JUDICIAL REVIEW OF PUBLIC PROCUREMENT DECISIONS

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In recent decades, Canadian courts have become more open to reviewing public procurement decisions, but they have also sent mixed signals in this regard. This article surveys the development of Canadian administrative law in this area, distinguishing three periods: a time when Canadian courts generally refused to review public procurement decisions (from the late 19th century to around 1990); a tentative opening (from around 1990 to 2010); and the current period, since around 2010, a time of "doctrinal turbulence." This article argues that current doctrinal controversies should be settled by making judicial review generally available with regard to procurement decisions, subject to the usual restrictions (such as the availability of alternative means of recourse).

Au cours des dernières décennies, les tribunaux canadiens se sont montrés plus disposés à examiner les décisions en matière de marchés publics, mais ils ont également envoyé des signaux contradictoires à cet égard. L'auteur examine l'évolution du droit administratif canadien dans ce domaine, en distinguant trois périodes. Tout d'abord, une époque où les tribunaux canadiens évitaient généralement de contester les décisions concernant les marchés publics, s'étendant de la fin du XIX^e^ siècle à environ 1990. Ensuite, une période d'ouverture prudente allant d'environ 1990 à 2010); et enfin, la période actuelle, qui a commencé vers 2010, caractérisée par une « agitation doctrinale ». L'auteur soutient que les controverses doctrinales actuelles devraient être réglées en rendant le contrôle judiciaire généralement accessible en ce qui concerne les décisions en matière de marchés publics, sous réserve des restrictions habituelles (comme la possibilité d'avoir recours à d'autres voies).

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Introduction

Judicial review is the centrepiece of Canadian administrative law.[2] In constitutional terms, judicial review is understood to safeguard the rule of law: ensuring, at a minimum, the legality of government action.[3] However, for many years, Canadian courts maintained that one particular kind of action, public procurement, was exempt from judicial review. In recent decades, this position has softened, and Canadian courts review public procurement decisions on some occasions. But the caselaw is inconsistent, and this question is surrounded by considerable uncertainty.

Public procurement refers to purchases of goods and services by public authorities.[4] Canadian public authorities acquire all kinds of goods and services from the private sector, ranging from bridges and highways, to computer hardware and software, to consulting services. It is generally recognized that these purchasing decisions can have important political and economic ramifications.

In recent decades, despite earlier exclusions, Canadian courts have become more open to reviewing public procurement decisions. They have explicitly held such decisions to be subject to judicial review—and

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2 The provincial superior courts have an inherent power to review the actions of public authorities: *Crevier v AG (Québec) et al*, 1981 CanLII 30 (SCC) at 234–37, 127 DLR (3d) 1; *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at para 51; Vis-à-vis the federal government, this power is generally exercised by the federal courts: *Federal Courts Act*, RSC 1985, c F-7, ss 18, 28.

3 *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27–31 [*Dunsmuir*].

4 One widely-accepted definition is that of the OECD: "Public procurement refers to the purchase by governments and state-owned enterprises of goods, services and works": The Organization for Economic Co-operation and Development, "Public Procurement", online: <tinyurl.com/bdfmyhtm>.

they have used their powers to overturn such decisions. In the process, they have set aside some of the obstacles that once stood in the way of the judicial review of procurement. Although courts have sent mixed signals, the caselaw no longer supports the idea of a categorical exclusion.

In this article, I take stock of the opening of Canadian courts to the judicial review of procurement decisions. I largely attribute this trend to changes in general administrative law doctrines. I explain that this trend can also be attributed, in part, to changes in the legal framework underpinning public procurement. I find evidence that Canadian judges are becoming sensitive to procurement's public dimensions.

The article is structured chronologically, organized around three time periods. Part 1 spans the period from the end of the 19th century until around 1990. Courts during this period generally excluded public procurement decisions from judicial review. One major reason for this exclusion was the assumption that public procurement was essentially a contractual matter, outside the realm of administrative law. Specific doctrines, such as the idea that only statutory decisions were subject to the writ of certiorari, also played a role.

Part 2 of the article, which I have entitled "a tentative opening," covers the 1990s and 2000s. It was during this period when Canadian courts began to fully engage with the possibility of judicially reviewing procurement decisions. Changes to general administrative law doctrines played an important role in this newfound openness, as did changes to the underlying legal basis of public procurement.

Part 3 is entitled "doctrinal turbulence." This part covers the period from roughly 2010 to the present day. During this period, courts have accepted that procurement decisions are reviewable—at least in some cases. In other cases, they have sought once again to exclude such decisions from judicial review, or at least to impose conditions on judicial review's availability. I try to sort through this caselaw to discern any overall trend.

In Part 4 of the article, I shift from description to prescription and suggest how these ambiguities might be resolved. In my view, judicial review should be generally available for challenges to public procurement decisions, subject to the usual doctrinal restrictions (such as the availability of alternative remedies). For suppliers who may be affected by public decision-making, judicial review is unlikely to be their first choice of avenue for recourse. It can only provide limited remedies, and the timelines are in some cases quite restrictive. For this reason, challenges to public procurement decisions are unlikely to generate congestion in the superior courts. Nevertheless, because it provides an important check

on public decision making, judicial review should at least be available as a last resort.

Before proceeding with the analysis, a couple of clarifications as to its scope. First, this discussion of judicial review focuses on *direct* challenges to public authorities' procurement decisions. Judicial review can also come about indirectly. Some procurement disputes are brought before arbitral panels or administrative tribunals, such as the Canadian International Trade Tribunal. The decisions of these tribunals are in turn subject to judicial review.[5] Other procurement disputes are subject to internal governmental appeal processes; the outcomes of these appeals are also likely to be subject to judicial review.[6] These indirect challenges raise a different set of issues, focused as they are on the rules applied and the powers exercised by tribunals and other review bodies. I therefore set them aside for the purposes of the present analysis.

Second, this article treats "procurement decisions" as a general category, including the various kinds of decisions that public authorities make at different stages of the process. The contract award decision, which is often the outcome of a competitive bidding process, tends to attract the most attention. However, *before* awarding the contract, a public authority may have to make other decisions, such as the choice of a contract award method, or the determination of a supplier's eligibility. Moreover, *after* awarding the contract, the public authority may have to make decisions with regard to the administration of the contract itself, or the evaluation of the supplier's performance—which may then affect that supplier's eligibility for future contracts.[7] Judicial review may be more suited to some of these decisions than others. I have tried to highlight these nuances when they are relevant, but I have not systematically distinguished them throughout the paper.

1. The Traditional Exclusion of Procurement from Judicial Review (late 19th century–c. 1990)

For much of the twentieth century, Canadian courts took the position that public procurement was immune from judicial review. There are numerous examples of courts declining to review procurement decisions. The most commonly cited basis for this exclusion was the notion that public procurement was a matter of private law rather than public law.

5 See e.g. *Northrop Grumman Overseas Services Corp v Canada (Attorney General)*, 2009 SCC 50.

6 See e.g. *Thales DIS Canada Inc v Ontario (Transportation)*, 2023 ONCA 866.

7 See e.g. *Transport Rosemont inc c Ville de Montréal*, 2021 QCSC 3163; *Les Entreprises KL Mainville inc c Bishop*, 2022 QCSC 2881; *Construction Socam ltée c Ville de Laval*, 2022 QCSC 4458.

Additional hurdles arose from specific administrative law doctrines, such as the association of judicial review with statutory powers. Some of these restrictive doctrines were eliminated in the late twentieth century. Nevertheless, the idea that public procurement decisions were unreviewable lingered long after their elimination.

