

Kevin McGuinness, a lawyer for nearly 30 years, epitomizes modern Canadian corporate-commercial law. He first came to public notice as the co-author of the Ontario *Construction Lien Act* – one of the few such works ever to become a best seller – which has influenced Canadian legislation ever since. Kevin wrote an analysis of that Act as his doctoral dissertation in law. He has also written leading texts on guarantees; Canadian corporate law; the world’s largest published collection of banking and finance precedents; a similarly large collection of precedents on the sale and supply of goods; and, most recently, a legal textbook on the sale and supply of goods. Many of you will know him as the co-author of *Municipal Procurement* as well as the co-author of “Municipal Matters,” a regular column in *Summit*.



PUBLISHER’S PROFILE

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Municipal Procurement and “Municipal Matters” were written in collaboration with Stephen Bauld, the publisher of *Summit* and Kevin’s partner in a new business – Purchasing Consultants International Inc., specializing in public procurement issues. The following is an interview conducted by *Summit* staff.

Summit. How many books have you written?

KM. I don’t really know. I lost count at 30. I have never been quite sure what to count. Does a four volume work count as one book or four?

Summit. Why did you write so many and how did *Municipal Procurement* come together?

KM. Most of the books are just polished versions of the practice notes that I put together while working on files I found that they were helpful to me, so I published them in the hope that they might be of some assistance to other lawyers and the judiciary. As for *Municipal Procurement*, Steve and I wrote that when we were getting our feet wet in the public procurement field. Both he and I had worked in purchasing in the private sector. He had the commercial background; I had the legal. What we lacked was a firm footing in the public side

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of things. We could see it was different, but we were not too sure about why and how. The book was the result of our study into these questions. The first edition was a work in progress. The second edition ties everything together.

Summit. From your perspective as a 'student' of public procurement and your new role as a partner in PCI, what do you see as the challenges?

KM. The general public are convinced that government procurement is riddled with waste and corruption. This is [pointing to recent article from the *Edmonton Journal*] the kind of thing that infuriates tax payers: paying \$1,948 to buy two plants and more than \$18,650 to clean the offices of a minister and a top bureaucrat; \$5,266 to install six recessed lighting pots and \$1,000 to remove a light switch. The critical question is not so much what to do about these problems after they arise, but how to change the system so that they don't arise?

Summit. Do you think problem is systemic, or the result of mistake.

KM. Obviously mistakes happen, and so does dishonesty, but government workers are no more prone to mistake or wrongdoing than their private sector counterparts. Often it is the processes that have been put into place to prevent waste that lead to precisely that result. Take the tender system. In theory, tenders encourage competitive bidding. But across North America, 20 percent of government tenders attract only one bid, or no bids at all. This is a systemic problem. It cuts across all levels of government: from the tiniest municipality to the federal government, and it is international in scope. In *Municipal Procurement*, foreign case studies illustrate these points. You'll find the same kinds of problems in every Western country.

Summit. And the solution is...?

KM. We have to start looking at the process of procurement. Take a look at the priorities here in this copy of a municipal purchasing by-law. The goal of achieving "best value for the City" is buried among a list of other concerns ranging from transparency and fairness; to ensuring a full and open process conducted in an unbiased way – not influenced by personal preferences, prejudices or interpretations; to such high minded notions as conserving energy, preserving and protecting the ecosphere; satisfying the requirements of the *Ontarians with Disabilities Act*; and complying with NAFTA. The average buyer is likely to get lost in such a sea of conflicting priorities. There is no guidance as to how to apply them. But this other by-law is even worse, stating "prudent management of municipal funds" as the last priority on its list of goals.

Ending fiscal irresponsibility should unite everyone. It should be shared concern of the public service as well as elected politicians. Failure to achieve results in this area has undermined public confidence in government. It also undermines the ability of government to do the things which the public expects it to do – like provide good quality, prompt health care and affordable post-secondary education. By causing higher taxes, it takes money away from the people who can afford it the least.

Summit. Is there a balancing needed between the philosophy and practice of public procurement?

KM. Everyone agrees that public procurement should be conducted in a manner that is open, transparent and fair. Governments spend public money, so all qualified suppliers are entitled to a fair shot at the contract. Transparency and accountability are also obviously important – they

are critical to genuine democratic government. But these principles are a means to an end. The primary focus has to be on getting a good deal. If you don't then, the whole process of public administration is undermined.

We have to start looking at the process in its totality. We have to look at the assumptions on which the process is based. We have to ask why governments spend money in ways so different from the private sector, and what lessons can be properly borrowed from the private sector. We need to look at why so many good suppliers do not bid for government contracts. We need to ask why governments tend to over-pay for everything. For many years, government lawyers have been trained to 'bullet proof' their contracts. My guess, is that all they are doing is increasing the government's cost. Risks are being over-managed by improvident allocation. One of the things that PCI aims to do is to help clients understand why they are spending so much money. Steve and I have international experience. He worked for years in America. I worked in Australia and England. Much is to be gained from looking at other jurisdictions. And, as I mentioned, the same kind of problems seem to occur everywhere.

Summit. After six years with the Ontario government you have decided to join in this private consultancy. Will you miss your time in government? Why move to the private sector?

KM. Certainly, I will miss it. I leave behind a good many friends as well as colleagues. As for the move, there is, of course, a great deal of risk in starting up your own business but as you enter the last few years of your working career, you begin to ask yourself, what kind of a legacy am I leaving. I do not want to be known only as the fellow who wrote a great pile of unreadable legal agreements, and even more incomprehensible legal books. Most lawyers who spend their careers in the public service got into those careers because they wanted to be of service to the public. I think that PCI can help governments get their costs of procurement down. Not way down, but maybe a percent or two down. Now, across Canada, that amounts to billions a year. Save that kind of money and we can find the money to build better public facilities; provide better public services; and get some of the working poor off the tax roll. I think it is worth taking a bit of a risk to achieve those goals. 