Université de Montréal

Government Contracts and Public Values: The Case of Court Administration

Par
Anastasia Konina

Faculté de droit

Thèse présentée en vue de l'obtention du grade de docteur
en droit

Janvier 2021

Université de Montréal
Faculté de droit

Cette thèse intitulée

Government Contracts and Public Values: The Case of Court Administration

Présenté par
Anastasia Konina

A été évalué(e) par un jury composé des personnes
suivantes

Pierre Larouche
Président-rapporteur

Nicolas Vermeys
Directeur de recherche

Karim Benyekhlef
Codirecteur de recherche

France Houle
Membre du jury

Amy Salyzyn
Examinatrice externe

Résumé

Cette thèse examine le rôle du secteur privé au sein du Système de Gestions des Cours et du Greffe (SGCG) qui a pour objectif de fournir un soutien administratif aux tribunaux judiciaires du Canada. Si, jusqu'à présent, cette tâche revenait au personnel des diverses cours, il est finalement apparu nécessaire de réduire les délais de procédure et d'accroître l'efficacité des tribunaux en sollicitant le secteur privé. C'est ainsi que les gouvernements ont pris l'initiative de moderniser le SGCG en investissant dans la transformation numérique, afin de permettre la numérisation et l'indexation des documents, ainsi que l'automatisation du flux de travail.

Au cœur de cette étude nous pouvons identifier un certain mécontentement quant à la manière dont le droit public tend à réglementer les services offerts par le secteur privé aux tribunaux. Plus précisément, cette thèse soutient que la méthode employée par les différents gouvernements (fédéral et provincial) concernant la réglementation des contrats, ne permet pas de faire face à la pression croissante que les acteurs privés exercent sur l'indépendance judiciaire, valeur pourtant fondamentale. Cela s'explique par le fait que cette régulation est trop centralisée, et qu'elle ne tient pas compte des besoins spécifiques à chaque institution et aux projets impliquant le secteur privé. Cette thèse suggère donc de s'appuyer sur des instruments alternatifs – tels que le processus d'acquisition de marchés et les clauses contractuelles qui en découlent – afin de combler les lacunes réglementaires existantes.

Mots-clés : administration des tribunaux judiciaires, contrats publics, indépendance judiciaire, privatisation, technologies de l'information.

Abstract

This thesis examines the role of the private sector in the delivery of courts and registry management services ("CRMS") for courts across Canada. CRMS represents a segment of court administration that can also be referred to as court support services. Traditionally, such services have been provided by the courts' administrative personnel. However, the private sector offers an opportunity to digitize and automate many services. Because the modernization of CRMS is instrumental in reducing procedural delays and increasing the efficiency of our courts, governments across the country have been investing money in technology-driven court administration solutions developed by the private sector.

At the heart of this thesis is a dissatisfaction with how public law regulates this privatized segment of court administration. Particularly, this thesis argues that the federal and provincial approaches to the regulation of government contracts are not prepared to address the mounting pressure exerted by private actors on the core value of court administration: judicial independence. Largely, this is because the regulation of government contracts is too centralized and does not account for the specific needs of different institutions and privatization projects. This thesis suggests relying on alternative instruments – such as the procurement process and the resulting contract clauses - to fill the regulatory gaps.

Keywords: court administration, government contracts, judicial independence, privatization, information technology.

Table of Contents

List of Figures

List of Abbreviations

Akron L Rev:	Akron Law Review
Alta L Rev:	Alberta Law Review
AMP:	Autorité des marchés publics
Am J Comp L:	American Journal of Comparative Law
AOUSC:	Administrative Office of the US Courts
BC:	British Columbia
BUL Rev:	Boston University Law Review
CAS:	Courts Administration Service
Can Bus LJ:	Canadian Business Law Journal
Can J Admin L & Prac:	Canadian Journal of Administrative Law and Practice
Can JL & Jur:	Canadian Journal of Law and Jurisprudence
Can Pub Admin:	Canadian Public Administration
C de D:	Cahiers de droit
CEIS:	Civil Electronic Information System
CIMS:	Court Information Management System
CITT:	Canadian International Trade Tribunal
CJC:	Canadian Judicial Council

CJHR:	Canadian Journal of Human Rights
CJLT:	Canadian Journal of Law and Technology
Const Forum Const:	Constitutional Forum Constitutionnel
CQLR:	Compilation of Quebec Laws and Regulations
CRMS:	Courts and Registry Management Services
CSV:	Court Services Victoria (Australia)
CUSMA:	Canada-United States-Mexico Agreement
Election LJ:	Election Law Journal
FAA:	Financial Administration Act
Fordham L Rev:	Fordham Law Review
Fordham Urb LJ:	Fordham Urban Law Journal
FRE:	Federally Regulated Institution
Ga L Rev:	Georgia Law Review
GCRs:	Government Contracts Regulations
Harv L Rev:	Harvard Law Review
IJP:	Integrated Justice Project
Ind J Global Leg Stud:	Indiana Journal of Global Legal Studies
Intl J Court Admin:	International Journal for Court Administration

IT:	Information Technology
J Leg Analysis:	Journal of Legal Analysis
Law & Contemp Probs:	Law and Contemporary Problems
LoI:	Letter of Interest
LRQ:	Lois refondues du Québec
Man LJ	Manitoba Law Journal
McGill LJ:	McGill Law Journal
Minn L Rev:	Minnesota Law Review
MOU:	Memorandum of Understanding
NAPE:	Newfoundland and Labrador Association of Public and Private Employees
NLSC:	Newfoundland and Labrador Supreme Court
NPP:	Notice of Proposed Procurement
NRFP:	Negotiated Request for Proposals
NSSC:	Nova Scotia Supreme Court
NYU L Rev:	New York University Law Review
Ohio St LJ:	Ohio State Law Journal
OPO:	Office of the Procurement Ombudsman

OSFI:	Office of the Superintendent of Financial Institutions
Osgoode Hall LJ:	Osgoode Hall Law Journal
Ottawa L Rev:	Ottawa Law Review
PbD:	Privacy by Design
PC:	Privy Council
PSP:	Public Sector Procurement
PSPC:	Public Services and Procurement Canada
PWGS:	Public Works and Government Services
Queens LJ:	Queens Law Journal
RA:	Risk Assessment
RIEJ:	Revue interdisciplinaire d'études juridiques
RFP:	Request for Proposals
RSBC:	Revised Statutes of British Columbia
RSC:	Revised Statutes of Canada
RSN:	Revised Statutes of Newfoundland
RSO:	Revised Statutes of Ontario
SAcLJ:	Singapore Academy of Law Journal
Saint Louis ULJ:	Saint Louis University Law Journal

SC:	Statutes of Canada
SCC:	Supreme Court of Canada
SCLR:	Supreme Court Law Review
SCR:	Supreme Court Reports
SNL:	Statutes of Newfoundland
SO:	Statutes of Ontario
SOR:	Statutory Orders and Regulations
Tex L Rev:	Texas Law Review
UBC L Rev:	University of British Columbia Law Review
UCLA L Rev:	University of California Los Angeles Law Review
U Pa L Rev:	University of Pennsylvania Law Review
UTLJ:	University of Toronto Law Journal
U Toronto Fac L Rev:	University of Toronto Faculty of Law Review
Va L Rev:	Virginia Law Review
Wash L Rev:	Washington Law Review
Yale LJ:	Yale Law Journal

Introduction

In Canada, like in many other countries, delays in access to justice have become a serious problem.[1] Over the years, both criminal and civil trials have become longer and more complicated. In a testimony before the Standing Senate Committee on Legal and Constitutional Affairs, the Chief Judge of the Provincial Court of Alberta Terrence Matchett recounted that in the late 1970s, when he started his career as a defence lawyer, he could get a trial date in Provincial Court within two to three weeks from the moment the charges were laid against an accused.[2] However, "[e]very decade since then, those numbers have kept creeping up across the country."[3] Today, in most provincial courts, delays can range "between five and ten months and beyond."[4] The length of trials has also increased dramatically. If forty years ago, a murder trial might

---

[1] See e.g. Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (Ottawa: The Senate, 2017)[Canada, Senate, *Delaying Justice*]; The American College of Trial Lawyers, *Working Smarter but Not Harder in Canada: The Development of A Unified Approach to Case Management in Civil Litigation* (Irvine, CA: The American College of Trial Lawyers, 2016), online : <https://soar.on.ca/sites/default/files/documents/ACTL.Cda_.Working_Smarter_Not_Harder_compressed.pdf> [College of Trial Lawyers, *Working Smarter*]; Tania Sourdin, Bin Li & Donna Marie McNamara, "Court innovations and access to justice in times of crisis", online: (2020) Health Policy and Technology <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/>.

[2] Canada, Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Testimony of the Chief Judge of the Provincial Court of Alberta Terrence Matchett* (28 September 2016), online : <https://sencanada.ca/en/Content/Sen/committee/421/lcjc/52768-e>.

[3] *Ibid.*

[4] *Ibid.*

have taken a week, today, a trial can go on for a month, and complex trials can continue for years.[5]

Partially, the delays in the criminal justice system can be attributed to the circumstances that improve the quality of justice. For example, the increased availability of legal aid programs since the mid-1970s extended legal services to people and organizations with limited means.[6] The advent of the *Canadian Charter of Rights and Freedoms* in 1982[7] allowed the accused to challenge breaches of fundamental rights.[8] Developments in science and technology allow for the collection of forensic evidence that requires expert testimony.[9]

Despite the positive effects of these developments, the criminal justice system can no longer ignore the problem of procedural delays. As the Supreme Court stated in *Jordan*,

> Broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Timely trials are possible. More than that, they are constitutionally required.[10]

---

[5] The Right Honourable Richard Wagner, P.C. Chief Justice of Canada, "Access to Justice: A Societal Imperative" (Remarks delivered on the occasion of the 7th Annual Pro Bono Conference in Vancouver, British Columbia, 4 October 2018), online: <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx>

[6] *Ibid.*

[7] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK) [Charter].

[8] Wagner, *supra* note 5.

[9] *Ibid.*

[10] *R v Jordan*, 2016 SCC 27 at para 141 [*Jordan*].

The problem of delays is not unique to the criminal justice system. In fact, in the civil justice system delays may be even longer. When a person's liberty is not at stake, there is less pressure to adhere to strict procedural deadlines. In civil litigation, parties tend to "overwhelm each other with thousands of pages of disclosure. It can take a year or more even to get a date for a trial that might last two months."[11] The delays cause parties to suffer financial losses and even accept a lower settlement to put an end to protracted litigation.[12]

Federal, provincial, and territorial governments responsible for administering justice systems are turning toward digitization and technological solutions to reduce procedural delays and improve the efficiency and accessibility of justice. The consultations held by the Standing Senate Committee on Legal and Constitutional Affairs confirmed that in the criminal justice system, many common practices "are inefficient and should be replaced by those based on technological solutions."[13] Particularly, "[m]ost procedural matters are still dealt with in front of a judge, such as the setting of dates and rescheduling of court appearances."[14] The Committee concluded that the adoption of a "common computer system across the justice system would help facilitate proceedings and allow for easier communication among the courts, legal counsel, clients, unrepresented accused persons, witnesses, victims and

[11] Wagner, *supra* note 5.

[12] *Ibid.*

[13] Canada, Senate, *Delaying Justice*, *supra* note 1 at 7.

[14] *Ibid.*

other affected parties."[15] By the same token, the National Action Committee on Access to Justice in Civil and Family Matters acknowledged that justice reform could capitalize on technological developments to facilitate communications between the actors of the justice system.[16]

The COVID-19 pandemic emphasized the importance of urgent innovations in the justice system.[17] Due to years of underfunding, courts are ill-prepared to deliver services in a way that does not involve face-to-face, high-contact interactions.[18] Some courthouses still do not have access to reliable WiFi to conduct hearings by videoconference and some courtrooms do not have their own phone lines and speakerphones to hold hearings by teleconference.[19] Due to a lack of technological infrastructure, the adjournment of hundreds of cases during the pandemic creates backlogs in courts that are already plagued by delays.[20] Many cases will be challenged on appeal because defendants are unable to exercise their

---

[15] *Ibid.*

[16] Alison MacPhail, Report of the Access to Legal Services Working Group (May 2012), at 3, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf>.

[17] Olivia Stefanovich, "Courts scramble to modernize to keep the system working in a pandemic", *CBC News* (31 March 2020), online: <https://www.cbc.ca/news/politics/stefanovich-covid19-exposes-court-shortcomings-1.5502077>; Hayley Woodin, "'Remarkable transformations' coming to B.C. courts, says Eby", *Businesss Vancouver* (24 June 2020), online: < https://biv.com/article/2020/06/remarkable-transformations-coming-bc-courts-says-eby>

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

right to a criminal trial within a reasonable time. It has yet to be seen how courts will consider defendants' constitutional rights in the context of the pandemic. While *Jordan* takes into account the possibility of delays caused by exceptional circumstances,[21] it is yet unclear how these exceptions should be applied.[22] In addition, post-pandemic trial delays caused by a lack of human and material resources in courts could still violate the *Jordan* limits down the line.

While governments are making investments to address a lack of critical court infrastructure,[23] in a medium-term perspective a more comprehensive reform is required to solve the problems exacerbated by the pandemic. Particularly, the digitization and automation of the courts and registry management services ("CRMS") are instrumental in reducing delays and increasing the efficiency of courts. CRMS represents a segment of court administration that can also be referred to as court support services.[24] It embraces many functions that contribute to the daily functioning of courts, such as access to court case records and documents; filing, transmission and service of court records; transfer of cases and documents among courts; scheduling of cases and courtrooms. CRMS allows courts to move to electronic operations from the moment documents are filed by litigants to the time a

[21] Jordan, *supra* note 10 at 632-633.

[22] Olivia Stefanovich, "Justice minister says he's ready to legislate if pandemic delays lead to charges being tossed", *CBC News* (15 July 2020), online: <https://www.cbc.ca/news/politics/stefanovich-jordan-decision-covid19-cases-delay-1.5638893>.

[23] Woodin, *supra* note 17.

[24] Perry S Millar & Carl Baar, *Judicial Administration in Canada*, (Kingston, Ont: McGill-Queen's University Press, 1981) at 17.

decision is made public. In a fully-integrated CRMS system, all interactions, processes and correspondence between courts, registries and court users are conducted through the system and all court information is centrally stored. Usually, CRMS systems are "built to be flexible to meet the diverse needs of the various jurisdictions, types of litigation (civil, criminal), and levels of court (courts of first instance, appellate)." [25] Annex I to this thesis provides a fuller description of the technical components and capabilities of a fully-integrated CRMS.

