-end legal support for both buyers and sellers, ensuring compliance, mitigating risks, and securing cost savings. We assist private sector companies and government entities at all levels in drafting RFPs, negotiating contracts, and handling bid disputes. Whether you're selling to or purchasing from Canadian markets, we help you navigate procurement agreements, optimize contracts, and resolve challenges efficiently.

Procurement is evolving rapidly, with increasing regulatory complexity, heightened competition, and greater scrutiny from shareholders, management, and the media. As governing bodies continually change procurement rules, businesses must navigate these changes strategically to minimize risks and maximize opportunities.

About McCarthy Tétrault

McCarthy Tétrault LLP provides a broad range of legal services, providing strategic and industry-focused advice and solutions for Canadian and international interests. The firm has substantial presence in Canada's major commercial centres as well as in New York City and London.

Built on an integrated approach to the practice of law and delivery of innovative client services, the firm brings its legal talent, industry insight and practice experience to help clients achieve the results that are important to them. Fostering strong values and commitment to diversity, equity, and inclusion, we are continually ensuring that we develop and bring forward a diverse, talented team of advisors to meet our clients' legal challenges.

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