Effective Remediation in Public Procurement: Contract Damages Versus Judicial Review

Nicolas Lambert

IN CANADA, CONTRACT liability is the primary means for addressing public contract award disputes. However, while courts are also recognizing the role that judicial review can play therein, public authorities are increasingly falling back on exclusions of liability in order to limit recourse to civil litigation. This development is important given that governments across Canada have committed themselves through international trade agreements to give suppliers the right to "effective remedies." The questions that arise are (1) to what extent Canadian law measures up to this international standard and (2) how tendering remediation can be made more effective. This essay explains to what extent contract liability for lost profits can be described as the principal means of regulating the public tendering process and the problems associated with this declining trend. The essay then turns to practical steps that can be taken so as to avoid public liability while ensuring fairness and respecting Canada's international commitments. The author argues in favour of a more financially effective approach to remediating tendering disputes, taking into account comparative perspectives on understanding the complementary role of damages and judicial review.

AU CANADA, LA responsabilité contractuelle est le principal moyen de régler les litiges relatifs à l'attribution des contrats publics. Cependant, bien que les tribunaux reconnaissent également le rôle que la révision judiciaire peut y jouer, les autorités publiques ont de plus en plus recours à l'exclusion de responsabilité pour limiter le recours au litige civil. Cette évolution est importante étant donné que les gouvernements à travers le Canada se sont engagés, au moyen d'accords internationaux, à donner aux fournisseurs le droit à des « recours efficaces ». Les questions qui se posent sont (1) dans quelle mesure le droit canadien est-il conforme à cette norme internationale et (2) comment rendre plus efficace le recours aux appels d'offres. Ce texte explique dans quelle mesure la responsabilité contractuelle pour perte de profits constitue le principal moyen de réglementer le processus public d'appel d'offres et les problèmes associés à cette tendance à la baisse. Le présent texte se penche ensuite sur les mesures pratiques qui peuvent être prises afin d'éviter la responsabilité civile, tout en garantissant l'équité et en respectant les engagements internationaux du Canada. L'auteur plaide en faveur d'une approche plus efficace sur le plan financier pour remédier aux différends en matière d'appels d'offres, en tenant compte des perspectives comparatives sur le rôle complémentaire des dommages-intérêts et de la révision judiciaire.

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*Nicolas Lambert**

I. INTRODUCTION

Procurement law is the forgotten child of the Canadian legal curriculum. Rather than having a seat of its own, procurement sits uncomfortably between contract and administrative law, reflecting the fact that procurement disputes are normally remedied by contract damages and occasionally through judicial review. Canada's predominant use of contract damages in procurement disputes goes back to *R v Ron Engineering*, where the Supreme Court of Canada ruled that parties to a call for tenders can be bound by a tendering contract—"contract A"— that is distinct from the procurement contract—"contract B."[1] In such a case, suppliers cannot withdraw their bid without incurring liability. In turn, bidders turned this ratio on its head and sued procuring entities for damages for violation of contract A, calculated on the basis of expected earnings for contract B.[2] Thus, until recently, Canadian lawyers had settled into the idea that contract liability for lost profits, not judicial review, is the way public tendering disputes should be remediated. This was also explained by the Diceyan view that there is no "special law" binding Canadian public authorities and that courts should not "second-guess" contract awards through judicial review.[3] As a result,

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1 See *R v Ron Engineering*, [1981] 1 SCR 111, 119 DLR (3d) 267 [*Ron Engineering*]. See generally Paul Emanuelli, *Government Procurement*, 4th ed (Toronto: LexisNexis, 2017).

2 See *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 55, 170 DLR (4th) 577 [*MJB*]; *Martel Building Ltd v Canada*, 2000 SCC 60 [*Martel*].

3 See Sue Arrowsmith, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988).

contract awards are generally not annulled *ex ante* through judicial review, but compensated for *ex post* through civil liability.

The problem with this system is that while lost-profit damages appear to be less intrusive for the owner, the taxpayer is left with the problem of "double damages": one set to the winner of the award of "contract B" and another to the would-be winner for lost expectations. Thus, once "contract B" is formed, there is room for debate as to whether judicial review is an appropriate recourse in relation to the contract's performance.[4] Prior to its award, however, judicial review is always preferable to damages as it remits the decision back to the owner and allows for a fresh award. It is not only less costly for governments but also for clients seeking redress. That being said, mistakes can happen, judicial review may not be possible, and thus no system can function purely on public law principles. Judicial review and damage awards thus have complementary roles in the remediation of procurement disputes. The problem is that rather than streamline their relationship—a concern that is specific to procurement law—public authorities have sought to stem the rise of damage claims against the government on an *ad hoc* basis, using contractual exclusions of liability without any consideration of the conditions that fuel both the preference for contract damages and devaluation of judicial review. The question this paper seeks to answer is how to manage contract liability stemming from procurement awards in light of new international procurement obligations binding public authorities at all levels of government. Specifically, do Canada's new procurement obligations necessarily imply more damage awards against public authorities, or can judicial review and other mechanisms play a role in ensuring effective remediation while reducing the burden on the public purse?

A. Government Liability and its Exclusion

One advantage of looking at the concept of procurement is that it obliges one to consider the overlapping considerations relating to private exclusions of liability and public privative clauses. For instance, legislative immunity may pertain to both judicial review and proceedings for damages.[5]

4 See Jonathan Morgan, "Against Judicial Review of Discretionary Contractual Powers: *Lymington Marina v. Macnamara*" (2008) LMCLQ 230.

5 See *e.g. Procurement Act*, RSNB 2012, c 20, s 27 (stating: "[n]o action or other proceeding for damages or otherwise lies or shall be instituted against any of the following persons or entities in relation to anything done or purported to be done in good faith, or in relation to anything omitted in good faith, under this Act or the regulations by the person or entity.").

At the same time, decisions taken under privative clauses are generally reviewable in Canada under a reasonableness standard,[6] while exclusion clauses are generally upheld unless a court has the power to overrule them as unconscionable or against public policy.[7] The policy behind overruling privative clauses in judicial review is that courts do not want public authorities to have jurisdiction over the courts' jurisdiction,[8] although this is exactly what happens if an exclusion of liability is held to be enforceable.

The policy of upholding exclusions of liability was most recently solidified in *Tercon Contractors Ltd v British Columbia* (*Transportation and Highways*) although this case illustrates broader questions relating to the complementary role of contract damages and judicial review.[9] In this case, the runner-up in a call for tenders challenged the award of a construction contract arguing the winner's ineligibility. In defending the award, the respondent province contended that the runner-up was not entitled to sue for damages because of an exclusion of liability. It read: "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP [request for proposal], and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim."[10] In the majority's (5 to 4) view, the phrase "as a result of participating in this RFP" meant that the clause did not apply where a participant was not entitled to participate in the RFP, as in *Tercon*. As a result, Tercon was awarded $3.5 million in damages for lost profits.

However, as Justice Binnie noted, injunctive relief was not barred by the exclusion but was only available, as per the province's statute, as a matter of private, not public law.[11] This interpretation of Crown Proceedings

6 See *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

7 See *Tercon Contractors Ltd v British Columbia* (*Transportation and Highways*), 2010 SCC 4 [*Tercon*].

8 See *Crevier v AG* (*Québec*), [1981] 2 SCR 220, 127 DLR (3d) 1.

9 *Tercon*, *supra* note 7.

10 *Tercon*, *supra* note 7 at para 60, citing the request for proposal (RFP).

11 *Ibid*, Binnie J, dissenting: "In this case, injunction relief *was* in fact a live possibility.... Had Tercon pushed for more information and sought an injunction (as a matter of private law, not public law), at that stage the exclusion clause would have had no application, but Tercon did not do so. This is not to say that estoppel or waiver applies. Nor is it to say that injunctive relief would be readily available in many bidding situations (although if an injunction had been sought here, the unavailability of the alternative remedy of monetary damages might have assisted Tercon)" at para 133 [emphasis in original]. Binnie J is referring to the *Crown Proceeding Act*, RSBC 1996, c 89, s 11 (prohibiting injunctions against the Crown). Compare Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed

legislation goes back to the general principle that the Crown is fully liable under the law of contract, unless otherwise provided. Tercon could have availed itself of private law injunctive relief (*i.e.* specific performance) but did not. Thus, if Justice Binnie is correct, Tercon had less hurdles to obtain interim relief in private law than through an application for judicial review. That being said, the Supreme Court retained authority to set aside exclusion clauses on grounds of public policy and unconscionability, which the Court decided was unnecessary in the case at bar because the clause could be interpreted restrictively.[12] Notably, because *Tercon* was litigated under the ordinary law of contract, this regime was extended to not only public authorities, but to all contracts between private individuals.

This extension is all the more surprising given that while the case was being litigated, public procurement throughout Canada was silently being restructured by international treaties.[13] In December 2013, the Canadian government ratified the *Revised Agreement on Government Procurement* (*AGP*),[14] broadening the World Trade Organization (WTO) *Agreement on Government Procurement* (*AGP* 1994).[15] Moreover, in 2017 the *Canada-European Union Comprehensive Economic and Trade Agreement* (*CETA*) came into force.[16] These agreements are important because they seek to open public procurement to foreign suppliers while ensuring they have a means

(Toronto: Carswell, 2011) at 56 (stating that statutory prohibitions of injunctions against the Crown also cover specific performance).

12 *Tercon*, *supra* note 7.

13 See Paul M Lalonde, "The Internationalization of Canada's Public Procurement" in Aris C Georgopoulos, Bernard Hoekman & Petros C Mavroidis, eds, *The Internationalization of Government Procurement Regulation* (Oxford: Oxford University Press, 2017) 300.

14 WTO, *Protocol Amending the Agreement on Government Procurement* (*with Annex*), WTO Doc A-31874 (entered into force 6 April 2014, accession by Canada 18 November 2013), online (pdf): <treaties.un.org/doc/Publication/UNTS/No%20Volume/31874/A-31874-0800000280340dae.pdf> [*AGP*].

15 *Agreement on Government Procurement* (*with Appendices, Rectifications and Modifications*), 15 April 1994, 1915 UNTS 103 (entered into force 1 January 1996, accession by Canada 22 December 1995), online (pdf): <treaties.un.org/doc/Publication/UNTS/Volume%201915/volume-1915-I-31874-English.pdf> [*AGP* 1994].

16 *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016 (entered into force 21 September 2017), online: <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng> [*CETA*]. As this paper was being written, the Government of Canada signed the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (entered into force 30 December 2018), online: <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng> [*CPTPP*]. This Agreement has similar provisions on the right to an effective remedy although it has yet to take effect.

of enforcing their rights. Indeed, had *Tercon* been litigated after the entry into force of *CETA*, British Columbia's Ministry of Transportation would have had to contend with its commitment to providing effective remedies,[17] something that would have raised red flags for government lawyers seeking to enforce general exclusions of liability.

While these treaties are opportunities to question the enforceability of exclusions of liability, they also raise broader questions about Canada's general approach to procurement remediation. Specifically, Canada's use of lost-profit damages leaves it standing in a class of its own while raising efficiency concerns. Indeed, because the *AGP* and *CETA* purport to formalize and expand the volume of foreign procurement, they make it more costly for Canada to deal with procurement disputes on an *ex post*, lost-profits basis; not to mention that the carve-outs to exclusions of liability and their interpretation raise the possibility of more litigation.[18] Thus, while it would be difficult to establish a fair system of procurement remediation that functions exclusively on the basis of judicial review, all would agree that providing for the review of contract awards should be promoted.

B. Right to Effective Remediation in Trade Agreements

Canada has many international trade agreements regulating public procurement.[19] The link between international trade and procurement is that foreign suppliers want equal access to government contracts.[20] Procurement agreements are modeled on United Nations Commission on International Trade Law (UNCITRAL) Model Law, which purports to minimize burdens on governments while ensuring fair procurement practices.[21] Sim-

17 *CETA*, *ibid*, Annex 19-2; *AGP*, *supra* note 14, Annex 2 (while the *AGP* binds all B.C. ministries, it does not apply to restrictions on highway projects).

18 See Christopher R Armstrong, *The Life and Meaning of Tercon: A Basil Fawlty Guide*, Construction Law—2010 Update, Paper 1.1 (Continuing Legal Education Society of British Columbia, April 2010) ("*Ron Engineering* lives on as the bread and butter of a litigious construction bar" at 1.1.8).

19 The list of agreements is provided at: Global Affairs Canada, "Government Procurement" (20 February 2018), online: *Government of Canada* <international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/index.aspx?lang=eng>.

20 See generally Mathias Audit & Stephan Schill, "Transnational Law of Public Contracts: An Introduction" (2016) University of Paris Ouest Nanterre La Defense & Amsterdam Centre for International Law Research Paper No 2017-06.

21 See *UNCITRAL Model Law on Public Procurement*, GA Res 66/95, UNCITRAL, 82nd Plen Mtg, UN Doc A/66/17, Annex I (2011) 3 [*UNCITRAL*].

ilarly, both the *AGP* and *CETA* are modeled on the idea that governments must resolve tendering disputes, but also minimize the costs of doing so.

However, had the *AGP* and *CETA* been drafted as traditional international treaties, they would require that suppliers exhaust available remedies within each signatory party before bringing the dispute to an *inter partes* panel for review. In contrast, the *AGP* and *CETA* require contracting parties to implement "domestic review procedures."[22] Moreover, in contrast to other international treaties binding Canada, international procurement treaties are directed not only at the federal government, but also concern "sub-central authorities," *i.e.* provinces and territories.[23] Coverage of the *AGP* follows a positive-list approach: entities not listed are not covered by the agreement.[24] The reason for this is that while national treatment is a pillar of international trade law, public procurement law has long functioned as an exception. For instance, the 1979 *Tokyo Round Agreement on Government Procurement* did not require national treatment of foreign suppliers.[25] In contrast, "non-discrimination" is now central to the *AGP*.[26] This inclusion can be explained by the ability of government entities to opt-in to the *AGP*, thereby protecting national interests such as defence.[27]

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22 *AGP*, *supra* note 14, art XVIII; *CETA*, *supra* note 16, art 19.17. This is also the case of the new internal *Canadian Free Trade Agreement*, 2017 (*CFTA*), which replaces the *Agreement on Internal Trade* (*AIT*) and is now federally incorporated: see *Canadian Free Trade Agreement Implementation Act*, SC 2017, c 33, s 219. Just as *CETA* and the *AGP*, the *CFTA* also calls for "administrative or judicial review" procedures. See *Canadian Free Trade Agreement*, art 518 (2017 Consolidated Version), online (pdf): <cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>.

23 *AGP*, *supra* note 14, Appendix I, Annexes 1 and 2 (list, jurisdiction by jurisdiction, the departments and offices that are bound by the Agreement). At the "sub-central" level, Annex 2 lists thresholds for goods and services that are slightly higher than those in Annex 1 (Annex 1 at 130,000 SDRs, whereas valuation for sub-central authorities in Annex 2 is almost triple at 355,000 SDRs), while the construction threshold is identical for both (5,000,000 SDRs) (*ibid*). This translates into CDN thresholds of $237,700 for goods and services, and $9,100,000 for construction. See "Contracting Policy Notice 2017-6 Trade Agreements: Thresholds Update" (21 December 2017), online: *Government of Canada* <canada.ca/en/treasury-board-secretariat/services/policy-notice/2017-6.html> [Policy Notice 2017-6].

24 The Canadian government stated that municipalities are not covered by the agreement: *AGP*, *supra* note 14, Appendix I, Annex 2.

25 See *Agreement on Government Procurement*, 12 April 1979, 1235 UNTS 258 (ratified by Canada 30 December 1980, in force 1 January 1981) [*AGP* 1979]; John H Jackson, *The World Trading System*, 2nd ed (Cambridge, Mass: MIT Press, 1997) at 224–25.

26 *AGP*, *supra* note 14, art IV.

27 *Ibid*, art III(1). See *e.g. Northrop Grumman Overseas Services Corp v Canada* (*AG*), 2009 SCC 50 [*Northrop*].

The ability to opt-in also explains the expanded coverage of the *AGP* with regard to "sub-central authorities," *i.e.* provinces and territories. Canada's delay in including "sub-central" authorities until 2013 has been explained as an assertion of provincial regionalism[28] (*e.g.* provincial favouring of local suppliers), although the opt-in logic of the *AGP* facilitates its expanded coverage. Lastly, each party can restrict access to procurement in specific instances for the protection of, *e.g.*, public morals, order or safety, and human, animal, or plant life or health, provided the measures do not constitute "arbitrary or unjustifiable discrimination."[29] While it is long and technical, the crux of the *AGP* concerns the requirement of "domestic review procedures." Indeed, while the principal means of dispute resolution under the WTO is direct resolution between Member States through the Dispute Settlement Mechanism (DSM), the *AGP* obliges parties to put in place a system of domestic challenge procedures for aggrieved suppliers.[30] Article XVIII of the *AGP*, which replaces Article XX of the *AGP* 1994, states:

> Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:…a breach of the Agreement; or…where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party.[31]

Furthermore, the *AGP* requires that Member States make challenge procedures available for aggrieved suppliers before an independent body in the procuring state itself.[32] Thus, jurisdictions falling under the *AGP* are not required to create a tribunal; remediation can be exercised through judicial authorities. Moreover, the *AGP* defines "supplier" broadly so as

28 See David Collins, "Canada's Sub-Central Government Entities and the Agreement on Government Procurement: Past and Present" in Sue Arrowsmith & Robert D Anderson, eds, *The WTO Regime on Government Procurement: Challenge and Reform* (New York: Cambridge University Press, 2011) 175 at 189.

29 *AGP*, *supra* note 14, art III(2).

30 *AGP* 1994, *supra* note 15, art XX. See Xinglin Zhang, "Constructing a System of Challenge Procedures to Comply with the Agreement on Government Procurement" in Arrowsmith & Anderson, *supra* note 28, 483; Hans-Joachim Priess & Pascal Friton, "Designing Effective Challenge Procedures: The EU's Experience with Remedies" in Arrowsmith & Anderson, *supra* note 28, 511.

31 *AGP*, *supra* note 14, art XVIII(1).

32 *Ibid*, art XVIII(4) (which states "[e]ach Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement").

to signify "a person or group of persons that provides or could provide goods or services," which suggests that any supplier (*i.e.* subcontractors) could initiate challenge procedures.[33] This definition does not distinguish between domestic and foreign suppliers. Under the *AGP* 1994, some doubted that domestic suppliers would be entitled to invoke their own Member States' lack of challenge procedures.[34] However, the *AGP* states: "a Party, including its procuring entities, shall not…treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership."[35] To this extent, the *AGP* purports to ensure that local bidders with some foreign ownership or affiliation are not discriminated against.

The second important agreement is Canada's *CETA* with the European Union (EU), which is described as a "second generation" trade agreement in that its scope and detail "is likely to serve as an international model."[36] In regard to public procurement, it was inspired by the *AGP* in that it seeks to promote market access to procurement while requiring "timely, effective, transparent and non-discriminatory administrative or judicial review procedure[s]."[37] At the same time, *CETA* goes further than the *AGP* in overall detail by lowering thresholds by almost half for sub-central authorities in relation to the purchase of goods and services.[38] A further distinction is that while EU Member States are not individually signatories to the *AGP*, both the EU and its Member States are parties to *CETA*.[39] Next, while both the *AGP* and *CETA* include select sub-federal governments, *CETA* is much broader in scale than the *AGP* in that it includes select municipalities.[40] Anecdotally, such expanded coverage meant that the Canadian delegation included about 100 people while the EU had less than a dozen.[41] As to their similarities, just as the *AGP*, *CETA* requires parties to establish or designate

33 *Ibid*, art 1(t).

34 Sue Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, 2003) at 392 [Arrowsmith, *WTO*].

35 *AGP*, *supra* note 14, art IV(2)(a).

36 Ali Tejpar, "The Challenges of Federalism to Canada's International Trade Relations: The Canada-European Union Comprehensive Economic and Trade Agreement" (2017) 72:1 Intl J 111 at 111.

37 *CETA*, *supra* note 16, art 19.17(1).

38 *Ibid*, Annex 19-2 (goods and services: SDR 200,000). Compare this to 355,000 SDRs in the *AGP*: *AGP*, *supra* note 14, Appendix I, Annex 2.

39 *CETA*, *supra* note 16, Preamble.

40 *Ibid*, Annex 19-2; Tejpar, *supra* note 36 at 114.

41 For details on the negotiations, see Patrick Fafard & Patrick Leblond, "Closing the Deal: What Role for the Provinces in the Final Stages of the CETA Negotiations?" (2013) 68:4

an impartial administrative or judicial authority to review supplier challenges.[42] When the reviewing authority is not a court, procurement awards shall be subject to judicial review or, in the alternative, parties shall establish procedures ensuring various rights, including disclosure; the right to be heard; the right to representation; the right to a public hearing; and the right to reasons.[43] Lastly, just as the *AGP*, *CETA* is founded on non-discrimination. This principle works both ways in that locally established suppliers cannot be treated less favorably than those of another party.[44] Measures invoked to protect public morals or the protection of human or plant life and health cannot arbitrarily or unjustifiably discriminate.[45] This means that public authorities at all designated levels of government have committed themselves to formalized tendering processes that have important impacts on how public services are allocated.

However, neither the *AGP* nor *CETA* require damages for lost profits.[46] Thus, while suppliers are entitled to fair treatment, there is no international procurement standard requiring public authorities to grant monetary compensation to would-be suppliers for their lost profits.[47] At the same time, international law does not seek to mediate the relationship between judicial review and damage awards—something that it leaves to domestic law. Thus, since Canada (including provinces and designated municipalities) now has a duty to ensure effective remediation, the question is how procurement law will be affected. One reason why we should not be hopeful is that lawyers and judges have not generally seen it as their role to prevent the necessity of liability. However, if all legal systems agree that suppliers should be treated fairly, the true questions are: how much this should cost, who should foot the bill, and can anything else can be done?

Intl J 553; David Collins, "Globalized Localism: Canada's Government Procurement Commitments Under CETA" (2016) 13:1 Transnat'l Disp Mgmt 1.

42 *CETA*, *supra* note 16, art 19.17(4).

43 *Ibid*, art 19.17(6).

44 *Ibid*, art 19.4(2)(b).

45 *Ibid*, art 19.3. Compare *AGP*, *supra* note 14, art III(2).

46 *CETA*, *supra* note 16, art 19.17(7)(b) states that "[e]ach Party shall adopt or maintain procedures that provide for…corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both." See also *AGP*, *supra* note 14, art XVIII (7)(b) and the discussion in Arrowsmith, *WTO*, *supra* note 34 at 400–401.

47 Caroline Nicholas, "Remedies for Breaches of Procurement Regulation and the UNCITRAL Model Law on Procurement" in Duncan Fairgrieve & François Lichère, eds, *Public Procurement Law: Damages as Effective Remedy* (Oxford: Hart Publishing, 2011) 213 at 217.

II. CANADIAN PROCUREMENT EXCEPTIONALISM

The problem with Canada's "contract A" model is that there is only a right to damages if one is able to make the prior demonstration of "contract A." Where there is no "contract A," there is no right to damages, and therefore no "effective remediation." On top of this, it is notoriously difficult to determine whether "contract A" actually exists. Some have described the paradigm as "tortuous and convoluted."[48] Others state that it is inappropriate for public tendering.[49] Thus, if negotiations are not creative of contractual obligations, it is the bidder who should be paid to maintain its bid, not the other way around.[50] Courts have answered that the consideration for maintaining the bid is the right to have the bid duly considered by the public authority.[51] Ultimately, it may be that it is the unfairness that is creative of "contract A" rather than the presence of "contract A" justifying, among other things, the remediation of unfairness.[52] Having recognized this, there are still three problems with enforcing the right to an effective remedy in Canada through the alternate use of judicial review. The first is the traditional doctrine of procurement immunity. Second, the right to an effective remedy in international law may not be enforceable in Canadian courts. Third, both administrative and judicial practice generally tend to favour damage awards, not judicial review.

A. Decline of Procurement Immunity

The earliest iterations of procurement immunity in Canada pertain to the unavailability of injunctive relief against a public procuring entity so as to oblige it to contract with a given supplier.[53] In turn, these specific immunities gave rise to a more general doctrine that procurement awards are themselves immunized. Thus, following its procedural unification in the 1970s, judicial review was denied because contract awards were viewed as

48 Peter W Hogg & Patrick J Monahan, *Liability of the Crown*, 3rd ed (Scarborough: Carswell, 2000) at 218.

49 See Peter Devonshire, "Contractual Obligations in the Pre-Award Phase of Public Tendering" (1998) 36:2 Osgoode Hall LJ 203.

50 Angela Swan & Jakub Adamski, *Canadian Contract Law*, 2nd ed (Markham: LexisNexis, 2009) at 248–55.

51 *MJB*, *supra* note 2 at para 23.

52 But see *Martel*, *supra* note 2 at para 87 (where the Supreme Court found the existence of "contract A" but awarded no damages for want of causation).

53 See *Haggerty v City of Victoria* (1895), [1896] 4 BCR 163 (BCSC).

the product of common law rather than "statutory powers" and therefore beyond the scope of the new statutory recourse.[54] At the same time, contract awards were also seen as a special "prerogative power" that courts could not second-guess.[55] In other contexts, courts invoke a "public character test" because government contracting is viewed as an exercise of common law rather than statutory power.[56] To this day, these doctrines still govern the review of administrative decisions taken in pursuance of a legal relationship based on mutual consent. In such cases, courts do not apply traditional doctrines of standing, but list criteria to determine whether judicial review itself is an appropriate recourse.[57]

However, it is fair to say that procurement itself has emerged as an exception to the rule. The most important attack on the statutory/non-statutory dichotomy in the field of public procurement is *Shell Canada Products Ltd v Vancouver (City)*,[58] where the Supreme Court unanimously supported the possibility of reviewing a resolution not to contract with Shell because it profited from activities in South Africa during the apartheid regime. Strictly speaking, this was not a procurement decision, but a resolution about future procurement. The majority of the Court took the general view that as creatures of statute, municipalities were bound to obey the four corners of their authority. Moreover, while it did refer to international procurement standards, the majority stated that granting immunity to this resolution would leave ratepayers without an effective remedy.[59] The dissent, led by Justice McLachlin (as she then was), furthered the argument by stating that municipal procurement decisions should be amenable to judicial review because of the presence of public funds. The dissent, however, limited its ruling to municipal contract awards, and not public procurement decisions as a whole.

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54 See especially *Judicial Review Procedure Act*, RSO 1990, c J1 (which allows for the review of "statutory powers," s 1); *Re Midnorthern Appliances Industries Corp and Ontario Housing Corporation* (1977), 17 OR (2d) 290 (Div Ct), 1977 CanLII 1081. See also *Transhelter Group Inc v Committee on Works and Operations* (1984), 28 Man R (2d) 137 at 15, 27 MPLR 244 (Man CA) (stating that *certiorari* does not lie with administrative, as opposed to judicial acts).

55 For criticism of this idea, see Hogg, Monahan & Wright, *supra* note 11 at 313–21.

56 See *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26; *Setia v Appleby College*, 2013 ONCA 753.

57 See *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 60.

58 [1994] 1 SCR 231, 110 DLR (4th) 1 [*Shell*].

59 *Ibid* at 274. The Court did not refer to international trade agreements.

At the lower level, where Crown immunity has not been crystallized into statute, courts have begun to chip away at it.[60] In *Bot Construction Ltd v Ontario* (*Transportation*),[61] the Ontario Court of Appeal reviewed the contract award although it was hesitant to concede this. *Bot Construction* is similar to *Tercon* in that both concerned the construction of a highway and the acceptance of an allegedly non-compliant bid by the Minister. Moreover, the tendering documents contained a limitation of liability. According to the Ontario Divisional Court, this implied that while theoretically available, government liability had been contractually eliminated. The justification for judicial review was that the tendering decision of the Minister "has obvious broad public interest implications that extend beyond the interests of the contracting parties, not only with respect to the construction of the public roads but also to the fairness and integrity of the process followed in the expenditure of significant public funds."[62] The Court of Appeal, however, emphasized that it was not expressing any view as to the availability of judicial review with respect to government contracts.[63] However, in validating the government's award as reasonable, it is fair to say that the Court was in fact reviewing the decision.[64]

These rulings aside, the most significant statement of principle from the Supreme Court since *Shell* is *Northrop Grumman Overseas Services Corp v Canada* (*AG*), where the Court unanimously stated that if a foreign supplier was not satisfied with a procurement decision, and that if a tribunal did not have jurisdiction over the complaint, the Federal Court would have jurisdiction to hear the complaint in an application for judicial review.[65] The Court did not use any international trade agreement to justify any right to an effective remedy—on the contrary, the Supreme Court stated that

60 Emanuelli, *supra* note 1 at 66.

61 2009 ONCA 879.

62 *Bot Construction Ltd v Ontario* (*Ministry of Transportation*) (2009), 99 OR (3d) 104 at para 24, 180 ACWS (3d) 78 (Ont Div Ct).

63 *Cf Metercor Inc v Kamloops* (*City*), 2011 BCSC 382 at 54 (where the Court reviewed the Municipality's overall procurement process. The Court stated that it could not "second-guess" government decision-making, yet the Court found that the City had created a system that excluded price as a consideration, while failing to disclose screening data to proponents. Accordingly, the procurement decision was quashed and remitted).

64 *Cf Dunsmuir*, *supra* note 6 (stating that judicial review is not appropriate when a contract is present, while allowing the government's application and quashing the adjudicator's order of reinstatement); *Canada* (*AG*) *v Mavi*, 2011 SCC 30 at para 51 (the Court added that *Dunsmuir* was specific to employment relationships and should not be read as dictating the available recourses in all contractual relationships).

65 *Northrop*, *supra* note 27.

neither the *North American Free Trade Agreement* (NAFTA) nor the *AGP* 1994 applied to this case since it pertained to military procurement. However, the Supreme Court seems to have gone out of its way to appease the foreign investor that Canadian procurement decisions are not utterly discretionary. Its words can either be read broadly as a general statement of principle, or specifically to federal procurement law: "It should be noted that a non-Canadian supplier of goods is not without recourse. Decisions of governments and government entities are subject to judicial review. In the case of the Government of Canada and its entities and, in particular, PW [Public Works], there is recourse to the Federal Court by way of judicial review."[66]

However, these words are exceptional, because to this day, there has been no general endorsement of judicial review of procurement decisions by the Supreme Court. Thus, some courts impose duties of fairness on public authorities in the context of a call for tenders.[67] The justification is not that contracting engages a specific statutory power but that public funds are engaged.[68] However, some still require an additional "public law element" to review a tendering decision by a public authority, although in some instances, this has been regardless of the creation of a "contract A."[69] Similarly, what could explain the right to review federal procurement decisions (as opposed to provincial and municipal levels) is the existence of the Canadian International Trade Tribunal (CITT) and its general jurisdiction over procurement complaints. In other words, what courts are reviewing at the federal level is not the actual procurement decision, but the treatment of the complaint by the CITT.

B. Trade Agreements and Domestic Law

The obvious limit to any right to an effective remedy contained in an international treaty is that it will not be domestically effective in Canada

66 *Ibid* at para 46.

67 See *Thomas C Assaly Corp v R* (1990), 44 Admin LR 89, 20 ACWS (2d) 260 (FCTD) [*Assaly*]; *Glenview Corp v Canada* (*Minister of Public Works*) (1990), 44 Admin LR 97, 21 ACWS (3d) 774 (FCTD); *Can Am Simulation Ltd v Newfoundland* (*Minister of Works, Services and Transportation*) (1991), 92 Nfld & PEIR 227, 25 ACWS (3d) 199 (Nfld SC (TD)); *Cape Breton Regional Ambulance* (*1993*) *Ltd v Nova Scotia* (1995), 143 NSR (2d) 311, 57 ACWS (3d) 149 (NSSC); *Hughes Land Co Inc v Manitoba* (*Minister of Government Services*) (1991), 72 Man R (2d) 81, 26 ACWS (3d) 3 (Man QB); *Hughes Land Co v Manitoba* (1998), 167 DLR (4th) 652, 131 Man R (2d) 202 (Man CA).

68 See *Northland Road Services* (*Robson*) *Ltd v Minister of Transportation*, 2004 BCSC 595 [*Northland*].

69 See *Rapiscan Systems, Inc v Canada* (*AG*), 2014 FC 68 at para 126.

without the treaty's incorporation into domestic law. In this respect, Canada's dualist tradition holds that international treaties are not directly enforceable without legislative incorporation.[70] The principle behind this policy is that the federal executive cannot legislate domestically through its prerogative to ratify international treaties; doing so would circumvent not only the legislative process but also the division of powers.[71] This is especially relevant in Canada, where federal jurisdiction does not extend to property and civil rights such as those arising out of contract.[72] The effectiveness of trade agreements in domestic law is important for the rights of Canadian suppliers because those with foreign affiliations can raise the lack of effective remedies through their country of origin.[73]

Moreover, while the doctrine of incorporation concerns the relationship between international obligations and primary legislation, the same doctrine does not explain how to resolve a conflict between international obligations and regulations, directives, common law principles, or even contract terms. Thus, in contrast to the Canadian doctrine of incorporation, EU law distinguishes between direct application and direct effect. This dichotomy can be understood as opposing legal validity and practical effectiveness.[74] It implies that concerned international norms can be legally binding, albeit not fully implemented. The *AGP* has thus been described by Sue Arrowsmith as being directly applicable in a Member State's law albeit not directly effective.[75]

However, this is not the position in Canada. For instance, when Canada acceded to the *AGP* 1994, the federal government committed to providing "effective recourses" to member suppliers,[76] and thus broadened the role of the CITT.[77] Notably, that agreement did not extend into provincial jurisdiction. Until 1994, federal trade and procurement had been administered separately, the latter by the Procurement Review Board. In

70 See Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008).

71 See Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: PIE Peter Lang, 2009) (defending the thesis that, on a constitutional level, the provinces have treaty-making power in matters pertaining to their jurisdiction).

72 See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5.

73 *AGP*, *supra* note 14, art XX.

74 J A Winter, "Direct Applicability and Direct Effect Two Distinct and Different Concepts in Community Law" (1972) 9:4 CML Rev 425.

75 Arrowsmith, *WTO*, *supra* note 34 at 386, n 101.

76 *AGP* 1994, *supra* note 15, art XX.

77 See *Canadian International Trade Tribunal Act*, RSC, 1985, c 47 (4th Supp) [*CITTA*].

1994, the CITT's mandate was expanded so as to include oversight over the compatibility of federal procurement decisions with domestic and international trade agreements. The CITT thus describes its mandate as allowing it to "inquire into complaints by potential suppliers concerning procurement by the federal government" that is covered by the *NAFTA*, the Canadian *Agreement on Internal Trade* (*AIT*),[78] the WTO, and other trade agreements.[79] Moreover, the Federal Court of Appeal stated: "[The CITT's] primary function is to determine whether Canada has breached obligations under specified international and domestic trade agreements."[80] Similarly, the Federal Court stated that trade agreements "impose significant obligations on our government institutions, and the legislative scheme implementing them ought to be rigorously respected."[81]

However, these statements do not establish that the infringement of a trade agreement is justiciable. For instance, in *Northrop*, the Supreme Court denied any legal status to the *AIT* because of the manner in which it was drafted: "Many of its provisions express general principles or goals that are not directly enforceable."[82] To be clear, this agreement is not incorporated in the form of a statute. The claim in this case was also based on the *AGP*, although the Court stated that the *AGP* did not apply because the procurement contract pertained to military equipment. Thus, had the matter fallen within its scope, the *AGP* would have been directly enforceable before the CITT and by the Federal Courts in their judicial review capacity.[83] The federal government has also stated that the only amendments required by the *AGP* are cursory amendments to the CITT *Procurement Inquiry Regulations*.[84]

78 (1995) 129 C Gaz I, 1323.

79 Canadian International Trade Tribunal, "What We Do" (5 September 2019), online: *Government of Canada* <citt-tcce.gc.ca/en/about-the-tribunal/what-we-do.html>. The CITT is a court of record and therefore can award a wide range of remedies (*ibid*, s 17(1)).

80 *TPG Technology Consulting Ltd v R*, 2011 FC 1054 at para 44 [*TPG Technology*].

81 *Wang Canada Ltd v Canada (Minister of Public Works & Government Services)* (1998), [1999] 1 FC 3, T-944-98 (FCTD) at para 27 [*Wang*].

82 *Northrop*, *supra* note 27 at para 12.

83 This is also supported by the fact that in incorporating the *WTO Agreement*, Canadian legislation generally prohibits "privative causes of action" thereunder. See *World Trade Organization Agreement Implementation Act*, SC 1994, c 47, ss 5–6. However, s 2(1)(a) of the Act defines the *WTO Agreement* as limited to Annexes 1 to 3 which implies that other annexes, such as the *AGP* (Annex 4b), are not included and are therefore directly enforceable (*ibid*, s 2(1)(a)).

84 "These consequential amendments are the only changes required for Canada to implement the revised [AGP] at the federal level. These amendments will allow the Tribunal to continue to consider and make findings with respect to complaints concerning government

While the federal government has interpreted its obligations under international procurement agreements as requiring it to establish a review tribunal and judicial review of its decision, most provincial governments seem to be relying on their discretion under the *AGP* and *CETA* to leave remedial jurisdiction to courts, as opposed to establishing administrative review.[85] For instance, in 2017, Québec established the Autorité des marchés publics (AMT).[86] Québec is the only province to have established a permanent authority with jurisdiction over procurement awards.[87] The main difference with regard to the CITT is that the AMT does not award damages. Ontario, for its part, is planning arbitration for tendering disputes,[88] which may run contrary to procurement review principles such as transparency.[89] Other jurisdictions have not provided any administrative review mechanisms; international tendering norms having been legislated into existing government structures.[90] Legislation would not be necessary since Superior Courts have full constitutional authority to effectuate remedies. Indeed, it is the common law, insofar as it has not been amended by statute, that determines the availability of damages or judicial review, not legislation. Legislatures therefore have little role unless they wish to go beyond the WTO standard. In short, if the establishment of effective judicial recourses is the only issue, neither the *AGP* nor the *CETA* need further incorporation because Canada's constitutional structure would already be compliant with international law.

If this is correct, local governments could see changes in their powers even without full legislative incorporation of international agreements. Indeed, public authorities have the authority to interpret statute and common law rules to conform insofar as possible to Canada's international

procurements that are subject to the terms of the [AGP]." See *Regulations Amending the Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/2013-168, (2013) C Gaz II, 2172.

85 *AGP*, *supra* note 14, art XVIII(4); *CETA*, *supra* note 16, art 19.17(4).

86 See *Loi favorisant la surveillance des contrats des organismes publics et instituant l'Autorité des marchés publics*, SQ 2017, c 27.

87 *Ibid*, s 29.

88 See *International Commercial Arbitration Act, 2017*, SO 2017, c 2.

89 Some also see arbitration ill-suited for polycentric issues such as bid awards. See Roberto Caranta, "Many Different Paths, But are They All Leading to Effectiveness?" (2011) 3 Eur Procurement L Series 53 at 84.

90 Domestic legislation refers to international trade agreements as being applicable to the procurement process. See *e.g. New Brunswick Regulation 2014-93 under the Procurement Act*, NB Reg 2014-93, s 5.

obligations.[91] According to Dicey, when interpreting statute, judges must presume that "Parliament did not intend to violate the ordinary rules of morality…and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and international morality."[92] This pertains to both international treaty and customary international law insofar as it does not conflict with statute.[93] Thus, because principles in procurement agreements extend general trade principles that are themselves codifications of customary international law,[94] concerned procuring entities can invoke measures restricting procurement in order to protect public morals, the protection of human or plant life, and health, provided these measures do not constitute arbitrary or unjustifiable discrimination.[95] The role of procuring entities in giving effect to trade exceptions is also supported by the fact that statutory interpretation should reflect the values and principles expressed in international law, both customary and conventional, particularly in cases where governments are empowered to take protective measures.[96]

Of course, interpreting domestic law in accordance with international obligations is conditional on statutory discretion or ambiguity. This is already the case of municipalities endowed with "natural person powers," as opposed to specific listed powers as was the case of many municipalities in the past. For instance, in *Shell*, a majority of the Supreme Court ruled that the City's enabling statute did not allow it to exclude Shell so long as it "completely withdraws from South Africa," in particular because of its policy of apartheid.[97] Specifically, the majority stated that the City's

91 For international treaties, see *Daniels v White and the Queen*, [1968] SCR 517 at 541, 2 DLR (3rd) 1. See generally Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014), ch 18.

92 Albert V Dicey, *The Law of the Constitution*, ed by JWF Allison (Oxford: Oxford University Press, 2013) at 38.

93 See *Re Powers to Levy Rates on Foreign Legations*, [1943] SCR 208, 2 DLR 481; James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 57.

94 See Dominique Carreau & Patrick Juillard, *Droit international économique*, 2nd ed (Paris: Dalloz, 2005) at 240.

95 *CETA*, *supra* note 16, art 19.3. Compare *AGP*, *supra* note 14, art III(2). However, see *AGP*, *supra* note 14, Annex 2, n 6, which refers only to "restrictions that promote the general environmental quality in that province or territory." *CETA* contains no similar provision.

96 See *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 70, 174 DLR (4th) 193; *114957 Canada Ltée* (*Spraytech, Société d'arrosage*) *v Hudson* (*Town*), 2001 SCC 40 at paras 30–32 (protection of the environment).

97 *Shell*, *supra* note 58.

resolution did not benefit its inhabitants and therefore did not have a municipal purpose.[98] The dissent, for its part, supported the resolution because it fell into the City's "good government" powers.[99] However, while Vancouver is not endowed with "natural person powers," legislative ambiguity leaves greater discretion for other municipalities to invoke unincorporated provisions of treaties ratified by Canada, and in particular, those listing provinces and other bound entities such as municipalities. While it could be argued that sub-central authorities would be in violation of their enabling legislation should they invoke restrictions to trade, it may well be that the very purpose of "second generation" trade agreements such as *CETA* is to provide local authorities with powers and responsibilities in such areas.

C. Trade Agreements and Remedial Practice

The last problem for the right to effective remediation is that, even when it is recognized, it inevitably seems to lead to the same model of remediation. Specifically, because provincial authorities have not established general review mechanisms, contract awards are likely to be contested under the existing "contract A" paradigm, *i.e.* awards for lost profits. In other words, the *ex post* damage awards model—as opposed to the *ex ante* review—is likely to prevail as the model of choice even though damages for lost profits are not required by international procurement treaties.[100] Thus, if fairness in the procurement process is a recognized principle of Canadian procurement law,[101] Canadian provinces that do not introduce procurement review mechanisms are likely to see claims for lost profits increase.

Moreover, even if they do establish administrative review mechanisms, public authorities appear to function on the assumption that damages are either necessary under international law, or that this is how procurement disputes should be remediated. For instance, in explaining the role of the CITT, the Federal Court of Appeal stated that the CITT is "not a court for

98 *Ibid* at 280.

99 *Ibid* at 252–58.

100 *CETA*, *supra* note 16, art 19.17(7)(b) (states that "[e]ach Party shall adopt or maintain procedures that provide for…corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both"). See also *AGP*, *supra* note 14, art XVIII (7)(b); Arrowsmith, *WTO*, *supra* note 34 at 400–401.

101 *MJB*, *supra* note 2.

the resolution of common law claims against the Crown."[102] For instance, the CITT seeks to intervene preventatively and order the postponement of the contract award.[103] The CITT can also intervene post-award and "recommend" remedies such as a new solicitation, a re-evaluation of bids, the termination of the contract, or that the designated contract be awarded to the complainant.[104] In one significant case outlining its approach to preventing public liability, the CITT stated: "Injunctive-like relief is preferred over monetary relief where practical, *i.e.*, before significant performance of the contract by another party."[105] The CITT can also "recommend" remedies such as "compensation" although the word is not defined.[106] Thus, the basis of the CITT's jurisdiction to award damages is legislative, not contractual.[107] Contrary to the procedures in a common law court, a claimant need not demonstrate the existence of "contract A" in order to obtain damages before the CITT. Because of its mandate in regards to the fulfillment of international trade law, the CITT viewed its jurisdiction as designed to "complement not duplicate" that of the Federal Courts.[108] This implies that the tests for suspending a contract award are not as strict as at common law and that the CITT's means of awarding damages are not based on common law considerations.

However, the CITT has interpreted its enabling legislation as allowing for lost-profit awards just as Superior Courts, and it is not clear why in some cases it has not made use of its broader injunctive powers. In *Oshkosh Defense Canada Inc v Department of Public Works and Government Services*, the CITT found the complaint partially valid and thereby detailed the failures in a defence procurement process relating to the purchase of military

102 *TPG Technology*, *supra* note 80 at para 44.

103 *CITTA*, *supra* note 77, s 30.13(3).

104 *Ibid*, s 30.15(2). On the meaning of this expression, see *Wang*, *supra* note 81 at para 27.

105 *Oshkosh Defense Canada Inc v Department of Public Works and Government Services* (29 December 2017), PR-2015-051 and PR-2015-067 at para 71, online: *CITT* <decisions.citt-tcce.gc.ca/citt-tcce/p/en/354883/1/document.do> [*Oshkosh* 2017].

106 *Ibid* at para 146, n 109. The Federal Court stated that the CITT's powers should be treated as mandatory: *Wang*, *supra* note 81 at para 27. There is also a federal Procurement Ombudsman. See *Procurement Ombudsman Regulations*, SOR/2008-143. While institutionally distinct, the Ombudsman exercises the same functions as the CITT, but for contracts below the latter's jurisdictional thresholds: Policy Notice 2017-6, *supra* note 23.

107 See *Almon Equipment Ltd v Canada* (*AG*), 2010 FCA 193 at paras 22–23 [*Almon*].

108 *Oshkosh* 2017, *supra* note 105 at para 71(1).

vehicles.[109] Specifically, this related to failure to consider information in a bid, failure to evaluate a bid in accordance with terms of the RFP, and failure to keep adequate records. Notably, these failures were found in five of the 11 bases of the complaint. Oshkosh went further, citing a "pattern of conduct" that "inflicted prejudice" and thereby gave rise to punitive remediation.[110] However, the CITT found these allegations unfounded.[111] As to the possibility of cancelling the bid and retesting the vehicles, the CITT noted that the contract had already been in place for ten months by the time it ruled on validity of the complaint.

Since it was no longer possible to cancel the award, nor possible to know Oshkosh's proper performance score, the CITT awarded $25.3 million in damages to the complainant based on anticipated profits had it been successful (10%).[112] Oshkosh was further awarded damages in the event that options were not exercised in its favour although this amount was not disclosed. Last, Oshkosh was awarded $135,000 in costs for preparing the complaint. In explaining this award, the CITT stated that the purpose of providing expectation damages was to deter public authorities from violating international trade agreements and incentivizing the use of the CITT, although it did not elaborate on this point.[113] What makes this award noteworthy is that countries normally do not recognize lost profits as an appropriate measure of damages given their contingent and uncertain nature, let alone establish a legislative scheme allowing for such compensation.[114]

What distinguishes this from judicial awards is that Canadian courts often apply "discounts" for contingencies such as the likelihood of the award,[115] although the formalization of tendering minimizes their rel-

109 *Oshkosh Defense Canada Inc v Department of Public Works and Government Services* (20 May 2016), PR-2015-051 and PR2015-067, online: *CITT* <decisions.citt-tcce.gc.ca/citt-tcce/p/en/354599/1/document.do> [*Oshkosh* 2016].

110 *Ibid* at para 233.

111 *Ibid* at para 241.

112 *Oshkosh* 2017, *supra* note 105 at para 71.

113 *Ibid*.

114 See Organization for Economic Co-Operation and Development, *Integrity in Public Procurement: Good Practice from A to Z* (Paris: OECD, 2007) at 112 [OECD, *Integrity*]. See also Christopher H Bovis, *EU Public Procurement Law* (Northampton, Mass: Edward Elgar, 2012) at 198.

115 These include (1) the likelihood of bidder being awarded contract B; (2) unanticipated consequences; and (3) bidder's behaviour in mitigating damages resulting from the loss of procedural fairness. Canadian courts therefore award expectation damages where there is proof that (1) the claimant would have been selected as winning bidder, and (2) that

evance because it eliminates unqualified bidders and ranks bids according to price. In short, Oshkosh was awarded expectation damages upwards of $25 million even though it was not established that it would have been awarded the contract. Moreover, *Oshkosh* illustrates how federal legislation can only be interpreted as not duplicative of the judicial process because it is more open-ended. Thus, while the CITT is not formally adversarial, it is advocacy-driven, which in turn drives the lost-profit model. Even when an administrative tribunal such as the CITT is primarily designed to review contract awards, the law has developed so as to privilege large, complex bidding disputes. The size of such bids favours delay, which in turn favours *ex post* review and compensation. While bidding errors deserve compensation, an administrative process should not disincentivize bidders to seek relief in kind, whether this be through injunctions or judicial review. The question is therefore not about choosing between damages and judicial review, but rather how to manage their relationship.

III. EFFECTIVE REMEDIATION AND THE PUBLIC PURSE

If international procurement law does not prescribe a particular model of remediation, it remains that procurement disputes are increasingly likely to arise because of the formalization of calls for tender. The question is how public authorities can ensure effective remediation while minimizing its impact on the public purse. In considering this problem, it is useful to refer to Calabresi and Melamed's description of law as a series of entitlements that can be protected alternatively by property, liability, or inalienability rules.[116] While studied in the context of nuisance and environmental pollution, this taxonomy explains much about Canadian procurement law. Generally, rules about "inalienability" are traditionally viewed as extreme and paternalistic because they restrict freedom of choice. Thus, if judicial review can be viewed as a form of "inalienability" because it prohibits the allocation of a given contract right, this might explain Canada's aversion to judicial review of contract awards, while promoting the expansion of damage awards for lost profits. As Calabresi and Melamed point out, "paternalism grounds is really a hidden way of accruing distributional

the profits claimed are realistic and accurate. See *e.g. Port Hawkesbury (Town) v Borcherdt Concrete Products Ltd*, 2008 NSCA 17; *Force Construction Ltd v Queen Elizabeth II Health Sciences Centre*, 2008 NSSC 214.

116 See Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089.

benefits for a group whom we would not otherwise like to benefit."[117] Thus, while "inalienability" is a remedy of last resort because courts do not want to "second-guess" government awards, this only serves those with means to litigate and the lawyers who serve them. Thus, the choice between entitlements should be mediated by efficiency and distributional concerns, not because of the impact of judicial review on a public authority's ego. Indeed, courts should not dispense with efficient remediation simply because some forms seem paternalistic. The question, however, is what are the practical circumstances that make judicial review more prevalent abroad than in Canada? Furthermore, if judicial review is not a cure-all, what can be done to render remediation more efficient and effective at deterring undesirable bidding behaviour?

A. Suspending Contract Awards

In contrast to Canada's soft recognition of judicial review, the European Court of Justice has stated that a contracting authority's decision to award the contract must be open to review, regardless of the possibility of obtaining an award of damages once the contract is awarded.[118] According to the EU "Remedies Directive," every contracting authority falling within Community rules is subject to judicial review.[119] Thus, EU Member States generally favour annulment of contract awards as opposed to financial compensation.[120] Moreover, in the United States and most EU countries, bid preparation costs, not lost profits, are the appropriate measure for damage awards.[121] The question that Canadian procurement lawyers should ask is how such a disparity is possible. No doubt continental Europe favours "droit administratif" and separate administrative courts. However, the true reasons for the prevalence of judicial review are

117 *Ibid* at 1115.

118 See *Alcatel Austria AG and Others v Bundesministerium für Wissenschaft und Verkehr*, C-81/98, [1999] ECR I-7671 at I-7708–I-7709 [*Alcatel*].

119 EC, *Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts*, [1989] OJ, L 395/33, art 2(1)(a).

120 OECD, *Integrity*, *supra* note 114. See also OECD, *Public Procurement Review and Remedies Systems in the European Union*, SIGMA Papers No 41 (2007); Fairgrieve & Lichère, *supra* note 47.

121 OECD, *Integrity*, supra note 114 at 112. See also Bovis, *supra* note 114 at 198; Daniel I Gordon & Michael R Golden, "Money Damages in the Context of Bid Protests in the United States" in Fairgrieve & Lichère, *supra* note 47, 199 at 199.

practical, namely the EU's more systematic approach to the suspension of contract awards.

Thus, while Canadian courts have not actively promoted judicial review, the reality is that public tendering does not favour it, nor even interlocutory relief. If international law requires "rapid interim measures,"[122] such measures are not easily available. Moreover, even when a losing bidder suspects unfairness, timing requirements for judicial review and damage claims are themselves radically different.[123] Generally, individuals seeking to suspend "contract B" have to establish: (1) "contract A"; (2) that a public authority is subject to injunctive relief; and (3) that they actually satisfy criteria for interlocutory relief.[124] Successful pre-award injunctions are therefore rare.[125] Notably, if an applicant must prove "irreparable harm," some judges do not view a lost opportunity to profit as "irreparable" because suppliers can always sue the government afterwards for lost profits.[126]

In order to favour the judicial review of contract awards, scholars have called for the suspension of the procurement awards—especially in the event of a tendering dispute.[127] This is because the availability of judicial review is contingent on all bidders being aware of the award's terms and having the opportunity to verify its conformity to tender terms. To a certain extent, this is recognized at the federal level (legislation speaks of "postponement," not "suspension"), although it is contingent on the filing of a complaint and the CITT's decision to suspend the award.[128] In contrast, following a ruling from the Court of Justice of the European Communities, an "Alcatel" mandatory standstill period is implemented at least ten

122 *CETA*, *supra* note 16, art 19.17(7) requires parties to adopt "rapid interim measures" to preserve the supplier's opportunity to participate in the procurement. The same provision states that damage awards are possible although they may be limited to bid preparation costs or challenge costs. Each party negotiates so as to "develop the quality of remedies, including a possible commitment to introduce or maintain pre-contractual remedies" (*ibid*, art 19.17(8)).

123 Judicial review delays are generally counted in days, whereas actions for damages are counted in years. See generally Graeme Mew, Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3rd ed (Toronto: LexisNexis, 2016).

124 See *American Cyanamid Co v Ethicon Ltd*, [1975] FSR 101, [1975] AC 396 (HL (Eng)).

125 See *Kwanlin Dün First Nation v Yukon*, 2008 YKSC 66.

126 This argument was advanced by Molloy J in *2169205 Ontario Inc v LCBO*, 2010 ONSC 5382 at para 18. The application for an interlocutory injunction was rejected even though the court recognized a serious issue to be tried.

127 See Richard E Speidel, "Judicial and Administrative Review of Government Contract Awards" (1972) 37 Law & Contemp Probs 63.

128 *CITTA*, *supra* note 77, s 30.13.

calendar days following the notification of an award decision in a contract tendered via the Official Journal of the European Union, before the contract is signed with the successful bidder. Thus, following the award of the contract, its effectiveness is automatically suspended, thus allowing unsuccessful bidders, duly notified of the award and reasons therefore, to challenge the decision before the contract is signed.[129] The mandatory standstill period has been explained as follows:

> In order to tackle the 'race to sign the contract issue', [EU law] requires public authorities to wait a certain number of days, known as a mandatory standstill period, before concluding a public contract. This gives rejected candidates or tenderers the opportunity to start an effective review procedure at a time when unfair decisions can still be corrected and before the contract is signed.[130]

In addition to the mandatory standstill period, since 2009 EU law has further required Member States to allow for the automatic suspension of the tendering process by a disappointed bidder.[131] Under the latter regime, the procurement process is automatically suspended when a disappointed tenderer challenges the contract award decision by issuing and serving a claim form. The issuance of this form prevents the contract from being awarded and the suspension remains until it is lifted, *inter alia*, by judicial order.[132] Such procedures account for the lesser role of civil liability in procurement remediation. While this may seem less generous than Canadian courts, bid preparation costs are awarded more broadly insofar as the supplier must simply prove that the infringement had an effect on its chance of being awarded the contract. The supplier does not have to demonstrate that, absent the infringement, it would have been awarded the contract.[133] Limitations of liability in such instances are all the more sensible given that co-bidders have an active role in verifying the award.

129 It is named after companion European Court of Justice cases jointly known as the *Alcatel* case: *Alcatel*, *supra* note 118. This case was decided when EU law itself was not clear; it stated that Member States are required to observe a mandatory standstill period if relevant conditions are met.

130 Priess & Friton, *supra* note 30 at 526.

131 See *Public Procurement Contracts (Amendment) Regulations 2009* (UK), SI 2009/2992, s 47G, which implemented, in the UK, EC, *Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts*, [2007] OJ, L 335/31.

132 See *Indigo Services (UK) Ltd v Colchester Institute Corporation*, [2010] EWHC 3237 (QB).

133 See EC, *Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement*

Thus, in spite of additional administrative costs, standstill periods protect taxpayers from having to unnecessarily compensate suppliers for government errors. The success of this mechanism is evidenced by its extension beyond EU borders. For instance, a "standstill period" has been adopted in UNCITRAL Model Law.[134] Similarly, *World Bank Procurement Regulations* favour the establishment of standstill periods.[135] Notably, many developing countries provide standstill periods although Canada, Australia, and the United States do not.[136] The closest mechanism in Canada to standstill would be "debriefing," although it is not suspensive of the award, nor is it automatic.[137] Most importantly, it happens only after the contract has been awarded.

What makes standstill important is that existing law provides little time to stop a project that has been improperly awarded. In *Tercon*, the misrepresentation stemmed from the role played by EAC, the project co-leader presented as a subcontractor. Even though the courts did not use the term "misrepresentation," the trial judge spoke of the proponents' duty to act in good faith in the bidding process.[138] In explaining its action for damages, Tercon stated that fraudulent concealment deprived it of its right to apply for judicial review or obtain declaratory relief.[139] However, Justice Binnie did not agree and stated that the exclusion clause should be upheld, *inter alia*, because Tercon was aware of negotiations between the province and a non-compliant bidder but had refused to take action and

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procedures of entities operating in the water, energy, transport and telecommunications sectors, [1992] OJ, L 76/14, art 11.

134 *UNCITRAL*, *supra* note 21, art 22(2).

135 See World Bank, *Procurement Regulations for IPF Borrowers* (2017), s 5.78.

136 See International Bank for Reconstructions and Development, *Benchmarking Public Procurement 2017* (Washington, DC: World Bank, 2016).

137 In *Oshkosh* 2016, *supra* note 109 at paras 205–12, the CITT spoke of an "obligation" to provide adequate debriefing, grounded in the principle of transparency mandated by international trade agreements. The CITT has also encouraged government to be more forthcoming in its debriefing obligations. See *Renaissance Aeronautics Associates Inc* (*DBA Advanced Composites Training*) *v Department of Public Works and Government Services* (28 May 2018), PR-2017-063 at paras 39–41, online: *CITT* <decisions.citt-tcce.gc.ca/citt-tcce/p/en/item/354885/index.do>. However, the argument can also be made that increased debriefing obligations without mechanisms to suspend contract awards is itself creative of liability, especially on the standard described in *Oshkosh* 2016, *supra* note 109.

138 See *Tercon Contractors Ltd v British Columbia* (*Ministry of Transportation and Highways*), 2006 BCSC 499 at para 15 (where Dillon J, the trial judge, spoke of proponents' duties of good faith). *Cf Tercon*, *supra* note 7 at para 58 (where the Supreme Court only spoke of such a duty in regard to the province).

139 *Tercon*, *supra* note 7 (Response Factum of the Appellant at para 48).

seek interlocutory relief.[140] The majority, for its part, did not decry Tercon's lack of application of judicial review and, on the contrary, took the defendant to task for accepting a non-compliant bid. That being said, even if a standstill clause would have allowed for the inspection of the bids and a detection of non-compliance, standstill, at the end of the day, is a matter for administrative rather than judicial initiative.

B. Civil Procedure and Qualification of Disputes

A further problem in Canada is that remedies are not designed to work together, but rather individually. For instance, in *Peter Kiewit Sons Co Ltd v Richmond* (*City*), Justice Vickers stated that "it would be inappropriate to allow both a public law and a private law remedy in situations involving government contracts where no particular procedure is prescribed by statute or regulation."[141]

However, this is far from being the case in EU procurement law. As Denys Simon states in relation to EU law, "une 'systématique positive'…repose sur l'idée de l'interdépendance et de la cohérence des voies de droit constituant le 'système juridique communautaire'."[142] In common law jurisdictions, however, little effort has been expended to regulate the relationship between recourses. On the contrary, lawyers generally approach remediation from the perspective of a "free-market" of entitlements. "Ordinary" remedies such as damages claims may even be wieldier than "extraordinary remedies" such as judicial review because the former are more familiar. What is more, because it originates in prerogative writs, judicial review is "discretionary," while damage claims are "as of right," which again favours private remediation. There is no issue as to standing and judicial economy where damages are concerned. Thus, while individuals seeking damages must mitigate their harm, this is not seen as going to the jurisdiction of the court, but one bearing on the scope of damages awarded.

Moreover, where remedial interdependence has been developed, it starts from the premise that liability is the starting point, such that some courts condition the reviewability of an award on proof of a "contract A."

140 *Ibid* at para 133.

141 (1992), 11 MPLR (2d) 110 at 120, 7 Admin LR (2d) 124 (BCSC) [*Peter Kiewit*].

142 Denys Simon, *Le système juridique communautaire* (Paris: Presses Universitaires de France, 1997) at 318. EU law recognizes remedial interdependence such that individuals who do not avail themselves of annulment are not admitted to request a preliminary ruling from the Court of Justice of the European Union. See *TWD Textilwerke Deggendorf GmbH v Germany*, C-188/92, [1994] ECR I-833.

For instance, the British Columbia Court of Appeal stated in *Hub Excavating Ltd v Orca Estates Ltd* that "[t]here is no free-standing duty of fairness in the bidding process independent of [the] contractual duty [arising on the formation of 'contract A']."[143] Similarly, in *Irving Shipbuilding Inc v Canada (AG)*,[144] the Federal Court of Appeal stated that absent a serious issue such as bad faith, subcontractors generally do not have standing to apply for judicial review because they are not bound by "contract A." However, such a justification does not consider the rights of disqualified bidders not bound by any "contract A."[145] Other courts have allowed judicial review regardless of the existence of a "contract A."[146] This would also support the rights of ineligible bidders and subcontractors to contest procurement decisions and would be more consonant with Canada's international trade obligations.[147] Lastly, if a supplier must first prove the existence of "contract A," and thereafter its breach, why would that same supplier not simply go ahead with a claim in contract liability? Of course, an application for judicial review will be useful in the face of a full exclusion of liability, but why should this be preconditioned by the proof of a "contract A?"

Similarly, when faced with a timely application for judicial review, it would be strange for a court to tell applicants to come back later and ask for damages. However, this is exactly what happened in *Lefroy Freshmart*, a case concerning a denied liquor licence by the Liquor Control Board of Ontario (LCBO).[148] In this case, the Divisional Court denied the availability of judicial review for the denial of a liquor licence because: (1) the RFP did not meet the public interest test because the value of the contract was too

143 2009 BCCA 167 at paras 39–40. *Contra Mellco Developments Ltd v Portage La Prairie (City)*, 2002 MBCA 125 (holding that an obligation to treat bidders fairly can exist in the absence of "contract A," as it did in this case). See also *Buttcon Ltd v Toronto Electric Commissioners* (2003), 65 OR (3d) 601, 38 BLR (3d) 106 (Sup Ct); *Pieter Kiewit*, *supra* note 141 (judicial review not available as remedy for breach of "contract A"—the only remedy available is damages for breach of contract); *Jack's Towing Ltd v Abbotsford (City)*, 2007 BCSC 93; *CUPE, Local 8 v Health Region No 4 (cob Calgary Regional Health Authority)* (1997), 52 Alta LR (3d) 186, 200 AR 175 (CA); *Puddister Shipping Ltd v Newfoundland*, [2000] NJ No 193, 189 Nfld & PEIR 325 (Nfld SC (TD)) (judicial review is not an appropriate remedy seeing that quashing the decision at this stage would delay ferry service to Labrador) [*Puddister*].

144 2009 FCA 116 at paras 38–41.

145 *Puddister*, *supra* note 143. See also *Design Services Ltd v Canada*, 2005 FC 890 at para 105.

146 *Northland*, *supra* note 68. See also *Holy Cross Surgical Services v Calgary Health Region*, 2005 ABQB 760 at paras 9–14 (decision reviewable even in the absence of "contract A").

147 *AGP*, *supra* note 14, art 1(t) ("supplier means a person or group of persons that provides or could provide goods or services").

148 See *2169205 Ontario Inc (cob Lefroy Freshmart) v Liquor Control Board of Ontario*, 2011 ONSC 1878.

low; (2) the LCBO was not required to run an open competition under the relevant government directive, making the process commercial in nature rather than statutory; and finally (3) any dispute should have been put forward as a contract claim, pursuant to *Ron Engineering*. However, this ruling confuses the sale of liquor with the licence to sell it. Notably, the applicant was trying to review the denial of a liquor licence, although Justice Swinton treated the case as one about the purchase and resale of liquor.

However, in *Murray Purcha & Son Ltd v Barriere (District)*,[149] the British Columbia Court of Appeal ruled that a RFP was not subject to lost-profit claims but rather to administrative law procedural fairness principles through judicial review. In making this call, the Court was not necessarily qualifying the relationship but making a remedial call. In contrast, while courts have occasionally stated that they should not favour damages awards when judicial review is available,[150] the Supreme Court in *Canada (AG) v TeleZone Inc* took the view that "two-track" remediation (damages or judicial review) is a matter of "access to justice."[151] In this case, TeleZone sued the federal government, *inter alia*, in contract law to request $250 million in lost profits following its denial of a telecommunications permit. The claimant alleged that it fit the criteria set out in government documents, and the issue of only four licenses constituted a breach of "contract A," hence entitling it to expectation damages amounting to $250 million. Tort allegations were also invoked.

In requiring TeleZone to make a prior application for judicial review, the government relied on the rule that a claim for liability against the federal government had to be preceded by a successful application for judicial review before the Federal Court. However, the Court ruled that this would complicate matters and impose costs unnecessarily.[152] Such a rule would also hinder concurrent jurisdiction over federal Crown liability. TeleZone was thus allowed to proceed in provincial courts and sue in civil liability. With respect, this assumes that the dispute was about jurisdiction, which arguably it was not. Indeed, prior to jurisdiction, one must qualify the

149 2019 BCCA 4. In this case, the appellant sought, alternatively to an order quashing the contract award, a declaration that it is entitled to damages for lost profits and an order remitting the case to the Supreme Court for their assessment.

150 *Assaly*, *supra* note 67.

151 See *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at para 18. See also the endorsement of the CITT in *Oshkosh* 2017, *supra* note 105 at para 149.

152 See also *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66 (holding that applying to review a decision is not a precondition for seeking damages against the Crown).

dispute in order to determine which rules of jurisdiction apply.[153] If the court assumes that the dispute is about liability, then jurisdiction is concurrent. Of course, deciding when to issue damages and when to seek relief through judicial review is a judgment call. For instance, courts already require parties to seek redress taking into account the "essential character" of a dispute.[154] Moreover, qualifying the dispute is not the same as determining whether judicial review should be sought as an application or an action.[155] However, in *TeleZone*, the Court did not explain why the situation would not be fully curable through an application for judicial review. Of course, requiring claimants to systematically make a prior application for judicial review is exaggerated. However, allowing the opposite—either liability or judicial review—is also extreme, since taxpayer damages should not be necessary if harm can be mitigated or even eliminated.

C. Liability Amongst Bidders

Where courts can intervene more, however, is in regulating liability amongst bidders once a contract has been awarded. For instance, in *Double N Earthmovers Ltd v Edmonton (City)*,[156] the Supreme Court held that an owner's duty to accept compliant bids did not extend to verifying the veracity of bidding submissions. As a result, this shielded it and other bidders from any responsibility for the use of non-conforming equipment, contrary to what was submitted in the bid. Absent any collusion between the owner and the contract winner (in this case, Sureway Construction), there is no violation of "contract A" because bid terms can be waived

153 See Ernest G Lorenzen, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws" (1941) 50 Yale LJ 743.

154 *Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 52, 125 DLR (4th) 583.

155 See *Federal Courts Act*, RSC 1985, c F-7, s 18.4(2). See also *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215 at paras 45–50 (the Federal Court of Appeal ruled in this case that damages can be sought where judicial review is sought through action).

156 2007 SCC 3 [*Double N Earthmovers*]. *Cf Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58. The Supreme Court of Canada applied *Ron Engineering* between a general contractor and a sub-contractor. The sub-contractor had been selected and subsequently let go for a cheaper competitor following the award of "contract B." As the Supreme Court stated: "the Contract A/Contract B approach rests on ordinary principles of contract formation, and there is no reason in principle why the same approach should not apply at this lower level" (*ibid* at para 36). Accordingly, the initial sub-contractor was awarded damages for breach of "contract A" by the primary bidder. It is not clear whether the Court was speaking of the same "contract A" or a discreet contract between the primary bidder and sub-contractor).

post-award. As a result, bidders bound by "contract A" are not bound to one another; the owner's duty is limited to verifying that the information submitted in the bid complies with the call for tender. The four-judge dissent stated that discharging both the City and co-bidder from any liability only promoted duplicity in the bidding process. Accordingly, the dissent stated that the City was liable and that the co-defendant must pay two-thirds of the damages due. In the words of the dissent:

> I fail to see how the integrity of the bidding process is protected by allowing a bidder to get rid of the competition unfairly and then hash it out with the owner after it has been awarded the contract. Approaching the tendering process in this manner encourages precisely the sort of duplicity seen in the present appeal. A bidder can submit a bid that is either ambiguous or deliberately misleading but compliant on its face in some respects, secure in the knowledge that if it is awarded Contract B, it will be in a strong position to renegotiate essential terms of the contract. And an owner can reason that it may be best not to resolve any ambiguity before awarding Contract B, since at that time all Contract A obligations towards other bidders will terminate and it can then enter into renegotiations with the successful bidder without fear of liability. This approach is not consistent with a fair and open process.[157]

It is understandable that public authorities should not have to verify bidding representations. However, bid winners should not be entitled to profit from dishonesty or lack of transparency. The Alberta Court of Appeal, for its part, ruled that Sureway had misrepresented its qualifications, although its liability was excluded on the basis of *Ron Engineering* and privity of contract.[158] In its view, Sureway was not liable to Double N for its misrepresentation because third-party notices serve to enforce duties owed by the third party to the defendant, not to enforce duties owed by the third party to the plaintiff.[159] However, liability for misrepresentation is generally based on tort, not contract law. Moreover, American authorities have allowed unjust enrichment claims between bidders.[160] There is no reason why this should not be possible in Canada. In such cases, a bidder alleging a breach of "contract A" could sue a co-bidder for profit disgorgement provided conditions for such a remedy are present, namely

157 *Double N Earthmovers*, *ibid* at para 123 (dissenting).

158 See *Double N Earthmovers Ltd v Edmonton* (*City*), 2005 ABCA 104.

159 *Ibid* at para 62.

160 See *e.g. Iconco v Jensen Construction*, 622 F (2d) 1291 (8th Cir 1980).

1) an enrichment; 2) a corresponding deprivation; and 3) the absence of any juristic reason for the enrichment.[161] To this extent, "contract A" could be viewed as an aleatory plurilateral contract—competing players holding their cards to themselves. Naturally, card players owe duties not only to "the house," but to each other as well. The problem is that tendering relationships have been viewed exclusively as bilateral such that courts have been reluctant to allow for actions between bidders, and it is not clear why.

A good opportunity to apply the *Double N Earthmovers* exception would have been in *Envoy Relocation Inc v Canada (AG)*.[162] In this case, Envoy suspected that the incumbent bidder was able to reduce its costs in a real estate bid for federal authorities because of its insider knowledge, and as a result, win an $800 million military relocation contract. The winning bidder, Royal LePage, had bid "0% commission" for its property management services (because it was aware of flaws in the government's pricing formula through insider knowledge) and was accordingly awarded the contract. However, because the CITT lacked disclosure jurisdiction, Envoy was unable to make its case. The CITT ordered a re-evaluation of all bids with respect to certain aspects of the RFP although this was quashed by the Federal Court of Appeal.[163] Once the contract was awarded, Envoy made its case before the Ontario Superior Court alleging a breach of "contract A." As would-be winner, Envoy was awarded, including costs, interest, and damages for loss of profits, $40 million—$10 million of which were in costs to denounce the government's "high-handed, arbitrary or highly reprehensible" behaviour.[164]

However, despite the length and exhaustive work of Justice Annis, it is still not clear why the taxpayer was footed the entire bill in this case. For one, Justice Annis found that the Government of Canada had colluded with the winning bidder, Royal LePage.[165] Justice Annis distinguished this case from *Double N Earthmovers* because of proof that the government was aware of the violation.[166] However, contrary to *Double N Earthmovers*, this

161 See *Pettkus v Becker*, [1980] 2 SCR 834, 117 DLR (3d) 257.

162 2013 ONSC 2034 [*Envoy*].

163 See *Canada (AG) v Envoy Relocation Services*, 2006 FCA 13.

164 *Envoy*, *supra* note 162 at para 1750. See also *Envoy Relocation Services Inc v Canada (AG)*, 2013 ONSC 2622. Costs were later reduced to $35M. See Kathryn May, "Government Pays $35M to End Relocation Contract Dispute", *Ottawa Citizen* (23 November 2014), online: <ottawacitizen.com/business/local-business/government-pays-35m-to-end-relocation-contract-dispute>.

165 *Envoy*, *supra* note 162 at paras 1280–89.

166 *Ibid* at paras 1285–89.

was not a lawsuit against the owner and Royal LePage, the winner of "contract B," but exclusively against the Government of Canada. Nothing in this case explains why Royal LePage was not called as a party. When such large contracts are in play, the public has nothing to lose in postponing the signing of "contract B" and allowing an inspection of the winning bid. There is also no reason why a colluding bidder should not be held liable.

IV. CONCLUSION

The Canadian tradition of using expectation damages for resolving procurement disputes is costly and not on par with international standards. One might say that it often goes above international norms were it not that Canadian practice privileges suppliers with means to litigate. Conversely, one can question whether exclusions of liability in procurement law should dictate what happens in contract law as a whole. That being said, there is little political will, particularly at the provincial level, to establish review mechanisms that will allow for procurement disputes to be avoided, partly because the legal community has not pushed for such reforms.

However, it would be amiss to placate the bar while not disclosing our own interests. No doubt, "effective remediation" can be less costly if emphasis is placed on means of avoiding the necessity of remediation in the first place. The challenge, however, may be that if one assumes that courts are well equipped to provide effective remediation, while courts themselves assume that legislation is necessary, there may be little initiative to streamline judicial review and damage awards. Thus, if common law history teaches us anything, it is that the free market of remedies, left to itself, will not result in economic optimum but rather the opposite, with the taxpayer footing the bill. International procurement law may thus oblige courts and public authorities to rethink the relationship between damage awards and judicial review. Admittedly, this would be welcome in academia since it supports the idea that procurement law is not just a sub-chapter of contract or administrative law but more usefully a subject matter unto itself.