CRMS fosters efficiency in many ways. E-filing of court documents and online service of process reduces procedural delays and allows courts to transfer information quicker. A Request for Proposals for an Integrated Case Management System recently published by one of the state courts in the United States anticipates that the use of technology will "[i]ncrease efficiency by eliminating redundant and manual processes through automated workflow, enterprise content management and e-filing."[26] A case management component of CRMS can "drive [the] escalation process when timelines are not adhered to,"[27] send automatic reminders and notifications to the participants in the proceedings, schedule court rooms and hearings[28] and force users to adhere to

[25] J Michael Greenwood & Gary Bockweg, "Insights to Building a Successful E-filing Case Management Service: U.S. Federal Court Experience" (2012) 4:2 Intl J Court Admin 2 at 2.

[26] State of North Carolina, Administrative Office of the Courts, *Request for Proposal No: 02-18055 Integrated Case Management System (ICMS)* (6 August 2018), s 7.2.

[27] Canada, Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Submission by RedMane Technology Canada Inc.* (30 January 2017) at 4, online: < https://sencanada.ca/content/sen/committee/421/LCJC/Briefs/RedMane_Techn_e.pdf> [Senate, *Submission by RedMane*].

[28] *Ibid.*

standardized forms, templates and interfaces.[29] Automation of procedures forces participants of a legal proceeding to commit to a timeline, ensures that all tasks are performed quickly and frees up time to perform other assignments.[30]

A. An Overview of Modernization Projects

A wave of privatizations that gained momentum in the 1980s called into question the inherently public nature of many services that were formerly delivered by governments. [31] Policy-makers started relying on a wide array of third parties – private companies, non-governmental organizations, international organizations - to deliver public services. These shifts in models of service delivery affected court administration. For example, Carl Baar recounts how in the beginning of 1990s the governments of British Columbia, Ontario, Nova Scotia, and New Brunswick made unsuccessful attempts to implement the elements of CRMS as part of larger, integrated justice projects that focused on the automation of processes and the exchange of information between police, prosecution, courts, and corrections.[32] As Carl Baar

[29] Francesco Contini & Antonio Cordella, "Law and Technology in Civil Judicial Procedures" in Roger Brownsword, Eloise Scotford & Karen Yeung, eds, *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2017) 246.

[30] Orna Rabinovich-Einy, "Beyond Efficiency: The Transformation of Courts through Technology" (2008) 12:1 UCLA JL & T 1.

[31] Michael Howlett & M Ramesh, "Patterns of Policy Instrument Choice: Policy Styles, Policy Learning and the Privatization Experience" (1993) 12:1–2 Review of Policy Research 3 at 3.

[32] For an overview of the history of integrated justice projects in Canada see Carl Baar, "Integrated justice: privatizing the fundamentals" (1999) 42:1 Canadian Public Administration 42 [Baar, "Integrated justice"].

explains, "since the courts component also includes civil and family matters, integrated justice systems extend to those fields as well."[33]

British Columbia. Later, in 2001, the Provincial and Superior Courts of British Columbia started utilizing an information system called JUSTIN to manage criminal cases.[34] JUSTIN was developed by a private vendor Sierra Systems to allow "authorized users of numerous justice sector partners (such as the police, corrections, ministry of justice, and federal crown counsel) to access a variety of information, including reports to crown counsel and an accused's criminal court file history."[35] The Civil Electronic Information System ("CEIS") was later included in the installed base. CEIS is a customized case management system facilitating information management for civil, family, and estates cases in the Supreme and Provincial Courts of BC.[36]

In 2004, the Court of Appeal Tracking System ("CATS") developed by a private company OpenRoad, became operational in the Court of Appeal.[37] Finally, in 2009, the Integrated Courts Electronic Documents Project ("ICED") linked JUSTIN with the Sheriff Custody Management System and the Corrections Offender Management

---

[33] *Ibid* at 43.

[34] Office of the Auditor General of British Columbia, *Securing the JUSTIN System: Access and Security Audit at the Ministry of Justice* (January 2013) at 4, online: <https://www.bcauditor.com/sites/default/files/publications/2013/report_9/report/OAGBC%20JUSTIN%20Report.pdf> [Auditor General of BC, *Securing the JUSTIN*].

[35] Giampiero Lupo & Jane Bailey, "Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples" (2014) Laws 353–387 at 371.

[36] *Ibid*.

[37] Jane Bailey, *Digitization of Court Processes in Canada*, Working Paper n°2 (Montreal: Université de Montréal, the Cyberjustice Laboratory, 2012) at 20.

System.[38] It uses "an ORACLE database to store PDFs, webMethods for workflow, i-keys with Entrust Software for digital signatures, and authentication and signature pads to get the electronic signature of an accused."[39]

Recently, as part of the Provincial Court's commitment to capitalize on the use of technology, Chief Judge Crabtree created the Judges Technology Working Group. One of the mandates of the working group is to review the features of software applications and determine their effectiveness.[40] In February 2018, the committee members tested an off-the-shelf, commercial software to evaluate if it was suitable for the use in the Provincial Court. Key features of the software included "the ability of Judges to access the court's material electronically (before, during and after a court proceeding) and a calendaring function to assist judges in accessing the content in matters with a continuation date."[41]

In 2018, the members of the Joint Technology Committee of the Supreme Court and the Court of Appeal of BC participated in the Courts Technology Board's Artificial Intelligence Challenge to harness private ingenuity for the provision of such

[38] Lupo & Bailey, *supra* note 35 at 372.

[39] *Ibid.*

[40] Provincial Court of British Columbia, *Annual Report 2017/2018*, at 54, online: <https://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2017-2018.pdf>

[41] *Ibid.*

service as completing court forms, automated transcription, online justice chatbot, and others.[42]

In a recently published Digital Transformation Strategy, the Ministry of the Attorney General of BC indicated that it plans on collaborating with the IT vendor community to implement Digital Content and Document Management System.[43] The system will offer the following opportunities:

> • filing of court forms, documents and evidence in various media;
>
> • evidence management and presentation that allows prosecutors and courts to manage completely paperless;
>
> • hearing of cases including video conferencing;
>
> • access to ... forms, documents and evidence for case management and use in any court proceeding; and
>
> • access to ... forms, documents and evidence by the judiciary for case preparation, the management of proceedings and use in decision-making.[44]

Ontario. Ontario made an attempt to streamline the management of criminal cases in 1996. Two provincial Ministries – the Ministry of the Attorney General and the Ministry of Public Safety and Security - initiated the Integrated Justice Project

---

[42] Supreme Court of British Columbia, *Annual Report 2018*, at 35, online: <https://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2018_SC_Annual_Report.pdf>.

[43] British Columbia, Ministry of the Attorney General, *Court Digital Transformation Strategy 2019-2023* (2019) at 23, online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf>

[44] *Ibid*.

("IJP").[45] IJP's objective was to improve "the information flow in the [criminal] justice system by streamlining existing processes and replacing older computer systems and paper-based information exchanges with new, compatible systems and technologies."[46] The IJP used a Common Purpose Procurement process under which the government and a private sector consortium led by EDS Canada Incorporated jointly provided human and financial resources.[47] Unfortunately, the project was suspended in 2002 due to "significant costs increases and delays."[48] In 2002, the Auditor General of Ontario issued a series of recommendations to improve the project, but the government and the private consortium were ultimately unable to renew their agreement prior to the expiration of the project's term. The project led to substantial losses for the government: it had invested $265 million, while realizing only a $9.6 million benefit.[49] Moreover, the service provider ultimately sued the government and the lawsuit was settled for $63 million.[50]

In 2007, the Ministry of the Attorney General of Ontario and a private contractor made another unsuccessful attempt to develop the Online System for Court Attendance

---

[45] Bailey, *supra* note 37 at 26; Michael Jordan, "Ontario's Integrated Justice Project: profile of a complex partnership agreement" (1999) 42:1 Can Pub Admin 26 (examining the process of allocating IJP's risks and rewards).

[46] Office of the Auditor General of Ontario, *Annual Report 2003*, at 283, online: <https://www.auditor.on.ca/en/content/annualreports/arreports/en03/403en03.pdf> [Auditor General of Ontario, *Annual Report 2003*].

[47] *Ibid* at 283-284.

[48] *Ibid* at 283.

[49] *Ibid* at 284.

[50] Lupo & Bailey, *supra* note 35 at 368.

Reservations ("OSCAR").[51] Finally, in 2009, the Ministry approved funding to create an integrated Court Information Management System ("CIMS") that was "to permit enhanced functionality such as e-document management, court scheduling, financial and automated workflow capabilities, and the introduction of online services to the public."[52] However, in 2013, the Ministry of the Attorney General cancelled the CIMS project, having chosen instead to enhance the capability of the legacy case tracking, scheduling, and e-filing systems.[53]

In recent years, CRMS digitization projects gained traction in the province. In November 2017, the Ministry of the Attorney General launched the online filing of civil claims, which was followed by the online filing for joint divorce applications.[54] In 2019, the Ministry of the Attorney General launched a "Digital Hearing Workspace" - an online document management platform providing real-time access to electronic copies of materials. Although the pilot project is limited to the Commercial List cases of the Ontario Superior Court of Justice, it is a "Proof of Concept that is intended to be extended to the entire court system."[55]

Finally, amid the COVID-19 pandemic, the Ministry of the Attorney General announced its decision to cancel the Halton Region Consolidated Courthouse

---

[51] Bailey, *supra* note 37 at 27.

[52] Lupo & Bailey, *supra* note 35 at 372.

[53] *Ibid* at 369.

[54] Omar Ha-Redeye, "Ontario Courts Finally Go Digital (Almost)", online: Slaw <http://www.slaw.ca/2019/02/03/ontario-courts-finally-go-digital-almost/>.

[55] *Ibid.*

construction project and to repurpose the funds to update Ontario's "severely antiquated justice system."[56] It is expected that "[s]hifting traditional investments toward innovation and new technology will move more services online."[57] Particularly, it was announced that the government plans on partnering with the private sector to develop integrated solutions that "spa[n] the entire... province, including rural and remote communities and criminal, civil and family law fields."[58] The consultations on the new project were launched in the summer of 2020. [59]

Quebec. In the beginning of the 2000s, Quebec announced its plan to implement the Système intégré d'information de justice ("SIIJ") whose goal was to "enhance the circulation of information and the exchange of documents within the administration of justice."[60] The system was to be utilized for "the production and electronic exchange of information and documents between all the actors of the administration of justice in civil, youth, criminal, and penal matters."[61] A public-private project for the development of the SIIJ was canceled after an estimated $75 million had already been

---

[56] Ontario, Ministry of the Attorney General, "Ontario Investing in Innovative Ways to Modernize the Justice System: COVID-19 outbreak underscores the urgent need to expand access across the province" (8 May 2020), online: < https://news.ontario.ca/mag/en/2020/05/ontario-investing-in-innovative-ways-to-modernize-the-justice-system.html> [Ontario, Ministry of the Attorney General, "Ontario Investing in Innovative Ways to Modernize the Justice System"].

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

[60] Michel Ricard, "Le SIIJ: vers une administration de la justice sur support numérique," in *Actes de la XVIe Conférence des juristes de l'état* (Cowansville, Que: Yvon Blais, 2004)175 at 176 [translated by author].

[61] *Ibid* at 176 [translated by author].

spent.[62] The Auditor General of Quebec cited the following reasons for the project's failure: "an absence of organization leadership, a lack of rigour and communications."[63]

Recently, the Ministry of Justice of Quebec announced its plan to spend $500 million over the next five years on innovations in the justice system.[64] A portion of the budget will be spent on purchasing new case management technologies that facilitate communication and coordination between the main actors of the criminal justice system (courts, prosecutors, attorneys, police) and improve time management.[65] This investment is in line with the recommendations of the former Chief Justice of the Superior Court of Quebec Francois Rolland, who suggested developing an innovative solution to improve coordination between the bench, the Directeur des poursuites criminelles et pénales and the Crown.[66]

---

[62] Renaud Beauchard, "Cyberjustice and International Development: Reducing the Gap Between Promises and Accomplishments" in Karim Benyekhlef et al, eds, *eAccess to Justice* (Ottawa: University of Ottawa Press, 2016) 29 at 40.

[63] Vérificateur général du Québec, *Rapport du Vérificateur général du Québec à l'Assemblée nationale pour l'année 2012-2013*, *Chapitre 7* (Fall 2012) at 3, online < https://www.vgq.qc.ca/Fichiers/Publications/rapport-annuel/2012-2013-VOR-Automne/fr_Rapport2012-2013-VOR-Automne-Chap07.pdf > [translated by author].

[64] Ministère de la Justice du Québec, *Plan stratégique 2019-2023*, at 22-23, online: <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/justice/publications-adm/plan-strategique/PL_strat_2019-2023_MJQ.pdf?1575473414>.

[65] *Ibid.*

[66] Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs,* 42nd Parliament, 1st Sess, No 6 (13 April 2016) at 8-9.

The Courts Administration Service. Finally, the federal Courts Administration Service (the "CAS") announced its plan to purchase a full-fledged, off-the-shelf CRMS for the federal courts: the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court. The CAS describes CRMS as "[o]ne integrated, user-centric and adaptable solution serving four distinct and independent Courts."[67]

B. Courts and Privatization of Services

The implementation of the elements of CRMS leads to substantial transformations in courts' work.[68] It requires courts to modify procedural rules and practice guidelines to accommodate technological change.[69] The dematerialized nature of digitized procedures impacts the public perception of courts and their role in

---

[67] Public Works and Government Services Canada, *Letter of Interest* (23 January 2019) at 6, online: <https://buyandsell.gc.ca/cds/public/2019/01/23/ba0f82432f6e293e106f9d64aa9c3c7c/ABES.PROD.PW__XL.B127.E34555.EBSU000.PDF> [Public Works and Government Services, *Letter of Interest*].

[68] See e.g. Panos Constantinides & Michael Barrett, "Large-Scale ICT Innovation, Power, and Organizational Change: The Case of a Regional Health Information Network" (2006) 42:1 Journal of Applied Behavioral Science 76; Marie-Claude Boudreau & Daniel Robey, "Accounting for the contradictory organizational consequences of Information Technology: Theoretical directions and methodological implications" (1999) 10:2 Information Systems Research 167; Olga Volkoff, Diane M Strong & Michael B Elmes, "Technological Embeddedness and Organizational Change" (2007) 18:5 Organization Science 832; Paul M Leonardi, "Activating the Informational Capabilities of Information Technology for Organizational Change" (2007) 18:5 Organization Science 813; Wanda J Orlikowski, "Using Technology and Constituting Structures: A Practice Lens for Studying Technology in Organizations" (2000) 11:4 Organization Science 404.

[69] Jane Bailey & Jacquelyn Burkell, "Implementing technology in the justice sector: A Canadian perspective" (2013) 11:2 CJLT 253 at 256.

society.[70] The implementation of technology may have differential effects on different groups of court users depending on their status in the case,[71] geographic location, and access to technology.[72] For these and other reasons, determining how to implement justice system technology and gauge success of modernization is a difficult task.

A review of literature on the implementation of technology in organizations reflects the difficulty of the endeavour.[73] Voluminous research suggests the importance of accounting for "system design and engineering as well as psychological and political/power aspects."[74] Studies confirm that the success of modernization efforts "depends only partially on the technology itself, and is also affected by individual characteristics and user practices and organizational structures and relationships."[75] Thus, modernization projects must account for "interactions between organizations, individuals, and technology, with resulting requirements for

[70] Fabien Gélinas, Clément Camion & Karine Bates, "Forme et légitimité de la justice – Regard sur le rôle de l'architecture et des rituels judiciaires" (2015) 73:2 Revue interdisciplinaire d'études juridiques 37.

[71] Michael Trebilcock, Anthony Duggan & Lorne Sossin, "Introduction" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 4.

[72] Bailey & Burkell, *supra* note 69 at 256.

[73] *Ibid* at 257 [footnotes omitted].

[74] *Ibid*.

[75] *Ibid*; See also Amy Salyzyn, "A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario" (2012) 50:2 Osgoode Hall LJ 429 (describing the transformative potential of using video-conferencing in civil trials in Ontario).

'visualizing entire work processes, real-time/flexible product and service innovation, virtual collaboration, mass collaboration, and simulation/ synthetic reality'." [76]

The aforementioned examples of automation and digitization of courts across the country also confirm the importance of successful public-private partnerships for the realisation of the governments' court modernization plans. In essence, the implementation of the elements of CRMS in courts across the country leads to the increasing role of the private sector in the provision of services that were previously performed by public servants, *i.e.* the privatization of court support services. It is, therefore, necessary that governments and courts determine how to structure their relationship with private service providers in a way that promotes justice system values.

Before this thesis proceeds with a discussion of the effects of privatization on courts' operations, it is necessary to make a brief note on terminology. The privatization of public services may take many forms:

> (1) the complete or partial sell-off (through asset or share sales) of major public enterprises; (2) the deregulation of a particular industry; (3) the commercialization of a government department; (4) the removal of subsidies to producers; and (5) the assumption by private operators of what were formerly exclusively public services, through, for example, contracting out.[77]

Because this last form of privatization, contracting out, is most frequently used when governments delegate the provision of court support services to for-profit

---

[76] *Ibid*.

[77] Richard W Bauman, "Foreword" (2000) 63:4 Law & Contemp Probs 1 at 2.

companies, this thesis focuses on it exclusively.[78] To specify, contracting out stands for inviting the market "to submit bids for contracts to provide particular services to the client...The market in this case is defined by the contract specification, and the bidding process resembles an auction."[79] In this thesis, the terms "contracting out," "outsourcing," and "privatization" are used interchangeably for convenience.

1. Reasons for Privatization

Governments across the country frequently enter into contracts for the provision of court support services with the private sector. As was described above, these contracts generally fall into two categories. A private company may be involved in the provision of separate functions and services, such as a database to store court files, a workflow management technology, or Entrust Software for digital signatures. Alternatively, the government may contract out the delivery of integrated services, as is the case with the CAS's CRMS project. Even if governments retain significant control over private actors through fragmented privatization, detailed specifications, and reporting procedures, it is riskier to contract out services than to keep them in-house. For example, as will be discussed in greater detail in Chapter II below, the privatization of court support services poses risks to the security of information and can lead to conflicts of interest when a company providing support services to a court appears in a proceeding before this court.

---

[78] Baar, "Integrated justice", *supra* note 32.

[79] Simon Domberger & Paul Jensen, "Contracting Out by the Public Sector: Theory, Evidence, Prospects" (1997) 13:4 Oxford Review of Economic Policy 67 at 68.

In light of the inherent risks of privatization, the following question arises: why do governments choose to delegate certain services to for-profit companies instead of keeping them in-house? Although in some instances a public purchaser conducts a careful study of the advantages and disadvantages of privatizing, most decisions result from a variety of assumptions about the potential benefits of privatization and are not based on an in-depth analysis.[80] Public purchasers, in particular, tend to assume that privatization will result in efficiency, improve the quality of public services, and allow governments to get access to state of the art technology, even though these assumptions may not materialize.

Efficiency. In the privatization context, efficiency is understood as "obtaining high-quality services at the lowest possible cost."[81] Much of the literature dedicated to the privatization of public services points out that competition plays a decisive role in governments' privatization decisions because it ensures efficient service delivery. [82]

Some studies show that even if the in-house provision of services is possible, public purchasers still prefer to contract out the provision of services expecting that

---

[80] Bryan Evans & Carlo Fanelli, eds, *The Public Sector in an Age of Austerity: Perspectives from Canada's Provinces and Territories* (McGill-Queen's University Press, Montreal, 2018) (arguing that in Canada the theory of new public management brought about the privatization of public services at 17).

[81] Jody Freeman, "Extending Public Law Norms through Privatization" (2002) 116 Harv L Rev 1285 at 1296 [Freeman, "Public Law Norms"].

[82] See e.g. John Donahue, *The Privatization Decision: Public Ends, Private Means* (New York: Basic Books, 1989) at 80 [Donahue, *The Privatization Decision*]; Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, c 4 (Oxford University Press, 2004); Steven Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 Pub Proc L Rev 103.

competition will generate efficiencies. [83] In fact, public purchasers are more likely to rely on the in-house provision of services (for example, through intragovernmental agreements) in monopolized markets. This is because in such markets, "[t]he strategies that public managers have to employ to build and sustain competition for contracts often require tangible investments of administrative resources."[84] In other words, in monopolized markets the increased transaction costs of privatization undermine the potential efficiency gains resulting from competition.

Public purchasers know many ways of stimulating competition for an opportunity to provide services to the public. They include: using open, competitive procurement procedures; formulating clear specifications; and relaxing controls on entry barriers for new businesses.[85] For example, at the federal level, the Treasury Board's *Contracting Policy* states that competitive procurement should be *modus operandi* for public purchasers.[86] Separate provisions of the *Contracting Policy* recognize four exceptions that allow federal organizations to set aside the requirement to solicit bids through a competitive process. These exceptions include pressing emergency, contracts below a certain threshold, requirements of public interest, or

---

[83] Amanda M Girth et al, "Outsourcing Public Service Delivery: Management Responses in Noncompetitive Markets" (2012) 72:6 Public Administration Review 887.

[84] *Ibid* at 887.

[85] Brenda C Swick, "Public procurement in Canada: Overview", online: *Thomson Reuters Practical Law* < https://ca.practicallaw.thomsonreuters.com/4-521-6007?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1>

[86] Canada, Treasury Board, *Contracting Policy* (Ottawa: Treasury Board of Canada, Secretariat, 2013), s 10.1, online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494&section=html > [Canada, *Contracting Policy*].

situations when a purchaser can demonstrate that only one person or firm is capable of performing a contract.[87]

Court modernization projects examined above relied on competitive tendering. It follows from the report of the Ontario Auditor General that the province utilized an open and competitive process called the "Common Purpose Procurement" to find an appropriate private partner for the implementation of the Integrated Justice Project:[88]

> Common Purpose Procurement is an open and competitive process for selecting a private sector vendor to work closely with a ministry, government agency or cross-ministerial initiative to:
>
> jointly identify, design, develop and implement new ways of delivering services or providing public infrastructure; and
>
> develop long-term public-private partnering relationships wherein there is a mutual sharing of investment, risks and benefits.[89]

The reports of the National Assembly of Quebec and the Quebec Auditor General confirm that the government conducted at least two competitive tendering procedures prior to terminating the SIIJ project.[90] Obviously, these failed projects confirm that competition alone does not determine the success of privatization efforts.

Quality. Beyond efficiency, governments engage in privatization projects to improve the quality of services. The government often assumes that private firms provide services of better quality because they must compete with each other for

---

[87] *Ibid*, s 10.2.

[88] Auditor General of Ontario, *Annual Report 2003*, *supra* note 46 at 283.

[89] Ontario, Management Board Secretariat, Purchasing Services Branch Services Division, *Guidelines for Common Purpose Procurement (CPP)* (October 1998), at 3-4.

[90] Quebec, Assemblée nationale, *État de situation du projet SIIJ* (15 mars 2011).

business.[91] However, market competition is not the only reason why private actors may provide services of better quality than the government. John Donahue, for example, notes that high-skilled workers see private-sector salaries "soar beyond what government offers."[92] The shifts in the labour market are particularly felt in the area of IT services, where a shortage of qualified IT experts within the government leads to an overreliance on costly consultants.[93] For example, in 2016, the Treasury Board Secretariat of Ontario "determined that an IT consultant costs $40,000 a year more, or about 30% more than similar full-time staff, after factoring in employee benefits."[94] The Ontario Auditor General's review of the aforementioned IJP project also found that "the billing rates of consortium staff working on the Project were approximately three times higher than those of the Ministries' staff for similar work."[95]

Similarly, between 2011 and 2018, the federal government outsourced over $11.9 billion in work to IT consultants, management consultants, and temporary help

[91] Janna Hansen, "Limits of Competition: Accountability in Government Contracting" (2003) 112:8 Yale LJ 2465 at 2470.

[92] John Donahue, "The Transformation of Government Work: Causes, Consequences, and Distortions" in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 41 at 42 [Donahue, "The Transformation of Government Work"].

[93] *Ibid.*

[94] Office of the Auditor General of Ontario, *Annual Report 2018*, vol 1, c 3, s 3.14, at 619, online:<https://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_314en18.pdf > [Auditor General of Ontario, *Annual Report 2018*].

[95] Auditor General of Ontario, *Annual Report 2003*, *supra* note 46 at 284.

contractors.[96] This number represents the budget of more than five departments and agencies combined.[97] The labour unions suggest that years of government outsourcing have created "a shadow public service" that undermines the work of government employees.[98] The critics of outsourcing point out that it leads to higher cost, lower quality of services, less transparency and accountability, and the loss of opportunities for professional training and development inside the public service.[99] At the federal level, outsourcing of IT services remains the main source of spending.[100] For example, a report issued by the consulting firm PricewaterhouseCoopers in 2016 recommended that Shared Services Canada, the department that provides IT goods and services to the federal government, outsources 1685 IT jobs to save money.[101]

Intellectual property. Governments are often forced to participate in privatization projects because the private sector owns intellectual property rights to innovative solutions. The term "intellectual property" encompasses several different rights regimes: patent, copyright, trademark, trade secret, as well as other related

---

[96] Professional Institute of the Public Service of Canada, *Part one: The real cost of outsourcing* (23 January 2020), online:< https://pipsc.ca/news-issues/outsourcing/part-one-real-cost-outsourcing> [Professional Institute of the Public Service, *The real cost of outsourcing*].

[97] The Professional Institute of the Public Service of Canada, "Putting a stop to outsourcing", online: <https://pipsc.ca/news-issues/outsourcing>.

[98] David Macdonald, *The Shadow Public Service: The swelling ranks of federal government outsourced workers* (Ottawa: Canadian Centre for Policy Alternatives, 2011).

[99] Professional Institute of the Public Service, *The real cost of outsourcing*, *supra* note 96.

[100] *Ibid.*

[101] Alison Crawford, "Shared Services Canada open to outsourcing much of its work, report says", *CBC News* (24 March 2016), online: < https://www.cbc.ca/news/politics/shared-services-canada-outsourcing-report-1.3501438 >.

rights.[102] A full account of these regimes is beyond the scope of this thesis. Suffice it to say that as long as courts are not using open source software, they must obtain appropriate licenses to use not only the required software, but also any other materials (including training manuals and guidelines) provided to them by a private service provider.[103]

Public and judicial discontent. Finally, strong public or judicial discontent about the ineffectiveness of the justice system can motivate governments' decisions to delegate the provision of some court support services to private companies.[104] For example, as was mentioned above, the procedural delays caused by the COVID-19 pandemic motivated the Ministry of the Attorney General of Ontario to partner with the private sector to develop integrated justice solutions that could improve access to justice across the province, in particular in rural and remote communities.[105]

2. How Privatization is Organized

One of the most interesting features of the privatization of court support services is that the judiciary is not directly involved in the process. Although CRMS are purchased for courts, procurement duties fall to the executive branch of government. This is

---

[102] Mark P McKenna, "Intellectual Property, Privatization and Democracy: A Response to Professor Rose Respondents" (2005) 50:3 St Louis U LJ 829 at 830.

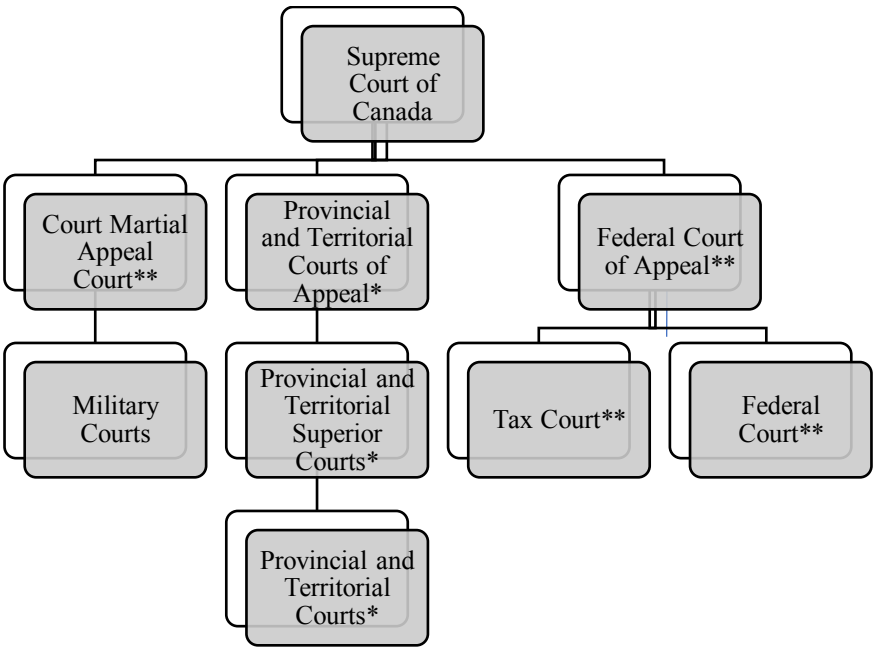
[103] Court Services Victoria & Journal Technologies, Inc. *Court Services Victoria CMS Project Agreement 2019*, at 17, online: < https://www.tenders.vic.gov.au/contract/view?id=77171 > [*Court Services Victoria CMS*].

[104] Hansen, *supra* note 91 at 2465.

[105] Ontario, Ministry of the Attorney General, "Ontario Investing in Innovative Ways to Modernize the Justice System", *supra* note 56.

explained by the idiosyncrasies of court administration in Canada. From the administrative standpoint, there exist two main models of courts: the ones that are administered by the governments of provinces and territories and the ones that fall under the jurisdiction of the federal Courts Administration Service.[106]

Figure 1. Administration of Federal, Provincial, and Territorial Courts



* Courts administered by provinces and territories

[106] The Supreme Court of Canada is administered autonomously and is not included in this thesis. See Canadian Judicial Council, *Comparative Analysis of Key Characteristics of Court Administration Systems* by Karim Benyekhlef, Cléa Iavarone-Turcotte & Nicolas Vermeys, (Ottawa: Canadian Judicial Council, 2011) at 39-40 [CJC, *Comparative Analysis*]; *Accord to strengthen the independence of the Supreme Court of Canada* between The Chief Justice of Canada and The Minister of Justice and Attorney General of Canada (22 July 2019), online: <https://www.scc-csc.ca/court-cour/accord-justice-eng.aspx>

** Courts administered by the federal Courts Administration Service

These two models of court administration flow from the *Constitution Act* of 1867. Section 92 (14) confers upon provincial legislatures the exclusive legislative power to administer justice in the provinces:

> In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...
>
> (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.[107]

This legislative power encompasses all courts sitting in the provinces, including provincial courts staffed by federally appointed judges.[108] The right of the Territories to organize and administer Territorial Courts is delegated to them by Parliament.[109]

At the same time, the courts that can be created by Parliament under s 101 of the *Constitution Act* of 1867 "for the better Administration of the Laws of Canada"[110] are excluded from provincial or territorial jurisdiction. Currently, these are the Federal Court of Appeal, the Federal Court, the Tax Court, and the Court Martial Appeal Court (the Federal Courts). These courts are administered by the Courts Administration

---

[107] *The Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, s 92 (14), reprinted in RSC 1985, Appendix II, No 5 [*The Constitution Act, 1867*].

[108] Millar & Baar, *supra* note 24 at 47.

[109] *Northwest Territories Act*, SC 2014, c 2, s 2, 18 (1)(k); *Nunavut Act*, SC 1993, c 28, 23(1)(e). *Yukon Act*, SC 2002, c 7, 18 (1)(k).

[110] *The Constitution Act, 1867*, *supra* note 107.

Service.[111] Together, the Federal Courts have jurisdiction over a wide range of federal laws and regulations. They deal, for example, with disputes over aboriginal claims, maritime and admiralty matters, immigration matters, intellectual property, and appeals related to the Income Tax Act.[112] The Federal Courts are itinerant, sitting and hearing cases across Canada. Consequently, the CAS must be able to support approximately ninety members of the Federal Courts (judges and prothonotaries) in "preparing files, conducting hearings and writing decisions 'anywhere, anytime'."[113]

As will be elaborated in more detail in Chapter I below, federal and provincial legislators adopted laws that afford broad powers over court administration to the executive branch of government, and, particularly, to the Attorneys General, the Ministers of Justice, and the Courts Administration Service. These enabling statutes empower ministers to enter into contracts for the provision of goods and services to courts. This statutory power is in addition to the inherent power of Ministers of the Crown to enter into contracts under the common law.

C. Research Problem, Research Question, and Hypothesis

Much of the research on court administration is devoted to structural reforms that could lead to better protecting judicial independence from the encroachments of

[111] *Courts Administration Service Act*, 2002, SC 2002, s 2 (a) [*CAS Act*].

[112] *Income Tax Act,* RSC 1985, c 1 (5th Supp.)

[113] Canada, Courts Administration Service, *2017-18 Annual Report* at 10, online: < http://www.cas-satj.gc.ca/en/publications/ar/2017-18/pdf/Annual_Report_Final_EN.pdf > [CAS, *2017-18 Annual Report*].

the executive branch of government.[114] This is due to the substantial involvement of provincial and territorial governments in court administration matters under the so-called "executive model" of judicial administration. The main features of the executive model are: an overwhelming control of the Ministries and Departments of Justice over strategic planning and the day-to-day operation of courts; an absence of formal provisions that establish clear command-and-control relationships between the judiciary and the support staff; and a lack of criteria for assessing the quality of provided support services. [115]

In 2006, the Canadian Judicial Council ("CJC"), [116] an independent body that coordinates the work of the federally-appointed judges, adopted a set of recommendations regarding the reform of judicial administration across the country.[117] It concluded that the constitutional principle of judicial independence calls for greater administrative autonomy of the judiciary.[118] The CJC suggested implementing a "limited autonomy and commission model," under which the judiciary would assume full responsibility for court administration and, particularly, would define "the

[114] Canadian Judicial Council, *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006) [CJC, *Alternative Models*].

[115] *Ibid* at 12.

[116] *Judges Act*, RSC 1985, c J-1, ss 59-71.

[117] CJC, *Alternative Models*, *supra* note 114.

[118] *Ibid* at 69.

standards by which it is accountable to the public for the exercise of that responsibility."[119]

1. Research Problem

Undoubtedly, the reform proposals of the CJC offer avenues for protecting judicial independence against governmental influence. At the same time, the privatization of court support services raises a set of specific concerns that stem from private access to information generated by courts and to services that are directly related to adjudication, such as scheduling of cases, assignment of judges to cases, communications with the parties to a proceeding, and case management.

To clarify, by raising concerns regarding the privatization of CRMS this thesis does not imply that CRMS is the only area where courts capitalize on private ingenuity. The procurement of IT services for courts is permanently featured in the reports submitted by the Departments of Attorney General across the country. Private companies provide transcription and translation services; evaluate the security of information networks; deliver off-the-shelf commercial software, including evidence management tools; provide legal databases; give expert advice on automated translation; provide video-conferencing services; and publish judicial decisions online.[120]

---

[119] *Ibid* at 108.

[120] This list of services follows from a search of documents in the federal procurement database <https://buyandsell.gc.ca> using the phrase "courts administration service."

While contracting out services to private actors is not in itself new, the scope and complexity of court support infrastructure provided by private, rather than government actors, keeps growing. At the heart of this thesis is a dissatisfaction with how the regulatory regime for government contracts – various statutory provisions, government rules, and practices - governs the privatization of CRMS. Particularly, this thesis argues that the federal and provincial approaches to the regulation of government contracts are not prepared to address the mounting pressure exerted by private actors on the core value of court administration: judicial independence. Largely, this is because at the federal and provincial levels the regulation of government contracts adheres to a hierarchical accountability framework which consists of centrally promulgated statutes, regulations, and internal government policies. As will be demonstrated in Chapter II below, this accountability design fails to account for the specific needs of different institutions and privatization projects.

2. Research Question and Hypothesis

Research Question. Absent effective public law mechanisms for protecting judicial independence in an era of privatization, what are the alternative avenues for courts to safely harness private ingenuity?

Hypothesis. Absent effective public law mechanisms for protecting judicial independence in an era of privatization, this thesis suggests relying on alternative instruments – such as the procurement process and the resulting contract clauses - to fill the regulatory gaps. These instruments emerge as effective mechanisms for navigating public-private collaborations in court governance for two reasons. First,

contract, as an instrument of governance, marshals market and hierarchical controls over private activities.[121] As will be demonstrated in Chapter III below, private actors, knowing that competition for an opportunity to provide services to courts is high, may be more willing to "commit themselves to traditionally public goals"[122] - such as judicial independence, accountability, transparency - to win the bid.[123] Simultaneously, contracts offer courts an opportunity to avail themselves of private ingenuity.[124]

Additionally, this thesis demonstrates that a well-organized contracting process shifts the decision of setting quality standards for court support services from the executive branch to the judiciary. In an era of privatization of court support services, CRMS design specification formulated in accordance with the judicial notion of quality help increase substantive administrative independence of the judiciary not only from the government departments, but also from the private providers of CRMS tools. In essence, design specifications operate as a protection against the growing power of two contracting parties – a government department and a private company – to impose their own vision of quality court administration on the judiciary.[125]

---

[121] Jennifer Nou, "Privatizing Democracy: Promoting Election Integrity through Procurement Contracts" (2009) 118:4 Yale LJ 744.

[122] Freeman, "Public Law Norms", *supra* note 81 at 1285.

[123] A C L Davies, *The Public Law of Government Contracts* (Oxford University Press, 2008) at 260 [Davies, *The Public Law*].

[124] Jody Freeman, "The Private Role in the Public Governance" (2000) 75 NYU L Rev 543 [Freeman, "The Private Role"].

[125] Ian Harden, *The Contracting State* (Buckingham, UK: Open University Press, 1992)

Therefore, this thesis makes two original contributions to the legal scholarship on government contracts. First of all, it offers a host of proposals that can help courts safely harness private ingenuity. Second, it suggests that government contract can be an effective vehicle to boost judicial independence from the executive branch of government and from private service providers.

D. Outline of Chapters

This thesis proceeds in four Chapters. Chapter I demonstrates that the principle of accountability plays a central role in the regulation of government contracts, introduces the doctrinal foundations of this principle, and examines how it is implemented in the federal and provincial regulatory regimes for government contracts. This Chapter establishes that governments adhere to the centralized regulation of government procurement whose main goal is to constrain the discretion of separate public purchasers, front-line procurement officers, and private providers of goods and services.

Then, Chapter II describes the main arguments that are levelled against the existing regulatory design. Studies of privatization demonstrate that the centralized regulation of government contacts is not always effective and that a more contextualized regulatory design is required when governments privatize services that are complex, "value-laden and hard to specify."[126] Chapter II demonstrates that there are grounds to believe that court support services fall into this category and starts

(Harden makes a similar point regarding the potential of government contracts to advance the principle of separation of powers at xi).

[126] Freeman, "Public Law Norms", supra note 81 at 1291.

laying the foundation for an alternative system of regulation that accounts for the specific needs of courts. Particularly, it describes the quality standards for digitized and automated court support services and explains why the identified quality standards should help courts safely harness the expertise of private actors.

Chapter III considers which legal mechanisms are better suited to enforce private compliance with the quality standards identified in Chapter II. It analyses three legal mechanisms - extending constitutional obligations to private activities, regulating private actors, and non-delegable duty - and demonstrates that these mechanisms have serious limitations in the context of the privatization of court support services. Due to the identified shortcomings, this Chapter examines the potential of the competitive procurement process and the resulting contract to constrain private actors. It focuses on the contract's potential to combine market and hierarchical controls over private activities,[127] legitimize the contracting process in the eyes of the judiciary, and capitalize on private ingenuity.

Chapter IV identifies and addresses the main arguments that may be levelled against the proposal to utilize the procurement process and the resulting contract to supplement the existing regulation of government contracts. These arguments are: (1) departure from familiar accountability frameworks promotes abuses of power; (2) competition has limited potential for enforcing private compliance with public norms; (3) additional accountability requirements and quality standards undermine competition; (4) additional accountability requirements reduce the administrative

[127] Nou, *supra* note 121.

efficiency of the procurement process; (5) government departments lack incentive to capitalize on the potential of the procurement process to protect public values; and (6) quality specifications for private CRMS instruments are difficult to define. Finally, Chapter IV offers initial thoughts on how the proposal to use the competitive procurement process and the resulting contract to boost judicial independence would operate in practice. It refers to a case study: the Courts Administration Service's current project for the privatization of CRMS of the Federal Courts. Given the discrepancies between the administration of the Federal Courts and provincial courts, this Chapter also briefly considers how the proposals contained in this thesis may be operationalized in the provinces that pursue complex modernization projects.

Chapter I. Regulation of Government Contracts

This Chapter demonstrates that the principle of accountability plays a central role in the regulatory regime for government contracts in federal and provincial law. The focus of this Chapter is on the federal regulation of government contracts that applies to the Courts Administration Service and on the regulation of government contracts for court support services in British Columbia, Ontario, and Quebec. These choices were made following a country-wide survey of courts' modernization priorities that is presented in Annex II to this thesis. A search of open access procurement reports demonstrates that, despite the potential of CRMS for increasing access to justice and efficiency of courts, technology is not implemented consistently across the country.

The narrative below illustrates how - through which rules and institutions – governments across the country implement and enforce norms on accountable government procurement. This Chapter establishes that governments adhere to a centralized regulation of government contracts, whose main goal is to constrain the discretion of separate public purchasers and, by extension, private providers of goods and services.

These strict lines of accountability in government contracting contrast with the public purchasers' power to enter into contracts under the common law. While in theory public purchasers are free to enter into contracts for the delivery of goods and services, in practice, this freedom is substantially curtailed by many internal government policies, directives, and regulations. The main goal of this patchwork of

constraining rules is to ensure the accountable spending of public funds. These accountability rules apply across all institutions that are funded from the public purse. Thus, courts, despite their institutional independence, are not exempt from the financial accountability requirements.

A. Power to Enter into Contracts

Under the common law, federal and provincial ministers have the inherent power to enter into contracts. This power flows from a legal fiction that the Crown is indistinguishable from the person of the Monarch. In other words, because the Crown is a natural person, it must possess the same legal powers as any other natural person, including the power to enter into contracts.[128] Consequently, absent specific limiting legal provisions,[129] the Crown (represented by its Ministers) has "a general capacity to make contracts which rests upon no statutory authority."[130] This general power to enter into contracts extends to all Ministers of the Crown, including the provincial Ministers of Justice, Attorneys General, and the head of the federal Courts Administration

[128] Sue Arrowsmith, "Government contracts and public law" (1990) 10:3 LS 231; Gareth Morley, "Sovereign Promises: Does Canada Have a Law of Administrative Contracts?" (2010) 23:1 Can J Admin L & Prac 17 [Arrowsmith, "Government contracts"].

[129] Of course, there are examples of specific federal and provincial legislation and regulations on government contracts in such sectors as transportation, water and sewage, energy, education and childcare, and others, see John P Beardwood et al, "Outsourcing: Canada overview", (01 February 2018), Thomson Reuters Practical Law (blog), online: <https://ca.practicallaw.thomsonreuters.com/2-501-6146?transitionType=Default&contextData=(sc.Default)&firstPage=true>; see also Chapter III *infra*.

[130] Colin Turpin, *Government Contracts* (Harmondsworth: Penguin, 1972) at 19.

Service. Therefore, they do not require a legislative mandate to contract out the provision of CRMS services to a private firm.[131]

In addition to this general power to enter into contracts, a host of power-conferring statutes confirms that provincial and federal ministers can exercise all powers necessary to administer those courts that fall under their jurisdiction. For example, at the federal level, the *Department of Justice Act* provides that the Minister of Justice has "the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces."[132] However, because the primary responsibility for the operations of the Federal Courts was delegated to the CAS, the Minister of Justice rarely intervenes in the matters of court administration. According to section 7(2) of the *CAS Act*, as the chief executive officer of the CAS, the Chief Administrator "has all the powers necessary for the overall effective and efficient management and administration of all court services."[133] Section 11 of the *CAS Act* provides for the power of the Chief Administrator to "engage on a temporary basis experts or persons who have specialized knowledge for the purposes of advising and assisting the Chief Administrator in the performance of his or her duties and functions in any matter."[134] Together, sections 7(2) and 11 of the *CAS Act* give the

[131] A C L Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press, 2001) at 9.

[132] *Department of Justice Act*, RSC 1985, c J-2, s 4.

[133] *CAS Act*, *supra* note 111, s 7 (2).

[134] *Ibid*, s 11.

Chief Administrator an overwhelming power to enter into procurement contracts on the CAS's behalf.

Similarly, the legislation of provinces empowers the Attorneys General to "superintend all matters connected with the administration of justice."[135] Effectively, these legislative provisions place the provincial attorneys general in charge of implementing section 92(14) of the *Constitution Act* that allocates the administration of justice to the legislatures of the provinces.[136] These broadly worded statutory powers should facilitate the governing process.

Some commentators point out that ministers can delegate the provision of public services to private actors in the same way that they can delegate discretion to civil servants under the *Carltona* doctrine.[137] As explained by Lord Greene in the famous English case of *Carltona Ltd v Commission of Works*,[138] ministers act through departmental officials in carrying out their duties:

---

[135] See e.g. *Attorney General Act*, RSBC 1996, c 22, s 2 (c); *Ministry of the Attorney General Act*, RSO 1990, c M-17, s 5 (c).

[136] Dale Gibson, "Development of Federal Legal and Judicial Institutions in Canada" (1995) 23 Man LJ 450 at 456, fn 33.

[137] A C L Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press, 2001) at 10; Alissa Malkin, "Government Reorganization and the Transfer of Powers: Does Certainty Matter" (2007) 39:3 Ottawa L Rev 537 (application of the *Carltona* doctrine in Canada); Henry L Molot, "The Carltona Doctrine and the Recent Amendments to the Interpretation Act" (1994) 26 Ottawa L Rev 257 (demonstrating that the *Carltona* doctrine confers on individual Ministers statutory powers for administering regulatory schemes or for delegating such powers); Mark Freedland, "Privatising Carltona: Part II of the Deregulation and Contracting Out Act 1994" (1995) Public Law 21 (the delegation of discretion to contracting partners may amount to a cavalier treatment of the *Carltona* doctrine).

[138] *Carltona Ltd v Commission of Works* [1943] 2 All ER 560 (CA).

> In the administration of government in this country the functions which are given to ministers ... are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department.[139]

Subsequently, in *R v Harrison*,[140] the Supreme Court of Canada entrenched the *Carltona* doctrine in Canadian law pointing out that a "power to delegate is often implicit in a scheme empowering a Minister to act."[141]

In the procurement context, this inherent power to delegate the provision of public services to private actors also implies that ministers (or other government officials acting on their behalf) exercise significant discretion in the choice of procurement procedures, except for a general restriction on sole sourcing unless certain exceptions apply.[142] The suitability of a procedure depends on the circumstances and the purpose of the procurement.[143] In those cases when the requirements are described in detail and mandatory criteria are used to evaluate a bid, public purchasers issue an "invitation to tender." Under this format, bids are

---

[139] *Ibid* at 563.

[140] *R v Harrison*, [1977] 1 SCR 238.

[141] *Ibid* at 245.

[142] See e.g. *Act respecting contracting by public bodies*, CQLR c C-65.1 ("such as an emergency that threatens human safety or property, where there is only one possible supplier or where the public body considers it will be able to prove that a public call for tenders would not serve the public interest given the object of the contract concerned" s 13) [*Act respecting contracting*].

[143] Paul Emanuelli, *Government Procurement*, 4th ed (Toronto, Ontario: LexisNexis, 2017) at 1303.

irrevocable and bidders tend to compete primarily about the price.[144] Another form of procurement solicitation is a request for proposals ("RFP"). A request for proposals differs from an invitation to tender in that it is used when a purchaser evaluates bidders based on several criteria. Requests for expressions of interest ("RFEIs") or Letters of Interest ("LoIs") are often used to pre-qualify the bidders who will participate in an RFP, particularly in situations when specialised expertise is required to carry out a complex project. Finally, public purchasers also frequently use requests for standing offers ("RFSOs") to obtain goods and services as needed. Standing offers contemplate that the same goods or services may be required regularly.

B. The Principle of Accountability: An Overview

The negative implications of ministers' unchecked privatization powers for such sectors as justice, healthcare, welfare administration, and correctional services have been scrutinized in literature.[145] Privatization's critics recount how contracting out leads

[144] An overview of formats presented in this paragraph draws from Swick, *supra* note 85.

[145] See *e.g.* Evans & Fanelli, *supra* note 80; David Mullan & Antonella Ceddia, "The Impact on Public Law of Privatization, Deregulation, Outsourcing, and Downsizing: A Canadian Perspective" (2003) 10:1 Ind J Global Leg Stud 199; Lorne Sossin, "Boldly Going Where No Law Has Gone before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2004) 42 Osgoode Hall LJ 363 [Sossin, "Boldly Going"]; Roderick A Macdonald, "Call-Centre Government: For the Rule of Law, Press #" (2005) 55:3 UTLJ 449 [Macdonald, "Call-Centre Government"]; Evan Atwood & Michael J Trebilcock, "Public Accountability in an Age of Contracting Out" (1996) 27 Can Bus LJ 1; Michael .J Trebilcock & Edward M Iacobucci, "Privatization and Accountability" (2003) 116 Harv L Rev 1422.

to a lack of accountability, procedural irregularities,[146] and even corruption.[147] For example, Bryan Evans and Carlo Fanelli observe that across Canada, "the privatization and commercialization of public services... has steadily usurped any counter-mechanisms – ombudsman offices, freedom of information, citizen participation and review panels, new forms of democracy, and so forth – for democratic accountability."[148] According to the critics of privatization, in these troubling circumstances public law should seek to regulate government contracting and constrain private discretion.

1. Reasons for Regulating Government Contracts

As mentioned above, while in theory public purchasers are free to enter into contracts for the delivery of goods and services, in practice this freedom is substantially curtailed by statutes, government policies, directives, and regulations. Let us begin by considering the arguments in favour of regulating government contracts in more detail.

First of all, as Justice McLachlin pointed out in *Shell Canada Products Ltd v Vancouver*,[149] public exercise of a contracting power "may have consequences for

[146] Philip de L Panet & Michael J Trebilcock, "Contracting-Out Social Services" (1998) 41 Can Pub Admin 21 at 24.

[147] Gerry Ferguson, *Global Corruption: Law, Theory & Practice* 3rd ed. (Victoria: University of Victoria, 2018) at 952-956.

[148] Evans & Fanelli, *supra* note 80 at 18.

[149] *Shell Canada Products Ltd v Vancouver (City of)* [1994] 1 SCR 231 [*Shell*] (Although in the dissent Justice McLachlin justified the judicial review of governments' tendering decisions, these arguments may also explain the public regulation of government contracts, see Davies, *The Public Law*, *supra* note 123, chapter 3).

other interests not taken into account by the purely consensual relationship"[150] between private contracting parties. For example, "public concerns such as equality of access to government markets ... and the promotion and maintenance of community values require that the public procurement function be viewed as distinct from the purely private realm of contract law."[151] Sometimes, legislators and regulators constrain government's open and competitive contracting process in order to pursue social and environmental goals not immediately related to the contract itself. As such, government contracts may be a meaningful mechanism for reinforcing policies that boost Indigenous and women-owned businesses and pursuing broad social goals such as human rights, equality, and sustainability.[152] For example, the *Comprehensive Economic and Trade Agreement between the EU and Canada* ("CETA") stipulates that certain Canadian provinces and territories may derogate from the agreement's requirements on open and competitive procurement (including non-discrimination based on the country of origin) in order to boost regional economic development.[153]

---

[150] *Ibid* at 240-241.

[151] *Ibid* at 241.

[152] Davies, *The Public Law*, *supra* note 123 at 262; See also Canada, Office of the Prime Minister, *Mandate Letter to the Minister of Public Services and Procurement* (13 December 2019) (The Minister is expected to "[d]evelop initiatives to increase the diversity of bidders on government contracts" and "[c]reate more opportunities for Indigenous businesses to succeed and grow by creating a new target to have at least 5 per cent of federal contracts awarded to businesses managed and led by Indigenous Peoples").

[153] *Canada-European Union Comprehensive Economic and Trade Agreement* (21 September 2017), Annex 19-7, s 4.

The second argument in favour of regulating government contracts holds that public bodies "undertake their commercial and contractual activities with the use of public funds"[154] and, therefore, "must exercise their contractual powers in the public interest."[155] First and foremost, the use of public funds suggests a need for vigilance against corrupt practices.[156] For example, section 47 of the *Competition Act* provides that bid rigging is an indictable criminal offense under subject to a maximum fourteen-year term of imprisonment.[157] Public officials engaging in bid rigging may be liable in tort for misfeasance in public office.[158] They may also be liable, along with any bidders with whom they collude, for civil conspiracy.[159]

Fortunately, bid rigging is not as pervasive of a problem in Canada as it is elsewhere in the world. Admittedly, in this country, one of the main goals of a stringent regulatory regime for government contracts is to maximize value for money for taxpayers.[160] For example, formal procedures on competitive procurement are designed to ensure that the government purchasers obtain the necessary information on project's timeline, price, and quality prior to entering into a binding contract. As will be discussed later in this Chapter, the accountability norms contained in statutes,

---

[154] *Shell, supra* note 149 at 240.

[155] *Ibid.*

[156] Samuel Greene, "*Attorney General of Canada v Rapiscan Systems Inc*.: Reflections on the Challenge of Judicial Review in Government Procurement" (2017) 75 UT Fac L Rev at 62.

[157] *Competition Act*, RSC 1985, c C-34, s 47.

[158] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 32, [2003] 3 SCR 263.

[159] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Al Enterprises Ltd v Brain Enterprises Ltd*, 2014 SCC 12, [2014] 1 SCR 177.

[160] Greene, *supra* note 156 at 62.

regulations, and internal government policies center mechanisms that ensure propriety in public spending.

Courts also ensure that public purchasers act within legal authority imposed on them by a variety of constraining rules. For example, when legislatures limit federal and provincial governments' contracting power, courts can scrutinize the exercise of that power to ensure that it is *intra vires*. However, the analysis of cases demonstrates that finding of *ultra vires* that leads to subsequent invalidity of a government contract does not occur frequently.[161] The plaintiffs must point to a "very clear statutory language to displace the normal rules of agency"[162] that apply to public purchasers contracting on behalf of the Crown and its ministers.

Another control applied by the courts is the procedural fairness review. The objective of the review is to determine whether the government has followed the required procedures in dealing with interested bidders. As explained by the Supreme Court in *Dunsmuir v New Brunswick*, the principle of procedural fairness seeks to ensure that "administrative decision makers, in the exercise of public powers ... act fairly in coming to decisions that affect the interests of individuals."[163] In recent years, courts across the country have, on certain occasions, applied the principle of

---

[161] *R v Transworld Shipping* [1976] 1 FC 159 at 163 (CA) (the court held that provisions regulating contracting power shall be construed as directory rules of indoor management at 172); *Verreault & Fils Ltée v Quebec (AG)* [1977] 1 SCR 41 (provisions regulating contracting power shall be interpreted as empowering at 45).

[162] Peter Hogg, Patrick Monahan & Wade Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 323.

[163] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 90.

procedural fairness to the tendering process of government departments.[164] Some contract award decisions have been struck down by the courts as the result of the review.[165]

2. Courts

At first glance, it may seem that the accountability framework promulgated by legislators and regulators should not apply to the contracts for the delivery of goods and services that are necessary for the performance of the judicial function. Indeed, the principle of judicial independence holds that the judiciary should remain independent from the executive and the legislative branches of government.[166] Constitutional guarantees of judicial independence, such as financial security and security of tenure, are meant to ensure individual and institutional independence of the judiciary.[167]

However, upon closer inspection it becomes evident that judicial independence is not absolute. Even though the normative value of judicial independence is unquestionable, the debates about the content, scope and limits of judicial independence are relentless. The partakers in these debates ask the following

---

[164] See e.g. *North End Community Health Assn v Halifax (Regional Municipality)*, 2014 NSCA 92; *Metercor Inc v Kamloops (City of)*, 2011 BCSC 382.

[165] See e.g. *Dignam v New Brunswick Liquor Corp*, 2014 NBQB 109; *Rapiscan Systems Inc v Canada (AG)* 2014 FC 68.

[166] *Valente v R* [1985] 2 SCR 673 at 687 [*Valente*].

[167] *Ibid.*; *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 [*Remuneration Reference*].

questions: how much independence is too little or too much? what conditions are necessary for its flourishing?[168] Some trade-offs between the competing values of judicial independence and accountability are inevitable:

> Those ... whose major concern is judicial independence, tend to argue that courts and the judiciary need more administrative autonomy from politicians and the executive branch of government in order to preserve and enhance their independence in decision-making and related activities; people (often politicians and government officials) whose focus is on accountability tend to argue that some variant of the partnership arrangement is the best way of ensuring that the courts remain publicly accountable in a parliamentary democracy based on Westminster traditions.[169]

Much scholarship on judicial independence addresses the fact that the judiciary must bear some accountability for the performance of the judicial function.[170] Troy Riddell et al recount that "the questions of how judges should be held accountable, and to whom ... are the subject of a range of perspectives. On the question of to whom judges should be accountable, possibilities range from the legal profession

---

[168] On the contested nature of judicial independence see e.g. Christopher M Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" (1996) 44 Am J Comp L 605, 607; Roderick A Macdonald & Hoi Kong, "Judicial Independence as a Constitutional Virtue" in Michel Rosenfeld & Andras Sajo, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2013) 831; Sanford Levinson, "Identifying 'Independence'" (2006) 86 BU L Rev 1297.

[169] Thomas W Church & Peter A Sallmann, *Governing Australia's Courts* (Carlton South, Victoria, Australia: The Australian Institute of Judicial Administration Incorporated, 1991) at 6.

[170] See e.g. Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 2; Stephen B Burbank, "Judicial Independence, Judicial Accountability and Interbranch Relations" (2007) 95:4 Geo LJ 909 at 912; Troy Riddell, Lori Hausegger & Matthew Hennigar, "Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy" (2012) 50 Osgoode Hall L J 403 at 417 [footnote omitted].

(particularly the judiciary itself), to litigants, to the broader public and the public's elected representatives."[171] The mechanisms for judicial accountability "can vary from indirect - such as norms regarding the judicial role and societal attitudes - to direct - such as appellate review, disciplinary hearings, administrative incentives and disincentives."[172]

The limitations of judicial independence also flow from the courts' accountability for the use of public funds. Because the courts' operations are funded by taxpayers, courts must follow the standard lines of accountability for the use of public funds. Some commentators maintain that the executive model of judicial administration helps ensure accountability and, at the same time, protects the judiciary from the political pressures that can emerge during budget negotiations.[173] For a long time, the accountability arguments fueled the discourse of the departments of the Attorney General who rejected the idea of being held accountable for judicial discretion in administrative matters. They were asserting that it was "dangerous for a government to surrender its powers and responsibilities [for judicial administration] into the hands of an independent [judicial] body."[174] If the management of this body gives cause for complaint, the government will be held accountable for poor judicial administration.

---

[171] Riddell, Hausegger & Hennigar, *supra* note 170 at 417.

[172] *Ibid.*

[173] Carl Baar, "Patterns and Strategies of Court Administration in Canada and the United States" (1977) 20:2 Can Pub Admin 242 [Baar, "Patterns and Strategies"].

[174] Jules Deschênes, *Masters in their own house: a study on the independent judicial administration of the courts* (Ottawa: Canadian Judicial Council, 1981) at 37.

In addition, the proponents of the executive model maintain that the Attorney General or the Minister of Justice serves as a buffer between the legislative branch and the judiciary.[175] In the matters of court administration, the Attorney General acts as a political figure, rather than as a Queen's counsel. The political character of the office means that she or he is accountable to legislature for "'general policy or administration' in a more direct way than ... for decisions on whether to prosecute specific individual cases."[176]

The accountability of the Attorneys General and Ministers of Justice to the legislative branch follows from the principle of responsible government. Although the principle of responsible government is not directly spelled out in the text of the *Constitution Act* of 1867, the courts suggest that it is one of the fundamental unwritten principles of the constitution that is "implicitly referred to in the preamble of the Constitution Act, 1867."[177] Specifically, "the preambular reference to a 'constitution similar in principle to that of the United Kingdom'"[178] was interpreted as "an entrenchment of responsible government, that is, a system where the Executive would be responsible to the legislature."[179] This principle is also reflected in the relevant

[175] *Ibid* at 40-43.

[176] Baar, "Patterns and Strategies", *supra* note 173 at 272; See also Dale Gibson, "Development of Federal Legal and Judicial Institutions in Canada" (1995) 23 Man LJ 450 at 456.

[177] *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at 38.

[178] *Singh v Canada (AG)*, [2000] 3 FC 185 at para 28.

[179] *Ibid.*

statutes. For example, in Quebec, the accountability of all government departments to the National Assembly is entrenched in the provincial *Public Administration Act*:

> This Act reaffirms the role played by parliamentarians with respect to government action and their contribution to the improvement of the services provided to the public by enhancing the accountability of the Administration to the National Assembly.[180]

Several specific statutes and regulations spell out how this general accountability framework should be applied to court administration. The applicable regulatory framework falls under three general rubrics: (a) the appointment of administrative personnel; (b) budget planning; and (c) ongoing court operations. Because the expenditures related to court administration are voted by the National Assembly under the Ministry's budget,[181] the Minister of Justice remains fully accountable for the administration of the appropriated funds. She or he presents to the President of the National Assembly of Quebec an Annual Report regarding the courts of the province.[182] Different units within the Ministry are responsible for the administration of the resources required for the proper ongoing operation of the courts of justice,[183] including building management, equipment, libraries, and general maintenance.

a. Memorandums of Understanding

---

[180] *Public Administration Act*, CQLR c A-601, s 1.

[181] Quebec, Ministère de la justice, *Rapport annuel de gestion 2016-2017*, at 50, online: <https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/ministere/rapp-annuels/rap1617.pdf>.

[182] *Ibid* at v.

[183] Justice Québec, online: < https://www.justice.gouv.qc.ca/en/department/administrative-structure/general-directorates/>.

While most courts in the country are governed by the executive model similar to that of Quebec, some provincial courts and the four Federal Courts shifted towards more autonomous models of administration, which are better aligned with the requirements of the principle of judicial independence.[184] Thus, it is necessary to examine whether these shifts affect the familiar accountability framework.

In Ontario, British Columbia, and Alberta, a more autonomous model of court administration emerged as a result of the Memorandums of Understanding ("MOUs") entered into between the Chief Justices of several courts and the provincial Attorneys General. Essentially, MOU "defines the broad parameters of the service relationship between the parties to the agreement, the service vision, and the exercise of decision-making authorities."[185] In public administration, MOUs are often utilized by two or more government departments to better organize their work on overlapping mandates.[186] MOUs may contain provisions "(1) delineating jurisdictional lines, (2) establishing procedures for information sharing or information production, (3) agreeing to collaborate in a common mission, (4) coordinating reviews or approvals where more than one agency has authority to act in a particular substantive area."[187] MOUs resemble contracts between private parties, yet, unlike contracts, they do not

[184] CJC, *Alternative Models*, *supra* note 114 at 3.

[185] Canada, Treasury Board, *The Guideline on Service Agreements: Essential Elements* (4 July 2012), s 4, online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25761>.

[186] Jody Freeman & Jim Rossi, "Agency Coordination in Shared Regulatory Space" (2012) 125:5 Harv L Rev 1131 at 1161.

[187] *Ibid*.

create any legally enforceable rights and obligations.[188] Also, there appears to be "no generally applicable statutory or executive branch policy regarding the use of MOUs,"[189] leaving their content largely to the discretion of the parties.

MOUs concluded in the area of court administration acknowledge that the judiciary and the departments of the Attorney General may bring different kinds of expertise to the task of court administration and that more deference should be given to the judiciary, represented by the Chief Justice, in such matters as the management of staff, the development of a proposed budget, the supervision and control of information and scheduling systems, and the supervision over the use of facilities.[190] However, MOUs do not exempt the judiciary from the familiar budget accountability framework that applies to the courts administered through the executive model. On the contrary, MOUs provide that the Attorney General bears responsibility to Parliament "for the expenditure of public resources required for the administration of justice and in particular, those resources that are used to operate...the [c]ourts."[191] The MOUs

---

[188] See e.g. *The MOU between the Attorney General of Alberta and the Chief Justice of the Court of Queen's Bench of Alberta* (30 January 2017) ("it does not create, purport to create, or detract from any law or legal rights or responsibilities that exist or may exist in the future between the Attorney General and the Chief Justice" and "it is not intended as a justiciable document," ss 2.2 - 2.3), online: <https://albertacourts.ca/docs/default-source/qb/memorandum-of-understanding.pdf?sfvrsn=4473df80_0> [*MOU Alberta*].

[189] Freeman & Rossi, *supra* note 186 at 1161.

[190] See e.g. *MOU Alberta*, *supra* note 188, ss 5.1.1.1.-5.1.1.13.

[191] See e.g. *The MOU between the Minister of Justice and Attorney General of British Columbia, the Chief Justice of British Columbia, the Chief Justice of the Supreme Court of British Columbia and the Chief Judge of the Provincial Court of British Columbia* (3 April 2013), s 1.3, online:

thereby mimic existing legislative provisions that place the responsibility for compliance with the financial accountability norms upon the Attorneys General.[192]

b. The Courts Administration Service

Although the Courts Administration Service was established to place courts' "administrative services at arm's length from the Government of Canada,"[193] this autonomous model of judicial administration does not exempt the Federal Courts from the usual lines of accountability to the Minister of Justice and to Parliament. The Service's enabling act establishes that the Chief Administrator is directly accountable to Parliament[194] and the Minister of Justice[195] for operating expenses. The Chief Administrator assumes the functions that are normally attributed to the deputy minister, such as "ensuring the control and supervision of the financial, personnel and other resources at the department's disposal."[196] Since the Service is entirely funded through appropriations of public funds, the Chief Administrator sends to the Minister of

---

<https://www.bccourts.ca/documents/Memorandum%20of%20Understanding%20(April%203%202013).pdf> [*MOU BC*].

[192] See e.g. British Columbia, *Attorney General Act*, RSBC 1996, c 22, s 6; Ontario, *Ministry of the Attorney General Act*, RSO 1990, c M 17**,** s 7; Ontario, Ministry of the Attorney General, Court Services Division, *Annual Report 2015-2016*, c 1, online: < https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_15/>.

[193] *CAS Act*, *supra* note 111, s 1.

[194] *Ibid*, s 12 (2).

[195] *Ibid*, s 12 (1).

[196] Canada, Privy Council, *Guidance for Deputy Ministers* (07 December 2017), s 3, online: <https://www.canada.ca/en/privy-council/services/publications/guidance-deputy-ministers.html#TOC1_5>

Justice a report on the activities of the Service each year.[197] A copy of this annual report is then laid by the Minister before each House of Parliament.[198] The Chief Administrator is also accountable to the appropriate committees of the Senate and the House of Commons for the delivery of "departmental programs in compliance with government policies and procedures," for maintaining "effective systems of internal control," and signing of the accounts. [199]

C. Implementing the Principle of Accountability in Government Contracts

In Canada's federal system of government, the regulation of government contracts is decentralized. A contract's subject matter determines which level of government has jurisdiction over the applicable accountability framework. As was mentioned in the Introduction to this thesis, contracts for the provision of administrative support services for the three levels of provincial courts (provincial, superior, and appellate) fall under provincial jurisdiction in accordance with article 92 (14) of the *Constitution Act*. The federal government represented by the Courts Administration Services is responsible for contracting out the provision of services to the four Federal Courts (the Federal Court, the Tax Court the Federal Court of Appeal, and the Court Martial Appeal Court).

---

[197] *CAS Act, supra* note 111, s 12 (1).

[198] *Ibid*, s 12 (2).

[199] *Financial Administration Act*, RSC 1985, c F-11, s 16.4 (2) [*FAA*].

Both at the federal level and in the provinces, the framework for accountable procurement consists of a complex patchwork of statutes, regulations, internal government policies, and *pro forma* contracts. There is no clear set of criteria that determines the form of accountability requirements. As Laura Pottie and Lorne Sossin point out, a decision to use a regulation, a directive, or a guideline "may be made for a range of bureaucratic, strategic, pragmatic, and principled reasons."[200]

Usually, legislators enable central spending departments (the Treasury Boards) to adopt regulations that contain specific rules on government contracts, such as applicable spending limits, tendering procedures, and limits on sole-source procurements. Additionally, central spending departments and specialized procurement regulators adopt internal government policies that provide separate government departments with comprehensive information about the contracting process. Some policies may duplicate requirements of applicable laws and regulations. Oftentimes, specialized procurement regulators (the Chief Procurement Officer, the Procurement Governance Office) have statutory authority to supervise public purchasers, enforce government procurement rules, hear complaints from disappointed bidders, and interpret regulatory requirements.

Finally, *pro forma* government contracts incorporate the requirements of procurement regulations, directives and policies. In essence, these standard government contracts extend to adhering private parties the accountability

[200] Laura Pottie & Lorne Sossin, "Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare" (2005) 38 UBC L Rev 147 at 149.

requirements promulgated by the Treasury Boards and by the specialized procurement regulators.

1. The Role of Spending Departments

As was mentioned above, both the common law and the statutes give government departments powers to procure goods and services and to engage in other activities necessary to maintain the ongoing operations of their respective departments. However, these seemingly unfettered powers are constrained by the strict lines of accountability for the spending of public funds. The requirement to comply with the rules on accountable spending of public funds apply across all institutions that are funded from the public purse.

In the system of democratic government, legislatures are the forums ultimately responsible for holding all public purchasers accountable for propriety in public spending.[201] However, the complexity of public procurement requires that the legislatures delegate their supervisory duties to specialized government watchdogs. As a result, there exist several subordinate forums for holding the government departments to account for compliance with the regulatory regime of government contracts. As Anne Davies notes, "[a]lthough it would be true to say, in a broad sense,

[201] Paul G Thomas, "The Swirling Meanings and Practices of Accountability in Canadian Government" in David Siegel & Ken Rasmussen, eds, *Professionalism & Public Service: Essays in Honour of Kenneth Kernaghan* (Toronto: University of Toronto Press, 2008) 34 ("[T]he ultimate goal of accountability processes is to make governments, their agencies, and their officials answerable to citizens.... In a democratic society, accountability depends ultimately on the political process; therefore, all accountability roads must lead back to Parliament" at 58).

that government is self-regulating with regard to its contracting activities, there is a clear separation in practice between those who set the rules and those who must comply with them."[202]

Because federal and provincial Treasury Boards review and approve government spending, they wield considerable supervisory powers over other government departments. These powers are exercised through a patchwork of norms on many issues, including government contracting. The Treasury Boards' powers typically include: adopting government-wide purchasing policies, standards, and certification requirements; regulating the procurement of goods and services over an established dollar value threshold; and monitoring regulatory compliance across government departments and other public purchasers.[203]

The constellation of regulations, policies and directives issued by the Treasury Boards seek to uphold managerial accountability also known as accountability "within the hierarchical structure of government itself."[204] The rules on managerial accountability apply to "individual ministers and, through ministers, down the hierarchical management structure existing within government departments"[205] to the

[202] Davies, *The Public Law*, *supra* note 123 at 34.

[203] Denise E Bellamy, "Toronto Computer Leasing Inquiry Research Paper" in *Toronto Computer Leasing Inquiry/Totronto External Contracts Inquiry* (City of Toronto, 2005) at xii.

[204] Susan L Gratton, *Administrative Law in the Welfare State: Addressing the Accountability Gap in Executive Social Policy-Making* (JSD Thesis, University of Toronto, 2010) [unpublished] at 60.

[205] *Ibid* at 49.

front-line procurement officers.[206] The goal of managerial accountability is to assist Parliament in holding public purchasers to account. As Paul Thomas points out: "[m]anagerial accountability can supplement and complement accountability to Parliament but it is not an appropriate or adequate substitute."[207]

a. Federal Level

At the federal level, the *Financial Administration Act* ("the *FAA*")[208] provides the overarching legal framework for controlling the expenditure of public funds by the departments of the federal government. Under the *FAA*, the Treasury Board is responsible for the determination of contracting policy and for establishing requirements that pertain to the federal procurement process.[209] The *Government Contracts Regulations* ("GCRs")[210] promulgated by the Treasury Board under the *FAA* condition entry into contracts, set out requirements for soliciting bids, and specify conditions under which bids need not be solicited. Additionally, the Treasury Board *Contracts Directive*[211] sets basic contracting limits for public purchasers, provides specific contracting limits for specific ministers, and sets out the limits above which departments must obtain the Treasury Board's approval. Finally, *Government*

---

[206] *Ibid* at 57-58.

[207] Thomas, *supra* note 201 at 58.

[208] *FAA, supra* note 199.

[209] *FAA, supra* note 199 ss 7, 41; Gerry Stobo & Derek Leschinsky, *Pocketbook on the Canadian Public Procurement Regime* (Borden Ladner Gervais, 2009) at 18, online: <blg.com/en/News-And-Publications/documents/ publication_1799.pdf>.

[210] *Government Contracts Regulations*, SOR/87-402.

[211] Canada, *Contracting Policy, supra* note 86, *Appendix C: Contracts Directive*.

Contracting Policy applies to contract entry and related administration activities, specifically, it requires that all departments and agencies use competitive process (unless certain exceptions apply), provide clear work descriptions and specifications for solicited goods and services, and respect the conditions of Comprehensive Land Claims Agreements with Aboriginal peoples.[212] Unlike the Treasury Board's *Contracting Policy*, the GCRs have the force of law.[213]

The federal rules on public procurement are implemented by the Public Services and Procurement Canada ("PSPC") and by other departments that may enter into contracts for the delivery of specific goods and services.[214] One such department is the Courts Administration Service. Within the Service, the Contract Review Committee provides oversight of the Service's procurement practices. The primary purpose of this Committee is to ensure that the contracting process follows the aforementioned *Government Contracts Regulations* and the Treasury Board's *Contracting Policy*. The Committee is charged with reviewing proposed contracts over $10,000. However, this oversight power excludes "call-ups against standing offers, contracts against supply

[212] *Ibid*, s 4.1 - 4.3.

[213] Canada, Treasury Board, *Contracting Policy Notice 2007-4 - Non-Competitive Contracting*, online: <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2007-4.html>.

[214] *Department of Public Works and Government Services Act*, SC 1996, c 16, s 20 [*PWGS Act*].

arrangements, and contracts issued by the PSPC on behalf of CAS."[215] For these exclusions, CAS relies on PSPC's integrity framework and internal review procedures.

In all fairness, it is important to note that since the beginning of the 1990s the federal government has been encouraging separate public purchasers to exercise greater independence in the procurement of goods and services. The government's *White Paper on Public Service 2000* released in 1990 described, among other things, the need for decentralization of the structure and management of public procurement in order to enable the public service to function effectively in the context of fiscal constraints.[216] It provided that the Treasury Board should make optional "as many common services as possible, maintaining mandatory services only when there is an overriding reason,"[217] such as considerations of national security or public safety. This means, among other things, reducing the number of standing offers, supply arrangements or other pre-negotiated procurement instruments that apply across government departments.[218]

It may seem, initially, that this policy was misguided because policymakers often rely on shared services and the centralization of procurement efforts to increase the

---

[215] Canada, Office of the Procurement Ombudsman, *Procurement Practice Review: Review of the Procurement Management Control Framework of the Courts Administration Service* (September 2018) at 7, online: < http://opo-boa.gc.ca/praapp-prorev/2017-2018/document/epa-ppr-09-2018-eng.pdf > [OPO, *Procurement Practice Review*].

[216] The Government of Canada, *Public Service 2000: The Renewal of the Public Service of Canada* (Ottawa: Minister of Supply and Services Canada, 1990) at 59-60.

[217] *Ibid* at 59.

[218] *Ibid.*

efficiency of the procurement process. First, as some commentators point out, a combination of purchase volumes and product standardization may lead to economies of scale.[219] Second, the reduction of duplications in tendering may result in management efficiencies and economies of process.[220] Finally, knowledge sharing between purchasing departments and the development of common purchasing expertise lead to the economies of information.[221] As we will see in the following sections of this Chapter, the centralization of procurement activities at the provincial level is partially driven by the goal of improving efficiency.

At the federal level, the review of mandatory common services arrangements in the beginning of the 1990s determined that greater decentralization of procurement could lead to more cost-effective outcomes and a more streamlined, efficient, and responsive public service.[222] As a result of this analysis, only several departments were assigned the provision of mandatory procurement services. For example, the already mentioned PSPC carries out certain central administrative functions on behalf of the federal government and provides optional and mandatory common services to government departments and agencies in support of their program objectives. In 2011,

[219] Joanne Meehan, Michael N Ludbrook & Christopher J Mason, "Collaborative public procurement: Institutional explanations of legitimised resistance" (2016) 22:3 Journal of Purchasing and Supply Management 160 at 161.

[220] *Ibid.*

[221] *Ibid.*

[222] Government of Canada, *Common Services Policy* (October 2006), s. 1.2, online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12025>.

the federal government established Shared Services Canada to procure shared IT services for the departments of the federal government.[223]

The separation of procurement duties between the Courts Administration Service, Shared Services Canada, and PSPC is determined by several governance instruments. In 2016, the Privy Council exempted the Courts Administration Service and a number of other federal government departments from the *Order in Council* that requires government departments to procure information technology ("IT") services through Shared Services Canada.[224] This means that the Federal Courts are entitled to independently choose the suppliers of IT services that fall under two categories: "services related to email, data centres and networks"[225] and "services related to end-user information technology."[226]

However, one must not forget that even when the IT procurement process for the Federal Courts is decentralized, the federal government exercises substantial authority over IT procurement for the Federal Courts in other ways. First, according to the *Generic Matrix of Responsibilities between PSPC and Client Departments for the Procurement of Goods and Services*[227] presented in Annex III to this thesis, PSPC

---

[223] *Shared Services Canada Act*, SC 2012, c 19, s 711.

[224] PC 2015-1071 (Shared Services Canada Act).

[225] *Ibid*, (f).

[226] *Ibid*, (b).

[227] Public Works and Government Services Canada, *Supply Manual* (4 June 2015 update), Annex 1.1.1, online: < https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/annex/1/1> [PWGSC, *Supply Manual*].

controls the choice of the contracting approach (including the choice of sourcing strategy), evaluation methodology for tenders, and selection method; it evaluates time, cost, and other contractual elements of the bid; it prepares consolidated evaluation and selection of the bidder, and determines that goods and services received are in accordance with the requirement. The Supply Manual of the federal government provides, however, that the PSPC and client departments may determine an alternative framework by entering into a special agreement.

Second, the Courts Administration Service is bound by the information security policies that apply to other government departments,[228] although the Canadian Judicial Council demonstrated in several reports why these government-wide policies may not be sufficient to protect the security of judicial information (a point to which this thesis returns in Chapter II *infra*).

Finally, the Courts Administration Service may lack human resources to take the leading role in a sophisticated procurement project. Given the complexity and cost of CRMS, the CAS will most likely have to collaborate with other government departments on this project. For example, the Letter of Interest[229] regarding CRMS was issued by the CAS in collaboration with the PSPC. For the CAS, the key advantage of such intradepartmental cooperation is an opportunity to capitalize on the expertise

---

[228] Canada, Treasury Board, *The Directive on Security Management*, *Appendix J: The Standard on Security Categorization* (1 July 2019), online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32614 >.

[229] Public Works and Government Services, *Letter of Interest*, *supra* note 67 at 6. This document is discussed in more detail in Chapter 4 *infra*.

of government experts. However, if several government departments plan to collaborate on this project, they will have to somehow separate their functions and responsibilities. At the same time, even if such separation of functions is feasible, there may be instances in which conflicts will arise — disputes over required technical specifications, for example. Such interdepartmental cooperation can be harmful to the Federal Courts if the CAS fails to find a meaningful way to represent the interests of the judiciary in the procurement process.

b. Provinces

As was mentioned above, in the provinces the system of procurement is more centralized, than at the federal level. While the Courts Administration Service is exempt from the jurisdiction of Shared Services Canada, the IT procurement for provincial courts is administered by specialized provincial departments. Those in charge of court administration at the provincial level have fewer opportunities to exercise discretion over the procurement process or define the content of resulting contracts with private service providers.

1) Quebec

In Quebec, prior to 2012, a responsible minister could establish policies applicable to contracting by public bodies falling under her or his jurisdiction. However, the amendments introduced in 2012 and 2017 to the *Act respecting Contracting by Public Bodies*[230] stripped the responsible ministers of this power and

[230] *Act respecting contracting, supra* note 142.

transferred it to the Conseil du trésor of the province. The Conseil du trésor issues "directives on the management of the supply, service and construction contracts of public bodies."[231] According to the *Act respecting Contracting by Public Bodies*, each public body must designate "a contract rules compliance monitor" who ensures the implementation of the legal framework regarding the public contracts.[232] This person formulates recommendations on procurement practices, ensures the transparency of internal contracting procedures and performs other functions that are required to uphold the integrity of public procurement.[233] Finally, within the Secrétariat du Conseil du trésor, the Sous-secrétariat aux marchés publics formulates proposals on government-wide procurement regulations, policies and directives and conducts procurement training for all departments and agencies of the government.[234]

Further, specialized government-wide policies on contracts for information technology supplement general rules that apply to a variety of goods and services. In April 2018, three government departments - the Secrétariat du Conseil du trésor, the Bureau de la gouvernance en gestion des ressources humaines, and the Sous-secrétariat du dirigeant principal de l'information - released a joint Information Technology Policy ("IT Policy").[235] This policy applies to public-private collaborations for the

---

[231] *Ibid*, s 26.

[232] *Ibid*, ss 21.0.1 - 21.0.2.

[233] *Ibid.*

[234] *Ibid.*

[235] Gouvernment du Quebec, *La Politique de main-d'œuvre en technologies de l'information* (Avril 2018), online: <https://www.tresor.gouv.qc.ca/fileadmin/PDF/publications/politique_main_doeuvre_TI.pdf > [Quebec, *La Politique de main-d'œuvre*].

provision of IT services within the government and to the public.[236] While the IT Policy acknowledges that separate government departments may require specific IT solutions to achieve their goals, it prioritizes centralized procurement of IT[237] and confirms the existing lines of accountability between the Conseil du trésor and other government departments.[238] The IT Policy provides that all ministries should adhere to a centralized procurement framework to ensure the efficient and accountable use of public resources.[239] This includes, among other things, purchasing goods and services through a number of shared services entities, such as Centre d'acquisitions gouvernementales and Centre d'Infrastructures technologiques.[240] According to the *Act Respecting the Governance and Management of the Information Resources of Public Bodies and Government Enterprises*,[241] each government department has an information technology officer who is responsible for the implementation of the government-wide IT policies.[242]

Although formally the procurement of goods and services for the courts of the province falls under the jurisdiction of the Ministry of Justice, the Secrétariat du Conseil du trésor and other procurement regulators have sweeping powers over

---

[236] *Ibid* at 1.

[237] *Ibid* at 2.

[238] *Ibid* at 3.

[239] *Ibid* at 1.

[240] *Ibid* at 5.

[241] *Act Respecting the Governance and Management of the Information Resources of Public Bodies and Government Enterprises* CQLR c G-1.03.

[242] *Ibid*, s 8.

government contracting. As will be discussed in greater detail below, other provinces follow a similar model of organizing government procurement. That is, the general rules on government procurement are supplemented with government-wide policies on contracting for information technology. Several reasons explain the governments' choice to focus on centralizing IT procurement. Of course, fragmented purchasing of IT produces waste and duplication of resources. However, a stronger motivation for centralization is the need to minimize inconsistencies in information security policies across government departments and mitigate systemic information security risks.

2) Ontario

In Ontario, the Treasury Board Secretariat is responsible for updating the procurement rules and best practices that are laid out in the *Ontario Public Service Procurement Directive.*[243] This directive applies to "all Ministries for the Procurement of all goods and services (including construction, Consulting Services, and Information Technology) required to meet government needs."[244] According to the Directive, IT goods and services for the courts must be purchased through the so-called "Vendor of Record arrangements" ("VOR") concluded by the Supply Chain Ontario. Under the VOR framework, one or more qualified vendors are authorized to provide goods and services for a defined time period and on defined terms and conditions, including

[243] Ontario, Treasury Board Secretariat, *Ontario Public Service Procurement Directive* (December 2014) [Ontario, *PSP Directive*].

[244] *Ibid.* ("except [goods and services] related to advertising, public relations, media relations or creative services and acquisition of real property," s 2).

pricing.[245] VOR arrangements are established to reduce procurement costs, "administrative redundancy and overhead when there is a need for the same goods and services"[246]across several governmental departments. These arrangements may be used by the entire government, several ministries, or a single ministry.[247] Typically, enterprise-wide VOR arrangements are mandatory "when the estimated procurement value is $25,000 or more,"[248] however, the Treasury Board may require their mandatory use for cheaper goods and services.[249]

3) British Columbia

In British Columbia, the Office of the Comptroller General ("the OCG") is responsible for the performance of the public procurement system, including developing and interpreting government procurement policy, monitoring compliance with this policy, establishing and managing a formal vendor complaints resolution process, and conducting a preliminary competitive process to select a limited number of preferred suppliers.[250] Some of the duties of the OGC overlap with the Shared Services BC mandate. The Shared Services BC is responsible for identifying and

---

[245] Ontario, Ministry of Government and Consumer Services, online: <https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/English/faq-vorprogram>.

[246] Ontario, Ministry of Government and Consumer Services, *How to Do Business with the Ontario Government* (2016), at 13.

[247] Ontario, *PSP Directive*, *supra* note 243, s 4.3.3.

[248] *Ibid.*

[249] *Ibid.*

[250] British Columbia, *Core Policy and Procedures Manual Policy*, c 6, s 6.2, online: <https://www2.gov.bc.ca/gov/content/governments/policies-for-government/core-policy/policies/procurement> [BC, *Core Policy*].

negotiating corporate supply arrangements; managing solicitation and contract award processes; ensuring that contracts for goods, services, and construction are designed to provide the best value to the government.[251] Public purchasers are prohibited from using any procurement or solicitation instruments to acquire goods or services that are available through the corporate supply arrangements or the arrangements of preferred suppliers.[252]

The Information Management and Information Technology (IM/IT) Procurement Policy promulgated by the OCG requires that "[p]rior to initiating procurement of all IM/IT-related products or services, ministries must discuss their IT requirements with Procurement Services Branch, SSBC (Shared Services BC) and their IM requirements with the Chief Information Officer (CIO), which will determine whether a corporate solution will be implemented for the requirement."[253] Further, the policy requires that

> All ministry IM/IT hardware and software requirements, including shared devices (e.g., desktop, laptop, server, and printer devices) must be ordered through SSBC. Where available, CSAs (corporate supply arrangements (CSAs)), pre-established by SSBC, will be utilized for the supply of these items. Any exceptions to this policy must be approved by CIO, or SSBC, as appropriate. This policy applies to purchases of any volume or dollar value.[254]

2. *Pro Forma* Contracts

[251] *Ibid.*

[252] *Ibid,* s 6.3.2.

[253] *Ibid*, s 6.3.5.a.3.

[254] *Ibid*, s 6.3.5.a.6.

As was noted in the Introduction to the thesis, government departments may seek private goods and services to modernize existing procedures or to "generate gains from specialization, optimal scale, and the spur of competition."[255] Regardless of the reasons for privatization, the provision of goods and services by private actors at arm's-length from the government brings an element of unpredictability into government's familiar bureaucratic routine. As John Donahue points out, shifting functions from government to a private firm also transfers the task from a setting which prioritizes accountability "into one in which productive efficiency is the prime directive."[256] In other words, private actors are not bound by the same standards of service and behavior, as public servants. Government departments often perceive private actors as "menacing outsiders whose influence threatens to derail legitimate 'public' pursuits."[257] From the standpoint of government, the accountability framework that ensures strict lines of accountability between taxpayers, their elected representatives, government departments, and front-line procurement officers can provide meaningful protections against impropriety in public spending only if it binds the actual private providers of goods and services. Accordingly, when government delegates the delivery of goods and services to the private sector, standard or *pro forma* government contracts become an important vehicle for extending to private actors strict accountability standards similar to those that apply to public servants.

---

[255] Donahue, "The Transformation of Government Work", *supra* note 92 at 44.

[256] *Ibid.*

[257] Freeman, "The Private Role", *supra* note 124 at 548.

Some scholars suggest that *pro forma* contracts should be considered as a source of law *per se* because they create a particular legal relationship between a private party and a public purchaser.[258] These contracts resemble an exercise of public power because they contain terms that flow from public law norms on accountability, integrity, and transparency. A company entering into a contract with a public purchaser essentially signs a standard form that it must either accept wholesale or miss an opportunity to deliver a service. As Ian Harden points out "[t]he terms of such contracts closely resemble the administrative rules of a public body."[259]

Despite these idiosyncrasies of *pro forma* government contracts, a relationship between a private party and a public purchaser is inherently contractual. First of all, private companies are not forced to adhere to *pro forma* contracts. They are free to reject the government's offer if they find it unacceptable. Second, both parties negotiate such substantial terms of a contract as price, quantity, delivery schedule, and phases of implementation.[260]

a. Specificity

Under a *pro forma* contract, a public purchaser may hold a private actor accountable by bringing a claim for a breach of contract. Such a claim may allege "the

---

[258] Pierre Lemieux, "Les récents développements en matière de contrats de l'administrationn" (1986) 16 RDUS 541 at 543 and 589; Gilles Pépin & Yves Ouellette, *Principes de contentieux udminisrratifs* (Montreal: Yvon Blais, 1979) at 525.

[259] Harden, *supra* note 125 at 4.

[260] Isabelle Leroux, *A Study on the Particularities of Government Contracts* (Master of Laws Thesis, University of Toronto, 1997) [unpublished] at 15.

contractor's overcharging or provision of substandard services, as well a failure to conform to other particular contract requirements."[261] However, public purchasers prefer to avoid costly and lengthy disputes and instead take *ex ante* measures that limit private discretion.

Most government procurement policies impose the requirement of specificity on contracts concluded by separate public purchasers. For example, the Government of Canada's Contracting Policy provides that "[w]ork descriptions or specifications must be defined in terms of clear outputs or performance requirements." [262] Similar requirements are contained in provincial contracting policies. The Procurement Policy of BC requires public purchasers to "clearly establish the outputs and outcomes required, together with their quality and quantity, against which the performance of the contractor can be monitored throughout the duration of the contract."[263]

The *IT Policy of Quebec* requires that a contracting department clearly establishes parties' roles and responsibilities, meaning that the contribution of a private party and that of a department or an agency must be clearly defined in a contract.[264] Ontario's Public Service Procurement Directive sets out the requirements for the content of a bid solicitation document. Particularly, government departments must clearly define

---

[261] Nina A Mendelson, "Six Simple Steps to Increase Contractor Accountability" in Freeman & Minow, *supra* note 92, 241 at 245.

[262] Canada, *Contracting Policy*, *supra* note 86, s 4.1.2.

[263] BC, *Core Policy*, *supra* note 250, s 6.3.6.

[264] Quebec, *La Politique de main-d'œuvre*, *supra* note 235 at 11.

"the specifications and evaluation requirements."[265] When a private contractor is providing consulting services, "clear terms of reference for the consulting assignment must be established, including: objectives, background, scope, constraints, staff responsibilities, tangible deliverables/results."[266]

John Donahue maintains that in government contracting specificity produces system-wide results because "[t]he more precisely a task can be specified in advance and its performance evaluated after the fact, the more certainly contractors can be made to compete; the more readily disappointing contractors can be replaced (or otherwise penalized); and the more narrowly government cares about ends to the exclusion of means."[267] At the contract negotiation stage, specificity allows the parties to draft a contract that "covers important contingencies *ex ante*"[268] and facilitates the resolution of disputes in cases of non-performance or improper performance of a contract.[269]

b. Reporting and Monitoring

Beyond the requirement of specificity, government departments constrain private discretion by imposing strict reporting obligations on private companies. The *Contracting Policy* of the federal government provides that "[i]t is the responsibility

[265] Ontario, *PSP Directive*, *supra* note 243, s. 4.1.

[266] *Ibid*, s. 4.1.1.1.

[267] Donahue, *The Privatization Decision, supra* note 82 at 79-80.

[268] Steven J Kelman, "Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Pespective" in Freeman & Minow, *supra* note 92, 153 at 156.

[269] Donahue, "The Transformation of Government Work", *supra* note 92 at 45.

of departments and agencies to ensure that adequate control frameworks for due diligence and effective stewardship of public funds are in place and working."[270] Similarly, Ontario's Public Service Procurement Directive requires that prior to starting a project public purchasers define a set of terms, such as: "timing, progress reporting, approval requirements;"[271] "reporting relationships and accountability mechanisms that will apply to the successful vendor(s)."[272] By the same token, the BC Core Policy and Procedures Manual provides that monitoring of contractors' performance must be "timely and consistent" [273] and that it must be carried out strictly "in accordance with the terms and conditions of the contract." [274]

Perhaps the strictest monitoring and reporting requirements are contained in the *IT Policy of Quebec*. The Policy provides that even if government departments delegate the provision of public services, the front-line procurement officers must have a good understanding of the tasks performed by a private contractor and guarantee the delivery of quality services.[275] In practice, however, such a requirement is difficult to fulfil because the front-line procurement officers often lack the required expertise to evaluate the work of specialized private contractors. Studies in government contracting

---

[270] Canada, *Contracting Policy*, *supra* note 86, s 5.1.1.

[271] Ontario, *PSP Directive*, *supra* note 243, s. 4.1.1.1.

[272] *Ibid*, s. 4.1

[273] BC, *Core Policy*, *supra* note 250, s 6.3.6.

[274] *Ibid.*

[275] Quebec, *La Politique de main-d'œuvre*, *supra* note 235 at 5.

demonstrate that government departments often hire consultants to evaluate the work performed by the private sector.[276]

Moreover, the IT Policy stipulates that in some cases familiar supervision and monitoring tactics may be insufficient to ensure successful service delivery. Thus, government departments may be required to collaborate directly with a private firm to ensure the delivery of services of the necessary quality.[277] However, when public purchasers and contractors cooperate on a design of a project, ethics and conflict-of-interest rules should require that an impartial, specialized body performs an evaluation of a project.[278]

3. The Role of Specialized Regulators, Courts, Quasi-Judicial and Alternative Dispute Resolution Bodies

The enforcement of accountability frameworks largely relies on the internal controls within the government. Federal and provincial parliaments create specialized procurement watchdogs - such as the federal Office of the Procurement Ombudsman, the BC Procurement Governance Office, the Autorité des marchés publics of Quebec - and vest them with statutory authority to supervise public purchasers and enforce procurement rules.

[276] Donahue, "The Transformation of Government Work", *supra* note 92 at 57.

[277] Québec, *La Politique de main-d'œuvre*, *supra* note 235 at 12.

[278] Donahue, "The Transformation of Government Work", *supra* note 92 at 57.

At the same time, other oversight mechanisms – courts, quasi-judicial and alternative dispute resolution bodies – also play an important role in enforcing the accountability norms. Most often, these fora are invoked by unsuccessful bidders who wish to contest either a contract award process or a contract performance process. Unlike the bidders, contracting departments rarely utilize these mechanisms. The aforementioned *pro forma* contracts between public purchasers and private entities are drafted in a way that protects government's interests. These contracts "tend to be more unilateral in design than contracts between two private parties: government generally establishes the terms and providers generally agree to them."[279] As was mentioned above, public purchasers can operationalize a number of contractual mechanisms to avoid prolonged and expensive disputes about contract performance. These mechanisms include extensive reporting requirements, a public purchaser's right to an early termination, damages for non-performance of a contract or provision of services of substandard quality, and a right to a set-off.[280]

a. Mandates of Specialized Procurement Regulators

Beyond the Treasury Boards, parliaments often delegate the duty to supervise public procurement to specialized government agencies. The regulatory supervision has proliferated in recent years in response to a number of public purchasing scandals involving federal, provincial, and municipal governments across the country.

---

[279] Freeman, "Public Law Norms", *supra* note 81 at 1328.

[280] Government of Canada, *General Conditions of a Service Contract* (12 July 2019), online: < https://www.ic.gc.ca/eic/site/113.nsf/eng/h_06661.html#gc28>.

1) Federal Level

The findings of the Gomery Commission provide many examples of impropriety in the spending of public funds. The Commission was convened in 2004, after a report of the Auditor General of Canada revealed misuse and misdirection of public funds intended for the federal government's advertising campaigns in Quebec.[281] The public consultation held by the Gomery Commission found that:

> Canadians ask for improved accountability structures to detect errors and to deter rule-breaking. These mechanisms include...better lines of reporting between departmental auditors and the Comptroller General; a more powerful role for the Auditor General's Office; and outside monitoring by an ombudsperson. [282]

In April 2006, in response to the Commission's findings, the federal government introduced an action plan under the *Federal Accountability Act*,[283] which included the appointment of a Procurement Ombudsman. The Office of the Procurement Ombudsman ("the OPO") was created in 2006 to increase the effectiveness and transparency of the federal government's business practices in relation to procurement.[284] One of the OPO's main functions is to review the departments'

---

[281] Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations* (Ottawa: Public Works and Government Services Canada, 2006); See also Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Who is Responsible? Fact Finding Report* (Ottawa: Public Works and Government Services Canada, 2005).

[282] Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations,* c 3 (Ottawa: Public Works and Government Services Canada, 2006) at 38.

[283] *FAA*, *supra* note 199.

[284] *PWGS Act*, *supra* note 214, s 22.1; *Procurement Ombudsman Regulations*, SOR/2008-143.

procurement practices and make appropriate recommendations.[285] The applicable statutes and regulations leave to the OPO's discretion the question of which department it wants to select for a procurement practice review. One of the reports stipulates that as part of the annual planning process the OPO assesses all issues brought to its attention "via procurement-related contacts."[286] Reference to "contacts" means nothing in particular, rather it suggests that the OPO may choose departments for a procurement practice review based on the results of internal audits, the complaints of disappointed bidders, or the information received from other government departments.[287]

The Court Administration Services was selected for a procurement practice review based on the issues raised by the undisclosed sources and the findings of the CAS's internal audit.[288] In 2018, upon concluding the review, the OPO criticized the CAS for failing to "formally document, approve and implement departmental procurement guidance, including procedures and guidelines"[289] and to "[d]ocument the process for assessing procurement risk."[290] The Service was encouraged to "[r]eview controls in place to ensure proper disclosure of contracts under the Treasury

---

[285] *PWGS Act*, *supra* note 214, s 22.1(3)(a).

[286] OPO, *Procurement Practice Review*, *supra* note 215 at 1.

[287] Canada, Office of the Procurement Ombudsman, *Procurement Practice review: Review of bid solicitation processes* (August 2018) (the report specifies that OPO "gathers data from many sources, including issues raised by the federal procurement community, professional and industry associations, and other governments" at 1), online: <http://opo-boa.gc.ca/praapp-prorev/2017-2018/document/epa-ppr-eng.pdf>

[288] OPO, *Procurement Practice Review*, *supra* note 215 at 2.

[289] *Ibid* at 18.

[290] *Ibid.*

Board Secretariat Guidelines on the Proactive Disclosure of Contracts."[291] Although in theory a reviewed department retains discretion regarding implementing the recommendations of the OPO, in practice these recommendations are binding. