A COMPARATIVE REVIEW OF SURETY BONDS & TENDER BIDDING IN QUEBEC (INCLUDING NUNAVIK), NEWFOUNDLAND (INCLUDING NUNATSIAVUT), AND NUNAVUT

Mark MacNeill, MBA, MPA, LLB, LLM, LLM (Environmental), LLL (Licentiate - 2022)
St. Mary's University, Carleton University,
Edinburgh School of Law, University of Miami School of Law,
University of Denver Sturm College, University of Ottawa
macneillmark@hotmail.com

Abstract

This paper is a comparative exploration of approaches to tender bidding and surety bond use in three Canadian jurisdictions: the Province of Quebec, as Canada's sole civil law jurisdiction; the common-law jurisdiction of the north-easterly neighboring Province of Newfoundland and Labrador; and, to the north of Quebec, Canada's newest territorial government, Nunavut. The review will also include an examination of the Indigenous self-governing regions of northern Quebec, Nunavik and northern Newfoundland and Labrador, Nunatsiavut.

The research commences with a literature review and discussion of the early history of contract law and the principle of good faith, as well as a review of the historical timeline and evolution of the use of suretyship via surety and other forms of bonds. From the completion of the historical review of tender bidding and surety bonds, the focus of the paper shifts to examining their use within public procurement policies with respect to contracts at the federal level, along with the select provincial, territorial and Indigenous governments. This paper also examines the respective self-government agreements and "land claim agreements," to ascertain the tendering flexibility and surety bond requirements.

This project's research methodology uses secondary data such as legal studies and case commentaries, as well as relevant political science and sociological papers, along with credible news articles and government webpages. This paper's research also includes communication with the administrations of the National Aboriginal Capital Corporations' Association (NACCA), the Territorial Government of Nunavut, the Nunavik regional government and the government of Nunatsiavut.

Résumé

Cet article est une étude comparée d'approches sur les appels d'offre et l'usage de cautions dans trois entités territoriales canadiennes : la province de Québec, seul lieu à tradition juridique de droit civil; la province voisine (au nord-est) de Terre-Neuve, Terre-Neuve et Labrador, dont la tradition juridique est celle de la « Common Law », et, au nord du Québec, le gouvernement territorial le plus récent, celui du Nunavut. La comparaison comprendra aussi un examen des régions autonomes autochtones du nord du Québec (le Nunavik) et de Terre-Neuve et Labrador (le Nunatsiavut).
On commence par revoir les écrits antérieurs et par une discussion de l'histoire ancienne du droit contractuel et du principe de la bonne foi, ainsi qu'un examen de la chronologie et de l'évolution de l'usage de cautions et d'autres garanties. Après avoir examiné l'histoire des appels d'offre et de la caution, on en vient à examiner leur usage dans des politiques de marchés publics en rapport avec des contrats au niveau fédéral, ainsi qu'avec les gouvernements provinciaux, territoriaux et autochtones pertinents. On examine aussi les ententes sur l'autonomie gouvernementale et les ententes de « revendication territoriale », ce afin d'évaluer la flexibilité des appels d'offre et les exigences de caution.
La méthodologie heuristique de ce projet fait usage de données secondaires, telles que des études légales et des commentaires de cas, ainsi que des articles pertinents de science politique et de sociologie, en plus d'articles journalistiques crédibles et des pages web gouvernementales. Cette recherche comprend aussi des échanges avec les administrations de l'Association nationale des sociétés autochtones de financement, le gouvernement territorial du Nunavut, le gouvernement régional du Nunavik et le gouvernement du Nunatsiavut.

Preface

While at a conference during the Winter of 2020 in Ottawa, I had dinner with two colleagues from the National Aboriginal Capital Corporation Association (NACCA). NACCA, I will point out, is sponsoring tuition fees for this legal research paper under their capacity-building program for member organizations, particularly for General Managers, which I am one. I shared with them that I was completing two legal research papers this term, which, due to topic similarity and subject overlap, had been combined into one interdisciplinary study on security for debt and obligations. To show appreciation for their sponsorship of my coursework leading toward a Quebec Licentiate, LL.L. degree I asked whether there were any topics that NACCA might benefit from my exploring. In response the NACCA senior staff suggested the topic of tender bids and surety bonds as a matter Aboriginal businesses and

communities are presently wrestling with, in connection with challenges in meeting Tender Call criteria and/or bonding requirements.

For them, as a lead organization, nationally, for Aboriginal financial institutions and communities, the concern is that traditional approaches to government tendering and surety bonds are systemically detrimental to Aboriginal economic entities as they are typically smaller in nature, with less financial capacity, and culturally these entities come from a tradition of sharing and community capacity-building versus profit-driven private enterprise.

The challenge, NACCA advised, is that Indigenous entities are frequently unable to participate in projects as they are not able to secure surety bonds. I surmise from experience and some brief research that the reason is the inability to come up with the fees required to secure the bond and or creditworthiness (or lack of any established credit—which is culturally a rather disjunctive element that puts them out of sync with matching tendering contracts relative to larger, wealthier, credit-established non-Aboriginal firms). NACCA went on to advise that they are wondering whether, if they were to create some of Aboriginal entity at the national level to provide insurance style surety bonds, what structure—and, in particular, what legal structure—should it be?

The latter part of NACCA's dilemma described above, I feel, gravitates outside the scope of contract law, into company law. Nevertheless, I still believe that there is room to do some legal research in contract law (obligations context) that may benefit them, and that doing so certainly can make for an interesting exploration.

What I am first dealing with is that because the coursework and legal research is for the civil law section of the University of Ottawa's law school, I must keep the research within a Quebec Civil Law context, and through that lens proceed with a comparative review of tender bidding and surety bond laws and regulations in Quebec versus one of more of the common law provinces of Canada. I thus decided that within a review of the government tendering requirements in Quebec, I will also examine the situation in Nunavik for the benefit of NACCA, and hopefully Indigenous readers. I include a quick review of the tendering process and surety bonds in Nunavik, a self-governing predominantly Indigenous region of Northern Quebec. Then for a comparative perspective, rather than a traditional comparison of civil law Quebec versus neighboring common law Ontario (Canada's two most populated and original members of Confederation), I will, alternatively, compare Quebec's tendering with that in the common-law jurisdiction of the Inuit-governed Territory of Nunavut and in Nunatsiavut (the area claimed by the Labrador Inuit) of Northern Newfoundland, as well as more broadly with Quebec's eastern neighbor, the common-law province of Newfoundland (NL).

Incorporated in my review, I examine the respective self-govern-

ment agreements and "land claim agreements," to ascertain the tendering flexibility these self-governing regions and territory may exercise, and whether surety bonds on projects are required. Furthermore, the issue of surety bond requirements for Indigenous economic project participants is at a sociological intersection where ethnicity and income meet to preclude or disadvantageously cast Indigenous entities, making them less likely to be able to bid on tenders. Within these parameters, there may be some Charter Rights or Indigenous Law and International Convention violations which are worth mentioning, but these will be limited in discussion within the scope of this research exercise.

This project's research methodology utilizes primarily secondary data such as legal studies and case commentaries to the extent possible, as well as relevant political science and sociological papers, along with credible news articles and government webpages. This paper's research also includes communication with the administrations of the National Aboriginal Capital Corporations Association (NACCA), the Territorial Government of Nunavut, the Nunavik regional government and the government of Nunatsiavut.

Introduction

From the earliest days of the socialization of mankind into groups for security of person, divisions of labor began to emerge; exchanges of goods began, as well as trade between hunters and gatherers, and between families. Traditionally, they shared, but history tells us that, with time, as populations grew, barter and the exchange of goods emerged, and larger undertakings and buildings were required. Mediums of exchange such as coins and, later, paper currency backed by gold emerged, and where it is referred to as legal tender, thereby it is construed that the paper currency was offered as a financial medium. As the Middle Ages progressed, the western world—which at that time was comprised of European expansionary empires—faced large-scale events requiring recovery, such as the Great Famine and the Black Death; European countries were simultaneously advancing from agrarian societies to commercial economies, which involved them in collective social justice movements such as the Peasant's Revolt. These developments saw the rise of insurance to manage risk associated with larger and more complex projects and enterprise (Herkimer). Through the ages, various and endlessly imaginable kinds of security were accepted for obligations to be later completed. For instance, "in 1468 the Danish king, who had acquired Orkney and Shetland when Norway and Denmark were unified under one crown in 1397" (The Map Archive), pledged these territories as security to honor his daughter's dowry prior to her marriage to James III of Scotland, because the King was preparing for war and sought the

spoils of war to bestow a much larger dowry befitting his daughter on his return from war. The King perished in battle, though, and these lands were formally ceded to Scotland in 1472 (The Map Archive).

The Commercial Revolution which began in the 13th and 14th centuries saw "the rise of insurance issuing, forms of credit, and new forms of accounting, allowing for better financial oversight and accuracy" (Herkimer). From this, as we shall see discussed below, emerged the use of surety bonds as a form of collateral security (Loyd, 1917) and, in more modern times, public calls for competitive bids (tenders) on large public projects, which would require security deposits to discourage bid reneging and encourage completion of the projects by the successful contractors (Bezer, 2010). In essence,

> [The] secondary obligation annexed to a contract to guarantee its performance, or the pledging of property to ensure the performance of a principal engagement, or to furnish means of indemnity in case of non-performance, is an idea familiar to modern law and was fairly developed in the legal systems of some of the civilized nations of antiquity. (Loyd)

Today, all levels of government are typically required by legislation, regulation and policy to request bids from competing contractors or suppliers when procuring goods or services and undertaking large construction projects.

> Public construction is done by open competitive bidding to obtain the best price for quality services, and to prevent favoritism and corruption. Construction contractors bidding on public projects must submit security with their bids to guarantee that if selected they will execute a formal contract to perform the work according to the terms of their bid. The threat of loss of this security is intended to discourage bid reneging (Bezer).

In Canada, to ensure good faith in conducting public contracts, our unique rules for "bidding on construction projects—and just about everything else—have evolved rapidly ever since the Supreme Court of Canada's landmark Ron Engineering decision in 1981. The decision has spawned well over a thousand lawsuits, with many more likely (Sandor et al, 2015)." Lawsuits, as we know, are very costly for both the claimant and the plaintiff, and having third-person guarantees as security for obligations makes litigation more complex and leads to lengthier examinations for discovery and presentation of evidence and testimony, thus adding further cost and demands of time on Canadian Courts trial processes, which are already known to be very busy (Sandor). Thus, it is beneficial to explore and distinguish between civil and common

law jurisdictions in Canada, and to understand how tender bidding and surety bonds are administered by law to promote and instill good faith in not only contractual relations between bidders and owners, but also with respect to accountability and transparency in the administration of public funds, projects and procurements.

Good Faith

So, what exactly is *good faith* and why is it significant to public tenders? Good faith can be defined in the following way:

> Sometimes legally binding due diligence around the effort made, information given, or transaction done, honestly, objectively, with no deliberate intent to defraud the other party. Yet, this does not cover a sin of omission, something done or not done in negligence. Known also as bona fides, implied by law into commercial contracts (*sic*) (Black's).

As demonstrated by definition, good faith goes to the core of negotiations and the formation of a valid contract, where one party, e.g., the offeror, conveys information detailing a good or service they wish to render for performance/sale, and the bidder/buyer relies on that information as being true and accurate in entertaining and engaging in negotiation, accepting the terms and then performing/consummating the transaction. Thus, good faith is essential to conducting reliable, sustainable, and valid transactions and represents one measure governments and other entities have adopted to protect and promote integrity in the industry. In particular, with large public contracts where accountability and transparency for the public funds being expended are paramount administrative obligations of fairness by the government to the public, the standard process used in almost all modern jurisdictions is to issue calls for tender bids, and the inclusion of surety bonds as a requirement.

Surety Bonds

From Clay to Bedrock—The Foundations and Staging of the Modern World of Transactions

The use of "surety bonds" as security for obligations can be considered part of the foundation and staging of the modern world of transactions within society, as well as between societies. On one hand, for some, "surety bonds" (or the lack thereof) are their Waterloo, while for others, these bonds are like the second coming of the Messiah.

Arguably, no other area of law comes closer to merging the common

and civil law in Canada (and elsewhere). Perhaps that is not surprising, given their deep and fertile roots in the ancient clay of Mesopotamia. The Law of Suretyship was first codified by Hammurabi (Morgan, 1927, p. 2), followed by Justinian (Morgan, p. 9) and Napoleon (French Civil Code, 1804) before being transplanted into the Code Civil du Québec (CCQ-1991, c.13) in its earliest iterations.

Bonds and surety agreements as forms of a guarantee for obligations have a long historical association with financing wartime funding and government actions. This combination of processes, in modern times, has spawned an industry unto itself, akin to the Lloyd's Coffee House[1]; but providing assurance, not insurance, is an important distinction.

Figure 1—Historic Timeline (Kayser)

2750 BCE	The earliest known Suretyship Agreement was cuneiformed into a Mesopotamian clay tablet (see Figure 2). A conscripted farmer could not take care of his fields because of his service in the King Enmebaragesi's Army (Wikipedia.org), so another farmer agreed to tend his fields. They agreed to split the profits 50/50. A local merchant agreed to act as what we believe[2] to be the world's first known surety by assuring that the second farmer would keep his bond.
1792 - 1750 BCE	The Law of Suretyship was first captured in a written legal code— the Code of Hammurabi
670 BCE	The oldest extant Surety Agreement was written.
180 BCE	Suretyship is noted in the Holy Bible. "An honest man is surety for his neighbour; but he that is impudent will forsake him. Forget not the friendship of thy surety, for he hath given his life for thee. A sinner will overthrow the good estate of his surety: And he that is of an unthankful mind will leave him [in danger] that delivered him. Suretiship hath undone many of good estate, and shaken them as a wave of the sea: and he that undertaketh and followeth other men's business for gain shall fall into suits." - Ecclesiasticus 29:14-19
150 CE:	Caesar Augustus developed the Roman Empire's first laws about surety (Coats, R. M., & Pecquet, G. M. (2013).
528-9 CE	Roman surety laws were captured in the Corpus Juris Civilis (Corpus of Civil Law; or, Justinian Code).

Figure 2 – Mesopotamian Clay Table

English Evolution

The word *surety* itself harkens back to late Middle English (c. 1300), being "a guarantee, promise, pledge, an assurance," from Old French *seurté*, "a promise, pledge, guarantee; assurance, confidence" (12c., Modern French *sûreté*), from Latin *securitatem* (nominative *securitas*), "freedom from care or danger, safety, security," from *securus* (see *secure*). From the late 14th century, we find the word defined as "security, safety, stability; state of peace," and also as "certainty, certitude; confidence." The meaning "one who makes himself responsible for another" is from early 15th century usage (Surety1.com).

Since the year 1720, when evidence shows an attempt to create a surety company in England. Although this first entity failed to take hold, it set the stage for other such companies (Kayser). "The first successful surety company was the Guarantee Society of London, founded in 1837 in London, England" (Kayser) And in North America, the creation of Fidelity Insurance Company, founded in 1865, brought the ideas about suretyship embodied by the Guarantee Society from the "Old World" to the "new" one (Kayser). Likewise, in Canada, The Guarantee Company of North America was founded in 1872, and was the first Canadian company to offer fidelity bonds and the largest and oldest independent Canadian-owned insurance company (Cincinatti).

North American Evolution to Current Surety (Kayser)

As western society prospered and expanded economically, more surety companies were started; surety bonds became more common, and became adapted to a broader array of uses, and the surety industry changed. For instance, in 1931, the Hoover Dam construction project began, demanding a $5 million surety bond for the $49-million-dollar project (Kayser). It was an extraordinary amount for a bond in that era, and the project is notable in other ways:

> For the first time, surety companies pooled their capacity to provide the bond. Because surety companies combined their resources, the contract for the Hoover Dam was secured. This was the first appearance of a struggle that will appear over and over again, even today. As construction projects grow more advanced, more complex and expensive, surety bonds have had to parallel that growth. Big questions are asked, like can surety bonds cover new design risks? Do underwriters understand these new risks enough to provide reliable bonds?" (Kayser)

The answers to the questions above are complicated and the answers are uncertain. But as the surety industry has evolved and changed, "underwriters still rely on "the 3 C's" (character, capacity and capital) while assessing risks" (Kayser). And while these unanswered questions may expose a perceived ambiguity in surety bonds, it is clear to those in the industry that sureties are not weak (Kayser) instruments but rather are essential forms of commercial guarantees particularly for most large public undertakings. "In the 2008 recession, when many major industries faced significant financial hardships and cuts, the surety industry remained strong through the entirety of the recession, even with the lack of government funded public works projects"(Kayser).

Construction requires the logistical coordination of multi-variate resources including labour, materials and financing under often strict, set timelines and is by nature a very risky business.

> According to Dun & Bradstreet's Business Failure Record, an average of 10,000 contractors fail each year, leaving behind them many unfinished private and public construction projects. Surety bonds assure project owners that contractors will perform the work and pay their subcontractors, laborers, and material suppliers. A surety bond is a risk-transfer mechanism by which the surety company guarantees to the obligee (the owner) that the principal (the contractor) will perform a contract. (Forestor, 2002)

For construction projects three primary types of surety bonds are used: bid, performance, and payment bonds (Forestor, 2002).

> A bid bond provides financial assurance that the bid has been submitted in good faith and that the contractor intends to enter into the contract at the price bid and provide the required performance and payment bonds. The performance bond protects the owner from financial loss if the contractor fails to perform the contract's terms and conditions. The payment bond guarantees that the contractor will pay certain subcontractors, labourers, and material suppliers on the project. (Forestor, 2002)

The use of surety bonds for public projects and procurement meeting minimal thresholds typically is legislated and regulated in most jurisdictions today. Alternatively, surety bonds are discretionary for privately owned construction projects and are often used by private owners too.

> With a surety bond, the risks of project completion are shifted from the owner to the surety company. Because of that, many private owners require surety bonds from their contractors to protect their company and shareholders from the enormous cost of contractor failure. Subcontractors may be required to obtain bonds to help the prime contractor manage risk, particularly if the subcontractor has a significant part of the job or is doing specialized work that is difficult to replace. (Forestor, 2002)

The Financial Foundations of Canada

Surety bonds and the provision of guarantees and security to reduce risk have played a major role in Canada's growth (as well as most other countries worldwide), since they emerged as a modern North American industry in the late 19th and early 20th centuries (Western). In a different context, yet parallel in significance, within Quebec the provincial police force is known as the *Sûreté* du *Québec (Quebec). Within the financial sector, and particularly with respect to the financing of large construction projects and our governments' public procurement,* the use of surety bonds yields confidence and has provided support for "hundreds of billions of dollars of investment in public infrastructure and private undertakings" and can even be considered "the bedrock of our modern construction industry" (Western). They have framed up and supported sound, prudent business practices and informed decision making from small to massive projects in the both public and private sector: in short, they are arguably the most comprehensive and effective risk management tool in existence today.

Suretyship, Guaranty, and Indemnity

Surety bonds are a species of guarantee agreement (McGuinness, 2021) which as described above is very commonly used as security to reduce risk in commercial transactions (Manzer & McKinnon, 2021). A guarantee typically involves large sums of money that are routinely lent (or other obligations such as contractual performance) on the basis of guarantees. A guarantee essentially is defined as follows: it is

> a promise by a person (the guarantor) to answer to someone (the beneficiary of the guarantee) for the payment or performance of a legal obligation of another person (the primary obligor). A guarantee is collateral to the principal contract; its enforceability arises only when a specifically named contingency occurs, for example a default of the primary obligor. (Manzer & McKinnon, 2021)

A guarantee may be an unlimited guarantee, or a limited guarantee (Manzer & McKinnon, 2021). If the amount of the guarantee is limited, then either the liability of the guarantor is limited to a specific dollar amount, or the limitation is related to a portion of the obligations that are guaranteed (e.g., 75% of the primary obligor's debt) (Manzer & McKinnon, 2021). A guarantee may also be limited as to recourse rather than by amount; e.g., it will allow the beneficiary of the guarantee to recover only against specific assets of the guarantor (Manzer & McKinnon, 2021).

A guarantee may also be categorized as either a "pure" guarantee or a guarantee and indemnity (Manzer & McKinnon, 2021).

> The pure guarantee contains only the secondary guarantee obligation, meaning the guarantor will only be liable if the primary obligor has failed to perform its primary obligations. An indemnity is a primary obligation, an express obligation to compensate a party for its loss or damage. A guarantee and indemnity contain both a guarantee obligation as well as an indemnity obligation. (Manzer & McKinnon, 2021)

The term *guarantee* as described above is commonly used to refer to a contractual obligation, whereby one party of the contract (guarantor) promises that another person (debtor) will compensate for a debt or fulfill an obligation (Manzer & Hargovan, 2020), "failing which the guarantor will answer in place of the principal debtor" (Manzer & Hargovan, 2020).

> Accordingly, the liability of the guarantor to the recipient of

> the guarantee constitutes a secondary undertaking with respect to the liability of the principal debtor. The guarantee provides a recipient creditor with a second source of recovery. For the guarantee to validly exist, the primary obligation must first be legally enforceable. If the primary obligation is not enforceable, the lender will not be able to rely on the guarantee. (Manzer & Hargovan, 2020)

An indemnity represents an independent undertaking to remediate any applicable losses incurred by a recipient of the indemnity (Manzer & Hargovan, 2020). A party who indemnifies is referred to as an indemnifier and is governed by certain stipulations:

> [The indemnifier] is liable regardless of the principal debtor's liability. An indemnity need not even relate to an obligation owed by another debtor, but rather may relate to any form of loss. Indemnities may arise under contract or deed like a guarantee but may also arise via statute, legal implication or the equitable principles of restitution. An indemnity need not be written to be enforceable, while a guarantee must be. (Manzer & Hargovan, 2020)

To categorize a contract as a guarantee or indemnity, one needs to look not only at the terms of the agreement, and the circumstances in which promises were made (Manzer & Hargovan, 2020). The Supreme Court of Canada noted in *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] S.C.J. No. 89 that "the distinction between contracts of guarantee and of indemnity ought not to be overemphasized" and that "attempts to label the contract as one of guarantee or indemnity may be less than helpful."

To be clear, we can summarize the distinction between contracts of suretyship, of guaranty, and of indemnity:

> To say that the distinction between a contract of suretyship and one of guaranty is a shadowy one and that the words "surety" and "guarantor" are often used indiscriminately as synonymous terms is to state a well known fact. In a broad. sense a contract of guaranty corresponds with that of suretyship, the distinction between them being merely technical, and a transaction which is called in some cases an absolute guaranty is denominated by other courts a contract of suretyship. A guaranty is like a suretyship in the sense that it is an engagement to answer for the debt, default or miscarriage of another and it is for this reason that the terms "surety" and "guarantor" or "guaranty" are often confounded and used interchangeably. Yet there are points

> of difference between them which should be carefully noted. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning and is held ordinarily to know every default of his principal. (West, 1927, p. 212)

As identified, surety bonds are a type of guarantee agreement (West, 1927, p. 213). They are usually issued by a bonding company or insurance company (Duhaime, 2021). A surety bond is a written promise under seal, and the way a surety bond works is that the issuer (the "surety") commits to pay an expressly named beneficiary (the oblige) (Duhaime, 2021) a sum, up to a specified amount if specific conditions are met (Duhaime, 2021), "but the issuer's obligation ceases if certain stipulated conditions occur. Generally, these conditions relate to the manner and timeliness of claims made under the surety bond, and, of course the conduct of the primary obligor whose default triggers the obligation to pay" (Kayser).

In essence, a surety is obliged to pay if the debtor does not, whereas a guarantor undertakes to pay if the debtor cannot (Quebec):

> In construing contracts of suretyship, in an effort to determine whether they are contracts of suretyship, in the narrow sense, or contracts of guaranty, the courts have applied various tests. One test is, whether the contract fixes time of default on the part of the principal debtor; if it does not, it is held to be a contract of guaranty, and if it defines the time of default when the surety is to pay or see the debt paid it is one of suretyship. (Quebec)

The scope of the obligations of the surety is essentially a matter of contractual interpretation. Contractual terms and conditions will usually pertain to the manner in which "claims are to be made, the timeliness of such claims and the performance of the principal" (Quebec).

> Surety bonds generally have three parts:
>
> (1) the obligation, or operative part of the bond, which defines the obligation of the surety;
>
> (2) the recitals which explain the transaction and its factual context; and
>
> (3) the conditions of the bond. (West, p. 214)

The surety entitlement under the law of guarantee is akin to the rights

and defences to which guarantors are generally entitled (McGuinness, 2018). As with guarantees, the obligations of the surety refer to collateral and are dependent on the obligations of the principal.

> Thus the surety is liable to the obligee only for the actual damages sustained by the obligee as a result of the non-performance of the principal (McGuinness, 2018). In most cases, the bond will provide the surety with a right to elect between paying the amount of damages suffered by the obligee (up to the limit of the bond) and performing the guaranteed obligation itself. (McGuinness, 2018)

In lieu of the obligations of guarantee, the surety should usually insist upon notice of any default by the principal (McGuinness, 2018). And, when default by the principal occurs, the surety must choose "within a reasonable time which option it intends to pursue: to complete, to correct or to pay. If it elects not to complete the work, it cannot complain when another company is hired to do that work" (McGuinness, 2018).

Commercial surety bonding is a process dominated by insurance companies (McGuinness, 2018). The common feature of the endless variations of surety bonds provided by insurance companies is that they "provide the obligee with the guarantee of the surety that the relevant obligation will be duly performed by the principal." One common form of commercial surety bond is the tender- (or bid-) related bond (Bid Bonds) (McGuinness, 2018), "which provides assurance that a party who submits a tender on a contract will enter into the contract if his or her tender is accepted" (McGuinness, 2018).

The purpose of a tender bid bond is to provide a guarantee to the obligee with the good faith of the principal in submitting a tender bid (McGuinness, 2018). Such a bond provides the following:

> If the principal's tender is accepted, the principal will enter into a formal contract with the obligee within the time allowed in the bond. Should the principal fail to satisfy this obligation, then the surety will be obliged to pay the obligee the difference between the amount of the tender and the price at which the obligee is able to arrange a contract with some other person. (McGuiinness, 2018)

The reader should carefully note that under a tender bid bond there is no obligation assumed by the surety to see to the performance of the contract, and, rather, they have a choice of remedy as explained earlier between compensation and performance. Essentially, if the obligee wishes to obtain a guarantee of the due completion or performance of the contract, then the obligee must seek a performance bond to be pro-

vided (McGuinness, 2018).

Distinguishing the Types of Surety Bonds

To begin with, under Canadian construction law, five types of bonds are often used. They are "bid bonds, performance bonds, labour and material payment bonds, lien bonds and financial guarantee bonds." (Glaholt and Rotterdam). As discussed above and continued below, each of these bonds has its own specific use and peculiarity. Performance bonds are a type of commercial surety bond in widespread use.

> Performance bonds provide assurance that a party will perform a contract as required by its terms. The basic purpose of a performance bond is to indemnify the obligee against the costs of completion in the event that the principal defaults in the performance of the contract. A performance bond may relate to the initial execution of the contract work or to the satisfactory resolution of warranty claims. (Glaholt and Rotterdam)

Whereas it is given that a performance bond relates purely to the performance of warranty obligations, it is often called a maintenance bond. It should also be note that distinct from performance, "a bond securing repayment of the unclaimed balance of any advance payment made to a contractor is not a performance bond" (Glaholt and Rotterdam).

The labour and material payment bond is another common form of surety bond, within the Canadian construction industry (Glaholt and Rotterdam).

> The function of a labour and material payment bond is to guarantee that all suppliers or subcontractors to the principal will be paid for the supplies which they make in connection with a particular project—the operative condition being that payment is due. Broadly worded bonds protect subcontractors and sub-subcontractors if they are not paid pursuant to their contracts. Provisions limiting potential claimants' rights are required to be written in plain language. Interpreting bonds in a manner that renders the guarantee's protection illusory should be eschewed. (Glaholt and Rotterdam)

The labour and material payment bond is distinct from a performance bond. The former does not relate to the due performance of the contract between the principal and the oblige, but, rather, it relates to contractual obligations between the principal and his or her subcontractors (Glaholt and Rotterdam). There are a number of considerations that will prompt an obligee to insist that such a bond be provided. They are

as follows:

> 1. The employer may wish to ensure that the supplies of services and materials by subcontractors will not be interrupted as a result of a weakening in the financial condition of the principal.
>
> 2. The employer may wish to protect his or her interest in the property on which the project is being constructed from mechanics' or construction lien claims.
>
> 3. The fact that such bonds are common on government construction projects suggests that the motivation behind such bonds may be at least partly political. There is little evidence to suggest that the provision of a labour and material payment bond results in any significant cost saving to the employer who demands it, and since such bonds are not themselves cost-free, they may well result in an actual increase in cost. (Glaholt and Rotterdam)

It should be further noted that most labour and material payment bonds operate on adherence as a payment guarantee at only one contractual level (e.g., sub-contractors having a direct contractual relationship with a primary contractor (general contractor). Also, multi-level payment bonds are not unknown, particularly in the case of government contracts.

> The standard form labour and material payment bond creates an express trust permitting the beneficiaries to claim and recover sums owed to them under contract. In general, where "it could be said to be to the unreasonable disadvantage of the beneficiary not to be informed" of the trust's existence, the trustee's fiduciary duty includes an obligation to disclose the existence of the trust (Glaholt and Rotterdam).

Another type of surety bond are repayment bonds. These provide security for the repayment of contract deposits or advances made during performance, in the event a breach of the contract occurs, which gives rise to the right to recover the amounts so advanced. There are also tax and revenue related bonds (Glaholt and Rotterdam). Finally, surety bonds may also be used with a court or tribunal "as security against an award of legal costs and liability on an adverse judgment … or as security for the due execution of some court (Glaholt and Rotterdam)."

Overview of the Bidding and Tendering Process

In the context of construction projects "bidding and tendering" is the process by which "a person (the 'Owner') (Glaholt and Rotterdam) who wishes to enter into an agreement for construction to be carried out on the Owner's land (a 'Construction Contract') by another person (the 'Contractor'), solicits binding offers, with a view to obtaining the best price and other terms" (Pattison, 2004). So how does it work? First, the owner of a project issues a Call (Pattison, 2004) for tenders (a "Call") for the contract. It is common experience that large public projects using public funds, for fairness, transparency and accountability use tender calls. As well, private interests seeking competitive bids from alternative firms may use the process as well.

When the Call for tenders is issued, it contains "Instructions to Bidders" (Pattison, 2004) defining the terms under which Bids will be accepted and the Construction Contract will be awarded. The terms "Bid" and "Tender" are interchangeable, and essentially mean an offer to enter into the Construction Contract on the terms set out in the Bid (Pattison, 2004). Bidding and tendering law is represented by a variety of presumptions and implied terms. While this can lead to obscurity, ambiguity, misapplication and misrepresentations during both bidding and the performance of the contract, it is readily overcome with the use of clear language (Pattison, 2004). And, in drafting a Call "based on a principled analysis of the authorities, an Owner may (subject to the general law of contract) impose any terms it chooses on Bidders, provided that it makes those terms clear, by express language or necessary inference" (Pattison, 2004).

> The law of bidding and tendering is no more than a set of presumptions, generally capable of being rebutted by careful drafting by the Owner in a Call for Tenders. The integrity of the bidding process can be protected in ways other than requiring a Bidder whose Bid price is too low due to a mistake to honour its price. The Owner's duty of "fairness" in bidding and tendering should be more precisely defined as an implied term that an Owner will not base its decision on criteria which are neither expressly disclosed nor inferable from the Call for tenders. (Pattison, 2004)

In common law, bidding and tendering is simply an application of the principles of contract law, e.g., offer and acceptance. In civil law a contract represents a set of obligations typically involving two or more parties, which is an enforceable obligation, or set of mutually enforceable obligations (Pattison, 2004). And while contracts may be unilateral in nature (Pattison, 2004), in this paper, where we are examining bid bond-

ing, two or more parties are required: the owner and the bidder/s.

When a Call has been issued, and even during the process of receiving bids, but before the conclusion of the Call period and review of the Calls, under contract law the following stipulations should be noted:

> An offer may be withdrawn at any time prior to acceptance; in fact, even an offer which is stated to remain open for a certain period may be withdrawn unless the promise to hold the offer open is itself given for consideration or under seal (i.e. unless bargained for). As we shall see, these exceptions to the right to withdraw an offer prior to acceptance have particular significance in the bidding and tendering context. (Pattison, 2004)

It is also often part of a Call's requirement for Bids, when a general contractor expects the inclusion of subcontractors in the performance of the contract, and, within Bid submissions responding to the Call, it will expressly name the proposed subcontractors (Pattison, 2004).

While we have examined the terms and process associated with putting out a Call for Tender, it is not to be confused with the term Request for Proposal (or "RFP").

> Unfortunately, Owners have frequently embarked on the process of soliciting Bids or Proposals without being clear on what it is they are attempting to elicit from interested contractors. Furthermore, in the past, Owners and courts have added to the confusion by often failing to distinguish between Calls for Tenders and RFPs. In *Rousseau Metal Inc. v. Canada*, for instance, the Call was referred to as a Request for Proposals, but it contained a provision which stated "It is stressed that your proposal may be accepted without negotiation". The Court described the call as a "call for tenders." (*sic*). (Pattison, 2004)

Thus, in *Rousseau Metal Inc. v. Canada*, the Call was referred to as a Request for Proposal (RFP) but was recognized by the court as a Call, and the proposals were recognized as bids, and the select bid accepted was deemed binding. Otherwise, if the proposal had not included the term recognizing the proposal as a tender call, then "Canadian courts have consistently adopted the position that the law will not enforce a contract to enter into a contract, or an agreement to negotiate" (Pattison, 2004).

> For clarity, the term "Call for Tenders" (or words to like effect) should be used by Owners where the intent of the process is to solicit an offer which, whether or not irrevocable prior to Contract B's award, becomes binding on the chosen Bidder upon the making of the award. The term "RFP" should be reserved

> for situations in which the Owner seeks to obtain a non-binding proposal (a "Proposal") which will form the basis of negotiations leading to a contract, but which does not entitle the Owner to require a chosen Bidder to enter into Contract B. (Pattison, 2004).

Essentially, there are many forms of Instructions within the terms provided to Bidders that are used in Calls. Thus, with bid contract litigation there is great variety in how the courts "distinguish decided cases and attempt to do justice to the parties" (Pattison, 2004).

In construction law the general principles of the use of surety bonds includes four criteria considered requisite in common law to establish an obligation of suretyship. They are as follows:

> (1) there must be a tripartite relationship involving the principal, the surety and the obligee;
>
> (2) the surety's obligation must be collateral or accessory to the obligation of the principal;
>
> (3) the surety's obligation to the obligee must be the same as, or less than, the obligation of the principal; and
>
> (4) the surety must be unconnected to the transaction except as surety, having no "interest" therein (Reynolds, 1993).

Basically, including the requirement of a bond in the tender call obliges a bidder to commit to securing a surety bond, and then the surety identified is obliged to indemnify a third party, the obligee,

> in the event the principal obligor fails to perform its obligations, whether they be the mere repayment of money or the construction of an entire building. The surety undertakes the obligation of the principal obligor in the event of such a failure. Insurance is a broader form of relationship, which, for the purposes of establishing entitlement to compensation, looks only to the risk insured against, and ignores the legal responsibility of the person causing the loss. This contrasts with surety, who will only become liable if the principal is also liable (Reynolds, 1993). A conditional bonding obligation is a simple undertaking to be answerable for the damage suffered by the creditor if the obligations of the debtor which are to be guaranteed are not performed (Wallace, 1995). Thus, breach of the primary obligation may give rise to damages not compensable by the surety. The surety merely steps in to substitute its performance for that of the

> primary obligor. (Glaholt, 2017, HCU-96)

As previously distinguished from indemnity, "where another person remains liable to the creditor and the promisor is not otherwise liable to the creditor than under the agreement, the agreement is one of guarantee rather than indemnity." However, if the obligation is an independent to make good a loss, the obligation is one of indemnity rather than guarantee (McGuinness, 1986).

So, what are the benefits of using surety bonds beyond serving as primarily as a security in case of default? On a secondary basis, bonds also serve as an important pre-qualification tool in the construction industry (Pattison, 2004).

> Tender packages on major projects will often require a "consent of surety" or "agreement to bond" as part of the tender of all qualified bidders. Such documents contain a unilateral representation by the surety to a principal and prospective obligee that the required bonds will be issued and delivered to the obligee if the contract is awarded to the tendering principal obligor (Ontario, 2000). The availability of an agreement to bond or a consent of surety indicates that the tenderer has satisfied its surety that it has the cash, character, capability, credit and continuity to fulfil its obligations of performance and payment for a given project at a given time, in addition to its other current obligations. While agreements to bond usually bear a seal, seals are not required unless specified in the call for tenders. (Ontario, 2000)

Surety bonds in construction law are distinguished by virtue of whether the sureties enter suretyship gratuitously (referred to as Accommodation sureties), with no expectation of remuneration and for the benevolent purpose of accommodating or assisting others (Canada, 1983). In contrast, compensated sureties underwrite bonds on the basis of "an expectation of complete indemnity and exoneration by the principal obligor and often its officers, directors and others. These underlying indemnities are a matter of contract" (Pattison, 2004).

A "General Indemnity Agreement" or "Master Surety Agreement" usually underlies a contractor's relations with its bonding company (Pattison, 2004). These indemnities will likely also extend to the following:

> affiliated and parent corporations and often to officers, directors and other personal indemnitors.

Such agreements usually provide that:

1. The indemnitors agree to indemnify and hold harmless the surety from any claims the surety may incur by reason of its issuance of the bond or by reason of any litigation resultant therefrom.

2. The surety is authorized to collect amounts incurred in enforcing the bond's obligations.

3. The indemnitors agree to pay the surety all premiums and fees for the bonds.

4. The indemnitors authorize the surety to pay, adjust, settle or compromise any claim under the bond.

5. The indemnitors authorize the surety to consent to a change in the bonded contracts, to make advances on the bonded contracts and to complete the bonded contracts.

6. The indemnitors assign any and all rights under the bonded contracts, all lien claims, all monies due under insurance policies, all rights under subcontracts, all machinery and equipment required for the performance of the contract and all proceeds derived therefrom to the surety. The surety is entitled to enforce this assignment without notice. The surety is given a full power of attorney to exercise all rights assigned.

7. All funds received by the indemnitors are held in trust for the benefit of those to whom the indemnitors incur obligations under the contract.

8. The indemnitors will pay interest on all amounts due to the surety.

9. A statement made by the surety of any liabilities is conclusive evidence of the fact and extent of such liability.

10. Each signatory must fully cooperate with the surety and provide full disclosure of its financial and business affairs to the surety.

11. The surety may settle with any signatory individually.

12. The liability of the undersigned is not affected by the principal's failure to sign the bond, by the surety's failure to procure or grant any bonds, by any claim that another security was to be

> obtained, or by the release of any indemnity.
>
> 13. The surety may set up a reserve.
>
> 14. The surety does not guarantee the issuance of any bonds. (Pattison, 2004)

Regardless of the type of bond used in a project Call/Tender, the intention of the parties as to the obligations of the surety is found in terms and language of the bond document (Nova Scotia, 2013). As far as the wording of the bond document, terms must be given their "ordinary and literal meaning in the context of the bond as a whole" (Nova Scotia, 2013). It is also further noted that "where the bond incorporates by reference the construction contract, the terms of the construction contract also form part of the bond" (Ontario, 2003). And where the wording of the bond agreement is clear and unambiguous, the parties will be bound to their agreement (Nova Scotia, 2013).

Public Procurement Policies: Federal Government Contracts

The Government of Canada regulates contracts with itself and its agencies under the authority of the Financial Administration Act (FAA) (Glaholt, 2017, HCU-201). Under the FAA, the Treasury Board serves as the general manager and employer of the Public Service (Glaholt, 2017, HCU-201), and has established policies governing public procurement. The FAA's goal via the Treasury Board's management is "to acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people" (Treasury, 2021).

The FAA enables the Governor in Council to do the following: "make regulations with respect to the conditions under which contracts may be entered into and may make regulations with respect to the security to be given to and in the name of Her Majesty to secure the due performance of contracts" (Treasury, 2021). The Federal Government Contracts Regulations defines a "construction contract" as a contract entered into for the construction, repair, renovation or restoration of any work except a vessel, including these:

> (a) a contract for the supply and erection of a prefabricated structure;
>
> (b) a contract for dredging;

> (c) a contract for demolition; or
>
> (d) a contract for the hire of equipment to be used in or incidentally to the execution of any contract referred to in this definition. (Treasury, 2021)

It should also be further noted that there are some exceptions whereby federal contracts may be entered into without soliciting bids. For instance, one exception to the rule allows non-bid contracts to be entered into in the event of an emergency in which delay or other considerations are not in the best interest of the public (Treasury, 2021).

> The Crown may also enter into contracts without soliciting bids if the estimated expenditure does not exceed: (a) in the case of a goods contract (which means a contract for the purchase of articles, commodities, equipment, goods, materials or supplies and includes a contract for the construction or repair of a vessel), $25,000; (b) in the case of a contract to be entered into by the Minister for International Development for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project, $100,000; (c) in the case of a contract for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, $100,000; or (d) in the case of any other construction contract, $40,000. (Glaholt, 2017, HCU-201)

As has been noted, most bid documents require security in the form of a bond, e.g., a surety bond. Yet, it can be noted that while it is not advisable to exclude surety bonds as a requirement of a bid, it is at the discretion of the owner whether a Call will leave room for the owner to waive this requirement should the bidder fail to provide a surety bond. It is understood such a waiver is seldom used and is not recommended because of the associated uncovered risk of losses due to non-performance and non-compliance of the contract by the bidder.

Generally, when a surety bond is specifically requested in the Call and a subsequent bid omits this security from their bid, it "suggests that the bidder is either very sloppy or lacks the financial resources to secure the required bonding" (Sandori, 2015). Bonding generally is seen as fundamental, and when Calls are made requesting proof of bonding or a commitment by the bidder to undertake a bond if chosen as the successful bid, if an owner subsequently waives or does not insist on the bidder bonding, then it would be construed as an unfair advantage

to the other bidders (Sandori, 2015). And a bidder who doesn't submit a required bid security is in breach of the Call requests and has rendered a non-compliant bid when a bond is expressly required (Sandori, 2015).

In practice, "few bid documents give the owner the discretion to waive the requirement that an agreement to bond be provided" (Sandori, 2015). It should be further noted that "unless the instructions to bidders give the owner some discretion, the submission of a conditional bid bond or conditional agreement to bond is equivalent to no bond at all. The bid is non-compliant" (Sandori, 2015).

Canada is signatory to the World Trade Organization's Agreement on Government Procurement (GPA). Drafted by some members of the WTO, its objective is to "ensure open, fair and transparent conditions of competition in the government procurement markets" (Sandori, 2015). The basic goal of the GPA is to open government procurement markets among its parties. Canada is also signatory to the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA), effective September 21, 2017. This binds all Canadian provinces and Territories as well to CETA terms. Under CETA,

> Canada has also agreed to broad coverage at the federal, provincial and municipal levels, which helps procurement processes be carried out in an open and transparent manner to ensure that taxpayers get the best value for their money. CETA applies only to high-value procurement contracts in order to ensure that governments can continue to use procurement to support local development, especially small and medium-sized enterprises. Nevertheless, certain important exceptions are built into CETA's government procurement rules, as they always have been in Canada's other free trade agreements. These include exceptions for cultural industries, Aboriginal businesses, defence, research and development, financial services, and services in the fields of recreation, sport and education, as well as social and health-care services. (Canada, 2020)

Figure 3. Legislative Approaches in Other Canadian Jurisdictions (Newfoundland, 2020)

Jurisdiction	Legislation	Regulation/Policy	*Comments*
Newfoundland and Labrador	Yes - PTA: goods, services, public works, leasing	PTA Regulations External Consultants	*Specific processes*
Nova Scotia	No		
New Brunswick	Yes: Public Purchasing Act - goods and services;	Public Purchasing Act Regulations Crown Construction Contracts Act Regulations	*Specific processes Crown Construction Contracts Act does not set out how contracting is to be done: but authorizes the Minister to make Regulations for that purpose*
Prince Edward Island	Yes: Public Purchasing Act - goods only		*Specific processes*
Quebec	Yes – An Act respecting contracting by public bodies – goods, services, construction, public-private partnerships	Quebec has a multitude of regulations, including but not limited to: - for all public procurement ; - for departments - for health and social service organizations; - for the education sector; - for municipalities Within e.g. the "departments' category there are: - a framework regulation; and - a regulation for goods, construction and services; and - a regulation for leasing	*Specific processes*

Ontario	No	Cabinet Directives	
Manitoba	Government Purchases Act - no construction		Act focuses on results, roles and responsibilities
Saskatchewan	Purchasing Act	Purchasing Act Regulations	*Neither the Act nor Regulations set out processes required or thresholds (other than for Saskatchewan Preference)*
Alberta	No	Direct Purchase Regulations	*The Regulations do not set out processes or thresholds*
British Columbia	No	Core Policy and Procedures Manual	*Specific processes*
Federal	No	Government Contracts Regulations (GCR) Treasury Board Contracting Policy PWGSC Supply Manual	*The GCRs cover require calling for bids except in prescribed situations, and deal with bid and contract security.* *Specific processes are in the Contracting Policy and the Manual (while use of the latter is not mandatory across government, it is commonly used as a reference tool)*

Note: We were asked how it is that some jurisdictions have Regulations, when the table shows that there is no legislation. Normally, Regulations are issued under the authority of a statute. The fine point we made is that in those cases there was some form of legislation in place to permit the Regulations: that legislation, though, is not specifically "procure-

ment" legislation (e.g., the federal Government Contracts Regulations are issued under the authority of the Financial Administration Act).

Tender Bidding in the Province of Quebec

In recent years, the civil law courts of Québec and the common-law jurisdictions in the rest of Canada, have grappled with maintaining fairness and transparency within the public tender bid processes at all levels of government. In the Province of Quebec, premised on allegations of breaches of good faith and transparency in the bid tendering process, conflict is ongoing and includes investigation into, and prosecution of, firms accused of bid-rigging, market segmentation, complimentary bidding, and bribes to bureaucrats (Clarke, 2019). "The provincial inquest into collusion and corruption in the construction industry that followed the police investigation (*sic*) revealed that a sophisticated cartel had existed since at least 2000 in this market" (Clarke, 2019).

