

# Access to Public Commercial Information in Evolving Public-Private Sector Relationships

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This paper evaluates public and judicial access to information in the context of public commercial interests. "Public commercial interests" are defined, for the purposes of this paper, as interests arising when the government itself engages in commercial activities or contracts with third parties to supply goods or services. This area is of increasing importance for three basic reasons. Firstly, the volume of government commercial activities is enormous. It has been estimated that in 1984 the total value of public sector procurement, including the contracts of Crown corporations, was \$73.6 billion.<sup>1</sup> Secondly, as an increasing number of private commercial actors become involved in various relationships with the government, access to information has become a focal point of competing policy considerations. On the one hand, both private commercial interests and public efficiency considerations demand transparency and fairness in any procedures used to define public-private relationships; on the other hand, the public availability of information demanded by fair and transparent procedures threatens the confidentiality of commercially sensitive information.

Thirdly, as public-private commercial relationships become increasingly complex, the scope of the potential for abuse of process increases correspondingly, adding to the necessity of access to information. The potential for this form of abuse in the context of government procurement was noted as early as 1963 by the Glassco Commission:

*At all levels of government there is pressure to influence purchasing for the personal advantage of individuals, for electoral advantages in constituencies, and for partisan advantage. This is a special and common hazard in government procurement procedures. In addition, government shares with private organizations the constant hazard that officials may make decisions for their own advantage or that of friends and associates.<sup>2</sup>*

This concern over potential abuse has increased in recent years, as the government employs the new strategy of establishing public-private "partnerships" to create and manage public infrastructure. One notorious example of this phenomena is the cancellation of the Pearson Airport contract for the redevelopment of Terminals 1 and 2 by the present federal government, allegedly for the abuse of the privatization process.<sup>3</sup> Others have contended that the real reason for the project's cancellation is the desire of the Liberal government to use this incident to punish their Conservative rivals.<sup>4</sup> The truth of this matter — and of others like it — can only be ascertained if there exists mechanisms to provide access to information concerning these arrangements.

In order to properly examine the question of public and judicial access to information, it is necessary to explore a range of examples describing the various types of

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1. This figure is an estimate, based on data contained in the Federal Department of Supply and Services (D.S.S) Canadian Public Sector Market 1983. A more current estimate by Federal Industry Minister John Manley is that the government procurement market alone (excluding Crown corporations) is worth about \$50 billion a year. See "Only a start on trade barriers" *Financial Post* (1 July 1994).

2. Canada, *Royal Commission on Government Organizations. The "Make or Buy" Problem* (Chairman J.G. Glassco), (1962-63), vol. 2, Report 10 at 80-81.

3. See R. Nixon, *Pearson Airport Review*, (29 November 1993) at 8-9.

4. See, for example, J. Geddes, "Projects' Outcome Had Little to do With Merit" *Financial Post* (9 July 1994) at 6.

commercial relationships that exist between the public and private sectors. The typology that will be employed defines these relationships by the level of government control.

(a) The provision of goods and services "in house" by state employees, operating within government-owned facilities.

While a certain amount of "in house" provision of goods and services has been found to be necessary, the trend in Canada has been to limit this form of commercial activity to areas that cannot be reasonably served by the private sector.<sup>5</sup> This principle was endorsed in the Report of the Study Team on Government Procurement to the Nielsen Task Force on Program Review in the Federal Government, prompting renewed investigations into the possibility of employing alternative instrumentalities for carrying out "in house" functions.<sup>6</sup>

(b) The provision of goods and services through crown corporations.

The Crown corporation represents an intermediate stage between direct "in house" departmental activity on the one hand and public regulation of private sector activity on the other.<sup>7</sup>

(c) The provision of goods and services through government contracting out.

"Contracting out" is the private provision of public goods and services through a competitive bidding process.<sup>8</sup> While governments past and present have relied on private sector procurement for many of the inputs they require to function, there has been an accelerating trend towards increasing reliance on this instrumentality (and other private-sector arrangements, described below) in preference to the direct provision of goods and services by public sector entities. In a recent U.S. bestseller, *Reinventing Government*, D. Osborne and T. Gaebler argue that the provision of public goods and services can be made

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5. Glassco Commission, *supra* note 2 at 311-363.

6. Canada, Task Force on Program Review, "Contracting Out" (Chairman E. Nielsen), Study Team on Government Procurement, (1986) s.3 at 123-185.

7. M.J. Trebilcock & J.R.S. Prichard, "Crown Corporations" in J.R.S. Prichard, ed., *Crown Corporations in Canada* (Toronto: Butterworths, 1983) at 7-8.

8. M.J. Trebilcock, *The Prospects for Reinventing Government* (Toronto: C.D. Howe Institute, 1994) at 52.

more efficient through the application of private sector organizational models to the public sector.<sup>9</sup> In particular, they envision government's role to be that of establishing policy priorities, as opposed to delivering the goods or services required by these priorities. They call this approach "steering rather than rowing". Without commenting on the difficulties involved in translating this approach into practical government action,<sup>10</sup> it is sufficient to note that a similar approach has been advocated by Canadian policy makers.<sup>11</sup>

(d) The provision of goods and services through the establishment of public-private sector "partnerships".

Public-private sector "partnership" arrangements, such as the granting of a franchise or licence to a private-sector organization to provide a public good or service, is similar to contracting out, with one important difference. In contracting out, the government hires or subsidizes a private company to provide a needed service; under this arrangement, the service commonly remains a public good in that it is paid for on behalf of all citizens by the government. In public-private "partnerships", the government merely provides the opportunity for a private firm (in the case of a franchise) or several private firms (in the case of a licence) to provide a service to citizens. The private "partners" involved are generally paid directly by citizens for services rendered rather than being paid by government out of general tax revenues.<sup>12</sup>

The basic difference between licensing and franchising arrangements is the difference between competition within the market and competition for the market.<sup>13</sup> In licensing arrangements, multiple providers compete directly with each other, while government regulatory control ensures fair competition. In franchising arrangements, firms compete not for individual consumers in the market but for the right to supply the entire market.<sup>14</sup>

As can be seen, there exists a wide variety of instrumentalities available to the government for the provision of goods and services to the public. It must be stressed that

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9. D. Osborne & T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Plume, 1993); see also *The Gore Report on Reinventing Government* (New York: Random House, Times Books, 1993).

10. For a discussion of this issue, see M.J. Trebilcock, *supra* note 8.

11. See in particular the Nielson Report, *supra* note 6, in which the contracting out of existing "in house" functions is recommended.

12. See M.J. Trebilcock, *supra* note 8 at 14-19.

13. Demsetz argues that competition for the market is more efficient than competition within the market in the case of natural monopolies. See H. Demsetz, "Why Regulate Utilities?" (1968) *Journal of Law and Economics* 11 at 55.

14. The World Bank, *World Development Report 1994: Infrastructure for Development* (New York: Oxford University Press, 1994) at 55.

the above taxonomy represents a spectrum of possible choices, with considerable overlap between the categories.

This paper will focus on the last three categories discussed (that is the provision of goods and services through Crown corporations, government contracting and public-private sector partnerships). In each of these categories, there is a varying degree of private participation in the provision of public goods, resulting in a variety of legal and policy implications. In each case, policy reasons will be identified for why certain types of information should or should not be protected by confidentiality. Finally, the legal structure for access to information will be described, and some suggestions for reform presented.

## I. THE CONTEXT

As government spending and regulation impose increasing costs on society, the need for more efficient government has become acute. This situation has led to increasing pressure on government to restructure itself and its relationships with the private sector. In Canada, ambitious plans have emerged for streamlining the public sector through the use of "entrepreneurial" instrumentalities as a replacement for the traditional mechanisms for provision by government of goods and services. The existence, and likely persistence, of this trend makes the question of the accountability of the parties involved in these transactions one of increasing importance.

In this paper, the issue of accountability will be addressed in the context of public and judicial access to information. In particular, the focus of this paper will be on access, by courts and competitors, to commercial information with respect to bids for public contracts. In light of the increasingly competitive nature of this field, it is likely that this area will be the subject of much future litigation.

