Keel Cottrelle LLP
www.keelcottrelle.com

Toronto —
36 Toronto St. Suite 920 Toronto ON M5C 2C5
416-367-2900 fax: 416-367-2791

Mississauga —
100 Matheson Blvd. E. Suite 104 Mississauga ON L4Z 2G7
905-890-7700 fax: 905-890-8006

Public Sector

Procurement Law Newsletter

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Meaningful review of procurement process impossible under Crown Corporation's review policy

Dignam v New Brunswick Liquor Corp., 2014 NBQB 109 (N.B. Queen's Bench) (Court), involved an Application for Judicial Review of the New Brunswick Liquor Corporation's decision to award an agency licence for the distribution of liquor products in certain New Brunswick communities.

The New Brunswick Liquor Corporation (NB Liquor) is a Crown Corporation which oversees the sale of alcoholic beverages in New Brunswick and which has authority to appoint agents to sell alcohol in designated communities. In November of 2012, NB Liquor placed notices in several New Brunswick newspapers requesting Proposals for the appointment of agents for the sale of alcohol in the town of Hanwell.

Three companies submitted Proposals, but only two were compliant: Power Plus Technology Inc. (Power Plus), and Scholten's Hanwell Ltd.

(Scholten's). NB Liquor hired Hudson Creative Design, an independent company, to evaluate the Proposals. Hudson gave Power Plus a score of 92 and Scholten's a score of 91. NB Liquor awarded the agency licence to Power Plus.

Scholten's, which had operated a convenience store, a retail gas bar, and a restaurant in Hanwell for approximately fourteen years, filed an Application for Judicial Review asking the Court to quash the decision of NB Liquor.

The parties disputed whether NB Liquor's decision could be subject to Judicial Review. NB Liquor argued that its activities "of a commercial nature" are not reviewable, distinguishing between public and private law decisions by Crown Corporations. Scholten's contended that Crown Corporations' procurement practices have no immunity from Judicial Review.

After reviewing applicable case law, the Court concluded that the answer to the question of whether a Crown Corporation's procurement decisions are subject to Judicial Review is "sometimes". If the authority to make procurement decisions is exercised in "an improper manner", it is subject to Judicial Review. Scholten's allegation that the process was unfair was, in the Court's view, tantamount to saying that NB Liquor exercised its authority in an improper manner. Therefore, the Court decided, NB Liquor's decision was reviewable.

Scholten's submitted that NB Liquor did not act fairly because NB Liquor:

- did not disclose all documents, recommendations, and scoring with respect to the Application;
- did not provide Scholten's with any particulars regarding the reasons for its decision;
- did not conduct its evaluation within the parameters that were to be considered, including location; and
- reviewed Scholten's Proposal with a closed mind, having already notified Power Plus of its success.

After being informed of NB Liquor's decision, Chris Scholten, director of Scholten's, requested a meeting to discuss the evaluation. On February 15, 2013, Von Richter (VP of Category Management and Marketing at NB Liquor), Maurice Belliveau of Hudson, and Chris Scholten met for two hours to review the evaluation.

The Court found that NB Liquor had not provided Scholten's with any information regarding the successful Applicant and Scholten's had to go to extraordinary lengths to obtain relevant documents from NB Liquor. Under the system NB Liquor followed, it entered into a contract with the successful candidate before the unsuccessful candidate(s) was even informed of which Proposal was selected. The Court found that, under such a system, NB Liquor's reviewing committee is not open to reversing the decision and possibly incapable of reversing the decision.

NB Liquor's review policy was also problematic because it expressly limited the review process to a meeting with an Applicant to recap the Corporation's evaluation of the Applicant's offer. The policy required an Applicant to demonstrate that the Corporation had "*misinterpreted critical elements of the applicant's proposal*" before the Corporation would review its evaluation of the Proposals.

The Court held that, in light of the importance of the decision to both Applicants and to the public interest in ensuring that such decisions are made openly and fairly, the duty of fairness required NB Liquor to do more than have a brief meeting with Chris Scholten. Rather, the Court stated, "*The party seeking a review must be provided with more information and the person or persons conducting the review must be open to the possibility of reviewing its decision*."

Scholten expected a meaningful review with the possibility of altering the decision. Since this

was not possible under NB Liquor's procedures, the Court quashed NB Liquor's decision to award the agency licence to Power Plus. The Court's decision suggests that if there is much at stake in a Crown Corporation's procurement process —in this case, a lucrative alcohol sales monopoly —there must be a meaningful review process in place to ensure the process is fair.

The decision also exposes NB Liquor to liability to Power Plus. Of course, this also occurs in other situations where the award is given to the "wrong proponent".

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Municipality satisfies duty of fairness despite not following its own procedure

North End Community Health Assn. v. Halifax (Regional Municipality) (appeal by Jono Ltd.), 2014 NSCA 92 (Nova Scotia Court of Appeal) involved the sale of a school site.

In March, 2008 the Halifax Regional School Board declared a school in the municipality to be surplus. The school closed at the end of the school year in 2011. The Halifax Regional Municipality (HRM) took vacant possession of the school property that year.

On June 28, 2011, HRM issued an RFP inviting Proposals for the purchase and redevelopment of the school. The participants in the RFP were Jono Developments Ltd. (Jono), which bid $3 million for the purchase of the property, and a group of three community organizations (Community Groups) which submitted a purchase bid of one dollar.

The Policy and Procedure for the Disposal of Surplus Schools (Procedure), passed by HRM Council in 2000, required HRM to take certain steps if it was not retaining a property for its own use. Specifically, the Procedure required HRM to advise all community groups expressing interest that they are required to submit a written Proposal within 90 days setting out the group's purpose and management structure, the nature of the activities proposed, a financial statement, a business plan for the first five years, and a clear statement of the terms they are prepared to offer for the purchase of the property. The Procedure required HRM to evaluate all submissions received and assess their viability before carrying any submission forward as a recommendation to Executive Management and Council.

An HRM Staff Report from 2000 acknowledged a distinction between sales at market value and at less than market value. The Report stated that criteria would be developed for evaluating competing interest from community groups so as to allow for the evaluation of all disposal options (at, above, or below market value) together and not independently of each other. However, no criteria were ever developed.

The 2011 RFP provided its own criteria: understanding of intent and objectives (worth up to 30 points), qualification and experience of proponent (25), proponent's financial capability (25), and financial offer (20). Jono's unconditional offer to purchase the property for $3million received the highest score. HRM Council passed a resolution to authorize the Mayor and Municipal Clerk to enter into an Agreement of Purchase and Sale with Jono.

Around the time that the school was approved for sale to Jono, the Community Groups and HRM Council became aware of the Procedure passed by HRM in 2000. The Procedure outlined a set of procedures to be used when HRM disposed of surplus school properties. However, between 2000 and 2013, HRM disposed of 18 surplus properties without following or referring to the Procedure, and it was not referred to in the 2011 RFP.

Upon becoming aware of the Procedure, HRM Council rescinded the sale to Jono, rescinded the Procedure, and then passed a motion to sell the property to Jono. The Community Groups sought Judicial Review of HRM's decision to sell to the Appellant.

The reviewing Judge set aside the sale to Jono on the basis that HRM had breached its duty of fairness to the Community Groups by not following the Procedure and that it breached the *HRM Charter*, (S.N.S. 2008, c. 39) by selling the Property below market value. The Judge also required Jono to pay a portion of the costs awarded on the Judicial Review of HRM's decision.

Jono appealed, arguing that the motions Judge erred in law by quashing the sale of the school property and by requiring Jono to pay a portion of the costs award.

The issues before the Nova Scotia Court of Appeal were whether the reviewing Judge erred: a) in finding HRM breached its duty of fairness to the Community Groups by failing to follow the Procedure? b) in finding HRM breached the *Charter* by selling the Property below market value? and c) in ordering Jono to pay a portion of the costs awarded on the Judicial Review?

The Court of Appeal was divided in the result. The majority of the Court of Appeal allowed the appeal. The dissenting Justice would have dismissed the appeal because, in his view, HRM breached the duty of fairness owed to the Community Groups by failing to follow the Procedure.

The majority and the dissenting Justice were in agreement that HRM owed a duty of fairness to the Community Groups, but differed on what that duty required and whether it was satisfied.

The majority focused on the question of what the Community Groups' legitimate expectations were with respect to procedural fairness. First, even though the Community Groups lacked knowledge of the Procedure during the RFP, they were nevertheless entitled to expect that HRM would abide by its own enactments.

However, the majority found that the Judge erred by equating the duty of fairness with the content of the Procedure. The majority described the Procedure as a representation of Council which gave rise to legitimate expectations, but added that legitimate expectations is just one factor to be considered in formulating the duty of fairness.

The purpose of the doctrine of legitimate expectations is especially to protect parties' reliance on an administrative agency's procedural undertakings, rules, or past practices and to prevent arbitrary conduct. In order to give rise to a legitimate expectation, the practice or conduct of the administrative agency must be clear, unambiguous and unqualified. Legitimate expectations serve not the actual expectation of an individual who may have been unaware of its existence, but to preclude procedural arbitrariness.

The majority of the Court of Appeal was satisfied that the Procedure gave rise to a legitimate expectation "*that the Community Groups would be entitled to participate in HRM's decision to dispose of surplus school properties in a* ***substantially similar manner*** *to the one [in the Procedure]*." (emphasis added) Strict compliance is not the focus; fairness is. The question is whether there has been a failure to comply with the legitimate expectations in a "material respect."

The Procedure provided that only those Proposals that met "*HRM's fiscal goals for the accommodation of community programs*" were to be carried forward as a recommendation to HRM. However, the Procedure did not specify the criteria for evaluating feasibility or alignment with fiscal goals.

The majority found that the RFP granted the Community Groups participatory rights that were substantially similar to those contemplated in the Procedure. They had the opportunity to make Proposals that were considered on more than just a financial basis. The Procedure required granting interested parties 90 days to prepare a Proposal; in this case the interested groups were advised as early as 2009 that Proposals would be called.

One notable disparity between the Procedure by Council in 2000 and the procedure actually followed in the RFP was that the Procedure

called for community submissions to be considered separately by the Community Grants Partnership Program, which did not occur. However, the majority was satisfied that the Team Lead of Grants and Contributions participation in both drafting the RFP and evaluating the non-profit submissions within the RFP Committee resulted in a substantially similar process.

Overall, the majority found the RFP process to be consistent and predictable. HRM had used the same process to sell 16 of 18 surplus schools in the past decade. The majority found that HRM had consistently represented to the public and to interested groups that it would follow the RFP process that was in fact used for the disposition of this property.

The dissenting Justice reasoned that, although the Procedure did not specify the criteria for evaluating feasibility or alignment with fiscal goals, it contemplated giving non-profit Proposals a fair chance and the process used in 2012 failed to do so.

The Court of Appeal unanimously found that the motions Judge also erred in finding that HRM breached the *HRM Charter* by selling below market value. There was ample evidence to support HRM's determination of the sale price. The Judge relied on the fact that Jono was willing to pay up to $4 million. However, Jono's offer was clear that it was adjustable upward only if there were competing price offers, but there were none.

Finally, the motions Judge did not err in awarding partial costs against the Appellant. However, in light of the decision being overturned, the costs award was nullified and any costs paid by Jono and HRM were ordered to be returned. Costs were awarded to Jono.

The majority applied a practical perspective to the issue of "legitimate expectations" relating to procedural fairness.

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Court of Appeal protects documents belonging to a civil action defendant from public disclosure due to RFP-related content

D+H Limited (D+H), in the course of defending a civil action, brought a motion for an Order for confidentiality to prevent the public disclosure of documents which were to be produced in the discovery stage of the action. The motions Judge held that the Defendant had failed to establish a public interest in confidentiality beyond their own commercial interest. The Order was denied.

D+H appealed. The Nova Scotia Court of Appeal in *Canadian Financial Wellness Group v. Resolve Business Outsourcing*, 2014 NSCA 98, allowed the appeal and issued a confidentiality Order. The documents for which the Order was sought were found by the Court of Appeal to be integral to servicing a Federal Government-sponsored project for which a competitive Tender call was imminent at the time the motion was heard. The Tender call would be for the re-procurement of a contract for the administration of the Canada Student Loans Program (CSLP).

The CSLP Contract in place was awarded in 2008 to Resolve Corporation, a company which D+H acquired in 2010. The Contract had a five-year term, with an additional two-year option followed by three one-year options, all exercisable by the Government. The Government exercised the two-year option, which runs until March 2015.

In 2012, the Government began the re-procurement process for the next contract to service the CSLP. In late 2012, the Government issued "Rules of Engagement" for the process. The Rules included a guarantee that "*Canada will not disclose proprietary or commercially-sensitive information concerning a Participant to other Participants or third parties, except and*

only to the extent required by law" and a term stating that "*[p]articipants will NOT reveal or discuss any information to the MEDIA/NEWSPAPER regarding the CSLP Re-procurement*…"

In August 2011, the Respondent The Canadian Financial Wellness Group Incorporated (CFW) sued D+H and Resolve Corporation. CFW claimed that it had developed a program that was designed to address the relationship between student loan borrowers and service providers. CFW alleges that Resolve and D+H became privy to proprietary information that was part of CFW's program and wrongly used that information for profit.

The parties exchanged notices of documentary disclosure. D+H/Resolve's notice listed almost 600 documents. The list included training and systems manuals for their customer service representatives and scripts for use by their representatives in communications with student borrowers. D+H viewed its systems documents as containing proprietary and commercially sensitive information that would benefit other bidders in the competitive bidding process for the new CSLP contract.

D+H agreed that these documents were relevant and should be disclosed to CFW, but wished to avoid public disclosure because it would make the information available to their competitors for use in the impending bidding process. Specifically, D+H was concerned that CFW might attach the information to Affidavits for an upcoming Motion, meaning the information would be on the public Court Record and accessible to its competitors.

Rule 85.04 of Nova Scotia's Rules of Civil Procedure authorize a Judge to grant a confidentiality Order in certain circumstances. Federal Court Rule 151 and section 137 of Ontario's *Courts of Justice Act* also provide Judges with this authority.

The leading case on when a confidentiality order is appropriate is *Sierra Club of Canada v Canada (Minister of Finance)*, a 2002 Supreme Court of Canada decision. The Court of Appeal summarized the test laid out by the Supreme Court of Canada in *Sierra Club* as follows:

*To summarize the test's two branches, the judge determines whether **(1)** the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and **(2)** the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. **For the first branch, the important interest must (a)** be real, substantial and well-grounded in the evidence, and **(b)** involve a general principle of public significance, rather than be merely personal to the parties, while **(c)** the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.* [emphasis added]

The motions Judge's rejection of D+H's request for a confidentiality order was, in the Court of Appeal's view, based on too narrow an interpretation of "important public interest" in part 1 of the above test.

Simply because D+H have an obvious private interest in obtaining a confidentiality Order does not mean there is no concurrent public interest, the Court of Appeal explained. The Government's Tender call is for a publicly funded, several-hundred million dollar contract for a government-sponsored program governing loans to thousands of students across the country. As the confidentiality requirements of the Rules of Engagement for the Re-procurement make clear, the integrity of the tendering process is a matter of public interest.

If D+H's material were publicly available, its competitors could tailor their Tenders to that material, while D+H could not do the same with its competitors' information. This would contravene the Government's commitment to

proceed with "*the utmost of fairness and equity between all parties*." The Court of Appeal accordingly found that there was an important public interest at stake, and that there was no reasonable alternative to a confidentiality Order that could preserve this interest.

As for the second part of the *Sierra Club* test, the Court of Appeal noted that no media representative had objected to a confidentiality order and there was little discernible public appetite for D+H's operational manuals and scripts. Moreover, the material would still be available to the parties and to the Court, and D+H had not requested any restrictions on public access to or media reporting on the Trial of the civil action.

The Court of Appeal held that D+H met the tests in *Sierra Club*, and granted the confidentiality Order.

The decision provides insight into a procedural process to protect confidential procurement information in civil proceedings.

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Court reviews recommendations made by Board to Nunavut's contracting authority

The procedural background to *Nunavut Innovative Health Solutions v. NNI Contracting Appeals Board*, 2014 NUCJ 29 (Nunavut Court of Justice) (Court), is somewhat complex, but can be summarized as follows. Following a tendering process, the Government of Nunavut awarded a contract for the provision of dental services to Nunavut Innovative Health Solutions (NIHS). Two unsuccessful proponents appealed Nunavut's award of the contract to NIHS. The NNI Contracting Appeals Board (Board) concluded that the Contracting Authority erred in its application of the relevant policy and made recommendations to the Contracting Authority.

The Board's recommendations "raised a cloud" about the legal validity of the tendering process and opened the issue of bid repair and recommended shortening the contract and retendering. The successful proponent, NIHS, applied for Judicial Review of the Board's "decision"—namely, its issuing of recommendations to the Contracting Authority. The Board moved for Summary Judgment, claiming that its recommendations were not subject to Judicial Review. The Court disagreed, asserted its jurisdiction to entertain NIHS's Application for Judicial Review, and dismissed the Board's motion for Summary Judgment.

There were two issues raised by the Board's motion. First, a preliminary issue was whether the Board had the right to raise the argument that its recommendations are not subject to review, given that it is the Board's decision that is being reviewed. The second issue was whether the Court should conduct a Judicial Review of the Board's decisions, given that its authority is limited to making recommendations to the Contracting Authority.

On the first issue, the general legal rule is that the administrative body (the Board in this case) whose decision is at issue before a Court should play a limited explanatory role. However, one exception to the general rule, which the Court found applied in this case, is where there is no one else to defend the decision of an administrative body.

On the second issue, the Court drew on a number of legal precedents to support the reviewability of recommendations. Exceptions to the generally accepted proposition that non-binding recommendations cannot be the subject of Judicial Review have developed through case law. One exception is where there is a legislative scheme in which an administrative tribunal makes recommendations that can be accepted or rejected by the final decision maker. Another exception is where a recommendation would

affect the legal rights or interests of a party. The Court relied on the latter exception in this case.

The Board argued that its recommendations do not qualify as a "decision" because they were not adopted. At the time of the hearing of the Board's motion, the Minister had not acted on the Board's recommendations and therefore, the argument went, its recommendations constituted neither a decision in themselves nor the foundation for the decision of another decision maker.

Nevertheless, the Court adopted a broad and flexible approach, noting that the term "decision" has no fixed or precise meaning but depends on the statutory context, having regard to the effect on the rights and liberties of those seeking Judicial Review.

An important fact in this case was that the Minister responsible for the Contracting Authority had expressly decided to postpone any decision concerning the Board's recommendations until Judicial Review of the Board's recommendations concluded. The Court found that the issues raised in the Application for Judicial Review must be addressed as soon as possible and that Judicial Review could prevent unnecessary litigation.

The Board had decided that the Contracting Authority erred in applying the NNI procurement policy. The Court concluded that the Board's recommendations had the potential to affect NIHS regardless of whether they are implemented by the Contracting Authority. In addition, the Court found that, if left unchallenged and undisturbed, the decisions of the Board could preclude the Court from considering the same issue in the losing proponents' Applications for Judicial Review because rearguing the same issue already decided by the Board could be regarded as a collateral attack or as abuse of process.

Finally, the Court noted that the NNI procurement policy has a significant impact on the business community and private enterprise in Nunavut, because the Government of Nunavut plays a large role in the economy, and the rules of natural justice and procedural fairness apply to some aspects of the work of the Board. Both of these were important factors in concluding that the Court should judicially review the Board's decision.

This decision confirms principles applicable to challenging recommendations as opposed to decisions.

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Court finds corporate reorganization amounts to a bid "transfer" prohibited by Public Works' Standard RFP Instructions

Public Works and Government Services Canada issued an RFP in January, 2012 for the construction of a radar system. Prior to issuing the RFP, Public Works had determined through its Solicitation of Interest and Qualification process that only five companies were qualified to bid on the contract. Among them was Selex, an Italian aerospace, defence and security-related electronics manufacturing company headquartered in Rome, Italy. It is one of a number of related companies owned by Finmeccanica, Italy's largest hi-tech industrial group.

Public Works' January 2012 RFP incorporated by way of reference certain parts of its Standard Acquisition Clauses and Conditions. These "Standard Instructions" expressly provided that "*[a] bid cannot be assigned or transferred in whole or in part*."

Selex and the other pre-qualified bidders submitted Proposals prior to the closing on May 2, 2012. Upon the completion of Public Works' evaluation of the bids in October 2012, only those bids submitted by Selex and EADS, a Dutch company, were found to be compliant with the terms of the RFP. Public Works

evaluated the two bids in accordance with its bid evaluation matrix. Selex had submitted a lower price, while EADS had scored higher on the technical components. Public Works scored Selex's bid at 86.50 and EADS' bid at 85.74.

After Public Works had scored the bids, but before revealing the results, it sought the bidders' approval to extend the bid validity period to March 21, 2013. Selex agreed, but asked whether the contract would be awarded in or after 2012, without explaining why the timing of the bid selection mattered.

On January 1, 2013, Selex underwent a corporate reorganization, as did a number of its sister companies, all of whom were owned by Finmeccanica. Prior to the reorganization, Finmeccanica operated its defence and security electronics system business operations through three Italian companies. Finmeccanica consolidated all of its defence and security electronics companies, with the intention of creating one European entity: Selex ES.

The manner in which Finmeccanica proceeded in its reorganization formed the crux of the dispute in this case. Selex argued that its business was "*transferred as a going concern and integrated into Selex ES*." The entirety of Selex's business, including its assets, operations, and personnel and administrative infrastructure, were transferred to Selex ES.

Selex informed Public Works of its reorganization on January 9, 2013, advising Public Works that Selex ES had "succeeded" Selex in its bid. In response, Public Works inquired into the nature of the corporate reorganization. Selex informed Public Works through counsel that all of Selex's assets and personnel had been transferred to Selex ES, but Selex was kept in existence only "*to handle some administrative and legal proceedings*" before being wound up. Selex also informed Public Works that the reorganization had "substantially the same effects" as a merger and that its bid for the radar project was included in its Sale of Business Complex Agreement.

On March 21, 2013, Public Works awarded the contract to EADS and so advised Selex without providing further details. On April 15, 2013, Public Works advised Selex in writing that its bid had been determined to be non-compliant "*as a result of enquiries stemming from its January 9, 2013 letter advising Public Works of its corporate restructuring*."

Selex filed a Notice of Objection with Public Works, but Public Works advised that its decision would stand because Selex had transferred its industrial and technological capabilities and the bid itself and was therefore not able to perform the necessary work and had contravened the prohibition in the RFP against transferring a bid. Selex applied for Judicial Review.

In *Selex Sistemi Integrati S.p.A. v. Canada (Attorney General),* [2014] F.C.J. No. 298, the three issues before the Federal Court of Canada on review were: (a) Did Public Works err in its interpretation of the clause that prohibited the assignment or transfer or bids?; (b) Did Public Works err in determining that Selex violated the anti-assignment clause by its reorganization?; and (c) Did Public Works breach its duty of procedural fairness to Selex?

For each of these issues, it was necessary for the Court to select a standard of review. The two possible standards by which a Court may review a decision of a government body are reasonableness and correctness. A reasonableness standard is more deferential, whereas a correctness standard demands that a decision be not just reasonable, but right. The Court applied the correctness standard to issues (a) and (c), and a reasonableness standard to issue (b).

In order for a transfer or assignment to occur, the transferor/assignor and transferee/assignee must be separate entities. The key thing is that a transfer or assignment of a bid has the effect of changing the bidder during the process. The Court concluded that Public Works was correct in its analysis of the meaning of the prohibition against transfer or assignment.

On the second issue, the Court held that Selex's reorganization had in fact resulted in the transfer of its bid to another corporate entity and had rendered Selex incapable of meeting the RFP's technical and management requirements, as virtually all of its assets and personnel had been transferred. Whether the reorganization amounted to a merger in Italian law, as Selex argued it did, was irrelevant. Selex ES was not a continuation of Selex, as the latter continued to exist.

All the information and documents available to Public Works confirmed that Selex had transferred its bid to Selex ES, a separate entity that had not been pre-qualified as a potential bidder for the Radar project. It was therefore reasonable for Public Works to find the bid non-compliant. In fact, the Court stated that Public Works was bound to consider Selex's bid non-compliant, as a failure to do so could have been considered unfair toward other bidders.

On the final issue, Selex argued that Public Works breached the duty of fairness by not informing Selex that its bid was not compliant before awarding the contract to EADS. The Court, however, found that the fact that Selex could have been advised of its non-compliance earlier changed nothing, as Public Works' decision was compliant with its RFP. Public Works' contracting officer explained, Public Works' standard practice "*is intended to be fair to all bidders*" and "*to prevent attempts at 'bid repair*.'"

As the Court stated, "*Although the question as to what is a transfer or an assignment for the purpose of […] the RFP is a pure question of law, it is certainly not a complex one*." Public Works stuck by the standard practice it had incorporated into the process, did not allow for 'bid repair', and was justified in finding Selex's bid to be non-compliant.

Transfers or assignments are becoming more common and the principles in this decision can assist agencies and bidders.

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Ongoing litigation regarding alleged breach of duty of fairness subjected to case management

Canada Forgings Inc. v. Atomic Energy of Canada Ltd., 2013 ONSC 5347, (Ontario Superior Court((Court) is a case that involved a tender that did not result in a "Contract B" being formed. After the tender expired, the defendant, Atomic Energy of Canada Ltd. (AECL) engaged in direct negotiations and contracted with certain parties, but not Canada Forgings Ltd. (CanForge).

CanForge filed an action based on breach of duty of fairness, among other causes of action. The defendant filed for Summary Judgment. CanForge's defamation claim was dismissed in the Summary Judgment, but the Court allowed the other issues to proceed to trial.

By way of background, AECL was planning in 2004 for the refurbishment of a nuclear reactor owned by Bruce Nuclear Power. On September 1, 2004, AECL requested tenders from the three qualified suppliers: Invar, Donlee, and Precision Nuclear Inc.

AECL received bids from these three on October 12, 2004. Invar submitted the lowest compliant bid. The bidders on the main refurbishment project had to arrange pricing from subcontractors and suppliers. CanForge submitted a bid for end fittings which was less than that of Patriot. Patriot was the supplier of the end fittings for Invar.

The project had two major components. One was fuel channel end fittings and forgings. There were only three potential suppliers in this area: Invar, Donlee, and Precision; and there were only two potential suppliers for the forgings: CanForge and Patriot.

The tender stated that the bids were open for 180 days. A contract was not entered into between AECL and Invar within 180 days

because of a delay in AECL signing a prime contract with Bruce Power. AECL's position was that, because there was no acceptance during the 180 days, the tender period had ended and it was allowed to deal with contractors directly. AECL then entered into direct negotiations with Invar and Patriot. The project was not retendered. AECL awarded the contract to Invar. In October, 2005, AECL also signed a contract directly with Patriot.

CanForge's position was that when AECL entered into direct negotiations with Patriot and Invar, it should have dealt with CanForge on the same basis because AECL owed it a duty of fairness. CanForge stated that because of the conduct of AECL, the tender did not close within the 180 days and AECL was therefore not free to deal with contractors directly. AECL had issued an addendum which made a number of changes to the original tender documents. CanForge argued that by making these changes, the tender process was extended.

The Court agreed that AECL had a duty to act fairly with all persons or corporations it comes into contact with in a competitive procurement process. If there were an extension of the bid time, it would have to be made available to all the parties in the original tendering process, but the Court found that none of the evidence suggested that there had been an extension of the time.

Nevertheless, the Court held that there were arguable questions relating to the duty of fairness issue, namely: if CanForge was the lowest bidder, why was there no reason given for not asking them to bid a second time?; and did AECL not disclose all the information that would have helped CanForge understand why it was not allowed to bid? The Court was not willing to dismiss the issue of the alleged breach of the duty of fairness at the summary hearing. The Court found that resolving it would require oral evidence given the sheer volume of material, the conflicts in the evidence, and the magnitude of the action.

Another issue that was allowed to proceed to trial was the limitation period issue. The parties agreed that if CanForge was aware of a potential action on or before April 27, 2009, its claim for breach of the duty of fairness would be statute barred for having been made too late. CanForge stated that its knowledge of the duty of fairness was incomplete and that it felt something was wrong but was not sure exactly what. The fact that the project was delayed for legitimate reasons and there was uncertainty surrounding when AECL in fact entered into a contract directly with Patriot for the supply of end fittings made it difficult to determine whether CanForge had waited too long to file an action. The Court decided that a full hearing would be necessary on this issue as well.

