



## Summer-Fall 2009

# Top 20 Countdown

Excerpted from the forthcoming  
*National Tendering Law Update*  
“2009 Summer-Fall Summary”

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# 1

***Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)***, March 23, 2009  
The Supreme Court of Canada hears arguments and reserves judgment on the controversial British Columbia Court of Appeal decision that enforced a limitation of liability provision and shielded the government from \$3.3 million in damages after awarding a contract to a non-compliant bidder.

# 2

***Northrop Grumman Overseas Services Corp v. Canada (Attorney General)***, May 19, 2009  
The Supreme Court of Canada hears arguments and reserves judgment on whether a foreign bidder can challenge a government procurement process based on the domestic Agreement on Internal Trade. The Canadian International Trade Tribunal previously ruled that the foreign bidder had standing under the treaty.

# 3

***Clarke’s Trucking & Excavating v. Attorney General of Canada***, June 6, 2009  
The Newfoundland and Labrador Supreme Court dismisses a contractor’s extra costs claim after finding that the contractor failed to perform a diligent pre-bid site inspection. The problematic dredging project resulted in \$250 000 in extra costs to the contractor on a contract originally valued at \$167 000.

# 4

***TeleZone Inc. v. Canada (Attorney General)***, December 24, 2008  
The Ontario Court of Appeal upholds a number of trial level decisions that recognized the jurisdiction of the provincial superior courts to hear procurement disputes involving the federal government. It also finds that the “Contract A” fair dealing duties apply to both public and private sector purchasing institutions.

# 5

***Cherubini Metal Works Ltd. v. New Brunswick Power Corp.***, December 22, 2008  
The New Brunswick Court of Appeal upholds a public utility’s decision to bypass a low bidder due to concerns over the inexperience of a proposed subcontractor. Curiously, the Court of Appeal states that “the law does not impose an implied obligation” on purchasers to disclose evaluation criteria weightings.

# 6

***SMRS Construction v. Atlantis Marine Construction Inc.***, March 24, 2009  
The Ontario Superior Court of Justice awards damages for unpaid work to a subcontractor after the parties fail to properly define the method of payment. The Court determines that the parties never agreed on either a flat rate or hourly pricing structure and substitutes its own pricing analysis to determine just compensation.

# 7

***Qikiqtaaluk Corp. v. Nunavut (Minister of Economic Development and Transportation)***, March 10, 2000  
The Nunavut Court of Justice rejects the request of an unsuccessful bidder for access to all of the documents created by the government in evaluating the bidder’s submission. The Court finds that the government’s editing out of comparative competitor information complies with relevant public access laws.

# 8

***Thales Rail Signalling Solutions v. Toronto Transit Commission***, May 1, 2009  
The Ontario Superior Court of Justice rejects the injunction application of an unsuccessful bidder who attempts to stop the TTC from awarding a contract to a competing bidder. The injunction application is rejected because the unsuccessful bidder’s bid contained a qualification that rendered it non-compliant.

# 9

***ISE Inc. v. Department of Public Works and Government Services***, May 25, 2009  
The Canadian International Trade Tribunal upholds the government’s rejection of a proposal that met most, but not all, of the numerous mandatory requirements. The Tribunal states that the bidder should take issue before bidding, rather than after the fact, if it perceives the evaluation requirements to be unreasonable.

**10**

*MTS Allstream Inc. v. Department of Public Works and Government Services*, February 24, 2009

The Canadian International Trade Tribunal awards lost profit damages to a complainant after finding that its proposal was improperly rejected as non-compliant. The Tribunal finds that the RFP was vague regarding the method of measuring compliance and, citing *contra proferentem*, sides with the supplier.

**11**

*R. v. Crown Paving.*, February 3, 2009

The Newfoundland and Labrador Court of Appeal renders a split decision in a controversial case involving bid shopping allegations. While the minority finds bid shopping, the majority upholds the government's decision to bypass an over-budget low bidder and extend the contract of a competing incumbent bidder.

**12**

*Cambridge Plumbing Systems Ltd. v. Strata Plan VR 1632*, May 1, 2009

The British Columbia Supreme Court rejects the bid shopping claim of an over-budget low bidder. The Court finds that the condo corporation could rely on a tender call clause that made award subject to available funding as the basis for cancelling the bidding process and negotiating with other bidders.

**13**

*James A Brown Ltd. v. Caisse Populaire Welland Ltee.*, March 17, 2009

The Ontario Superior Court of Justice upholds the purchasing institution's decision to bypass the low bidder over contract performance concerns after discovering that the low bidder had made a price calculation error in its bid. The Court finds that the purchaser had the right to award to a more qualified higher bidder.

**14**

*Hub Excavating Ltd. v. Orca Estates Ltd.*, April 17, 2009

The British Columbia Court of Appeal reverses a trial decision that found a land developer liable to the low bidder for cancelling a tendering process. The Court finds that the low bidder could not rely on the pre-cancellation contract award representations made by the engineer who was retained by the developer.

**15**

*Gulf Physiotherapy Ltd. v. Western Health Care Corp.*, April 9, 2009

The Newfoundland and Labrador Supreme Court finds a health care corporation liable for lost profit damages to a low bidder. The corporation had awarded a contract to the low bidder for physiotherapy services but then continued to use the second lowest incumbent bidder for the provision of those services.

**16**

*Ontario Realty Corp. v P. Gabriele & Sons Ltd.*, January 23, 2009

The Ontario Superior Court of Justice awards the ORC damages after finding that the defendant unlawfully conspired with ORC employees in a land sale transaction, using inside information in post-bid "clarifications" to improve its bid before negotiating post-award price reductions and flipping the property.

**17**

*Budget Rent-A-Car of B.C. Ltd. v. Vancouver International Airport Authority*, January 23, 2009

The British Columbia Court of Appeal upholds a summary judgment dismissing a claim against the Vancouver International Airport Authority. The lower court found that the RFP in question did not create a binding "Contract A" bidding process and that the plaintiff was therefore not entitled to claim compensation.

**18**

*Perimeter Transportation Ltd. v. Vancouver International Airport Authority*, November 7, 2008

The British Columbia Supreme Court rejects the plaintiff's claim against the Vancouver International Airport Authority, finding that the authority is not under a common law duty as a "public utility" to make its business opportunities available to all potential suppliers.

**19**

*Irving Ship Building v. Canada (Attorney General)*, April 16, 2009

The Federal Court of Appeal upholds a trial judgment that found that unsuccessful subcontractors have no standing to challenge a government tendering process under "Contract A" and (subject to exceptional circumstances) cannot challenge the government tendering processes under judicial review applications.

**20**

*Black Diamond Paving Ltd. v. Thierman Construction Ltd.*, November 27, 2008

The Alberta Court of Queen's Bench finds a subcontractor liable for failing to honour its sub-tender after the prime bidder who carried the subcontractor's sub-tender in its main bid was awarded a construction contract. The Court rules that the subcontractor was bound by the irrevocability period in the main tender call.