The classic justification for the exclusion of procurement from judicial review is that procurement is a matter of private law rather than public law.[8] This logic implies that public bodies enjoy the same contractual freedom as private parties, including decisions about where to take their business. The treatment of procurement as a private law matter is consistent with the Diceyan paradigm in which government is to be held accountable using the mechanisms of the "ordinary law" rather than a specialized body of administrative law.[9]

The application of contract law to public institutions has been reinforced by legislative reforms that have eliminated any notion of Crown immunity in this area. In England, from the late 19th century onwards, it was held that private parties could make contractual claims against the Crown using the procedure known as a petition of right.[10] Under the *Crown Proceedings Act, 1947*, the UK Parliament made it possible to sue the Crown for breach of contract in the ordinary manner.[11] All Canadian jurisdictions adopted substantively equivalent reforms from the 1950s to the early 1970s.[12]

Even if public procurement is characterized as a matter of administrative law, other rules and doctrines have historically stood in the way of judicial review. Chief among these have been the rules surrounding the prerogative writs—the medieval procedures that crystallized into a rudimentary form of administrative law from the seventeenth century onwards.[13] Historically, the writ of *certiorari*, used to quash decisions,

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8 See the discussion of Justice McLachlin in *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 at 239–40, 1994 CanLII 115 (SCC) [*Shell*].

9 Sue Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988) at 14–16 [Arrowsmith, *Government Procurement*]; See generally AV Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed (London: Macmillan, 1952).

10 Peter W Hogg, Patrick Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 6–7.

11 *Crown Proceedings Act 1947* (UK), 10 & 11 Geo VI, s 1.

12 Hogg, Monahan & Wright, *supra* note 10 at 9–10

13 JM Evans, *De Smith's Judicial Review of Administrative Action*, 4th ed (London: Stevens & Sons, 1980) at 584–95.

was only available for decisions based on statutory powers.[14] However, many decisions relating to public procurement, especially contract award decisions and decisions related to the administration of the contract, may be based on inherent administrative powers, without any statute coming into play.[15]

The applicability of *certiorari* to statutory decisions meant that this mechanism was, in principle, available to challenge procurement by statutory bodies such as municipalities. Parties could argue that a municipality's decision to undertake procurement, or the contract award decision itself, exceeded the municipality's jurisdiction. There are a few examples from the late nineteenth and early twentieth centuries of Canadian courts at least taking such challenges seriously.[16] There is even one example of a successful challenge, in which a court overturned a municipality's procurement decision because it had failed to observe a statutory requirement.[17]

Later in the twentieth century, this association of judicial review with statutory powers was weakened. Many Canadian jurisdictions codified their judicial review procedures. In doing so, they replaced the prerogative writs with new statutory remedies. For example, the Ontario *Judicial Review Procedure Act* makes it possible to apply to the court for "an order in the nature of *mandamus*, prohibition or *certiorari*."[18] And in many cases, these remedies applied to a broad range of public decisions, whatever the source of the power in question.[19] For example, under the

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14 Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge: Harvard University Press, 1963).

15 See e.g. the discussion in *Glenview Corp v Canada (Minister of Public Works) et al*, 1990 CarswellNat 602 at para 19, 44 Admin LR 97 [*Glenview Corp*].

16 See e.g. *Haggerty v Victoria (City of),* [1895] BCJ No 36, 4 BCR 163 [*Haggerty*]; Compare *Kelly v Winnipeg (City of)*, 1898 CanLII 164 (MBKB).

17 *Perron c St-Casimir (Village)* (1929), 48 BR 549.

18 *Judicial Review Procedure Act*, RSO 1990, c J.1, s 2(1).

19 These codifications have also sometimes had the effect of limiting the availability of judicial review, perhaps in unforeseen ways. For example, Ontario's *Judicial Review Procedure Act* also invites applications for declarations and injunctions, but the latter two procedures are only available in relation to statutory powers: *Ibid*; During the 1970s, when the *Judicial Review Procedure Act* was still new, Ontario courts sometimes held that such reliance on a "statutory power" was also applicable to orders in the nature of mandamus, prohibition, or certiorari: David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 440–41 [Mullan, *Administrative Law*]; This restriction had an impact in some procurement cases: for example, in a 1977 case, the Divisional Court held that the Ontario Housing Corporation's exclusion of a supplier based on past performance was not reviewable because it was not based in the exercise of a statutory power: *Re Midnorthern Appliances Industries Corp and Ontario Housing Corporation et al*, [1977] 17 OR (2d) 290 (ONSC), 1977 CanLII 1081 (ONSC); Likewise, in a 2011 case, the Liquor Control Board

Federal Courts Act, judicial review is available to challenge the decision of any "federal board, commission or other tribunal," a term defined to include bodies applying statutory powers as well as prerogative powers.[20]

For much of the twentieth century, even if a procurement decision were considered reviewable, administrative law doctrines posed additional obstacles. British courts held that the rules of natural justice only applied to "judicial" or "quasi-judicial" decisions, rather than "administrative" decisions.[21] Canadian courts eventually followed their lead.[22] This distinction was a notoriously subtle one.[23] Nevertheless, it seems safe to conclude that almost any procurement decision would have fallen on the "administrative" side of this divide, exempt from the requirements of natural justice.

In the 1979 *Nicholson v Haldimand-Norfolk Regional Police Commissioners* case, a majority of the Supreme Court of Canada recognized the existence of a general duty of fairness that extended to administrative decisions as well.[24] This expansion of procedural rights had the effect of broadening the availability of judicial review.[25] Given that procurement decisions would normally have been classified as "administrative," it had the potential to open the door to scrutiny of procurement decisions on procedural fairness grounds.

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of Ontario's decision to award a concession to a particular convenience store was held to be immune from judicial review because it did not involve a statutory power of decision: *2169205 Ontario Inc o/a Lefroy Freshmart v Liquor Control Board of Ontario*, 2011 ONSC 1878 [*2169205 Ontario Inc*]; See also *Grascan Construction Ltd v Metrolinx*, 2017 ONSC 6424 [*Grascan Construction*].

20 *Federal Courts Act*, *supra* note 2, ss 2 ("federal board, commission or other tribunal"), 18; However, the federal courts have sometimes refused to entertain applications for judicial review due to the underlying power being exercised. In a 2005 case, the Federal Court held that judicial review was not available in respect of a procurement decision by the Halifax Port Authority. It reasoned that because procurement powers are a matter of private law, authorities exercising these powers are not acting as a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*: *DRL Vacations Ltd v Halifax Port Authority*, 2005 FC 860.

21 *Local Government Board v Arlidge*, [1915] AC 120, [1914] 7 WLUK 80; *Nakkuda Ali v Jayaratne*, [1951] AC 66 (PC).

22 *Calgary Power Ltd and Halmrast v Copithorne*, 1958 CanLII 73 (SCC); See David Jones & Anne de Villars, *Principles of Administrative Law*, 7th ed (Toronto: Thomson Reuters, 2020) at ch 8.

23 For a demonstration of the difficulties involved, see the multi-factor test established by the Supreme Court of Canada in *Minister of National Revenue v Coopers and Lybrand*, 1978 CanLII 13 (SCC) at 504.

24 1978 CanLII 24 (SCC) [*Nicholson*].

25 Mullan, *Administrative Law*, *supra* note 19 at 409.

Nevertheless, even after *Nicholson*, courts often excluded procurement decisions from the reach of procedural fairness. In one case from 1984, the Court of Appeal for Manitoba clung to the pre-*Nicholson* judicial/administrative distinction in order to deny the availability of *certiorari*.[26] In two other cases, Ontario courts identified "commercial" decisions as an exceptional category, not subject to judicial review on procedural or other grounds.[27] Similar decisions were rendered in British Columbia[28] and the Northwest Territories.[29]

Another important doctrinal change around the same time was the Supreme Court of Canada's 1981 *The Queen (Ontario) v Ron Engineering* decision.[30] In this case and in a series of subsequent cases, the Court posited the existence of a preliminary contract ("contract A") governing the bidding process.[31] (This preliminary contract is thus distinguished from "contract B"—the substantive contract being awarded.) "Contract A" is formed when a potential supplier submits its bid. It obliges the bidder to honour its bid, if selected. It also obliges the "owner" to treat bidders fairly and to evaluate bids in accordance with stated criteria. If either party breaches its obligations, the other party can bring an action for damages.

These doctrines thus helped channel public procurement challenges into private law. Frustrated bidders were likely to allege breaches of contract A, and to sue for contract damages, rather than to bring applications for judicial review. *Ron Engineering* and its progeny thus helped reaffirm a contractual understanding of public procurement processes. In particular, the *Ron Engineering* line of cases emphasizes that bidding processes must be procedurally fair.[32] But this duty of procedural fairness is derived

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26 *Transhelter Group Inc v Committee on Works and Operations*, 1984 CanLII 3700 (MBCA).

27 *Re Ainsworth Electric Co Ltd and Board of Governors of Exhibition Place et al* (1987), 58 OR (2d) 432 (ON Div Ct), 1987 CanLII 4317 (ONSC); *St Lawrence Cement Inc v Ontario (Minister of Transportation)* (1991), 3 OR (3d) 30 (Gen Div), 1991 CanLII 7108 (ONSC) [*St Lawrence Cement*].

28 *Associated Respiratory Services Inc v British Columbia (Purchasing Commission)* (1992), 70 BCLR (2d) 57, 1992 CanLII 1041 (BCSC) [*Associated Respiratory Services*].

29 *Socanav Inc v Northwest Territories (Minister of Transportation)*, 1993 CanLII 3412 (NWTSC).

30 [1981] 1 SCR 111, 119 DLR (3d) 267 [*Ron Engineering*].

31 *Calgary v Northern Construction co*, 1987 CanLII 15 (SCC); *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, 1999 CanLII 677 (SCC) [*MJB Enterprises*]; *Martel Building Ltd v Canada*, 2000 SCC 60 [*Martel*]; *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58; *Double N Earthmovers Ltd v Edmonton (City)*, 2007 SCC 3; *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 [*Tercon Contractors*].

32 *MJB Enterprises*, *supra* note 31; *Martel*, *supra* note 31.

from contract law; it is entirely separate from procedural fairness as it is generally understood in administrative law.[33]

In some cases, Canadian courts have explicitly invoked the availability of contract law remedies as a justification for excluding such disputes from judicial review. They have presumed that such disputes are subject to the implied contract paradigm. The clearest example is found in the 1992 *Peter Kiewit Sons Co v Richmond (City)* case, where the British Columbia Supreme Court held that bid disputes in the public sector, as in the private sector, should be subject to "private law protections afforded by the law of contract" rather than to judicial review.[34]

On the whole then, until the last decade of the twentieth century, Canadian courts often shied away from the judicial review of procurement decisions. One important reason for this exclusion was a characterization of procurement decisions as essentially contractual—a characterization that was reinvigorated in the 1980s by *Ron Engineering* and subsequent "Contract A" cases. In addition, doctrines proper to administrative law, especially the association of *certiorari* with statutory powers and the restriction of natural justice to "judicial" or "quasi-judicial" decisions, served to exclude procurement decisions from judicial review. These exclusionary rules underwent some reforms later in the twentieth century. But in practice, these reforms did not always convince courts to entertain applications for judicial review of procurement decisions.

2. The Tentative Opening of Canadian Courts to the Judicial Review of Procurement (c. 1990–c. 2010)

The traditional exclusion of public procurement decisions from the scope of judicial review began to break down around 1990. This evolution can be largely attributed to shifts in general administrative law doctrines. It can also be explained in terms of changes to the underlying legal basis of procurement, as well as a growing awareness of the public policy issues involved.

In the previous section, I canvassed certain late-twentieth-century changes in administrative law doctrines. Among these was the recognition of a duty of procedural fairness applicable to "administrative" decisions (and not only decisions characterized as "judicial" or "quasi-judicial").[35]

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[33] David Mullan, "The State of Judicial Scrutiny of Public Contracting in New Zealand and Canada" (2012) 43 VUWLR 173 at 179 [Mullan, The State of Judicial Scrutiny].

[34] (1992), 11 MPLR (2d) 110, 7 Admin LR (2d) 124 [*Peter Kiewit*].

[35] *Nicholson*, *supra* note 24.

I also noted that during the aftermath of that doctrinal change, Canadian courts resisted one of its implications, which was that procurement decisions might be reviewable.

By the early 1990s, however, this resistance began to crack. Some Canadian courts began to review some procurement decisions for procedural fairness.[36] For example, the case of *Thomas c Assaly Corp v R* arose from a federal solicitation for office space.[37] The Federal Court ultimately held that the Department of Public Works had misapplied its own evaluation criteria. It proceeded to quash the contract award decision. In arriving at this conclusion, Strayer J provided one of the clearest statements in favour of the judicial review of procurement decisions, writing:

> It appears to me that, in principle, certiorari is a possible remedy in such a case. The Minister and his officials, in rejecting or accepting tenders, performed administrative functions which are ultimately authorized by regulations which are, in turn, authorized by statute. These are not broad policy functions involving unlimited discretion. Decisions with respect to the acceptance or rejection of bids directly affect the interests of persons invited to bid who have undertaken the trouble and expense to tender and to hold their property available until a decision is made. There is therefore attached a duty of fairness which courts can enforce by certiorari, a public law remedy to control the proper exercise of governmental powers.[38]

In another case from the early 1990s, *Volker Stevin NWT Ltd v Northwest Territories (Commissioner)*, the Court of Appeal for the Northwest Territories held that a public authority was subject to a duty of procedural fairness at a preliminary stage of the procurement process.[39] In this case, the court reviewed a government panel's decision to revoke a company's designation as a "northern business"—a designation that would have earned it a 15 to 20 percent price preference on government contracts. The court held that the government had an obligation of procedural fairness when deciding on the designation. Moreover, it held that the existence of this duty of procedural fairness implied the availability of judicial review.

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36 See e.g. *Puddister Shipping Ltd et al v Newfoundland et al*, 2000 CanLII 28784 (NLSC); *R v Cape Breton Regional Ambulance (1993) Ltd* (1995), 143 NSR (2d) 311, 411 APR 311 (NSSC).

37 1990 CarswellNat 601, [1990] FCJ No 243 [*Thomas c Assaly Corp*].

38 *Ibid* at para 10; It is worth noting that the Department subsequently re-issued the call for tenders, resulting in a successful bid for the applicant Thomas C. Assaly Corp.: *Glenview Corp*, *supra* note 15.

39 1994 CanLII 5246 (NWTCA) [*Volker Stevin*].

Another important change to administrative law doctrines—and an expansion of the scope of procedural fairness—came about in 1990, with the Supreme Court of Canada's decision in *Knight v Indian Head School Division No 19*.[40] This was a case about public-sector employment, stemming from a school board's dismissal of its director of education. The majority of the Supreme Court ultimately held that the school board had an administrative law duty of procedural fairness toward its employee. According to Justice L'Heureux-Dubé, writing for the majority, the contractual nature of the employment relationship did not exclude the decision from administrative law.