Summary Judgment can be a valuable tool to avoid expensive litigation where it is possible to safely predict the result without a trial. Unfortunately for AECL in this case, after 6 days of hearings on this motion for Summary Judgment, the motions Judge had to finally conclude, "*In hindsight I should have dismissed the motion for summary judgment at the onset of the motion*" because of the sheer volume of the material, the contradictions between witness Affidavits and examinations, and the magnitude of the action.

AECL appealed the dismissal of its motion for summary judgment to Divisional Court. Its appeal was dismissed (2013 ONSC 6145). The Divisional Court stated in its dismissal of the appeal: "*This is a case that has languished and suffered from being 'motioned to death' rather than being moved forward in a timely and economical manner for the benefit of the parties. It is time that occurred. This is also a case, given its procedural history, that would benefit from judicial case management and I invite the parties to seek that assistance from this court.*" The Divisional Court also awarded $12,500 in costs.

Once again, these decisions confirm the complexity of procurement litigation.

MFIPPA request for details of Town RFP granted, in part

The Town of Halton Hills (Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (Act) for access to the successful Proposal in a particular Request for Proposal (RFP) issued by the Town, as well as the evaluation materials the Town used to select the successful Proposal.

The Town denied access to portions of the evaluation materials. In *Order MO-3058-F* (June 10, 2014), the Adjudicator upheld the Town's decision to withhold access to some information under sections 10(1) (third party information) and 14(1) (personal privacy), but ordered disclosure of other portions.

Section 10(1) of the Act is designed to protect the "informational assets" of businesses or other organizations that provide information to government institutions. For it to apply, the institution and/or third party must satisfy each part of the following test: 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and 3. the prospect of disclosure must give rise to a reasonable expectation that one of the harms listed in paragraphs (a)-(d) of section 10(1) will occur (described below).

Applying the first part of this test, the Adjudicator found that both the successful Proposal and the evaluation materials fit within the definition of commercial information as they relate solely to the buying, selling or exchange of merchandise or services.

Under the second part, information may qualify as "supplied" if it was given directly to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. The fact that some of the terms proposed in the successful Proposal came to be included in the Town's contract with the proponent does not transform the original Proposal from information "supplied" into a "mutually generated" contract. The Adjudicator distinguished the circumstances of this case from those cases where the successful Proposal becomes the basis of the commercial arrangement and no separate contract is created.

The evaluation materials, though created by the Town's employees, incorporated information supplied through the affected parties' Proposals. These materials include descriptions of the proponents' methodology, examples of prior or current work, descriptions of their workforces, and financial details of their Proposals. The Adjudicator was satisfied that the evaluation materials were also "supplied" to the Town within the meaning of s. 10(1).

The second part of the test for section 10(1) requires not only that information be "supplied", but "supplied in confidence". The supplier must have an expectation of confidentiality based on reasonable and objective grounds at the time the information was provided. In this case, the successful Proposal was treated consistently in a manner indicating concern for its protection and it was not otherwise publicly available at any time. It therefore met this part of the test. The evaluation materials also met this component of the test. The other affected parties also submitted their Proposals with an expectation of confidentiality, and it was the information from all the Proposals that was used by the Town to create the evaluation materials.

The third part of the test requires a risk that disclosure could result in one of the following harms, to paraphrase section 10(1)(a)-(d): (a) significant prejudice to competitive position, (b) similar information may be withheld in the future though it is in the public interest for it to continue to be supplied, (c) undue loss or gain to any party would result, or (d) reveal information to a person appointed to resolve a labour dispute. The standard of proof is, as the

Supreme Court of Canada recently confirmed in *Merck Frost Canada Ltd. v. Canada (Health),* (2012), S.C.C. 3, "*a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities*". The party claiming the exemption must provide "detailed and convincing" evidence.

The detailed fee Proposal of the successful submission was exempted under (a) and (c), as it revealed details of the successful proponent's approach to the project that could aid its competitors in future bids. Not exempt was information about the size and value of the successful proponent's previous projects, the approximate number if its employees, its annual business volume, its membership in an industry organization, and the roles that certain employees would fulfill on the project. No significant risk of prejudice and no undue loss or gain could be shown to be reasonably expected to result from disclosure, meaning (a) or (c) did not exempt this information. For the same reason, the Adjudicator found that disclosure would not impact contractors' willingness to provide such information in the future under (b).

Similarly, the detailed financial components of the Proposals contained in the evaluation materials were exempt from disclosure, as were details of parties' methodologies and certain financial details of previous projects performed by the proponents and financial information about their businesses. Not exempt were the *total* value of the construction management fee Proposal from each proponent and the total value and size of proponents prior projects.

Finally, the Adjudicator addressed the application of section 14(1) of the Act. To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. However, even if information relates to an individual in a professional or business capacity, it may still qualify as personal information if it reveals something of a personal nature. For section 14(1) to apply, it must be reasonable to expect that an individual may be identified if the information is disclosed.

The Town and the successful proponent submitted that certain highlighted portions of the successful Proposal contain the personal information of employees of the successful bidder. The Adjudicator held that information similar to that found in resumes, such as employee work histories and references, fell within the section 14(1) exemption. Paragraphs 14(1)(a)-(f) contain exceptions to the general exemption for personal information in section 14(1). The only exception that could apply in this case is section 14(1)(f), which allows disclosure where it "*does not constitute an unjustified invasion of privacy*." However, section 14(3)(d) states that disclosure is *presumed* to be an unjustified invasion of privacy if it relates to employment or educational history, meaning section 14(1)(f) does not negate the general personal information exemption here. Therefore, the employees' work history and references need not be disclosed.

MFIPPA creates significant challenges for bidders and agencies with respect to confidentiality of business information and protection of personal privacy of the "team" of the bidder. While this case reinforces general principles, each case will be determined on the specific facts.

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No compelling public interest in releasing RFP records in possession of the Toronto Police

The Toronto Police Services Board (Police) received a request under the *Municipal Freedom of Information and Protection of*

Privacy Act (Act) for access to records related to a Request for Proposal (RFP) for a construction management services project. The requester specified that she sought access to a copy of the successful submission, all score cards, meeting minutes, evaluation notes and interview notes pertaining to the award of the project.

The Police refused to disclose the records, relying on the mandatory third-party information exemption in section 10(1) of the Act. The Requester appealed to the Ontario Information and Privacy Commissioner (Adjudicator). In *Interim Order MO-3080-I,* [2014] O.I.P.C. No. 165, the Adjudicator upheld the Police's decision to withhold most of the records, except for information from a proponent who consented to disclosure and certain portions of the records which did not qualify for an exemption.

There were two issues in *Interim Order MO-3080-I*. First, did the mandatory exemption in section 10(1) apply to the records? Second, under section 16 of the Act, was there a compelling public interest in disclosure that clearly outweighed the purpose of the section 10(1) exemption?

The Adjudicator's analysis of the first issue parallels the analysis in the *Halton Hills* case, above. In short, section 10(1) limits disclosure of confidential commercial or financial of third parties that could be exploited by a competitor where such information was "supplied" directly or where its disclosure would allow accurate inferences to be made, where it was supplied "in confidence" (meaning the supplier had a reasonable expectation of confidentiality at the time the information was provided), and where disclosure could result in one of the harms listed in section 10(1)(a)-(d) of the Act.

The successful Proponent and the other Proponents asserted that their commercial information was supplied in confidence. The Adjudicator found that the Proposals fit within the section 10(1) exemption, although several pages of the successful Proposal containing information about previous and current construction projects of the successful Proponent were promotional in nature and available on the Proponent's website, and therefore not confidential. As for the scoring records used to select the successful Proposal, some portions were exempted and other were not, depending on whether or not they contained any commercial or other confidential information.

The Adjudicator also found that disclosure of much of the contents of the Proposals and the scoring materials would cause one or more of the harms contemplated in section 10(1) by revealing the details of the Proponents' approaches to the project. The bid amounts, however, were not protected because, on their own, they provide no insight into the commercial or financial information of the opponents that could significantly prejudice their competitive position or provide an undue gain to competitors. Other portions of the successful bid that were not protected included a description of the successful proponent's firm, legal structure and ownership history, and various positions of key staff and their roles for the project.

The Requester (Appellant) argued that, despite the section 10(1) exemption, the requested records should be disclosed under section 16. For section 16 to apply, there must be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

The Adjudicator noted that the Act is silent as to who bears the burden of proof in respect of section 16 and explained that the burden of proof cannot be absolute, since it would be seldom if ever possible for the Appellant to demonstrate a compelling public interest without the benefit of reviewing the requested records. Consequently, the Adjudicator must review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

The first question to ask when applying section 16 is whether there is a relationship between the record and the Act's central purpose of shedding light on government operations. In order to find a compelling public interest in disclosure, the information must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices. The word "compelling" has been defined in previous orders as "*rousing strong interest or attention*."

A public interest does not exist where the interests being advanced are essentially private, but where there are issues of general application, a public interest may exist. In addition, any public interest in non-disclosure must be considered; a significant public interest in non-disclosure means that disclosure cannot be "compelling" and the section 16 override will not apply. A compelling public interest has been found where records were related to the economic impact of Quebec separation, the integrity of the criminal justice system, public safety issues relating to the operation of nuclear facilities, and contributions to municipal election campaigns.

The Appellant made no submissions supporting the application of section 16, but the Police, the successful Proponent and the other Proponents all submitted that there was no compelling public interest in disclosure of the records outweighing the important purpose of the section 10(1) exemption. The Adjudicator agreed and did not see any relationship between the exempt information and the central purpose of the Act—to shed light on the operations of government.

The Adjudicator initially deferred the issue of the disclosure of employee resumes contained in the successful Proposal, which it later ruled on in *Final Order MO-3091-F* [2014] O.I.P.C. No. 199. The Adjudicator upheld the Police's decision to withhold the resumes, but did so under the mandatory personal privacy exemption in section 14(1) rather than the third party information exemption in section 10(1). Here again, the Adjudicator's analysis reflects that in the *Halton Hills* case.

In *Halton Hills*, it was held that information in the successful Proposal which was similar to information that would be contained in an employee resume was exempt under section 14(1). In this case, the successful Proponent had submitted actual employee resumes to the Police as part of their Proposal. "*As a general rule*," the Adjudicator stated, "*information associated with an individual in a professional, official or business capacity will not be considered to be 'about' the individual*." However, the Adjudicator continued, "*Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual*."

The employees' resumes contained details of their educational and employment history. Citing *Halton Hills* and other cases, the Adjudicator concluded that this type of information qualifies as personal and is exempt under section 14(1) of the Act.

Again, this Order supplements the principles set out in *Halton Hills* above.

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Adjudicator Orders disclosure of specific Hospital RFP Records

In *Order PO-3371*, *Humber River Regional Hospital (Re)*, Ontario's Information and Privacy Commissioner (Adjudicator) reviewed Humber River Regional Hospital's (Hospital) refusal to disclose certain records relating to its RFP for the provision of arthroscopic supplies and equipment.

The Appellant's initial Request, made under the *Freedom of Information and Protection of Privacy Act*

(Act), was for: a copy of the contract between the Hospital and successful Proponent; a copy of the successful Proposal; copies of any selection criteria, scoring documents, and product evaluations/clinical assessments related to the RFP; and copies of all emails, correspondence, notes and documentation relating to the evaluation of the RFP.

In denying access to the requested records, the Hospital relied on the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 18(1) (economic and other interests) of the Act.

During mediation, the Appellant indicated he wanted access to the unsuccessful Proposals as well. The Hospital took the position that this was outside the scope of the written Request. The scope of the Request was therefore added as an issue in this Appeal. The Appellant also raised during mediation the possible application of the public interest override in section 23 of the Act.

The issues in the Appeal were: (a) what is the scope of the request? (b) does the mandatory section 17(1) exemption apply to the records? (c) does the discretionary section 18(1) exemption apply to the records? and (d) is there a compelling public interest in disclosure of the records, an interest which clearly outweighs the purpose of the section 17(1) exemption?

For reasons summarized below, the Adjudicator found: (a) the unsuccessful Proposals were outside the scope of the Request, (b) the Hospital's reliance on section 17(1) was upheld in part, (c) the Hospital could not rely on the section 18(1) discretionary exemption, and (d) there was no public interest in disclosing the information that would override the section 17(1) exemption.

Issue A: Scope of the Request

The Adjudicator found that the Request used clear and direct language, and specifically mentioned the successful Proposal, but not the others. While the Request for evaluation and scoring materials would include information relating to the other Proposals, it would not mean that the other Proposals themselves would be included in this type of information. The Hospital's interpretation of the Request was reasonable.

Issue B: Section 17(1) Exemption

The Hospital relied on section 17(1) to withhold portions of a "Contract Update and Summary Form", a summary of three affected parties' Proposals, comparisons between proponents, and equipment lists, portions of scoring sheets containing pricing information, and portions of the successful Proponent's pricing list, equipment list, and Proposal, and—lastly—the contract.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations, limiting disclosure where there is a risk that competitors or others could exploit such information. The same three part test applies to section 17(1) as applies to section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, which we reviewed in the articles on the *Halton Hills* case and the *Toronto Police* case in this Newsletter.

All of the records in question were found to be commercial information for the purposes of the first part of the test for section 17(1). However, the Adjudicator was not prepared to accept the successful Proponent's argument that its identity as the successful Proponent constitutes "commercial information". In any event, the identity of the successful Proponent would not meet the third part of the test for section 17(1).

Applying the second part of the test was more complicated. As for the "Contract Update and Summary Form", portions of it were "supplied" for the purposes of section 17(1) because they replicated portions of the affected parties' Proposals. However, non-exempt portions included the weighted rating scores of the three affected parties, the final outcome of the contract negotiations, the contract value, and the financial and operational implications for the Hospital.

Portions of the summary of the three affected parties Proposals, which the Hospital had prepared, contained mostly "supplied" information. However, the portions of this record containing the requirements of the RFP, instructions to the selection team, and rating criteria were not "supplied" and therefore not exempt. The selection team's evaluation summaries for each of the proponents contained mostly information that was not "supplied" and the purchasing scenarios and pricing rating methodology contained therein were

created by the Hospital. Only the parties' respective pricing Proposals were "supplied".

The successful Proposal was "supplied" for the purposes of section 17(1) as well. The terms in the Proposal are those proposed solely by the affected party. While it may be that some of those terms were incorporated into the contract later entered into with the Hospital, the Proposal itself was not the product of negotiation and, consequently, was not mutually generated.

Contracts are generally treated as mutually generated, rather than "supplied" by the third party, but there are two exceptions. The "inferred disclosure" exception applies where disclosure of information in a contract would permit accurate inferences to be made about underlying non-negotiated confidential information supplied by the affected party. The "immutability" exception applies to information that is not susceptible to change, such as the operating philosophy of a business, or a sample of its products.

The Adjudicator found that none of the contractual information in question was "supplied" within the meaning of section 17(1). It was simply information about how the successful proponent and the Hospital will fulfill the contract, all of which could have been subject to negotiation. This information would not allow accurate inferences to be made about non-negotiated confidential information, and did not contain "immutable" information about the successful proponent.

The third part of the test examines whether there is "detailed and convincing evidence" to support a reasonable expectation of harm that would result from disclosing the requested records. All of the information that was found to be supplied in confidence met this part of the test, with the exception of the parties' identities.

Issue C: Section 18(1) Exemption

The purpose of section 18(1) is to protect certain economic interests of institutions. The Adjudicator considered whether section 18(1) justified the non-disclosure of the RFP Update and Summary (consisting of the estimated cost of the project and information regarding the length of the contract and two pricing options), the outcome of the negotiations, the names of the three proponents, the final scores, the contract value and term, the financial and operation implications for the Hospital, the pricing options and rating methodology, and the withheld portions of the contract between the Hospital and the successful proponent.

The Hospital and the successful proponent argued that disclosure of the above information would harm the Hospital by discouraging vendors from bidding, thus diminishing the Hospital's ability to obtain agreements on favourable terms. The Appellant argued that the Hospital failed to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" to its economic interests. The Adjudicator agreed with the Appellant, finding the Hospital's argument to be speculative. The need for public accountability in the expenditure of public funds is an important reason why relying on an exemption requires detailed evidence.

Issue D: Compelling Public Interest

Section 23 of the Act states that an exemption under sections 17 and 18 (and others) does not apply "*where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption*." The parallel provision in the *Municipal Freedom of Information and Protection of Privacy Act* is section 16, which was discussed in the *Toronto Police* case.

The Appellant submitted that the compelling interests were ensuring that Ontarians receive treatment using the highest quality-for-price supplies available, that the RFP process is in the best interests of public health and safety, and that there is transparency in the acquisition of medical equipment and supplies.

The Adjudicator was unconvinced that the exempt portions of the records contained specific information identifying an actual public health or safety concern, meaning there was not a clear connection between the supposed compelling interest and the information requested. As for the public's interest in the quality and cost of health care, the Appellant did not provide sufficient evidence that this interest was compelling. In light of these findings, the Adjudicator did not need to decide whether the purpose of the section 17(1) exemption was outweighed.

This series of Orders in this Newsletter confirms the complex issues involved in access requests.

— KC LLP —

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KEEL COTTRELLE LLP

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
Procurement Law Newsletter

Robert Keel - Executive Editor
Anthony Rosato - Managing Editor
Patricia Harper – Contributing Editor

Contributors —
The articles in this Newsletter were prepared by Jonathan Sikkema, who is associated with Keel Cottrelle LLP.