In order to analyze the problem of access to information, it is necessary to develop a set of policy criteria to determine what amount of access is desirable. The arguments for increasing public and judicial access to public commercial information are:

(i) Full disclosure of commercial information is necessary for determining the fairness of the award of a government contract. Without full disclosure of information obtained by the government from all bidders, it is impossible to judge the merits of the competing claims involved. Full disclosure is necessary to determine whether the government acted from improper motives in awarding a contract (as was alleged in the Pearson Airport contract noted above), or whether there might exist some compelling reason for preferring a seemingly more expensive bid (for example, the use of superior technology).

(ii) Full disclosure of commercial information is necessary for due process in litigation. One of the basic principles of our legal system is that the courts, in order to reach a just resolution of disputes, must be able to hear and consider all relevant evidence. For this reason, the court is empowered to compel the production of material and the attendance at trial of any witness who possesses information relevant to the matter in

dispute. The court's power to compel the production of evidence is based on the principle that the public interest in the due administration of justice outweighs any private interest in confidentiality.<sup>15</sup> At common law, however, the Crown possessed the prerogative right to refuse to produce information to the court (as will be discussed below). The basis for this claim of "Crown privilege" (or "public interest immunity") is that the Crown should refuse to disclose information where this is contrary to the public interest.<sup>16</sup> Obviously, when a claim of Crown privilege is raised in court proceedings, the public interest in the administration of justice may conflict with the public interest which the Crown asserts would be harmed by public disclosure of the information required by a litigant. This is particularly true in the context of public commercial transactions, with their potential for abuse.

(iii) Full disclosure is necessary to prevent perverse incentives in the choice of government instrumentality for the production of goods and services. If access to information is prevented under some instrumentalities (for example, because of Crown privilege), but not others, the choice of an access to information regime may unduly influence the government in its decision as to which instrumentality it will use to procure government services: it may choose an inefficient solution, merely to prevent the disclosure of information. Thus, the public interest in obtaining government services for the lowest cost to the taxpayer may be compromised.

(iv) Public scrutiny of the regulatory activities of the government with respect to the various forms of public commercial enterprise (such as Crown corporations or public-private sector partnerships) is necessary to ensure that the public interest is being served. For example, access to information concerning the effectiveness of government consumer protection or the protection of the environment requires proof of the vigour with which enforcement mechanisms have been deployed against firms, both public and private, which have not complied with regulatory standards. The ability to engage in this type of scrutiny is necessary to ensure that government regulatory powers are being used in an even-handed fashion in the sense that public and private commercial interests in similar circumstances are subject to similar regulations.

On the other hand, there are compelling arguments for limiting public and judicial access to public commercial information:

(i) The disclosure of the "informational assets" of an enterprise, whether public or private, is contrary to the public interest. Disclosure of information acquired by a business after a substantial capital investment has been made in its production could discourage other firms from engaging in such investment, as such disclosure could be exploited by a competitor.

(ii) The fear of such disclosure may substantially reduce the willingness of commercial enterprises to comply with reporting requirements or to respond fully and

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15. Except for certain privileged communications, such as those between client and solicitor.

16. See P. Lordon, *Crown Law* (Toronto: Butterworths, 1991) at C. 13.

accurately to government requests for information. This situation could be particularly problematic in the context of tendering for government contracts.

(iii) The ability of parties to gain access to commercial information through litigation could create perverse incentives to engage in unnecessary court proceedings, contrary to the public interest.

(iv) Premature disclosure of the decisions of government institutions to engage in economic transactions may undermine the institution's ability to accomplish its objectives, or may create opportunities for some parties to take an unfair advantage by exploiting this knowledge.

(v) Under our parliamentary system of government, the convention of individual ministerial responsibility requires that public servants advising our elected officials remain neutral and anonymous. It is argued that public disclosure of government policy advice would not only violate this convention, but would also threaten the future provision of candid advice.<sup>17</sup>

It is obviously necessary to strike a balance between these two sets of considerations. Any proposed access to information regime must be able to fairly, flexibly and transparently weigh the competing policy interests involved in either disclosing or not disclosing a particular item of information, in the context of the request for its disclosure. As will be demonstrated below, the present system of information access fails to provide the type of transparent balancing test required.

## II. CROWN CORPORATIONS

The provision of public goods and services through the use of Crown corporations demonstrates the difficulties involved in formulating a fair and transparent access to information regime. The first major problem is one of definition. Simply put, there is no unambiguous method of defining the concept of a Crown corporation with any degree of precision.<sup>18</sup> This problem is perhaps inevitable, given the widely diverse range of purposes for which "Crown corporations" have in the past been invoked as a policy instrument. The "Crown corporation" instrumentality in fact represents a range of instrument choices, with varying degrees of public ownership, public purposes and accountability to government.<sup>19</sup> As will be noted below, this imprecision in the definition

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17. See R.H. Botterell, "Access to Information: A Comparative Analysis of the Policy Advice Exemption" (1991-92) 5 Can. J. of Admin. L. & Practice at 180.

18. For a comprehensive discussion of the problems involved in the definition of Crown corporations, see M.J. Trebilcock & J.R.S. Prichard, *supra* note 7 at 8-15; see also J.W. Langford & K.J. Huffman, "The Uncharted Universe of Federal Public Corporations" in J.R.S. Prichard, ed., *Crown Corporations in Canada* (Toronto: Butterworths, 1983) at 219.

19. For an attempt to provide a functional definition of "Crown corporation", see the criteria developed by the Lambert Commission in: Canada, *Royal Commission on Financial Management and Accountability: Final Reports*, (Ottawa: Ministry of Supply and Services, 1979) at 439.



of the Crown corporation instrumentality creates numerous fairness and transparency problems for any potential access to information regime.

### A. Crown Agency Status and "Crown Privilege"

An important example of this problem is the definition of a corporation with Crown agency status. The principal significance of Crown agency status is that, by virtue of the federal *Interpretation Act*, the immunities and privileges (such as Crown privilege) that apply to the Crown will apply to the Crown corporation if it is deemed to be an agent of the Crown.<sup>20</sup> However, the determination of Crown agency status is a complicated issue, and even when an entity has been designated as having Crown agency status, this status does not imply that this entity is a Crown agent for all purposes and in all circumstances.<sup>21</sup> The difficulties involved in determining whether a certain entity enjoys Crown agency status, and under what circumstances it can exercise this status, undermine the fairness and transparency of the current access to information regime; as will be demonstrated below, the exercise of the privileges conferred by Crown agency status may create barriers to information access in litigation.

At common law, the Crown (and Crown corporations with Crown agency status) possesses the prerogative right to refuse to produce certain information to the court under the doctrine of "Crown privilege". "Crown privilege", or "public interest immunity", is a rule of evidence which may be shortly stated as follows: evidence that is relevant and otherwise admissible must be excluded if its admission would be injurious to the public interest.<sup>22</sup> Crown privilege differs from other forms of privilege in that it cannot be waived by the individual holding the evidence; secondary evidence used to prove the contents of a document excluded by Crown privilege is inadmissible; and the right to withhold evidence by reason of Crown privilege cannot be displaced by proof of fraud.<sup>23</sup> A claim of Crown privilege may be made in any proceedings, civil or criminal, before any court or tribunal, and at any stage of the proceedings. The claim need not be made by the Crown or Crown agent: it can be made by a private party or even by the court of its own motion.<sup>24</sup>

Obviously, Crown privilege is an extremely powerful potential barrier to information access in litigation. For example, now that discovery is generally available against the Crown,<sup>25</sup> Crown privilege can be used by the Crown to prevent the production

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20. P. Lordon, J. Rheume & M.E. Macdonald, "The Structure of the Crown" in P. Lordon, ed., *supra* note 16 at 50.

21. For a discussion of the problems involved in the determination of Crown agency status, see *ibid.* at 50 (Statutory determination of Crown agency status) and at 54 (common law test for Crown agency status).

22. P.W. Hogg, *Liability of the Crown* (Carswell: Toronto, 1989) at 59.

23. *Ibid.* at 60-61.

24. *Ibid.* at 62.

25. *Ibid.* at 29.

of documents at discovery in civil proceedings to which it is a party. As well, Crown privilege may be used in an application to quash a *subpoena duces tecum* served on a Crown officer or agent, in order to prevent that witness from producing documents at the trial.<sup>26</sup>

The unfettered use of Crown privilege on the part of Crown corporations could, potentially, give these entities a significant advantage in commercial litigation, leading to substantial unfairness.

Recent developments in the law regarding Crown privilege have, however, limited the potential for the abuse of this doctrine. The original position, stated by the House of Lords in *Duncan v. Cammell Laird*, was that a claim of Crown privilege was conclusive and could not be reviewed by the court; moreover, the court could not question the need to withhold a whole class of public documents, even where the contents of particular documents within that class were admittedly innocuous.<sup>27</sup> The modern position, stated by the Supreme Court of Canada in *Carey v. Ontario*, is to submit claims of Crown privilege to a "balancing of interests" test.<sup>28</sup> The basic interests to be considered in this balance are the importance of withholding production on the basis of a public interest, weighed against the public interest in the proper administration of justice. In order for the court to determine this balance, it is obviously necessary for it to inspect the specific documents in question; claims that documents should not be disclosed on the grounds that they belong to a certain class will, in general, no longer succeed.<sup>29</sup>

The main reason for this shift to a less deferential stance on the part of the courts is the changing role of government, and in particular the extension of government interests into the commercial area. This position was well-stated by La Forest J. in *Carey v. Ontario*:

*It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest. The general balance between these two competing interests has shifted markedly over the years. [...]. The need for secrecy in government operations may vary with the particular public interest sought to be protected. There is, for example, an obvious difference between information relating to national defence and information relating to a purely commercial transaction. [...]. The shift in the balance between the two interests has also been affected by changing social conditions and the role of government in society at various times. [...]. With the expansion of state activities into the*

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26. See for example, *Carey v. Ont.*, [1986] 2 S.C.R. 637.

27. See *Duncan v. Cammell Laird*, [1942] A.C. 624 (H.L.).

28. See *Carey v. Ontario*, *supra* note 26.

29. *Ibid.* at 655. One exception is documents relating directly to national security; obviously, this exception gives Crown corporations involved in defence procurement a potential advantage in litigation.

*commercial sphere, different attitudes to suits against the Crown developed and statutes were enacted to make these possible.*<sup>30</sup>

This statement clearly reflects the view that information relating to commercial transactions will not, in normal circumstances, be determined to be of a quality that necessitates protection by Crown privilege.

### III. GOVERNMENT CONTRACTING

The Canadian system of procurement by government contract has undergone major changes recently, and even more changes are likely to occur in the future. The general trend is towards more competition in the tendering process, judicial review of procurement decisions, and limiting preferred treatment for certain classes of suppliers (such as "domestic" suppliers, or "intra-provincial" suppliers).<sup>31</sup> The effect of these changes has been to accelerate the development of access to information regimes for various categories of government procurement. However, as will be discussed below, progress in this area is still sporadic at best; there exists no coherent, over-arching, national information policy for government contracting.

#### A. The Common Law Position

At common law, the traditional theory of government contracting held that such contracts were awarded on a "lottery" basis. The lottery theory of contract awards originated in the traditional legal analysis that tender calls were invitations to treat, bids were offers, and the tender caller had an unlimited discretion to accept or reject any or all bid offers. This principle was embodied in the typical privilege clause, "The lowest or any tender will not necessarily be accepted". This stream of reasoning, in which it was assumed that government procurement was substantially immune from judicial review,<sup>32</sup> is still employed in contemporary Canadian cases.<sup>33</sup> However, a second stream of reasoning has recently emerged, which has held that the "lottery theory" is incompatible with the fundamental purpose of government contracting (namely to obtain the best price for the performance of the intended contract).

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30. *Ibid.* at 647-648.

31. See A. Reich, "Government Procurement and Bid Challenging in Canada after the Free Trade Agreement" (1991) 18 Can. B. L.J. at 195.

32. For a summary of the traditional legal position on government procurement, see S. Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988) at 8.

33. See, for example, *Acme Building & Construction Ltd. v. Newcastle (Town)*, (1993) 2 C.L.R. (2d) 308 (Ont. C.A.), which upheld the lower court's findings that the express privilege clause entitled the Town Council to reject the lowest tender; see also *Elgin Construction Co. v. Russell (Twp.)* (1987), 24 C.L.R. 253 (Ont. H.C), and *M.S.K. Financial Services Ltd. v. Alberta* (1987), 23 C.L.R. 172, 77 A.R. 362.

Under this "second stream" in the common law, bidders who believe that they have been unfairly deprived of the award of a government contract (where, for example, they have submitted the lowest offer from a government tender) may apply for relief from the courts. The basis of this relief is a claim for breach of contract on the part of the procurement agency. Briefly put, the call for tenders by the procuring agency creates a unilateral contract, "contract A", which comes into being without the necessity of further formality upon the submission of the tender.<sup>34</sup> The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation on both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the procuring agency to accept the lowest tender, the nature of this obligation being controlled by the terms and conditions established in the call for tenders.<sup>35</sup>

Thus, it is necessary to examine the exact terms of the tender in question. In government procurement situations, these terms tend to be structured by the statute under which the power to procure is granted. However, in these cases, the terms expressed in the statutes are governed by two further considerations: firstly, by the governments' obligations under various trade agreements (described below); and secondly, by the overarching policy considerations by which the courts will interpret the statutes in question. As Brenner J. stated in *Tercon Contractors Ltd. v. British Columbia*,<sup>36</sup> in a case where the procuring agency (MOTH)<sup>37</sup> was attempting to rely on a "privilege clause" in its tender conditions (based on its enabling statute)<sup>38</sup> in order to avoid awarding the tender to the lowest bidder:

*The policy reasons for s.49 are in my view clear. The ultimate result of the tendering process is the expenditure of substantial sums of public money annually. Section 49 of the Act is designed to ensure that the MOTH carries out this process in a manner that is fair to tenderers and that the taxpayers of British Columbia obtain the maximum value for the public moneys so expended. On any given tender this requires that it be awarded to the lowest qualified bidder. In a broader sense, this requires that tenders be awarded to the lowest qualified bidder so that future prospective bidders will have a high level of confidence in the integrity of the bidding process [...].*<sup>39</sup>

As can be seen, the courts will be reluctant to accept any interpretation of the procuring agencies' statutory powers that implies the power to reject the lowest qualified bidder.

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34. See *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, 119 D.L.R. (3d) 276 at 274 (S.C.C.).

35. *Ibid.* at 275.

36. *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197 (B.C.S.C.).

37. Ministry of Transportation and Highways.

38. MOTH's statutory duty with respect to public tenders is described in section 49 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1979, c.280.

39. *Supra* note 36 at 206.

The importance of this judicial attitude for access to information is that, in order to ensure the success of the lowest qualified bidder, the exact terms of the tender offer must be available in advance to all potential bidders. These terms must not confer on the government an unlimited discretion to reject the lowest qualified bidder (for example, by the insertion of a clause in the tender offer that allows the rejection of the lowest bidder if it was in the "best interests of the Province" to do so). This position was made clear by Halvorson J. in *Kencor Holdings Ltd. v. Saskatchewan*, a case involving an undisclosed practice of favouring local bidders:

*To maintain the integrity of the tendering process it is imperative that the low, qualified bidder succeed. This is especially true in the public sector. If governments meddle in the process and deviate from the industry custom of accepting the low bid, competition will wane. The inevitable consequence will be higher costs to the taxpayer. Moreover, when governments, for reasons of patronage or otherwise, apply criteria unknown to the bidders, great injustice follows. Bidders, doomed in advance by secret standards, will waste large sums preparing futile bids.*<sup>40</sup>

Thus, the courts have created an "implied term" in government contracting, namely that the government will comply with industry custom regarding the acceptance of low bidders, and not apply to the bidding process any "hidden rules". This position was aptly summarized by Selbie C.C.J. in *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)*:

*At the risk of erring on the side of being simplistic I might sum up my position in this matter in four steps:*

*Firstly, there was a contract.*

*Secondly, the phrase in question, a part of the contract, must be interpreted in accordance with custom and usage.*

*Thirdly, custom precludes or does not include secret preferences.*

*And lastly, awarding the contract to a third party according to the secret preference is thus a breach of contract.*<sup>41</sup>

The damages for such breaches of contract can be very substantial. In *Tercon Contractors Ltd. v. British Columbia*, Brenner J. held that Tercon was entitled to claim damages measured according to the difference between the revenue it would have received

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40. *Kencor Holdings Ltd. v. Saskatchewan*, [1991] 6 W.W.R. 717 (Sask. Q.B.) at 721.

41. *Chinook Aggregates Ltd. v. Abbotsford (Municipal District)* (1987), 28 C.L.R. 290 at 297 (B.C.C.C.). It should be noted that in *Acme Building & Construction Ltd. v. Newcastle (Town)* (1993), 2 C.L.R. (2d) 308 (Ont. C.A.), the Ontario Court of Appeal distinguished *Chinook* on the basis that there was no custom or usage in Ontario industry that the lowest qualifying bid should be accepted. The court went on to state that in their opinion, even if there was acceptable evidence of custom and usage known to all the tendering parties, it could not prevail over the express language of the tender documents.

had it been awarded the contract and the costs it would have incurred in performing the work.<sup>42</sup> The resulting damages against the B.C. government totalled \$1,046,861, plus interest and costs.<sup>43</sup>

Clearly, the common law position that has developed regarding government contracting favours a transparent bidding process.<sup>44</sup> The implications of this for access to information are obvious: the government must provide complete and accurate information regarding tenders to potential bidders, or face litigation for breach of contract by unsuccessful bidders. As well, in order to prevent unnecessary litigation, it is imperative that the government provide unsuccessful bidders with the details of the resulting contract, so that they may verify that they have been fairly treated.<sup>45</sup>

## B. International, Regional and Domestic Access to Information Mechanisms

One of the main reasons for the recent adoption of a more transparent and competition-oriented government procurement system is the ratification by Canada of a series of international, regional and domestic trade agreements dealing with government procurement as a category of international and interprovincial trade. As has been noted elsewhere,<sup>46</sup> these agreements have had a substantial impact on *domestic* procurement regimes, and are therefore not just an "international trade phenomenon". The collective effect of these instruments has been to create a new series of requirements for transparency in the bidding process as a necessary adjunct to the proposed goal of

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42. *Tercon Contractors Ltd. v. British Columbia*, [1994] B.C.J. No. 1636, Vancouver Registry: C915190 [unreported] at paragraph 2.

43. *Ibid.* paragraph 174. In *Kencor Holdings Ltd. v. Saskatchewan*, *supra* note 40 at 721, the damages amounted to \$180,000. This amount represented, according to Halvorson J. "[...] among other things, the plaintiff's loss of profit for not having been awarded the contract".

44. For example, in an attempt to reconcile the two streams of common law theory, a "duty to act fairly" in the tendering process has been seen as a possible common ground. In *Power Agencies Co. and Du Pont Canada Inc. v. Newfoundland Hospital and Nursing Home Assoc.* (1991), 90 Nfld. & P.E.I.R. 64 at 69; 280 A.P.R. 64 (Nfld. T.D.), the court stated that "[t]hese cases do illustrate the courts using the implied term that all bidders be treated fairly to protect the integrity of the system by ensuring that if contracts are to be awarded on anything other than commonly accepted basis this must be revealed to bidders and that what is awarded is what was called".

45. Many government agencies are, in fact, legally required to provide certain types of information. For example, in *Tercon Contractors Ltd. v. British Columbia*, *supra* note 42, Brenner J. noted that section 49(4) of the *Ministry of Transportation and Highways Act* requires the minister to make available, on request, the value of a contract and the name of the contractor. In the UK, by contrast, all public authorities are required by statute to use competitive procedures in the awarding of government contracts, and disappointed contractors are entitled to a reasoned decision as to why they were not chosen. The aggrieved contractor can seek judicial review of the public authority's decision, and also reliance damages (expenditures reasonably incurred for the purpose of submitting the tender). See P. Craig, *Administrative Law*, 3d ed. (London: Sweet & Maxwell, 1994) at 690-693.

46. See A. Reich, *supra* note 31 at 244.

liberalizing trade in this area.<sup>47</sup> However, this effect has been far from uniform in its application.

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47. For an example of the impact of a regional level access to information mechanism on domestic law, note the effect of the European Community rules regarding government procurement on the domestic law of the United Kingdom. See P. Craig, *Administrative Law*, *supra* note 45 at 685-689.

## 1. The International Level: GATT

At the international level, the most important agreement with respect to government procurement is the GATT Code on Government Procurement. The Code, added to the GATT during the Tokyo Round of negotiations, seeks to achieve greater liberalization of government procurement through the establishment of an agreed framework with respect to regulations, procedures and practices regarding government procurement.<sup>48</sup> The Code not only establishes the obligation of National Treatment, but also sets out detailed rules for transparent procurement procedures that are to be followed in order to ensure that suppliers indeed receive fair treatment.

The Code is, however, quite limited in scope and coverage. It only applies to contracts of a value of SDR 130,000 or more,<sup>49</sup> although there are procedures to prevent the evasion of this threshold.<sup>50</sup> Service contracts are not covered at all by the Code,<sup>51</sup> and article VIII provides for other exceptions, notably in the area of defence spending. As well, the Code only applies to government agencies "contributed" to it, as listed in annex I:13; signatories normally exclude numerous departments and Crown corporations from this list. Provincial or municipal governments are also not covered by the Code.

The key mechanism of the Code is a set of detailed and transparent tendering procedures. The preferred procedure under the Code is the "open" tender, in which a notice of each proposed purchase (NPP) is published in the designated publications, containing all of the information necessary for the timely submission of both foreign and domestic bids.<sup>52</sup> "Selective" tendering procedures are also allowed, either by the use of previously established lists of suppliers, or by a qualification requirement as a precondition for the submission of bids; however, such lists and qualifications must be published, and they must not be used as a means of excluding targeted suppliers.<sup>53</sup> More problematic is the use of "single" tendering procedures, where the government only considers tenders from a single source. In order to control the potential abuse of single tendering, the Code requires a report of justification to be published in an appropriate publication (as defined by the Code) in the event of a single tendering.<sup>54</sup>

The Code requires that a contract shall be awarded to the lowest tender, or to the tender which in terms of the specific evaluation criteria set forth in the NPP is determined

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48. See *The Agreement on Government Procurement* (the Code), (1980) GATT DOC. 26 s/56 at 33. The subsequent amendments to the Code were published as "Protocol Amending the Agreement on Government Procurement", BISD 34th Supplement at 12.

49. This threshold was lowered from SDR 150,000 (article 1:1(b)) by the pre-Uruguay Round amendments. SDR 130,000 is approximately CDN \$212,000. See article 1:2(3) of the amendments.

50. See article 1:1(b), and article 1:2(3) of the amendments.

51. See article 1:1(a).

52. See article V.

53. See articles V:2, V:6, and V:7.

54. Article V:16 limits circumstances for "single tendering".



to be the most advantageous.<sup>55</sup> However, the Tokyo Round Code provided for no private right of action on the part of complaining suppliers: rather, the emphasis was on the settlement of disputes between the states involved.<sup>56</sup>

The GATT Code has been substantially revised during the Uruguay Round negotiations in an attempt to address the limitations in the Code.<sup>57</sup> These revisions have the effect of harmonizing the GATT Code with the NAFTA agreement on government procurement (see below). There are three key areas of change with respect to access to information in the revised GATT Code: firstly, the scope and coverage of the Agreement have been expanded to include services and construction contracts;<sup>58</sup> secondly, the scope and coverage of the Agreement have been expanded to include certain "sub-central government" (or state, provincial and municipal) entities;<sup>59</sup> and thirdly, the parties are now required to establish effective bid challenge procedures.<sup>60</sup>

The establishment of mandatory bid challenge procedures, by which aggrieved suppliers may challenge alleged breaches of the Agreement directly, is potentially the most important change in the Uruguay Round Code. Under this requirement, each party to the Code will have to establish impartial review bodies to adjudicate procurement disputes in a timely fashion. However, as noted in article XX:7(c), the compensation provided to the aggrieved supplier may be limited to the costs for tender preparation or protest, a sum which may be insufficient to deter governments from effectively breaching their obligations under the Agreement.

## 2. The Regional Level: The Canada-U.S. FTA

As a result of the limited coverage of the pre-Uruguay Round GATT Code, member states were free to pursue protectionist and other discriminatory measures in much of their procurement contracting. In Canada, for example, procurement policies are regulated by administrative directives, the most important of which is the Canadian

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55. See article V:15(f).

56. See article VI:6. The failure to provide a private right of action undermined the effectiveness of the Tokyo Round Code. See U.S. International Trade Commission, *Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements*, (Washington, D.C.: USITC, 1985).

57. Informal Working Group on Negotiations on Government Procurement, *Agreement on Government Procurement* (18 March 1994). The Uruguay Round Code will enter into force on 1 January 1996, with the exception of the procedures on consultations and dispute settlement (article XXII), which are contingent on the entry into force of the WTO Agreement.

58. *Ibid.* article 1.

59. Under the Uruguay Round Code, each party is responsible for listing in appendix I all entities within its jurisdiction to be covered by the Agreement, and each party may withdraw one of the listed entities at will (subject to objections from other parties, which are to be resolved in accordance with the procedures on consultations and dispute settlement contained in article XXII).

60. *Ibid.* article XX. See discussion of the Procurement Review Board below.

Content Premium Policy. Under this directive, the federal Department of Supply and Services will apply a premium of 10% to the difference in foreign content on competing bids in favour of sources with greater Canadian content. As well, when the value of a procurement exceeds \$2 million, the "procurement review mechanism" is triggered, with the purpose of ensuring that the awarding of the contract will achieve the "maximum benefit to Canada".<sup>61</sup> These administrative directives only affect contracts not covered by international agreements, but given the limited coverage of the pre-Uruguay Round Code, they represented an important source of discretion on the part of the government.

The FTA represents an attempt to liberalize government procurements which were not covered under the pre-Uruguay Code from the effects of these policies. The two most important changes made by the FTA were: firstly, to lower the threshold of eligibility from SDR 130,000 to US \$25,000; and secondly, to establish the requirement for a domestic procurement review bid protest mechanism, available to aggrieved suppliers.<sup>62</sup> The FTA also contains provisions which improve the transparency of the procurement process, obliging the parties to ensure: "[...] that complete documentation and records, including a written record of all communications substantially affecting each procurement, are maintained in order to allow verification that the procurement process was carried out in accordance with the obligations of this chapter".<sup>63</sup>

In Canada, the Procurement Review Board was established to fulfil these obligations. Governed by both the procedures of the GATT Code and the "expanded" obligations under article 1305 of the FTA, the board has the authority to order the government to postpone the awarding of a contract pending the completion of the board's investigation. However, the board was subject to a bizarre limitation: in order to reserve the benefit of the board to Canadian and American suppliers, it could only review procurements of a value more than the FTA threshold and yet less than the GATT threshold. Large procurement awards were thus immune from scrutiny by the Board. Of course, with the establishment of an international obligation for bid challenge procedures under the Uruguay Round Code, this limitation will no longer be necessary.

The Board is to consist of up to five members, including the Chairman, to be appointed by the Governor in Council. A member must have knowledge and experience related to public sector procurement.<sup>64</sup> The fact that the Board is a specialized public procurement tribunal gives it an advantage over regular courts in dealing with procurement matters. In fact, a court may, therefore, wish to use the Board's services and request it to make a determination on such matters, in cases involving government procurement.<sup>65</sup> The decisions of the Board may be appealed only to the Federal Court.<sup>66</sup>

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61. Treasury Board of Canada, *Administrative Policy Manual*, (March 1980) c. 305 ("Procurement Review").

62. A requirement later adopted by the Uruguay Round Code; see above.

63. FTA, article 1305:4.

64. The Procurement Review Board Regulations, SOR/89-41, s. 7(4).

65. See *ibid.* s. 41(1).

66. For a discussion on the effectiveness of the Board, see A. Reich, *supra* note 31.

### 3. The Regional Level: NAFTA

Chapter 10 of NAFTA provides for considerably wider coverage than either the pre-Uruguay Round GATT Code or the FTA,<sup>67</sup> both in terms of entities and types of contracts covered. Not only does NAFTA extend the improvements available under the FTA to Mexico, it also extends coverage to many federal government agencies not covered by either the FTA or the Code.<sup>68</sup> NAFTA also closed some previously-existing exclusions in the earlier agreements, such as construction and service contracts (which are now covered).<sup>69</sup> For the purposes of this paper, the most important changes made by the NAFTA agreement are in the area of provision of information.<sup>70</sup> The Agreement requires the parties to provide such information as may be necessary to determine whether the award of a procurement contract was made fairly and impartially, in particular with respect to unsuccessful tenders.<sup>71</sup> To this end, the party of the procuring agency must provide information on the characteristics and relative advantages of the winning tender and the contract price. This requirement is subject to three important caveats: firstly, the parties need not disclose any information relating to their "essential security interests";<sup>72</sup> secondly, where the release of the requested information would "prejudice competition in future tenders", the requesting party may not release it to the aggrieved suppliers except with the agreement of the party that provided the information;<sup>73</sup> and thirdly, no party may disclose confidential information where such disclosure would prejudice the legitimate commercial interests of a particular person or might prejudice fair competition between suppliers, without the formal authorization of the information provider.<sup>74</sup>

One serious limitation on the scope of the NAFTA chapter on government procurement is its lack of applicability to federal and provincial Crown corporations. The NAFTA chapter on government procurement covers "government enterprises" set out in annex 1001.1a-2. However, these "enterprises" are allowed a higher monetary threshold before the Agreement applies to their procurements,<sup>75</sup> and to date only eleven federal "government enterprises" have been submitted to the Schedule of Canada listed in the annex. The process of negotiation is still, however, far from complete. Under article 1024, the parties have agreed to attempt to expand the coverage of this chapter to include more

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67. Note that NAFTA largely supersedes the FTA.

68. Compare annex 1001.1a-1 of NAFTA with annex 1304.3 of the FTA.

69. See NAFTA article 1001.1(b).

70. See NAFTA article 1019: "Provision of Information".

71. See NAFTA article 1019(3).

72. Namely, any defence procurement. See NAFTA article 1018(1).

73. See NAFTA article 1019(3).

74. See NAFTA article 1019(5).

75. For example, for federal government goods contracts the threshold is US \$50,000; for "government enterprises", the threshold is US \$250,000.

"government enterprises", and to seek to include provincial government entities and enterprises within the coverage of this chapter.

#### 4. The Domestic Level: The Internal Trade Agreement

Within Canada, an attempt is currently being undertaken to rationalize provincial government procurement policies. The recently concluded Internal Trade Agreement<sup>76</sup> addresses the problem of inconsistent and exclusionary provincial government procurement policies as part of a larger effort aimed at reducing or eliminating many existing interprovincial trade barriers.<sup>77</sup> Subject to the scope and coverage limitations described in article 501, each party to the Agreement shall accord to the goods and services of any other party and the suppliers of such goods and services treatment no less favourable than the best treatment that it accords to its own goods and services and its own suppliers of such goods and services (the National Treatment principle).<sup>78</sup> Article 502(5) specifically prevents any party from imposing, in the evaluation of bids or the award of contracts, local content or other "economic benefits" criteria designed to favour suppliers from a particular area; however, a party may under exceptional circumstances exclude a procurement from the application of this Agreement for economic and regional development purposes, provided that all such exceptions are reported, prior to the commencement of tendering procedures, to the other parties.<sup>79</sup>

Most important, for the purpose of this paper, is the adoption in this Agreement of a transparent procurement system. Under this system, a notice of a tender opportunity must be made in a public format,<sup>80</sup> and it must contain a specified set of information, including any evaluation criteria (non-price related) that will be employed.<sup>81</sup> As well, each party must provide to the public information on how to do business with the government, including a contact point for inquiries or complaints,<sup>82</sup> and each party must (in the event of a dispute) provide the relevant bid information.<sup>83</sup> However, nothing in this chapter shall require an entity to breach confidentiality obligations or to compromise security or commercially proprietary information identified by the supplier in its tender documents.<sup>84</sup>

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76. Dated July 18, 1994.

77. See The Agreement on Internal Trade, article 500A.

78. Article 502. Article 502(4) provides a non-exclusive list of measures which are inconsistent with the principles of non-discrimination.

79. Article 505 B(2). Article 504(11) and (12) contain a wide range of allowable derogations, mostly narrowly defined exceptional cases.

80. Either an electronic tendering system, a daily newspaper, or through a source list: article 504(2).

81. Article 504(4) and (6).

82. See article 508(5).

83. Article 508(6).

84. Article 507.

Bid protest procedures are set out in article 509. Each government must assign one point of contact concerning all disputes that may arise from the application of this chapter. For disputes arising within provincial jurisdictions, the aggrieved supplier must first attempt to resolve the dispute with the purchasing party. If the dispute cannot be resolved, the supplier may then approach the contact person of its own party. If the contact person judges the complaint to be reasonable, that contact would then act on behalf of the supplier, and request that the complaint be considered by a review panel. The review panel is empowered to investigate the challenge, and make recommendations to the procuring organization.<sup>85</sup> In the case of challenges regarding procurement by the federal government, where a supplier does not achieve a successful resolution of its complaint with the procuring entity, it may bring the matter to the attention of a reviewing authority with no substantial interest in the outcome of the procurement.<sup>86</sup>

There is no right of judicial review under the Agreement. Rather, there exists two parallel dispute resolution procedures: government-to-government dispute resolution,<sup>87</sup> and person-to-government dispute resolution.<sup>88</sup> The first mechanism may be used when one of the parties to the Agreement is dissatisfied with the outcome of the bid protest procedure described above,<sup>89</sup> and the second mechanism may be used when the party refuses to initiate proceedings on behalf of the aggrieved supplier.<sup>90</sup>

One serious limitation on the scope of the chapter on government procurement is its lack of applicability to Crown corporations. The chapter on government procurement in the recently concluded Internal Trade Agreement divides Crown corporations into three categories of coverage. Annex 1 lists the government entities fully included under the chapter; Annex 2 lists the government entities fully excluded under the chapter; and Annex 3 lists entities excluded under the chapter, but covered by a "non-intervention commitment". Under Article 501(3), the parties agree that they will not direct these entities to breach the agreement, but the entities are free to do so if they choose. These entities are described as "[...] businesses of a commercial nature and/or in competition with the private sector, and state monopolies involved in the transformation and distribution of goods and services". As can be seen, Crown corporations by and large escape the application of this chapter.<sup>91</sup>

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85. See article 509(7).

86. Article 509(9)(e).

87. Articles 1703 to 1710.

88. Articles 1711 to 1720.

89. This mechanism is only available in cases regarding procurement by the Federal Government: see article 1702(6).

90. This mechanism is only available in cases regarding procurement by provincial governments: see article 1702(6).

91. Catherine Swift, chief economist for the Canadian Federation of Independent Business, noted that "the exceptions on Crown corporations are an absolute disgrace". See P. Morton, *Financial Post* "Modest nature of first step frustrates business groups" (July 19, 1994).

## C. Access to Information Statutes

A third possible method of obtaining public commercial information from the government, distinct from gaining access to information through litigation or through the specific government procurement regimes noted above, is through the use of access to information statutes.

### 1. The Federal Level

Access to information held by the federal government is governed by the *Access to Information Act* ("federal Act").<sup>92</sup> The purpose of this Act is to create a right of access to information in records under the control of a government institution in accordance with the principle that government information should be made available to the public.<sup>93</sup> However, the Act contains many provisions which effectively prevent the obtaining of commercially important information relating to either the government or other entities with business relations with the government. For example, under the heading of "Economic Interests of Canada", the head of a government institution may<sup>94</sup> refuse to disclose any record that contains commercial information that belongs to a government entity that is "reasonably likely to have substantial value",<sup>95</sup> could "reasonably be expected to prejudice the competitive position of a government institution",<sup>96</sup> or could "reasonably be expected to be materially injurious to the financial interests of the Government of Canada or [...] result in an undue benefit to any person [...]".<sup>97</sup> Under the heading of "Third Party Information", the head of a government institution must refuse to disclose any record that contains any commercial information that is supplied to the government by a third party and is treated as confidential by that party,<sup>98</sup> could reasonably be expected to prejudice the competitive position of a third party,<sup>99</sup> or could reasonably be expected to interfere with contractual or other negotiations of a third party.<sup>100</sup> The only exceptions to

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92. *Access to Information Act*, S.C. 1980-81-82-83, c.111 [now R.S.C. 1985, c. A-1]. Information that is restricted by or pursuant to any of the various secrecy provisions in the statutes listed in schedule II of this Act shall not be disclosed: see s. 24.

93. *Ibid.* s. 2(1).

94. Unlike the third party exception described below, this exception is discretionary.

95. *Ibid.* s. 18(a).

96. *Ibid.* s. 18(b).

97. *Ibid.* s. 18(d).

98. *Ibid.* s. 20(1)(b). In the most recent annual report of the Information Commissioner of Canada, this section of the Act has been described as one of the "most used, abused and litigated exemptions". The report recommends the removal of mandatory protection for third party trade secrets, and the adoption of a discretionary exemption available only where the party seeking to resist disclosure can establish that release of the information will cause harm. See J.W. Grace, *Annual Report of the Information Commissioner of Canada*, (Ottawa: Supply and Services, 1993-1994) at 26.

99. *Ibid.* s. 20(1)(c).

100. *Ibid.* s. 20(1)(d).

this section are if the supplier of the information consents to the disclosure, or if disclosure would be in the public interest as it relates to health, public safety or protection of the environment and if this public interest "clearly outweighs in importance" the considerations listed above.<sup>101</sup>

The exemption in section 20(1)(b) deals with information generated by a third party and then supplied to a government institution, often for a regulatory purpose: in consequence, it is concerned with the most sensitive types of information. A third party may feel victimized when it learns that the government has disclosed such information to a competitor. The legislation, therefore, provides more protection for such information: unlike sections 20(1)(c) and (d), section 20(1)(b) does not require the third party to show that any particular harm will occur if the information is disclosed.

Court decisions have, however, interpreted section 20(1)(b) as requiring third parties to satisfy a four-part test in order to successfully claim the exemption: the third party must show firstly, that the information is "financial, commercial, scientific or technical"; secondly, that the information is confidential in nature under an objective test; thirdly, that the information was supplied by the third party; and lastly, that the information was treated consistently as confidential by the third party.<sup>102</sup> The most significant (and controversial) part of this test is the requirement that the information be confidential in nature under an objective test, since this requirement permits the court to go behind the third party company's own perception of the importance and sensitivity of the information.<sup>103</sup>

The "material harm" test found in sections 20(1)(c) and (d) has also been the subject of some controversy. In both paragraphs, the court must find that the disclosure "could reasonably be expected to" result in one of the specified types of harm. The standard of certainty required by this phrase has been the main issue in the interpretation of paragraphs (c) and (d). In the *Piller Sausages* case, Mr. Justice Jerome held that to satisfy the evidentiary burden under section 20(1)(c) the party seeking to prevent access is required to establish direct causation between disclosure of the information and harm to the third party.<sup>104</sup> This direct causation test was, however, rejected by the Federal Court of

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101. *Ibid.* s. 20(6).

102. This four-part approach to the s.20(1)(b) exemption was first set out in *Montana Band of Indians v. Canada (Minister of Indian Affairs and Northern Developments)* (1988), 18 F.T.R. 15 (F.C.T.D.).

103. The exhaustive definition of the confidentiality test was supplied by Mr. Justice MacKay in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194, 37 Admin. L.R. 245, 27 C.P.R. 180. In this case, Mr. Justice MacKay adopts (and adapts) the "Wigmore Four" test approved of for confidential communications privilege in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. He wrote that to qualify as confidential, the information must possess three characteristics: it must not be available from other public sources and could not be obtained by observation or independent study; it originated and was communicated to government in a reasonable expectation of confidence; and it was communicated to government in a relationship that should be fostered for the public benefit. For an examination of this issue, see T. Onyshko, "The Federal Court and the *Access to Information Act*" (1993) 22 Man. L. J. 73 at 124.

104. *Piller Sausages & Delicatessens Limited v. Canada (Minister of Agriculture) et al.* (1987), 14 F.T.R. 118 at 128-129.

Appeal in *Canada Packers*.<sup>105</sup> In that case, Mr. Justice MacGuigan adopted a "reasonable expectation of probable harm" test, thus rejecting both "direct causation" and "reasonable foreseeability" as the basis for establishing material injury.

Under the *Access to Information Act*, an applicant may appeal a decision not to disclose to the Information Commissioner, who is empowered to recommend (not order) disclosure.<sup>106</sup> Thereafter, an appeal lies to the Federal Court.<sup>107</sup> One crucial question concerning the court's review power is the scope of review for permissive exemptions. In general, the cases demonstrate<sup>108</sup> the willingness of the court to challenge the discretionary decisions of government.<sup>109</sup>

In such an appeal, notwithstanding any other statute or privilege under the law of evidence, the Federal Court may examine any record under the control of the government, and no such record may be withheld from the Court on any grounds.<sup>110</sup> The Court must, however, take all reasonable precautions to prevent the disclosure of the information in question during the proceedings.

At the federal level, the *Access to Information Act*<sup>111</sup> lists all of the institutions that it applies to in schedule 1 of the Act. The Act applies to both "Departments and Ministries of State" and "Other Government Institutions". The latter category includes many Crown Corporations by enumeration.

## 2. The Provincial Level: The Example of Ontario

Access to information in Ontario is governed by the *Freedom of Information and Protection of Privacy Act*.<sup>112</sup> The provisions of the Ontario Act are even more restrictive in their effect on access to public commercial information than those of the federal Act. For example, the section entitled "Economic and Other Interests of Ontario" contains all of the discretionary exclusions found in the federal Act, and in addition states

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105. *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47, 26 C.P.R. (3d) 407 (C.A.).

106. *Supra* note 92 s. 37(1).

107. For a review of the Commissioner's ruling, either on behalf of the person refused access (s. 41) or on behalf of a third party affected by the disclosure of information where access was granted (s. 44).

108. See, in particular, *Rubin v. Canada Mortgage and Housing Corporation (President)* (1988), 86 N.R. 186, (1989), 21 C.P.R. (3d) 1 (F.C.A.), in which Mr. Justice Heald upheld the power of the court to review discretionary decisions taken under permissive exemptions.

109. See T. Onyshko, "The Federal Court and the *Access to Information Act*" *supra* note 103 at 101.

110. *Supra* note 92, s. 46.

111. See note 90.

112. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Section 67(1) of this Act states that it prevails over the confidentiality provisions in any other Act, with the exception of those listed in s. 67(2).



that a head<sup>113</sup> may refuse to disclose a record that contains "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario",<sup>114</sup> or "information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision [...]".<sup>115</sup> Under "Third Party Information", the Ontario Act contains all of the mandatory exclusions found in the federal Act, and in addition states that a head shall refuse to disclose a record containing commercial information where the disclosure could reasonably be expected to result in information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied.<sup>116</sup> On the other hand, the third party exemption in the Ontario legislation only obliges the custodians of government files to refuse disclosure of third party information where it has been provided by the third party in confidence (implicitly or explicitly), and where disclosure could reasonably be expected to result in specified harm; this is clearly a higher threshold than that found in the federal Act, which contains no requirement for confidentiality as a prerequisite for refusal to disclose third party information.

In Ontario, applicants may appeal a decision to refuse access to part or all of a record to the Information and Privacy Commissioner. The Commissioner may initiate mediation and if this fails an inquiry will be held. In an inquiry, the Commissioner is empowered to review whether a particular exemption applies in fact and in law and if it does not, he or she may order disclosure. There is no right of appeal in the Act from a decision of the Commissioner to a court. In rare cases, a judicial review proceeding may be brought before the Supreme Court of Ontario where it is alleged that the Commissioner has made a serious procedural error, has acted on inadmissible evidence or has exceeded his or her jurisdiction.<sup>117</sup>

Under the Ontario *Freedom of Information and Protection of Privacy Act*,<sup>118</sup> all institutions to which the Act applies are listed in the regulations. The regulations to the Act list a large number of Crown corporations, as well as other agencies, boards, commissions and other bodies, to which the Act applies.<sup>119</sup>

#### IV. PUBLIC-PRIVATE SECTOR PARTNERSHIPS

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113. *Ibid.* s. 2(1). A "head" is defined as the person designated as the head of the institution in question as defined in the regulations, or in the case of a ministry of the government, the minister.

114. *Ibid.* s. 18(1)(e).

115. *Ibid.* s. 18(1)(g).

116. *Ibid.* s. 17(1)(b).

117. See *Freedom of Information and Protection of Privacy Manual* (Ontario: November 1990) at 6-4.

118. *Supra* note 102.

119. See O. Reg. 460/90, Column 1 of the Schedule.

Public-private sector partnerships have become an increasingly important method for the provision of goods and services to the public, particularly in the development and operation of infrastructure. In Canada, the scale and nature of these arrangements vary widely. The most prominent include the Prince Edward Island Fixed Link, the Highway 407 toll road north of Toronto, and the Pearson International Airport terminal projects, all of which involve capital investments of close to \$1 billion.<sup>120</sup> Some involve public ownership with private operation through lease contracts, concessions, or management contracts, while others involve full private ownership and private operation. Yet others involve non-profit operation through local community organizations. Thus, the term "public-private partnership" covers a wide spectrum of instrument choices, ranging from those which can easily be defined as a subset of traditional government contracting (for example, management contracts) to those which cannot (for example, projects with full private ownership and private operation).

### **A. Characteristics of Public-Private Partnerships**

The most distinctive feature of many of the larger public-private sector infrastructure partnerships that are now emerging is the integration within a single private sector firm or consortium of all or most of the functions of financing, designing, building, operating and maintaining the facility in question. Under traditional government contracting regimes, the facility in question would have been publicly owned, and many of the functions noted above would have been contracted out to separate private sector firms. Thus, the major innovation which distinguishes the public-private partnership instrumentality is the bundling of these functions, reflecting a form of vertical integration on the part of the private sector provider of these services. However, because the functions involved are often so specialized and entail deployment of quite different bodies of complementary expertise and resources, private sector providers are typically not vertically integrated firms in a conventional sense but consortia ("virtual corporations") that are formed to develop and operate a particular facility.<sup>121</sup>

In spite of these differences, the public-private partnership bears some similarities with the traditional government procurement instrumentality:

(i) Firstly, if government procurement is the chosen instrumentality, the public will pay by way of taxes; if, on the other hand, some form of public-private partnership is involved, the public will pay either by way of taxes (if financing is accomplished by means of subsidies) or directly by way of user fees (if financing is accomplished by means of self-financing by the winning consortia). In either case, the government is under the same obligation, namely to provide the best possible services to the public at the lowest possible cost.

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120. For a discussion of these issues, see R. Daniels & M.J. Trebilcock, "Public-Private Sector Infrastructure Partnerships: The New Trend In Privatization" (Unpublished: Draft of September 29, 1994).

121. *Ibid.* at 2. Also *supra* note 14 at 54.

(ii) Secondly, the government has recognised the functional similarity of the government procurement and the public-private partnership instrumentalities, at least to the extent of creating competitive selection processes for bids. In each of the three current Canadian infrastructure case studies reviewed by Daniels and Trebilcock (namely the Toronto Highway 407 Toll Road, the Prince Edward Island Fixed Link, and the Pearson Airport Terminal Contracts)<sup>122</sup> a Request for Proposals (RFP) was issued, containing information and restrictions similar to a bid solicitation issued as part of the traditional government procurement process.

## **B. Access to Information: A Common Law Solution**

The public-private partnership instrumentality has both significant differences from and similarities to the government procurement instrumentality. There is, however, no difference of sufficient significance to prevent the extension to the public-private partnership instrumentality of the common law right on the part of bidders who believe that they have been unfairly deprived of the award of a government contract to apply for relief from the courts. Given the fact that governments are attracted to the public-private partnership instrumentality at least in part by efficiency concerns, there is an additional reason for treating public-private partnerships as legally analogous to government procurement for the purpose of bid challenge: namely, in order to prevent the creation of perverse incentives in the choice of government instrumentality for the production of goods and services. If bid challenges are prevented in the case of public-private partnerships, but not in the case of traditional government procurement, the choice of a bid challenge regime may unduly influence the government in its decision as to which instrumentality it will use to procure government services. The government may choose to employ the public-private partnership instrumentality even in cases where this would not be an efficient solution, merely to prevent the possibility of bid challenge litigation.

As well, the public-interest policy considerations noted by Brenner J. in *Tercon Contractors Ltd. v. British Columbia* and Halvorson J. in *Kencor Holdings Ltd. v. Saskatchewan* in the context of traditional government procurement are equally applicable to the public-private partnership instrumentality. In these two cases, the judges stated two basic reasons for the necessity of judicially reviewable bid challenge procedures: firstly, in order to protect the interests of the public in obtaining services at the lowest cost (which can only be assured by a fair and transparent bid competition); and secondly, in order to protect the legitimate interests of the bidders, who have invested large sums in the preparation of tenders (millions of dollars in the three large infrastructure projects noted above).

Therefore, there is a strong case for the creation of a common law right to challenge the government award of a public-private partnership contract. Under such a system, the call for a Request for Proposals by the procuring agency would create a unilateral contract, "contract A", which would come into being without the necessity of

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122. *Ibid.*

further formality upon the submission of the bid. The principal term of contract A would be the irrevocability of the bid, and the corollary term would be the obligation in both parties to enter into a contract (contract B) upon the acceptance of the bid. Another term would be the qualified obligation on the part of the procuring agency to accept the lowest bid, the nature of this obligation being controlled by the terms and conditions established by the RFP.

Clearly, for such a system to work in a fair and transparent manner, the terms and conditions stated in the RFP must be reasonably complete. Therefore, it would be an implied term of contract A that the procuring agency will not use any hidden criteria in the bid selection process. This in turn implies that the RFP will include all relevant information necessary to complete a successful bid, including the evaluation criteria, and that the procuring agency will disclose the grounds on which the successful bid was accepted and the others rejected.

### **C. The Pearson Airport Terminal Contracts**

The political and legal controversy surrounding the decision by the Federal government to cancel the Pearson Airport Terminal contracts is a current example of the complexity of the issues facing the courts when they are called upon to adjudicate public-private sector partnership disputes. A brief chronology of the events leading to the governments' decision to cancel the contracts demonstrates the political and legal implications of this decision:

(i) On August 30, 1993, a general agreement was reached between the winning consortium and Transport Canada to redevelop and operate Terminals 1 and 2. The winning consortium, Pearson Development Corporation, was formed as a result of a merger between the only two bidders in the competition: Paxport Inc. and Air Terminal Development Group (after the project was initially awarded to Paxport).

(ii) On September 8, 1993, the Government of Canada called a federal election. During the election campaign the Leader of the Opposition (Jean Chrétien) stated that any deal that was concluded before the federal election would be considered politically suspect by his party and would therefore be subject to a full review by his government if his party were to gain office.

(iii) On October 7, 1993, at the direction of the Prime Minister, all contracts were signed and the transfer to the Pearson Development Corporation of Terminals 1 and 2 was finalized.

(iv) On October 28, 1993, 3 days after winning the federal election, Prime Minister Chrétien appointed an advisor, Mr. Robert Nixon, to carry out a review of the matters concerning the privatization of Terminals 1 and 2 at Pearson Airport.

(v) On November 29, 1993, Nixon reported that in his opinion the contract was seriously flawed and should be revoked by the Liberal government.

(vi) On December 3, 1993, the government simultaneously cancelled the contract that existed between Transport Canada and Pearson Development Corporation, and made public the Nixon Report to support the government's actions.

(vii) In April 1994, the government introduced Bill C-22 into the House of Commons. This Bill was intended to settle all of Pearson Development Corporation's claims against the government for breach of contract. The Bill allowed compensation only for the developer's out-of-pocket expenses: lobby fees and foregone profits were excluded from any redress offered by the government to the consortium. Further, the Bill proposed to block the Pearson Development Corporation from pursuing any action through the courts.

(viii) On July 5, 1994, a Senate committee voted to block passage of Bill C-22. Tory Senate leader John Lynch-Staunton called the decision to block recourse to the courts "obscene", and two law professors who testified before the committee stated that Bill C-22 was unconstitutional.<sup>123</sup>

(ix) On September 16, 1994, the Pearson Development Corporation filed a statement of claim in the Ontario Court's General Division seeking damages for breach of contract. Retired Supreme Court judge Willard Estey, hired as a legal advisor by the consortium, characterized the proposed federal Bill C-22 as an action more fitting in a "banana republic" than a democratic state.<sup>124</sup>

Obviously, the government's decision to block the consortium's access to the courts has important constitutional implications. However, even if this legislation is declared unconstitutional, this case still poses many unique legal challenges for the courts. Firstly, unlike the cases cited above, in this case the government is cancelling the final contract that it signed with the consortium (contract "B" in the terminology employed above), alleging as a reason for this action improprieties in the original bidding process (contract "A").<sup>125</sup> Therefore, this case is in essence a mirror image of the cases noted above: the government, as opposed to the supplier, is arguing that the bidding process was unfair. This situation puts the burden on the plaintiff developer to demonstrate that, in fact, it deserved to win the bidding competition. Clearly, in order to do so it is necessary that the plaintiff be allowed access to all records of the bidding process held by the government. Thus, this case demonstrates the necessity of a fair and transparent access to information regime for the integrity of the contracting process: otherwise, the resulting contract is open to legal challenges from both parties.

Secondly, this case is interesting because one of the parties to the consortium, the U.S.-based Lockheed Corp., may resort to the North American Free-Trade Agreement

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123. See J. Geddes, "Senators Block Pearson Bill" *Financial Post* (6 July 1994).

124. See Canadian Press, "Developers Sue Over Loss of Airport Deal" *Globe and Mail* (17 September 1994).

125. For a description of the improprieties alleged, see R. Nixon, *Pearson Airport Review*, November 29, 1993. At 13 he notes: "To leave in place an inadequate contract, arrived at with such a flawed process and under the shadow of possible political manipulation, is unacceptable".

(NAFTA) to challenge the federal government's plan to legislate limited compensation to the consortium for breach of contract.<sup>126</sup> Under article 1110 of NAFTA, no party may expropriate an investment of an investor of another party in its territory, or take a measure tantamount to such an expropriation, except "in accordance with due process of law"<sup>127</sup> and on prompt payment of fair market value compensation.<sup>128</sup> If Lockheed succeeds in this action, the government will be in the odd situation of having to compensate the American partner of the consortium, while denying compensation to the Canadian partners. As the lawyers for the Canadian partners of the consortium point out, this result would be politically difficult for the government, leading to the conclusion that "a non-Canadian clearly has more rights than a Canadian".<sup>129</sup> In this case the lawyers for the Canadian partners of the consortium are attempting to utilize the effect of NAFTA to extend the domestic range of rights.

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126. See A. Freeman, "U.S. Firm Considers Pearson Challenge" *Globe and Mail* (20 July 1994).

127. NAFTA, article 1110(1)(c).

128. NAFTA, articles 1110(1)(d) and 1110(2)-1110(6).

129. *Supra* note 119.

## CONCLUSION

The legal structure for access to information in the context of public commercial interests is complex. There exist a variety of instrumentalities available to the government for the provision of goods and services to the public, and therefore a wide range of possible relationships between the public and the private sectors. This situation has resulted in considerable confusion over the rights of the various parties to information access, leading to concerns about the fairness and transparency of the access to information regime.

There are, however, three factors at work that are effecting an evolutionary change in the law of public commercial information access:

(i) In a purely domestic context, the general trend in the common law is towards more competition in the tendering process, judicial review of procurement decisions, and limiting preferred treatment for certain classes of suppliers through the use of hidden criteria in the bid competition process. Therefore, the government faces increasing pressure from the judiciary to provide fair and transparent access to information to all parties in the process of government contracting.

(ii) As can be seen in the above Pearson Airport Terminal Contract case, international treaties and trade agreements relating to government procurement are having a "spillover effect" on domestic law. As rights of access to public commercial information are granted to foreigners through such treaties, it becomes increasingly difficult to deny such rights to Canadian citizens.

(iii) As the government becomes involved in increasingly complex relationships with the private sector, the range of arguments available to aggrieved suppliers increases proportionally. In the Pearson case above, for example, the plaintiffs may make constitutional arguments, common law contract arguments, and arguments under the North American Free-Trade Agreement. The existence of a number of complementary access to information systems has resulted in a "race to the top", in which the elements in each system most conducive to fair and transparent access to information have tended to predominate.