Flowing from Quebec's investigations into the collusion and bureaucratic corruption discovered within the evidentiary revelations of bid-rigging by contractors, subcontractors and bureaucrats interrogated, the Quebec Courts and National Assembly have responded with decisions, legislation and policies introducing a more heavily regulated and transparent system for the tender-bidding system in Quebec. On October 11, 2011, the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (also known as the Charboneau Commission) was formed to examine the existence of schemes in the industry and the possible presence of organized crime, and to provide solutions and recommendations to ameliorate "and prevent collusion and corruption in awarding and managing public contracts in the construction industry" in Quebec (Clarke, 2019).

In December 2012, the Integrity in Public Contracts (the Integrity Act) was passed (Beauregard & Verdon-Akzam, 2016, p.1). With it the Act Respecting Contracting by Public Bodies was amended with the goal of promoting integrity within the public procurement process in Quebec. Part of this process was the creation of a registry of businesses eligible and seeking participation in public tendering within Quebec, to be administered by the "Autorité des marchés financiers (AMF) as the organization responsible for overseeing all public procurement for public bodies" (Beauregard & Verdon-Akzam, 2016, p.1).

Quebec's current procurement framework, as noted above, includes the amended Act Respecting Contracting by Public Bodies, which applies to public procurement of goods, services, construction and public-private partnerships. Quebec has a multitude of regulations, including but not limited to all public procurement; for departments (Read et al., 2008), for health and social service organizations, for the education

sector and for its municipalities (Read et al, 2008). Furthermore, as part of its bid contract reform in Quebec to ensure the maintenance of fairness and good faith in the assignment and delivery of public contracts both by the owners, bidders and any associated subcontractors (Grammon et al., 2011, p. 431), the Government of Quebec, in response to the Charboneau Commission, introduced several new pieces of legislation under Bill 108, including the Act (the Act) to Facilitate Oversight of Public Bodies Contracts, and established the Autorité des Marchés Publics (AMP) (Beauregard & Verdon-Akzam, 2016, p.1). The AMP was subsequently created by the law, on December 1, 2017, promoting the supervision of contracts of public bodies and establishing the Public Procurement authority (Quebec, AMP). The establishment of the AMP, provides that it shall

> oversee all public contracts, and shall apply the *Act respecting contracting by public bodies* in determining the eligibility for public contracts, granting prior authorization to obtain public contracts or subcontracts, and evaluating contractors' performance. As such, the AMP assumes all the existing responsibilities that were held by the AMF under the *Act respecting contracting by public bodies.* (Beauregard & Verdon-Akzam, 2016, p.1)

Amendments to the Act respecting contracting by public bodies and the Tax Administration Act

The Act amendments to the Act Respecting Contracting by Public Bodies include the following:

- Public bodies are required to publish, prior to entering into certain contracts by mutual agreement, a notice of intention. They must also establish a procedure for receiving and examining the complaints filed with them in the course of the tendering or awarding process for a public contract.

- The government may require an enterprise to obtain authorization to contract while it is in the phase of performing a public contract.

- The government may require an enterprise to obtain authorization to contract in order to enter into a public contract involving an expenditure below the applicable authorization threshold.

- The AMP could cancel an application for authorization to

contract or suspend such an authorization if the enterprise in question fails to communicate the required information.

- An enterprise that has had its application for authorization to contract cancelled or has withdrawn its application may not file a new application within the year after such cancellation or withdrawal.

- The Conseil du trésor could give permission, "in exceptional circumstances," to an enterprise to enter into or to continue performing a contract by mutual agreement or a public call for tenders despite a negative decision of the AMP.

- A penal offence will be introduced for anyone who communicates or attempts to communicate with a member of a selection committee for the purpose of influencing the member.

- The disclosure of information that allows the number of enterprises that asked for a copy of the tender documents or that tendered a bid to be known, or that allows those enterprises to be identified, is limited. (Beauregard & Verdon-Akzam, 2016, p.2)

The AMP also oversees all other contracting processes determined by the government, including the following:

- examine the compliance of a tendering or awarding process for a public contract of a public body—the review may be done on the AMP's own initiative, or after a complaint is filed by an interested person, or on the request of the Chair of the Conseil du trésor or a bidder;

- maintain the register of enterprises ineligible to enter into a public contract or subcontract and the register of enterprises authorized to do so; and

- ensure that the contract management of the Ministère des Transports and any other public body the government designates is carried out in accordance with the normative framework to which the body is subject. (Beauregard & Verdon-Akzam, 2016, p.2)

Since January 25, 2019, the AMP is responsible for the authorization of contracts with the government and the administration of the registry for

eligible firms, as noted, replacing the AMF. In Figures 4 and 5 below, listing the legislative documents regulating the AMP, any occurrence of the AMF is considered to mean AMP.

Figure 4. Key Legislative Documents Regulating the ADP

Autorité des marchés publics
Act respecting contracting by public bodies
Integrity in Public Contracts Act Ce lien s'ouvrira dans une nouvelle fenêtre Regulation of Autorité des marchés publics under Act respecting contracting by public bodies
Regulation respecting supply contracts, service contracts and construction contracts of bodies referred to in section 7 of the Act respecting contracting by public bodies
Regulation respecting certain supply contracts of public bodies
Regulation respecting certain service contracts of public bodies
Regulation respecting construction contracts of public bodies
Regulation respecting contracting by public bodies in the field of information technologies
Regulation respecting the register of enterprises ineligible for public contracts
Cities and Towns Act
Municipal Code of Québec
Act respecting the Communauté métropolitaine de Montréal
Act respecting the Communauté métropolitaine de Québec
Act to facilitate the disclosure of wrongdoings relating to public bodies
Act respecting Access to documents held by public bodies & the Protection of personal info.
Act respecting the Protection of personal information in the private sector
Regulation respecting the distribution of information & the protection of personal information

Figure 5. Orders in Council

Decree 435-2015 concerning contracts and subcontracts for services involving an expenditure equal to or greater than $ 1,000,000 (November 2, 2015)
Decree 793-2014 concerning public-private partnership contracts involving an expenditure equal to or greater than $ 5,000,000 (October 24, 2014)
Decree 796-2014 concerning contracts and subcontracts for services and contracts and subcontracts for construction work involving an expenditure equal to or greater than $ 5,000,000 (October 24, 2014)
Decree 890-2014 concerning the obligation to request the authorization provided for in chapter V.2 of the Act respecting contracting by public bodies (October 8, 2014)
Decree 795-2014 concerning certain supply contracts and service contracts of the Ville de Montréal that involve an expenditure equal to or greater than $ 100,000 and various subcontracts that include an expenditure equal to or greater than $ 25,000 (Sep. 24, 2014)
Decree 815-2014 concerning the obligation to request authorization to contract provided for in chapter V.2 of the Act respecting contracting by public bodies (September 17, 2014)
Decree 1105-2013 concerning contracts and subcontracts for services and contracts and subcontracts for construction work involving an expenditure equal to or greater than $ 10,000,000 (December 6, 2013)
Decree 1103-2013 concerning public-private partnership contracts involving an expenditure equal to or greater than $ 10,000,000 (December 6, 2013)
Decree 1049-2013 concerning the application of chapter V.2 of the Act respecting the contracts of public bodies to contracts for construction, reconstruction, demolition, repair or renovation work relating to roads, aqueducts or sewer of the City of Montreal which involves an expenditure equal to or greater than $ 100,000 and to sub-contracts of the same kind which are directly or indirectly attached to these contracts and which involve an expenditure equal to or greater than $ 25,000 (October 23 2013)

Decree 951-2013 concerning the application of chapter V.2 of the Act respecting the contracts of public bodies to certain contracts of the Ville de Montréal (September 18, 2013)
Decree 800-2013 concerning certain contracts of the Ville de Montréal (July 10, 2013)
Decree 544-2013 concerning certain contracts of the Ville de Montréal (June 5, 2013)
Decree 482-2013 concerning certain contracts of the Ville de Montréal (May 15, 2013)
Decree 471-2013 concerning the obligation to request authorization to contract provided for in Chapter V.2 of the Act respecting contracting by public bodies (May 8, 2013)
Decree 414-2013 concerning certain contracts of the Ville de Montréal (April 17, 2013)
Decree 206-2013 concerning certain contracts of the Ville de Montréal (March 20, 2013)
Decree 97-2013 concerning certain public-private partnership contracts (February 13, 2013)
Decree 96-2013 concerning certain contracts of the Ville de Montréal (February 13, 2013)
Decree 1226-2012 concerning certain contracts of the City of Montreal (January 15, 2013)

Given the large size of the Quebec economy, at a GDP of $377 billion in 2019 (Statista, 2019), there are a large number of enterprises seeking to transact as contractors and venders with Québec government departments and agencies and Québec municipalities involving an expenditure equal to or greater than the bid thresholds determined by the Government, and thus requiring registration with the ADP.

Code Civil du Québec

In addition to the recent legislative framework introduced by the Province of Quebec with respect to public procurement, tender bidding

and surety bonds, the Code Civil du Québec, Chapter XIII, Suretyship, Articles 2333-2366 also provide guidance on the nature and effects of suretyship.

> The Civil Code of Québec, in harmony with the Charter of Human Rights and Freedoms (Chapter C-12) and the general principles of law, governs persons, relations between persons, and property.
>
> The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it. (Civil Code of Québec, 1991, Preliminary Provision)

With respect to suretyship and surety within the Code du Québec, Chapter 12, Articles 2333-2366, refer to Figure 6 below:

Figure 6. Code du Québec, Chapter XIII, Suretyship

Article #	Description
	DIVISION I - NATURE, OBJECT AND EXTENT OF SURETYSHIP
2333	Suretyship is a contract by which a person, the surety, binds himself towards the creditor, gratuitously or for remuneration, to perform the obligation of the debtor if he fails to fulfil it.
2334	Suretyship may result from an agreement, or may be imposed by law or ordered by judgment.
2335	Suretyship is not presumed; it is effected only if it is express.
2336	A person may become surety for an obligation without an order from or even the knowledge of the person for whom he binds himself. A person may also become surety not only for the principal debtor but also for his surety.
2337	A debtor bound to furnish a surety shall offer a surety having and maintaining sufficient property in Québec to answer for the obligation and having his domicile in Canada; otherwise, he shall furnish another surety. This rule does not apply where the creditor has required that a specific person be the surety.
2338	A debtor bound to furnish a legal or judicial surety may offer other sufficient security instead.
2339	Any dispute as to the sufficiency of the property of the surety or the sufficiency of the security offered is decided by the court.

2340	Suretyship may be contracted only for a valid obligation. It may be for the fulfilment of an obligation from which the principal debtor may be discharged by invoking his incapacity, provided the surety is aware of this, or the fulfilment of a purely natural obligation.
2341	Suretyship may not exceed what is owed by the debtor, or be contracted with more onerous conditions. Suretyship which does not meet that requirement is not null for that reason; it may only be reduced to the extent of the principal obligation.
2342	Suretyship may be contracted for part of the principal obligation only and with less onerous conditions.
2343	Suretyship may not be extended beyond the limits for which it was contracted.
2344	Suretyship extends to all the accessories of the principal obligation, even to the costs of the first demand and to all costs subsequent to notice of it given to the surety.
§ 1.	**DIVISION II, EFFECTS OF SURETYSHIP - Effects between the creditor and the surety**
2345	At the request of the surety, the creditor is bound to provide him with any useful information as to the content and the terms and conditions of the principal obligation and as to the stage reached in its performance.
2346	The surety is bound to fulfil the obligation of the debtor only if the debtor fails to perform it.
2347	A conventional or legal surety enjoys the benefit of discussion unless he renounces it expressly. A person who is surety of a judicial surety may not demand the discussion of the principal debtor nor of the surety.

2348	A surety who avails himself of the benefit of discussion shall invoke it in the action against him, indicate to the creditor the seizable property of the principal debtor, and advance to the creditor the sums required for the costs of discussion. Where the creditor neglects to carry out the discussion, he is liable to the surety, up to the value of the property indicated, for insolvency of the principal debtor occurring after the surety has indicated the seizable property of the principal debtor.
2349	Where several persons become sureties of the same debtor for the same debt, each of them is liable for the whole debt but may invoke the benefit of division if he has not renounced it expressly in advance. Each surety who avails himself of the benefit of division may require the creditor to divide his action and to reduce it to the amount of the share and portion of each surety.
2350	If, at the time division was obtained by one of the sureties, some of them were insolvent, that surety is proportionately liable for their insolvency, but he may not be made liable for insolvencies occurring after the division.
2351	Where the creditor has himself voluntarily divided his action, he may not call the division into question although, even prior to the time of the division, some of the sureties were insolvent.
2352	Where the surety binds himself with the principal debtor as solidary surety or solidary co-debtor, he may no longer invoke the benefits of discussion and division; the effects of his undertaking are governed by the rules established with respect to solidary debts so far as they are consistent with the nature of the suretyship.

2353	A surety, whether or not he is a solidary surety, may set up against the creditor all the defences of the principal debtor, except those which are purely personal to the principal debtor or that are excluded by the terms of his undertaking.
2354	The surety is not discharged by mere prorogation of the term granted by the creditor to the principal debtor; in the same way, forfeiture of the term by the principal debtor produces its effects with respect to the surety.
2355	A surety may not renounce in advance the right to be provided with information or the benefit of subrogation.
§ 2.	**Effects between the debtor and the surety**
2356	A surety who has bound himself with the consent of the debtor may claim from him what he has paid in capital, interest and costs, in addition to damages for any injury he has suffered by reason of the suretyship; he may also charge interest on any sum he has had to pay to the creditor, even if the principal debt was not producing interest. A surety who has bound himself without the consent of the debtor may only recover from him what the debtor would have been bound to pay, including damages, if there had been no suretyship; however, costs subsequent to notice of the payment are payable by the debtor.
2357	Where the principal debtor has been discharged from his obligation by invoking his incapacity, the surety has, to the extent of the enrichment retained by the debtor, a remedy for reimbursement against him.

2358	A surety who paid a debt has no remedy against the principal debtor who paid it subsequently, if he failed to inform the debtor of the payment. A surety who paid without informing the principal debtor has no remedy against him if, at the time of the payment, the debtor had defences that could have enabled him to have the debt declared extinguished. In these circumstances, the surety has a remedy only for the sum the debtor could have been required to pay, to the extent that the debtor could set up other defences against the creditor to cause the debt to be reduced. In all cases the surety retains his right of action for recovery against the creditor.
2359	A surety who has bound himself with the consent of the debtor may take action against him, even before paying, if he is sued for payment or the debtor is insolvent, or if the debtor has bound himself to effect his acquittance within a certain time. The same rule applies where the debt becomes payable by the expiry of its term, disregarding any extension granted to the debtor by the creditor without the consent of the surety, or where, by reason of losses incurred by the debtor or of any fault committed by the debtor, the surety is at appreciably higher risk than at the time he bound himself.
§ 3.	**Effects between sureties**
2360	Where several persons have become sureties of the same debtor for the same debt, the surety who has paid the debt has in addition to the action in subrogation, a personal right of action against the other sureties, each for his share and portion. The personal right of action may only be exercised where the surety has paid in one of the cases in which he could take action against the debtor before paying. Where one of the sureties is insolvent, his insolvency is apportioned by contribution among the other sureties, including the surety who made the payment.

	DIVISION III - TERMINATION OF SURETYSHIP
2361	Notwithstanding any stipulation to the contrary, the death of the surety terminates the suretyship.
2362	Where suretyship is contracted with a view to covering future or indeterminate debts, or for an indeterminate period, the surety may terminate it after three years, so long as the debt has not become due, by giving prior and sufficient notice to the debtor, the creditor and the other sureties. This rule does not apply in the case of a judicial suretyship.
2363	Suretyship attached to the performance of special duties is terminated upon cessation of the duties.
2364	Upon termination of the suretyship, the surety remains liable for debts existing at that time, even if those debts are subject to a condition or a term.
2365	Where, as a result of an act or omission of the creditor, the surety can no longer be usefully subrogated to his rights, the surety is discharged to the extent of the injury he suffers thereby.
2366	Where a creditor voluntarily accepts property in payment of the principal debt, the surety is discharged even if the creditor is subsequently evicted.

In lieu of the complexity of procurement laws, tender-bidding and suretyship in Quebec and the large volume of business registrants being added to the registry, the Québec government is phasing in the Integrity in Public Contracts Act (Quebec, AMP).

Thresholds and Categories of Public Contracts and Subcontracts (Quebec, AMP)

The provincial threshold (Quebec, AMP) is set at $5 million for construction contracts and subcontracts or public-private partnership agreements; and $1 million for service contracts and subcontracts entered into pursuant to a call for tenders or by mutual agreement.

The Ville de Montréal threshold is set at $100,000 for any of the following contracts:

- contracts for the construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers;
- contracts for the supply of bituminous compounds;
- service contracts for the construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers.

In addition, the Ville de Montréal threshold (Quebec, AMP)) is set at $25,000 for the following subcontracts directly or indirectly related to contracts subject to the abovementioned $100,000 threshold:

- subcontracts for the construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers;
- subcontracts for the supply of bituminous compounds;
- service subcontracts for the construction, reconstruction, demolition, repair or renovation of roads, waterworks or sewers.

Nunavik

Within Quebec, the northern third of the province has been occupied by Inuit people for 4000 years or more and only became part of Quebec in 1912, in an agreement under which Quebec is obliged to recognize and negotiate the rights of the Inuit. This special unique character of the northern part of Quebec is defined by the James Bay and Northern Quebec Land Claims Agreement (Nunavik Government) and has led to the creation of the self-governing region of Nunavik within a tripartite political accord with the Inuit of Nunavik, Quebec and Canada, signed in 1999; in December 2007 another Tripartite Agreement in Principle for the establishment of the Nunavik Regional Government was signed. More recently, in June 2019, the Nunavik Inuit signed a

Memorandum of Understanding (MOU) establishing a framework for any future negotiations towards self-government. The next step for Makivik Corporation, representing the Inuit people, will be to enter into a similar agreement with the Quebec government. "The Quebec-Nunavik relationship is a model for a dynamic relationship between a sub-national government and an Indigenous region" (Washington, U.).

Prospectively, this is of significance to tender-bidding within Quebec, as the Inuit of other settlement areas in neighboring regions in Canada have within their self-government agreements been given control of procurement, and have subsequently introduced Inuit factor-discounting within the tender-bid assessment process to give disadvantaged Inuit firms and contractors a leg up and to level the playing field in encouraging Inuit business participation and optimized Inuit employment and training. As Vice -President Michael Gordon of Makivik noted, "There is insufficient capacity for Nunavik Inuit Enterprises to access federal contracts" (2011).

While self-governance negotiations between the Inuit of Nunavik and Quebec continue, in the interim they are bound administratively to the Act Respecting Northern Villages and the Kativik Regional Government, and the Cities and Towns Act. The new regional government, agreed to under the MOU as part of the self-government negotiations with the federal government and being advanced in negotiations with Quebec, will not be an Inuit government but, rather, a public government, representing all citizens of Nunavik. This will see "the amalgamation of the three institutions created under the James Bay and Northern Quebec Agreement—the Kativak Regional Government, which has limited municipal government powers, the Kativik School Board (KSB), and the Nunavik Regional Board of Health and Social Services (NRBHSS)—into a new Nunavik regional government structure" (Nunavik Government).

> The Inuit of Nunavik today want more than a local government. According to ____ (2012) (*sic*), It should be remembered that the Inuit live in a vast area potentially rich in natural resources, but difficult to access. However, this territory remains an object of covetousness for large mining companies and various economic entrepreneurs. It is in such a context that the Inuit claim greater control over the governance of their region. The Inuit do not seem to appreciate that the regional organizations of the North remain entirely subject to the laws and regulations of the government of Quebec, although they are controlled by the majority Inuit population. (Laval U.)

It should also be noted that the majority of the Inuit of Nunavik are anglicized and generally perceived as Anglo-Inuit, and "they do not con-

sider themselves Quebecers, any more than the Inuit of Labrador would be Terreneuvians! Another fine litigation in perspective! (Laval U.)

Public Procurement in Newfoundland and Labrador

Domestically within Canada, the Province of Newfoundland and Labrador (NL) is signatory, as well, to interprovincial trade-related agreements, including the Canadian Free Trade Agreement (CFTA) and the Atlantic Procurement Agreement (APA) (Newfoundland Government). "The purpose of such agreements is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and construction within Canada and to establish an open, efficient, and stable domestic market" (Newfoundland Government).

The Public Procurement Agency of Newfoundland and Labrador (PPANL) is responsible for the implementation and management of the public procurement framework for the province as established by Part II of the Public Procurement Act (Newfoundland Government) (PPA) and per the general provisions of the Act. Flowing in precedence from the PPA, the PPANL is further enabled and guided by the Public Procurement Regulations (PPR) and The Public Procurement Policy (PPP) (Newfoundland Government).

The PPANL objectives for all purchases made by its provincial public bodies are as follows:

- Ensuring that commodities are obtained through an open, fair, consistent and transparent process that maximizes competition.
- Adhering to the framework and relevant trade agreement requirements.
- Utilizing best practices to obtain best value for money.
- Ensuring processes and practices are managed consistently.
- Encouraging supplier involvement to identify new and innovative ideas and products. (Read, 2008)

And the requirements for purchases meeting minimum price thresholds are established by the PPR under the PBA. In particular,

> A public body referred to in subparagraphs 2(q)(iv), (v) and (vii) of the Act and the College of the North Atlantic and Memorial University of Newfoundland, each of which have been designated as a public body under subparagraph 2(q)(viii) of the Act,

shall issue an open call for bids, [which] are required for:

(a) goods and services with an estimated value of $105,700 or greater;

(b) public works with an estimated value of $264,200 or greater; and

(c) leases of space with an estimated value of $100,000 or greater. (Read, 2008)

Per Section 5(2) of the PPR, the procurement thresholds are notably lower for public bodies: those "referred to in subparagraphs 2(q)(i) and (vi) of the Act, and a public body designated under subparagraph 2(q)(viii) of the Act other than those entities referenced in subsections (1) and (2), shall issue an open call for bids for:

(a) goods with an estimated value of $26,400 or greater;

(b) services and public works with an estimated value of $105,700 or greater; and

(c) leases of space with an estimated value of $100,000 or greater."

An open call for bids is required for commodities at or above the following thresholds (unless an exception applies). (See Figure 7.) All thresholds are exclusive of harmonized sales tax.