It must be acknowledged that the Supreme Court of Canada ultimately overturned *Knight* in its 2008 *Dunsmuir v New Brunswick* decision.[41] In *Dunsmuir*, the Supreme Court of Canada held that the decision to dismiss a civil servant employed under contract was subject to the standard requirements of (contractual) employment law and thus did not attract an administrative law duty of fairness.[42] Nevertheless, throughout the 1990s and for most of the 2000s, the *Knight* approach prevailed.

Knight and *Dunsmuir* were part of a series of cases in which the Supreme Court grappled with the boundaries of administrative law vis-à-vis contract law. One might also mention *Société de l'assurance automobile du Québec v Cyr*, released only three weeks after *Dunsmuir*, in which a majority of the Court held that Quebec's public automobile insurance corporation was under a duty of procedural fairness (as codified in Quebec's *Act Respecting Administrative Justice*[43]) when it revoked the accreditation of a mechanic who worked in a garage that had a contract to inspect vehicles.[44] Finally, in the 2011 *Canada (AG) v Mavi* case, the Court held that an administrative law duty of fairness applied to Ontario's attempts to collect money from people who had assumed financial responsibility for their immigrant relatives; the contractual aspects of this process did not serve to "extricate" it from public law.[45] Although none of these cases dealt with public procurement, most of them (with the notable exception of *Dunsmuir*) affirmed the relevance of an administrative law analysis in the context of contractual processes.[46]

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40 [1990] 1 SCR 653, 1990 CanLII 138 (SCC) [*Knight*].

41 *Dunsmuir*, *supra* note 3 at paras 81–82.

42 *Ibid* at paras 112–16.

43 *Act Respecting Administrative Justice*, CQLR c J-3, ss 4–8.

44 2008 SCC 13 [*Cyr*].

45 2011 SCC 30 at para 49 [*Mavi*].

46 Mullan, The State of Judicial Scrutiny, *supra* note 33 at 187; Another case from around the same time period that grappled with related issues is *Canada (AG) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*], in which the Court unanimously held that an applicant for a licence to provide mobile phone services had the option of suing the federal government

These doctrinal changes can be situated within a broader set of reflections, during the 1990s and early 2000s, on the scope of administrative law, and particularly on the boundaries between administrative law and contract. These reflections were prompted, in large part, by changes in public administration during the 1990s. In many industrialized countries, governments sought to reduce the size of public administration, in part by contracting out some public functions to private entities.[47] In tandem with this trend, public officials began using management techniques modeled on those used in the private sector.[48] They also devised new, more flexible regulatory techniques aimed at supervising private entities—including those newly responsible for functions that were formerly carried out by the government.[49] These trends left many administrative lawyers wondering about the applicability of administrative law—including the availability of judicial review.[50]

Another doctrinal change with implications for public procurement arose from the Supreme Court of Canada's 1999 decision in *Baker v Canada (Minister of Citizenship and Immigration)*.[51] Prior to *Baker*, for the purposes of judicial review, Canadian courts sharply distinguished between discretionary decisions and decisions based on the application of rules. Parties seeking to challenge discretionary decisions had to demonstrate that such decisions were made in bad faith, for an improper purpose, or so on.[52] These are difficult standards to meet. In *Baker*, however, the Supreme Court of Canada integrated the review of discretion into its general framework for the review of administrative decisions.[53] This included the possibility of overturning a discretionary decision on grounds of unreasonableness. Indeed, unreasonableness was one of the Supreme Court's bases for overturning the decision in *Baker* itself.

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before the Ontario courts for breach of contract, rather than bringing an application for judicial review before the federal courts.

47 See generally Ian Harden, *The Contracting State* (Milton Keynes: Open University Press, 1992).

48 Carol Harlow & Richard Rawlings, *Law and Administration*, 4th ed (Cambridge: Cambridge University Press, 2022) at 43–76; Daniel Mockle, "Gouverner sans le droit? Mutation des normes et nouveau modes de régulation" (2002) 43 C de D 143.

49 Harlow & Rawlings, *supra* note 48 at 301–498; Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).

50 See generally Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997).

51 1999 CanLII 699 (SCC) [*Baker*].

52 See e.g. *Cité de Sillery v Sun Oil Co and Royal Trust Co*, 1964 CanLII 82 (SCC); *Maple Lodge Farms v Government of Canada*, 1982 CanLII 24 (SCC); See also *Baker*, *supra* note 51 at para 53.

53 *Baker*, *supra* note 51 at paras 54–56.

The changes brought about by *Baker* had implications for public procurement.[54] Some parts of the procurement process, such as the determination of a contract award method, have at times been left to the discretion of the contracting authority. Such decisions had historically been difficult to challenge.[55] (The actual contract award decision is less likely to be discretionary, especially where there is a formal bidding process. However, if some other process is used, the public authority may have some discretion.) *Baker* made judicial scrutiny of such decisions more plausible.[56]

Canadian judges and lawyers were also prompted to take a fresh look at the reviewability of procurement by the Supreme Court of Canada's decision in *Shell Canada Products Ltd v Vancouver (City)*.[57] This case arose from two city council resolutions targeting the multinational oil company Shell, on account of its business in apartheid South Africa. The first of these resolutions declared Vancouver a "Shell-free zone"; the second proclaimed a municipal boycott of Shell products. The majority of the Court, in an opinion penned by Justice Sopinka, held the resolutions to be inconsistent with the city's enabling legislation. Justice McLachlin (as she was then), dissenting in the result, nevertheless agreed with the majority that the resolutions were amenable to judicial review. And in her dissenting opinion, she devoted some attention to the question of the reviewability of procurement decisions. Responding to the claim that procurement should be treated as a matter of private law, Justice McLachlin noted that fact that purchasing decisions involved public funds and can have important public consequences. She also noted the statutory sources of municipal powers. Justice McLachlin ultimately rejected claims of a "doctrine of immunity from judicial review of procurement powers," at least as applied to municipalities.[58]

Although the *Shell* case did not arise from a specific contracting decision, it plainly demonstrated how procurement can raise difficult questions of values. While some procurement decisions may have a purely commercial basis, others take on political dimensions. The city council resolutions at issue in *Shell* touched on questions of racism, solidarity, human rights, and international trade. As such, they appeared squarely in the public realm—appropriate matters to be addressed through public law processes.

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54 Mullan, The State of Judicial Scrutiny, *supra* note 33 at 188.

55 See e.g. *Haggerty*, *supra* note 16.

56 See e.g. *Mastermeter Products Canada Inc v Corporation of the City of North Bay*, 2012 ONSC 1887 [*Mastermeter Products*]; *Murray Purcha & Son Ltd v Barriere (District)*, 2019 BCCA 4 [*Murray Purcha*].

57 *Shell*, *supra* note 8.

58 *Ibid* at 241.

Finally, another factor influencing the reviewability of procurement during this period was that, at least in some Canadian jurisdictions, procurement decisions came to be more tightly regulated. The most substantial legislative overhaul during this period occurred in Quebec, which adopted its *Act respecting contracting by public bodies* in 2006 (proclaimed in force in 2008).[59] Additional provisions in other Quebec statutes addressed procurement by municipalities as well as public transit corporations.[60]

At least in some cases, this new legislative framework surrounding public procurement provided additional material for judicial review: it became possible to argue that a public authority had breached some statutory condition in its contracting process. A good example is the 2008 *Alstom Canada inc c Société de transport de Montréal* case.[61] This case concerned a decision by the Montreal public transit authority (under pressure from the Quebec government) to negotiate directly with the homegrown manufacturer Bombardier for the purchase of new subway cars, rather than issuing a public call for tenders. Alstom, Bombardier's French competitor, which had also had discussions with the public transit authority, applied for a declaration to the effect that this decision was inconsistent with the requirements of Quebec's *Act respecting public transit authorities*.[62] The Quebec Superior Court agreed. It not only issued the declaration requested, but also used its inherent powers to declare that the transit authority was obliged to issue a public call for tenders.[63]

During the last decade of the twentieth century and the first decade of the twenty-first, Canadian law thus underwent a series of changes that made the judicial review of procurement decisions more plausible. Some of these changes were the result of evolving judicial attitudes, toward administrative law in general or toward public procurement in particular. But others were brought about by changes in the underlying legal framework governing public procurement. The shift was not uniform; there were still cases from this period that held procurement decisions to be unreviewable.[64] But collectively, these changes resulted in an unmistakable trend toward the reviewability of procurement.

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59 *Act respecting contracting by public bodies*, CQLR c C-65.1; See also Pierre Giroux, Denis Lemieux & Nicholas Jobidon, *Contrats des organismes publics: loi commentée*, 2e ed (Brossard, Québec: Wolters Kluwer CCH, 2013) at 50–55.

60 *Cities and Towns Act,* CQLR c C-19; *Municipal Code of Québec,* CQLR c C-27.1; *Act respecting public transit authorities*, CQLR c S-30.01.

61 2008 QCSC 8 [*Alstom Canada Inc*].

62 *Act respecting public transit authorities*, *supra* note 60.

63 *Alstom Canada Inc*, *supra* note 61 at paras 206–08.

64 See e.g. *St Lawrence Cement*, *supra* note 27; *Peter Kiewit*, *supra* note 34; *Associated Respiratory Services*, *supra* note 28.

3. Doctrinal Turbulence (c. 2010–present)

During the contemporary period, since around 2010, the law related to the judicial review of procurement has been rather unsettled. The factors identified in the previous section, those that helped to open Canadian courts' attitudes, remain in play. Nevertheless, Canadian courts have also sought once again to limit the applicability of judicial review in procurement cases, relying on old as well as new doctrines.

One way courts have purported to limit judicial review is by returning to the idea that "commercial" decisions of public authorities are exempt from an administrative law duty of procedural fairness. The Federal Court of Appeal invoked this exception in the 2009 *Irving Shipbuilding Inc v Canada (AG)* case, holding that judicial review was not available to challenge a ministerial procurement decision.[65] Justice of Appeal Evans reasoned the availability of judicial review in that case should depend on the existence of an administrative law duty of fairness, and that "it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute."[66] The same exception came to the fore in the 2011 case of *2169205 Ontario Inc o/a Lefroy Freshmart v Liquor Control Board of Ontario* (a case about the granting of a concession).[67] In this case, the Ontario Divisional Court based its reasoning in part on the notion that the decision was a commercial one, noting that "there is no broad public interest that is sufficient to justify judicial review of the tendering process."[68]

However, one might observe that the language used in *Irving Shipbuilding* and *2169205 Ontario Inc*, emphasizing the private, commercial nature of the decisions in those cases, implies that judicial review might be appropriate in *other* cases where broader public interests are at stake. Indeed, courts have at times justified their willingness to judicially review procurement decisions on this basis. Such was the reasoning of the Ontario Divisional Court in *Bot Construction Ltd v Ontario (Ministry of Transportation)*, in which it purported to quash a contract award by the Ontario government related to the purchase of steel

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65 2009 FCA 116 [*Irving Shipbuilding*].

66 *Ibid* at para 46.

67 *2169205 Ontario Inc*, *supra* note 19; See also *Grascan Construction*, *supra* note 19.

68 *2169205 Ontario Inc*, *supra* note 19 at para 30; As noted earlier, the exclusion was also based on the Divisional Court's conclusion that no "statutory power of decision" was involved.

beams for a highway construction project.[69] The Divisional Court held that the lowest bid had been non-compliant and that the government's acceptance of this bid had therefore been unreasonable; it also held that the process had been procedurally unfair. (The Court of Appeal for Ontario overturned the lower court's judgment, holding that the government was entitled to greater deference in its assessment of compliance.[70])

Additional limits on judicial review, during this contemporary period, have come from non-procurement cases where courts have tried to draw boundaries between public and private. The most important such case is the Federal Court of Appeal's 2011 decision in *Air Canada v Toronto Port Authority et al.*[71] This case concerned the Toronto Port Authority (TPA)'s management of take-off and landing slots at the Toronto Island airport. Air Canada considered that some of the TPA's decisions unduly favoured its competitor, Porter Airlines. It applied for judicial review. Justice of Appeal Stratas held that judicial review was not available, because in making its decisions, the TPA was essentially acting in a private capacity, as a property manager. In arriving at this conclusion, Justice of Appeal Stratas set out a list of eight factors relevant to determining whether judicial review should be available. These included such elements as "[t]he character of the matter"; "[t]he nature of the decision-maker and its responsibilities"; "[t]he extent to which a decision is founded in and shaped by law as opposed to private discretion"; and "[t]he suitability of public law remedies."[72] Under the heading, "[t]he character of the matter," Justice of Appeal Stratas distinguished between "private, commercial" matters and matters that are "of broader import to members of the public," implying that procurement decisions would generally fit into the former category.[73]

A few years later, the Supreme Court of Canada took on the public/private distinction in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall.*[74] This was not a procurement case. It stemmed rather from the expulsion of a member from a religious community. Justice Rowe (for a unanimous court) held that judicial review was not available to review the decision of a private body. And in doing so, he made certain broad declarations about the availability of judicial review. He wrote that "[j]udicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public

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69 2009 CanLII 92110 (ONSCDC) at para 24 [*Bot Construction*].

70 *Bot Construction Limited v Ontario (Transportation)*, 2009 ONCA 879 [*Bot Construction ONCA*].

71 2011 FCA 347 [*Air Canada*].

72 *Ibid* at para 60.

73 *Ibid*.

74 2018 SCC 26 [*Wall*].

character."[75] Justice Rowe went on to specify, in *obiter*, that "decisions that are private in nature—such as renting premises and hiring staff … are not subject to judicial review" as these are merely contractual decisions that do not raise concerns about the rule of law.[76] Taken at face value, these statements might seem to imply a blanket exclusion of procurement decisions from judicial review.

Although neither *Air Canada* nor *Wall* was a procurement case, courts have subsequently relied on the formulations in these two cases to exclude some procurement decisions from judicial review. One recent example can be found in the Quebec Superior Court's decision in *Buanderie Blanchelle inc c Procureure générale du Québec (Ministre de la Santé et des Services sociaux)*, which concerned a decision by a government department to change the supplier for some laundry services for public institutions.[77] Applying the Supreme Court's analysis from *Wall*, the Quebec Superior Court held that judicial review was unavailable.

Likewise, in the *Knibb Developments Ltd v Siksika First Nation* case, the Federal Court declined to review a First Nation band council's resolution to the effect that it would no longer enter into contracts with a particular supplier.[78] The Federal Court held that the resolution was private in nature and therefore could not be the object of judicial review, as per *Wall*.

Even more recently, the Ontario Divisional Court was asked to review the provincial government's decision to disqualify a bidder, as part of a competition for a contract for debt collection services.[79] Applying the *Air Canada* factors, the court concluded that the matter was "a private contract dispute to which public law remedies are not suitable."[80]

Despite these exclusionary moves, it must be acknowledged that the analysis in *Air Canada* is a nuanced one, which can lead to the applicability of judicial review in certain cases. The leading example is the *Rapiscan Systems, Inc v Canada (AG)* case, which arose from the Canadian Air Transport Security Authority (CATSA)'s award of a contract for the purchase of xray luggage scanners.[81] The Federal Court agreed to review the decision. Referring to the *Air Canada* factors, it noted that CATSA was exercising a statutory power, that airport security is a matter of broad

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75 *Ibid* at para 14.

76 *Ibid*.

77 2019 QCCS 2039 [*Buanderie Blanchelle*].

78 2021 FC 1214 [*Knibb*].

79 *A-1 Credit Recovery v Ministry of Finance*, 2023 ONSC 6667.

80 *Ibid* at para 26.

81 2014 FC 68 [*Rapiscan*].

public interest, and that the allegations raised concerns about CATSA's governance.[82] The Federal Court ultimately found that CATSA had based its decision on undisclosed criteria and that it had failed to observe its own contracting procedures.[83] It concluded that the procurement process was fundamentally flawed.[84] And it issued a declaration to the effect that the contract award had been unreasonable and illegal. The Federal Court of Appeal affirmed this decision, endorsing most aspects of the Federal Court's judgment (except as to the latter's finding of procedural unfairness).[85]

Other, more recent cases also seem to endorse this idea, i.e. that judicial review should be available where there are important public interests at stake. For example, in *Aquatech v Alberta (Minister of Environment and Parks)*, the Alberta Court of Queen's Bench determined that the provincial government's award of a contract for local water services was amenable to judicial review, in part because of the broad public impact of such a decision.[86] The court nevertheless rejected the challenge on the merits. (The Court of Appeal for Alberta endorsed the lower court's rejection of the judicial review application.[87])

However, what is even more remarkable about recent caselaw is how often courts engage in judicial review without ever stopping to ask whether procurement decisions are reviewable. A good example is the *Pomerleau Inc v New Brunswick* decision of the New Brunswick Court of Queen's Bench.[88] This case arose from the New Brunswick government's exclusion of a bidder on a hospital construction project. The call for tenders required a letter from a New Brunswick insurer; Pomerleau provided a letter from a company that was registered to provide insurance in New Brunswick but had no physical address in the province. However, in the context of other procurements subject to the same requirements, the government had treated bids insured by the same company as compliant. Justice McLellan therefore held that the decision to exclude Pomerleau was unjustifiably inconsistent with past practices, ignored basic principles of corporate law, undermined the purposes of the *Crown Construction Contracts Act*, and gave rise to "concerns of subjective, arbitrary and inconsistent decision-

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82 *Ibid* at paras 51–54.

83 *Ibid* at paras 64–91.

84 *Ibid* at paras 127–31.

85 *Canada (AG) v Rapiscan Systems*, 2015 FCA 96.

86 2019 ABQB 62 [*Aquatech ABQB*].

87 *Aquatech Canadian Water Services Inc v Alberta (Minister of Environment and Parks)*, 2020 ABCA 153 [*Aquatech ABCA*].

88 2021 NBQB 56.

making."[89] Justice McLellan issued a declaration deeming Pomerleau's bid to have been compliant.

Surveying recent cases where the availability of judicial review is taken for granted, it is striking that the lion's share of such decisions have come from Quebec. There are a number of reasons for this outsize contribution. This development can be partly attributed to Quebec's statutory framework, alluded to earlier, which regulates the procurement process in considerable detail. However, it can also be attributed to the *Civil Code of Quebec*, which stipulates that "[a]ny contract which does not meet the necessary conditions of its formation may be annulled."[90] Quebec courts have ruled that, for public bodies, these "necessary conditions" include respect for the statutes and regulations governing the contracting process.[91] If the contracting process breaches these rules, the resulting contract is absolutely null—it is deemed never to have existed.[92] This interpretation of the *Civil Code of Quebec* gives suppliers a powerful incentive to litigate. If they can show that the public authority broke the rules, the court *must* annul the contract: the sanction is meant to be automatic.[93]

Although this mode of recourse is based on private law, when parties have used it to challenge public contracts, Quebec courts have often characterized the ensuing litigation as an administrative judicial review.[94] Indeed, in some of these cases, Quebec courts treat these decisions as straightforward instances of judicial review, without much reference to the underlying civil law concepts.[95] This characterization has given courts a way to restore their discretion with regard to remedies.[96] In these cases,

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89 *Ibid* at para 22; *Crown Construction Contracts Act*, RSNB 2014, c 105.

90 *Civil Code of Québec,* CQLR c CCQ-1991, s 1416.

91 *Montréal (Ville de) c St-Pierre (Succession de)*, 2008 QCCA 2329 at paras 33–35; *Autobus Dufresne inc c Réseau de transport métropolitain*, 2017 QCSC 5812 at paras 39–41.

92 See *Civil Code of Québec*, *supra* note 90, s 1417.

93 *Ibid*, s 1418.

94 *Indigo Parc Canada inc c Commission scolaire des Découvreurs*, 2017 QCCS 1852; *Transport en commun La Québécoise inc c Réseau de transport métropolitain*, 2019 QCCA 752; *Daniels SharpSmart Canada Limited c SigmaSanté*, 2020 QCCS 3280; for a critical perspective on this line of cases, see Liviu Kaufman, "Le recours en nullité d'un contrat conclu en contravention des normes d'ordre public visant les appels d'offres avec le pouvoir public" (2024) 551 Barreau du Québec, Service de la formation continue, Développements récents en droit des marchés publics.

95 See e.g. *Fédération des transporteurs par autobus c Société de transport du Saguenay*, 2021 QCCA 1303 [*Fédération des transporteurs par autobus*]; Compare *Autobus des Monts inc c Développement Côte-de-Beaupré*, 2022 QCCS 3222 [*Autobus des Monts inc*].

96 See e.g. *CMC Électronique inc c Procureure générale du Québec*, 2021 QCCS 3169; *Compagnie de recyclage de papiers MD inc c MRC de Vaudreuil-Soulanges*, 2019 QCCS 4169.

even where they have detected flaws in the contracting process, courts have insisted on their discretion to uphold[97] the contract or to suspend[98] their declaration of the contract's nullity. Courts have notably exercised this discretion where the performance of the impugned contract was already underway.

It must be acknowledged that Canadian courts' greater openness to judicial review does not imply that challenges to procurement decisions are always successful. There are numerous cases where courts have allowed judicial review to go ahead, while ultimately upholding the public authority's decision. The *Aquatech ABQB* decision discussed above, together with its subsequent appeal, is a case in point.. Another example is *Mastermeter*, in which the Ontario Divisional Court upheld the reasonableness and procedural fairness of a municipal decision related to the procurement of a water metering system.[99] Likewise, in *Murray Purcha & Son Ltd v Barriere (District)*, the British Columbia courts noted some irregularities in a municipality's evaluation of bids for a snow removal contract, but ultimately held the municipality's evaluation to be reasonable as well as procedurally fair.[100]

Another factor militating toward the availability of judicial review in recent years is the decline in the use of "contract A." The implied contract model, developed by the Supreme Court in *Ron Engineering*, has come under heavy criticism. In a leading manual for construction law practitioners entitled *Bidding and Tendering*—a manual devoted largely to the mechanics of the implied contract model—the authors admit that "the negative consequences [of the implied contract model] may outweigh the benefits."[101] They then go on to detail some of these negative consequences: that it renders bids binding even when they contain genuine mistakes, generating windfall gains for owners; that bidders who make mistakes are thus placed in "the ludicrous position" of having to prove that their own bids are non-compliant; that owners are held liable for "huge" damage awards, despite reasonable disagreements as to whether certain bids were compliant.[102]

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97 See e.g. *Régulvar inc c Société québécoise des infrastructures*, 2021 QCCS 1036; *Laval Fortin ltée c Ville de Dolbeau-Mistassini*, 2021 QCCS 2700.

98 *Fédération des transporteurs par autobus*, *supra* note 95; *Autobus des Monts inc*, *supra* note 95.

99 *Mastermeter Products*, *supra* note 56.

100 *Murray Purcha*, *supra* note 56.

101 Paul Sandori & William M Pigott, *Bidding and Tendering: What is the Law?*, 6th ed (Toronto: LexisNexis, 2020) at 360.

102 *Ibid*.

For these reasons, since the turn of the millennium, more and more public authorities have employed contract award methods that do not involve a "contract A." In some cases, they have used "requests for proposals" (RFPs) or other documents that either negate the existence of a contract A or severely limited any contractual liability.[103] This turn away from contractual mechanisms appears to have contributed to the use of judicial review. Indeed, in a number of cases, including *Aquatech* and *Murray Purcha*, courts have explicitly linked the availability of judicial review to the unavailability of contractual remedies.[104]

That said, courts have not consistently taken the limitations of contractual remedies as a cue to expand the availability of judicial review. In *Irving Shipbuilding*, discussed above, although the bidding process had been governed by a contract A, the complainants, as would-be subcontractors, lacked standing to enforce this contract. In rejecting their judicial review application, Justice of Appeal Evans held that the arrangement as a whole had been "governed by the law of contract," and that it would be inappropriate to "supplement" contractual protections with those of administrative law.[105] In that case, the non-availability of contractual remedies served as a basis for excluding administrative law as well.

On the whole, then, the contemporary period (since around 2010) has seen some prominent attempts to limit the availability of judicial review of procurement decisions. Despite these attempts, however, Canadian judges have in fact reviewed procurement decisions on dozens of occasions. In some of these cases, judges have explicitly engaged with the question of the availability of judicial review; in others, they have taken it for granted. The overall picture of the caselaw remains a somewhat confusing patchwork.

4. A Better Approach

Canadian courts have demonstrated over the years that public procurement decisions can be a suitable target for judicial review. Indeed, the caselaw suggests that judicial review should at least *sometimes* be available. Nevertheless, considerable uncertainty remains. Courts have sometimes denied the availability of judicial review, employing a range of restrictive

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[103] Compare *Mellco Developments Ltd v Portage La Prairie (City of)*, 2002 MBCA 125; *Budget Rent-A-Car of BC Ltd v Vancouver International Airport Authority*, 2009 BCCA 22; *Tercon Contractors*, *supra* note 31; See also *Metercor Inc v Kamloops (City of)*, 2011 BCSC 382.

[104] See e.g. *Murray Purcha*, *supra* note 56 at paras 30–35; *Aquatech ABCA*, *supra* note 87 at para 13; See also *Holy Cross Surgical Services v Calgary Health Region*, 2005 ABQB 760.

[105] *Irving Shipbuilding*, *supra* note 65 at paras 46–54.

doctrines. In this section, I propose a way out of this conundrum. Essentially, I argue that judicial review should *generally* be applicable to public procurement decisions, subject to the usual conditions.

A starting point for this analysis is that there are compelling grounds for subjecting public procurement to judicial review, at least some of the time. Ever since *Shell*, Canadian courts have recognized that public procurement can raise important questions of values.[106] Other cases, such as *Rapiscan*, have helped to reveal problems in public administration and financial management. Judicial review, as a classic public law accountability mechanism, is well suited to addressing such concerns. As the majority of the Supreme Court of Canada wrote in *Vavilov*, judicial review "concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society."[107] Any doctrines that would purport to *categorically* exclude public procurement from judicial review should therefore be rejected.

It might nevertheless be argued that not all public procurement cases should be subject to judicial review—that this means of recourse should only be available in a subset of cases. Indeed, in some cases where Canadian courts have allowed judicial review to go forward, they have expressed doubts about its appropriateness. For example, in *Bot Construction*, the Court of Appeal for Ontario grounded its decision on the reasonableness of the governmental decision at issue, "without expressing any view as to the availability of judicial review as a remedy with respect to the tendering process for government procurement contracts."[108] Likewise, in *Aquatech ABCA*, the Court of Appeal for Alberta explicitly refrained from commenting on the appropriateness of judicial review.[109] Conversely, in cases where courts have denied the availability of judicial review, they have nevertheless acknowledged that judicial review might be suitable in other circumstances: *Irving Shipbuilding* is the most notable example.[110]

However, there is no easy way to distinguish between those public procurement cases that should and those that should not be subject to judicial review. No simple test is available. *Air Canada*'s eight-factor test, while sophisticated and comprehensive, requires a substantial factual

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106 *Shell*, *supra* note 18.

107 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 4 [*Vavilov*].

108 *Bot Construction ONCA*, *supra* note 70 at para 19.

109 *Aquatech ABCA*, *supra* note 87 at para 14.

110 *Irving Shipbuilding*, *supra* note 65 at para 61. Justice of Appeal Evans noted that there may be room for public law mechanisms to protect the public interest in exceptional cases where the public authority's behaviour is egregious, such as fraud or bribery.

basis in order to apply. The outcome of the test can depend on the relative weight assigned to different elements. It therefore seems ill-suited as a preliminary screening mechanism.

It may be helpful to draw on a parallel from the United Kingdom (or, to be more precise, the situation that prevails in the United Kingdom when special mechanisms, such as those under the *Procurement Act 2023*,[111] are not available). UK courts have held that contracting decisions are generally matters of private law; they are only "amenable" to judicial review under certain conditions.[112] If the procurement decision had a "statutory underpinning," judicial review may at a minimum be used to challenge any breach of these statutory rules; it may also be available on other grounds.[113] If the procurement decision did not have a statutory basis, the decision will only be amenable to judicial review where there is an additional "public law element"—or, according to some cases, a "sufficient" public law element.[114] The existence of such an element depends largely on the grounds of review. If the claimant alleges illegality, bribery, fraud, bad faith, or the implementation of an unlawful policy, judicial review should normally be available. However, judicial review is generally not available to challenge contracting decisions on grounds of mere unfairness, irrationality, or breach of legitimate expectations.[115]

It is widely recognized that the "public law element" criterion is amorphous, and that UK courts have applied it inconsistently. As Sue Arrowsmith has written, "the case law is confusing, often contradictory, and very uncertain."[116] Arrowsmith has also noted that there are also other cases in which UK courts have held procurement decisions to be

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111 *Procurement Act 2023* (UK), ss 100–07 (Establishing a cause of action, available to some suppliers, that they can use to enforce compliance with the statute); Prior to Brexit, a similar mechanism was established by the EU-inspired *The Public Contracts Regulations 2015* (UK).

112 See *Dukes Bailiffs Ltd v Breckland Council*, [2023] EWHC 1569 (TCC) at paras 105–09 [*Dukes Bailiffs*].

113 *R v Lord Chancellor's Department ex parte Hibbit and Saunders*, [1993] COD 326 (TCC); *Mass Energy v Birmingham City Council*, [1994] Env LR 298; Eleanor Aspey, "The Search for the True Public Law Element: Judicial Review of Procurement Decisions" (2016) Pub L 35.

114 *R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales*, [2006] EWHC 2167.

115 See *Dukes Bailiffs*, *supra* note 112 at para 108.

116 Sue Arrowsmith, "The Conceptual Reorientation of Procurement Regulation in the UK: The New Objectives of the Post-Brexit Regulatory Regime and the Enhanced Role of Hard Law as a Domestic Policy Tool" (2024) Pub Procurement L Rev 161 at 168 [Arrowsmith, The Conceptual Reorientation].

reviewable without requiring any "public law element."[117] Moreover, as Eleanor Aspey notes, there does not appear to be any coherent theory underlying the distinction between the grounds of review that render judicial review available and those that do not.[118]

Aspey argues that judicial review should generally be available, at least where the contract is made under statutory powers.[119] Likewise, Arrowsmith argues that it would be better to establish a general rule: either that procurement decisions should be reviewable, or that they should be unreviewable (perhaps with narrow exceptions, such as for bad faith).[120] Although Arrowsmith refrains from taking a specific stance in favour of one or the other option, her sympathies clearly lie with the idea that judicial review should be available.[121] Arrowsmith acknowledges that there may be some practical challenges involved in adapting standard judicial review doctrines for public procurement decisions, but she suggests ways that these challenges can be overcome.

The same analysis is applicable to Canada. Since a categorical exclusion would be problematic, and since no simple test is available, it would be better to allow *all* public procurement decisions to be potentially subject to judicial review, like any other exercise of public-sector decision making. In other words, Canadian administrative law should dispense with any doctrines that purport to treat public procurement decisions as a special category for the purposes of judicial review.

Such an approach would not amount to a reform so much as a clarification of existing law. As this paper has documented, Canadian courts have accepted the reviewability of public procurement decisions on numerous occasions. But Canadian courts have also sent mixed signals in this regard. A clear, consistent approach would make this area of law more intelligible and align it with general administrative law doctrines.

This doctrinal clarification is unlikely to revolutionize public procurement disputes. The "supply" of judicial review, as a means of resolving such disputes, will continue to be limited by general administrative law doctrines, especially the principle that applicants should first pursue other means of recourse. Where there exist internal processes or administrative tribunals with authority to review public procurement disputes, applicants will be expected to make use of these

117 *Ibid* at 167; See also Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3d ed (London: Sweet and Maxwell, 2014) at 117–24.

118 Aspey, *supra* note 113 at 47.

119 *Ibid*.

120 Arrowsmith, The Conceptual Reorientation, *supra* note 116 at 122.

121 Compare Arrowsmith, *Government Procurement*, *supra* note 9.

before turning to judicial review. The law therefore already contains safety valves that will prevent the floodgates from opening.

Limits on the use of judicial review are also likely to come from the "demand" side. It is clear that judicial review will not always be applicants' first choice. Judicial review brings certain potential disadvantages, such as short timelines (in some jurisdictions).[122] Judicial review is also normally based on a limited evidentiary record.[123] Where parties wish to put forward fundamentally conflicting accounts of the facts, judicial review is unlikely to provide an adequate forum. Finally, and perhaps most importantly, judicial review cannot give rise to an order for damages.[124] In bid disputes, parties might ask the judge to cancel or suspend a contract award decision. But monetary compensation is out of the question.

If Canadian courts accept that public procurement decisions are in fact generally reviewable, they may have to adapt certain doctrines accordingly. For example, Canadian administrative law subjects most decisions to a reasonableness standard.[125] Public procurement decisions would be no exception. But, at least in the context of competitive bidding, a reasonable decision would be one that respected certain constraints. Evaluation criteria are generally announced in advance. Under the contract A paradigm, public authorities are bound to base their decisions on these criteria.[126] An administrative law assessment of the reasonableness of public procurement decisions would have to at least take this principle into account, if not incorporate it wholesale.

It may also be challenging to subject public procurement decisions to an administrative law duty of procedural fairness. Especially in the context of competitive bidding, procedural fairness takes on a distinct texture. Deadlines are sacrosanct.[127] There are strict limits on public institutions' ability to communicate with potential bidders.[128] Public authorities must not be too accommodating with any particular bidder, lest this give that

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122 See e.g. *Administrative Tribunals Act*, SBC 2004, s 57 (60-day time limit for initiating judicial review); *Federal Courts Act*, *supra* note 2, s 18.1(2) (presumptive 30-day time limit).

123 Donald J M Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, looseleaf) at para 6:53ff.

124 *TeleZone*, *supra* note 46 at para 26.

125 *Vavilov*, *supra* note 107 at paras 23–32.

126 See e.g. *Zutphen Brothers Construction Ltd v Nova Scotia (AG)* (1993), 125 NSR (2d) 34, 1993 CanLII 4417 (NSSC).

127 *Coco Paving (1990) Inc v Ontario (Transportation)*, 2009 ONCA 503.

128 Compare ACL Davies, *The Public Law of Government Contracts* (Oxford: Oxford University Press, 2008) at 137–38.

bidder a competitive edge.[129] And while procedural rigour matters, so does efficiency. From an economic standpoint, procedures are a form of transaction costs; overly onerous procedures may defeat the purpose of the entire exercise.

Assessing public procurement decisions according to such principles may require a change of mindset.[130] But administrative law doctrines will not stand in the way. It is generally acknowledged that reasonableness may be subject to certain constraints; deference is not a blank cheque.[131] In particular, the Supreme Court of Canada has stated that internal consistency in decision-making can play a role in the assessment of reasonableness.[132] It is not difficult to see how this principle can be taken to require transparency and consistency in the evaluation of bids. Likewise, the Supreme Court of Canada has long held that "[t]he concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."[133] It will require a certain effort to adapt the principles of procedural fairness to the context of public procurement, but such a task is feasible.

On the whole, then, in terms of the availability of judicial review, public procurement decisions should be treated the same as other decisions. Judicial review may not be available in all cases, but any such exclusion will result from general administrative law principles rather than any targeted doctrine. And in terms of the operation of judicial review, it may be necessary to adapt certain principles to take into account the particularities of procurement processes. But Canadian judges and litigants should be up to the challenge.

Conclusion

As Sue Arrowsmith observed in 1988, the exclusion of public procurement from judicial review in Canada appears to be a relic of an outdated Diceyan approach. In this mode of thinking, government decisions are primarily subject to the "ordinary" private law. Administrative law, if it exists, is pushed into the shadows. In the years since, Canadian courts have taken steps to free themselves from this mindset. But progress has been inconsistent; the reviewability of procurement decisions has often been called into question. The current caselaw is therefore rife with uncertainty.

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129 See e.g. *Vachon Construction Ltd v Cariboo (Regional District)*, 1996 CanLII 1851 (BCCA).

130 Davies, *supra* note 128 at 124–27.

131 *Vavilov*, *supra* note 107 at paras 99–142.

132 *Ibid* at 129–32.

133 *Knight*, *supra* note 40 at 682; Cited with approval in *Baker*, *supra* note 51 at paras 22–23; *Dunsmuir*, *supra* note 3 at para 79; *Vavilov*, *supra* note 107 at para 77.

In this article, I have traced the evolution of this caselaw over the years. I have tried to show that the opening of judicial review to public procurement decisions is the best way to resolve the lingering uncertainty. Such an approach would not solve all problems associated with public procurement. Nor would it replace other contestation mechanisms, where they are available. But it would offer suppliers a form of recourse where no other recourse is available. It would, moreover, provide Canadian courts with a means of examining the range of public policy issues involved in procurement, and bringing these to light for a broader public. The benefits could be considerable, and the downsides are few.