Figure 7. Open-Call Bid Thresholds (NL)

Public Bodies	Thresholds			
	Goods	Services	Public Works	Lease of Space
Departments	$26,400	$105,700	$105,700	$100,000
MASH*	$105,700	$105,700	$264,200	$100,000
Crown Corporations	$264,200	$264,200	$264,200	$100,000

*Municipalities, Local Service Districts, Academic Institutions, School Districts, Health Authorities[3]

In addition to the purchases of goods, services or public works not

meeting minimum procurement price thresholds, similar to Quebec, Nunavut and other jurisdictions, NL's procurement framework provides for exemptions when an open call for bids is not required. Per PPR Section 6 they are as follows:

> (a) the head of the public body determines that
>
> (i) the estimated value of the commodity being acquired is less than the thresholds established in section 5,
>
> (ii) the commodity is of the nature that an open call for bids could reasonably be expected to compromise security,
>
> (iii) the commodity is available from a public body,
>
> (iv) an emergency or a situation of urgency exists and the acquisition of the commodity cannot reasonably be made in time by an open call for bids,
>
> (v) there is only one source reasonably available for the commodity,
>
> (vi) a list of pre-qualified suppliers has been established using a request for qualifications and the public body is re questing quotations from all pre-qualified suppliers on the list, or
>
> (vii) an acquisition of a commodity is for the purpose of resale or for incorporation into a product for resale; or
>
> (viii) set rates have been established by the Public Utilities Board acting under the *Public Utilities Act* or another Act.

The PPP Section 4, Procurement Controls, also has provisions to ensure controls for procurement with respect to security of bids, separation of duties and the authorization of purchasing documents. The PPANL, Section 10, Management of Procurement, also further ascribes the responsibilities of the heads of public bodies with respect to procurement for commodities and services.

Labrador Inuit Regional Self-Government Within NL: The Nunatsiavut Government

Within NL there exists a self-governing Inuit regional government, the Nunatsiavut Government. The PPANL, Section 4, Labrador Inuit

Rights, provides regulation regarding this government:

> This Act and regulations made under this Act shall be read and applied in conjunction with the Labrador Inuit Land Claims Agreement Act and, where a provision of this Act or regulations under this Act is inconsistent or conflicts with a provision, term or condition of the Labrador Inuit Land Claims Agreement Act, the provision, term or condition of the Labrador Inuit Land Claims Agreement Act shall have precedence over the provision of this Act or regulations made under this Act.

The Labrador Inuit Association (LIA) was formed in 1973 and in 1977 filed a statement of claim with Canada. After years of subsequent negotiations and consultations, the Labrador Inuit Land Claims Agreement (LILCA) and the Labrador Inuit Constitution came into effect, December 1, 2005, when the first Assembly of the Nunatsiavut Transitional Government, was held, in Nain (Nunatsiavut). The LILCA "set a precedent by including self-government provisions within the land claim" (Nunatsiavut). While Nunatsiavut remains part of NL, as a regional form of autonomous self-governing people, it has through the agreement received many devolved powers[4] from NL, including procurement as noted per Section 4 of the PPANL.

The Nunatsiavut Assembly, to promote integrity in the spending of Inuit pubic monies, has passed an act effective July 1, 2011 entitled "An Inuit Law to Establish Procedures to Be Followed by the Nunatsiavut Government, the Inuit Community Governments and Their Agencies in the Procurement of Goods and Services." Article 17 of the Act, Determination of Inuit Content Factor, sets forth Nunatsiavut's stratagem for Labrador Inuit discount factoring in the awarding of bid contracts, as follows (Figure 8.):

Figure 8. Labrador Inuit Content Factors (Nunatsiavut)

Discount Category	Act Section	Discount Factor	Description
Inuit Ownership	17 (1) (a)	20 points maximum	% of Inuit ownership of supplier @ 0.5 points per 1% of Inuit Ownership great than 50%. O points for under 50%.
Location	17 (1) (b)	10 points maximum	10 points if suppliers Head office and principal operating office in an Inuit community. 6 points if head office is in Inuit community and 4 points if head office or operating office located elsewhere in Labrador.
Training	17 (1) (c)	10 points maximum	Calculated as 0.1 point per 1% of all training money spent by the supplier on training of Inuit.
Inuit Employment	17 (1) (d)	20 points maximum	Based on Inuit/employees e.g. 0.2 points per 1% of employees who are Inuit.
Inuit Wages	17 (1) (e)	10 points maximum	Inuit wages/total wages e.g. 0.1 point per 1% of payroll paid to Inuit.
Inuit Sourcing	17 (1) (f)	10 points maximum	Related to % of goods & services purchased by supplier from Inuit businesses. E.g. 0.1 point per 15 of the value of all purchases from Inuit businesses
Inuit Subcontracting	17 (1) (g)	10 points maximum	0.1 point per 1% of value of all sub-contracts awarded to Inuit businesses.

Nunavut's Procurement Bid Adjustments Stratagem: The Nunavummi Nangminiqaqtunik Implementation Act, 2017

The word *Nunavut* is Inuktitut, the language of the Inuit, for "Our Land" (IWGIA). It represents a new Canadian territory partitioned from the existing Northwest Territories and provided with its own government, on June 10, 1993, when the Nunavut Act (NA) and the Nunavut Land Claims Agreement NLCA) received royal assent in Parliament (Dewar, 2009, p.1). From these two agreements signed by the Government of Canada, the Government of Northwest Territories and the Inuit people represented by Tunngavik Federation of Canada the Territory

of Nunavut self-government for the people of Nunavut came into force effective on April 1, 1999 (IWGIA).

"At more than 2.1 million square kilometers, Nunavut encompasses 23 per cent of Canada's land mass" (IWGIA) and is substantially larger than Quebec, Canada's largest province in area. Nunavut is also three times larger than Texas and ten times larger than Britain. In fact, if it were a sovereign nation it would rank as the twelfth largest nation in the world (IWGIA).

The Inuit position from the beginning was that a land claims agreement would include a guarantee that Nunavut would be created and primarily Inuit would staff the Government of Nunavut Territory (Nunavut MTO, 2005). While Nunavut has become Canada's newest territorial government, more importantly for the Inuit who represent 85% of the Nunavummiat (people of Nunavut) (Nunavut MTO, 2005) it also represents their traditional homeland to which their culture, language and lifestyle are inextricably linked. The NLCA, "will try to protect this reality by giving special duties to Inuit organizations like Nunavut Tungavit Incorprated (NTI) with respect to language culture and social policy. These duties might be handled directly by NTI of through working together with Regional Inuit Associations (IWGIA), Institutions of Public Government and Government" (NTI, p. 6).

The Government of Nunavut (GN), in consultation with the NTI, introduced the Nunavummi Nangminiqaqtunik Implementation (NNI) Act, which was approved March 17, 2000, and came into effect April 1, 2000 (Nunavut, , 2017, S.2.1.). The NNI is "a set of rules providing for preferential treatment in public procurement of Inuit firms, Nunavut businesses and contractors employing Inuit, local or Nunavut labour as set off in NNI Regulations, R-023-2017" (Treasury, 2021). These regulations represent an amendment to NNI effective on April 1, 2017, replacing the previous NNI 2006 Policy (Treasury, 2021). The objectives of NNI are as follows:

> (a) Compliance with Article 24 (Government Contracts) of the NLCA;
>
> (b) Good value and fair competition in the procurement process;
>
> (c) Strengthening Nunavat's economy; and
>
> (d) Increasing Inuit participation as well as education and training in Nunavut (NTI)

within GN contracts. Nunavut's NNI, on examination, are particularly important with respect to bid-tendering because it applies to "any pro-

curement process and the award of any contract where the contracting authority is a GN department or territorial corporation and where

> (a) The GN provides more than 51% of the individual contract funds, or
>
> (b) The GN provides more than 51% of the annual operating funds for a party to the contract. (NTI)

The NNI regulations also provide that they apply to all GN territorial corporations, including

> (a) Nunavut Arctic College,
>
> (b) Qulliq Energy Corporation,
>
> (c) Nunavut Housing Corporation,
>
> (d) Nunavut Business Credit Corporation, and
>
> (e) Any territorial corporations which are subject to Schedule B of the Financial Administration Act. (NTI)

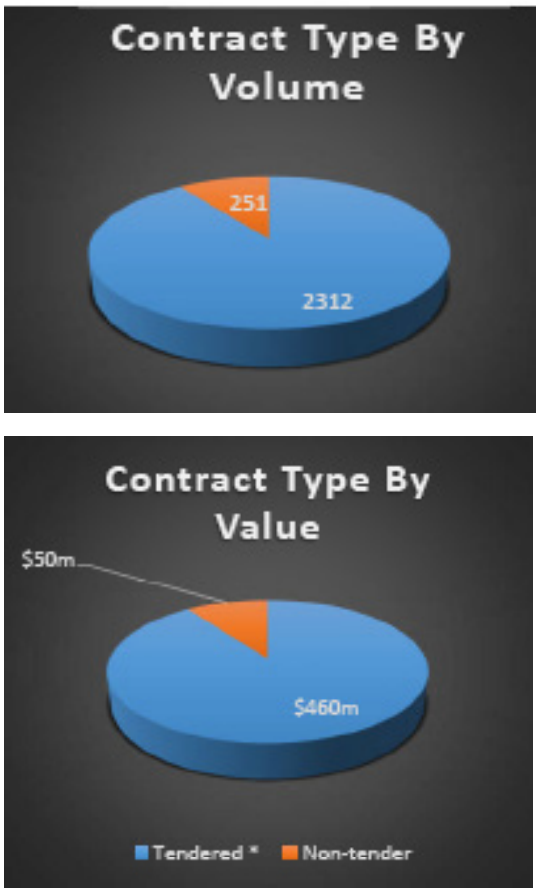
Under NNI Articles 17 and 25, to be further reviewed below, bid adjustments on government contract tenders with respect to materials and labour, which are separately specified, are provided for the preferential categories including Inuit beneficiary ownership status, local business, and Nunavut businesses. Article 16 of the NNI Implementation Act essentially identifies the objectives of NNI's bid adjustment stratagem as follows:

> (a) to increase participation of Inuit Firms in business opportunities in the Nunavut Settlement Area economy;
>
> (b) to improve the capacity of Inuit Firms to compete for contracts;
>
> (c) to promote employment of Inuit at a representative level in Nunavut Settlement Area workforce;
>
> (d) to increase access by Inuit to on-the-job training, apprenticeship, skill development, upgrading and other job-related programs through the performance of work on contracts; and
>
> (e) to provide greater opportunities for Inuit to receive training

> and experience through the performance of work on contracts to assist Inuit in successfully creating, operating and managing Northern businesses. (Treasury)

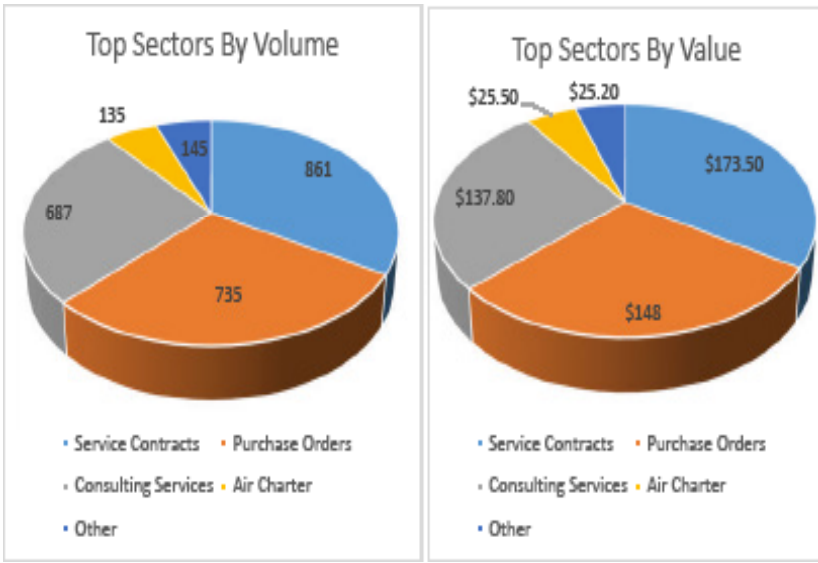
Figure 9, below, demonstrates that under Nunavut's NNI stratagem in 2017-2018, fewer than 10% of the GNs competitive contracts by volume and value (including open and invitational bids) were not tendered. Within these contracts, by nature of activity, the vast majority of the tender contracts are related to Calls for service contracts, purchase orders and consulting contracts. See figure 10.

Figure 9. Nunavut Government Contracts 2017-2018



Total No. of Contracts = 2563; Total Value = $510m (*Up Here Business*, p.15.)
Note: *Competitive contracts include open and invitational bids.[5]

Figure 10. Nunavut Gov't Nunavut Contracts 2017-2018, by Sectors



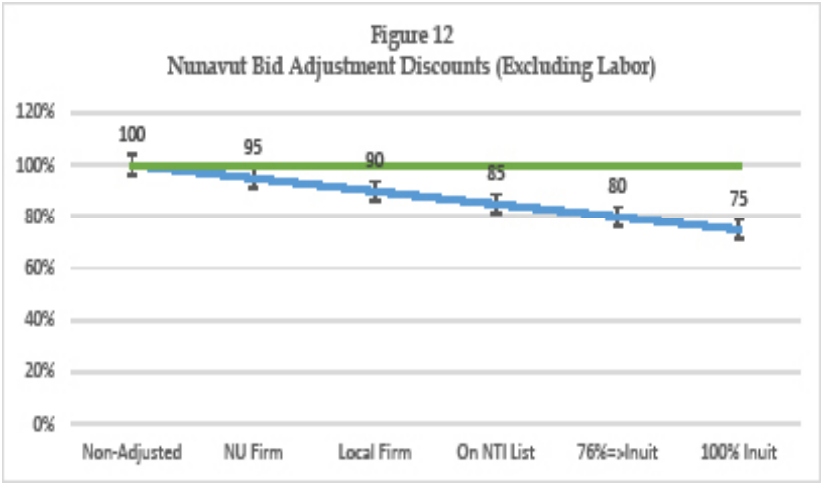
Under the 2017 amended NNI regulations, the revised bid-adjustment formula increases the totally allowable to 25% from 21% for firms qualifying as a local, Nunavut business and/or Inuit firm with increased firm ownership criteria as well. The breakdown is as follows per Figure 11:

Figure 11. GN Bid Adjustments for Goods & Services (NTI)

Bid Discount Category:	NNI Section
5% for Nunavut business	Section 251.(a)
5% for local firms	Section 25.1 (b)
5% for Inuit firms on the NTI Inuit Firm Registry	Section 17.1 (a)
Additional 5% for Inuit firms with 76% or more Inuit ownership	Section 17.1 (b)
Additional 5% for Inuit firms with 100% Inuit Ownership	Section 17.1 (c)

Labour is evaluated and scored separately from goods and services. In a procurement process in which Inuit labour is identified, the GN will adjust the bid adjustment by 15% for Inuit Labour. However, the total cumulative bid adjustments shall not exceed 25%, whether a labour adjustment is applied or not (NTI). See Figure 12 (NNI) below:

Regulations effective 1 April 2017 (NTI)



The chart in Figure 12, above, demonstrates that Inuit Firms with greater Inuit ownership will have better contracting opportunities. The bid adjustment stratagem also provides for increased opportunities for subcontractor Inuit Firms who, when identified in the general contractor's bid, will facilitate a bid adjustment. For general contractors who are not qualified for Nunavut business or Inuit Firm bid adjustments, an incentive is provided by the stratagem to encourage partnering, joint venturing and subcontracting with Inuit Firms, in order for these contractors to gain a competitive advantage in the tender process.

The 2017 NNI Regulations also increased the bid adjustment cap (BAC) (NTI). The BAC is defined as "the maximum dollar value for the cumulative bid adjustments for a procurement process. The bid adjustment cap for a goods only bid is 25% of the first $125,000 of the bid value. The bid adjustment for a mixed goods and services contract shall not exceed $125,000" (NTI). The mixed goods and services BAC does not apply to minor or major construction procurement, and in all cases the cumulative bid adjustment shall not exceed 25%. The NNI also provides for "bonuses and contractor performance measures with respect to construction projects."

> A contract authority will award a bonus to a contractor that exceeds the mandatory Inuit Labour level for their contract. When a bonus is applied, it is calculated as 1% of the total Inuit Labour value of the contract for each 1% of the Inuit Labour level that exceeds the minimum requirement of the contract. The maximum bonus shall not exceed 25% of the total Inuit Labour value or $150,000, whichever is lower. (NTI)

Furthermore, taking into account the NLCA objectives and subject to GN contract regulations, a contracting authority may award a contract directly to an Inuit Firm without a competition (NTI). In essence, a contract authority may

> decide to issue contracts that are restricted to Inuit Firms, as long as the value of the contract is less than $100,000 for architectural/engineering and construction contracts, or $25,000 for all other contracts. A contract authority may require, for contracts restricted to Inuit Firms, that any sub-contracting work is also performed by Inuit Firms. (NTI)

The 2017 NNI Regulations per Section 9 also provide for an independent NNI Tribunal, which was created to "review and respond to complaints about how the NNI was applied to a GN procurement process" (NTI). The Tribunal's mandate is strictly limited to reviewing and responding to the NNI procurement process and will not accept complaints about contract disputes or performance (NTI). The Tribunal is comprised of five members appointed for three years terms, two of whom are nominated by NTI (and appointed by GN), and three members appointed by the GN, with the GN designating the Chairperson and Vice-Chairperson. Legal counsel and experts are called in to advise as required (NTI).

The 2017 NNI Regulations, Section 12, also provide for an NNI Review Committee. It is composed of a representative from both the NTI (S. 12(a)) and GN (appointed by the Minister, S. 12(b)), and other representatives from both entities as determined by the representatives appointed under S. 12(a) and (b). These Section 12(a) and (b) appointees will also serve as Co-Chairs of the Review Committee. The Committee shall meet regularly at the discretion of the Co-Chairs and as part of the mandate shall also conduct a comprehensive review of the NNI every five years (or as directed by the GN's Executive Council and consultation with NTI). These reviews will include public consultations and will be available to the public (NTI).

Conclusion

The relationship between Canada's two legal traditions, common law and Quebec civil law, has varied over the country's 150-year history, with little judicial dialogue between the traditions for long periods. Jurists pursued unification and harmonization of the two traditions, "seeking common outcomes in both common and civil law provinces, or, at the other extreme, a diversification model that instead emphasized Québec's civilian tradition's distinctiveness from the common law and the need to keep the two traditions in isolated silos. Neither of these models produced ideal results" (NL). This approach was favoured in the late 19th and early 20th century, and was prevalent during the "Taschereau years" of the Canadian Supreme Court (NL). Unification, though, has meant standardizing Canadian law "by imposing common law solutions onto Québec civil law issues. While this trend was based on a philosophy of harmonizing the law across Canada, it unfolded in a markedly non-reciprocal way and ultimately became a project of making the civil law compatible with the common law and not vice versa" (NL). At issue with this common-law-dominant approach to unification of the civilian tradition of Québec is that it potentially would erode and see a withering away of Quebec Civil Law, and thus it would lose its distinctive character and/or potentially weaken the robust legal tradition it has otherwise become today.

In contrast to harmonization and unification of Canada's common law and civil law traditions, the diversification model, promoted by Judge Mignault (who served on the Canadian Supreme Court from 1918 to 1929), "favoured staunch legal autonomy for Québec's civil law tradition. This approach emphasized the distinctiveness of the civil law and its need to be developed autonomously from common law influences in order to preserve its identity, originality, and integrity" (NL).Thus, under this approach, judicial dialogue was for a period of time limited. It was as if Quebec's civil law, in its infancy, required an incubation period when external influences were limited so that the French Civil Law tradition could firmly take root in the new bi-jural nation of Canada. As Judge Mignault asserted, "since the two systems were so distinct, using one to inform the other was unnecessary and would only render each system less pure and coherent. Instead, answers to legal questions needed to be found internally within each legal tradition" (NL).

Today, with a push toward diversity, we see growth in comparative law and judicial conversation occurring between Canada's legal traditions (NL) with instances of "the Supreme Court of Canada increasingly look[ing] to Québec civil law in appeals from common law provinces, and to the common law in appeals from Québec, embracing the concept of learning from the other" (NL).

The impact of the judicial discourse discussed above is demon-

strated throughout this paper via extensive legislation, regulations and policies established under both Canada's civil law of Quebec and the common law of Newfoundland and Labrador, and of Nunavut. We have seen that this has resulted in an evolution of good faith in contract law in both Canada's civilian and common law jurisdictions (NL). This emergent trend of the Canadian common law and Quebec courts using comparative law in the wake of harmonization of global trade and contractual obligations has, despite gravitation toward conformity, had a positive influence in the development of each distinct legal traditions (NL).

> As Stevenson J (*sic*) of the Supreme Court so eloquently said: This Court (*sic*) has the benefit of being the final court of appeal in a country that has two legal traditions: the English common law and the French civil law. Our two legal traditions are independent and should not be confused. Concepts and solutions found in one tradition should not be imposed on the other tradition. But this does not mean that there is no place for comparative law on this Court. (NL)

Within the merging of the two distinct legal systems we find that the use of surety bonds is common to both and has in fact been common to humankind in general into antiquity. In Quebec, particularly, we see a new legal framework for procurement and government contracts emerge in response to competitive abuses and anti-trust actions by unscrupulous business interests to the point where Quebec now has the most extensive set of laws governing suretyship and tender bidding in Canada.

Also in the exploration of the application of the tender bidding process within the three jurisdictions (QC, NL and NU), with two sub-jurisdictions (Nunavik and Nunatsiavut), we see that federal laws are respected and adapted in all and that variation occurs most greatly in Nunavut and Nunatsiavut; there, under their land claims and governance agreements for economic development and cultural sustainability purposes to support the self-determination of our Inuit people of Canada, we see that tender bidding is adjusted to favor and prefer Inuit and local participation. While elements of Call bid review preferences or favoritism flies in the face of the purpose of tender bidding regulations and policies designed to prevent favoritism, in this instance it is a form of "positive" not "negative" discrimination, where the intent and results are to protect, reconcile and foster an economic, social and cultural renaissance of the Inuit people. With good faith inherent and protected within all the jurisdictions reviewed, there is embedded within the application of the location and cultural exceptions to standard tender bidding a facilitation of a greater cause for the Inuit people, who were among the last people within Canada to be colonized and who are

signatory to a vast part of Canada, which is the Inuit homeland. Thus, the inclusion and exercise of tender bidding preferences and factor discounts represents a restoration of self-governance for the Inuit and the ability to promote and nurture their own enterprise and commerce, to build strength, sustainability and independence into their economy, society and ecology. In essence, all legislation, regulations and policies reviewed within this paper across the respective jurisdictions, including those of Nunavut and Nunatiavut, with respect to public projects and procurement contracts, are in place for the protection and best interest of the public they serve.

Notes

1. "With roots in marine insurance, Lloyd's was founded by Edward Lloyd at his coffee house on Tower Street in 1686. It was popular with sailors, merchants, and ship owners, and Lloyd catered to them with reliable shipping news. The establishment became known as a good place to purchase marine insurance."

2. Although the first that we are aware of that one written has survived, it is highly unlikely in my view that this was the first time one was written; or, that someone pledged such a bond to assure a third of earnest intent.

3. Notwithstanding the tabled threshold data in Figure 5, until March 31, 2021 the architectural and engineering services threshold will be $264,000 for municipalities and local service districts only.

4. E.g. health, education, culture and language, justice and community matters.

5. The GN doesn't include four major spending categories in its procurement breakdown for 2017-18. In its procurement report, the GN says it spent an additional $45m on scheduled medical travel, $137m on fuel, $41m on police and laboratory services and $19m on physician services.

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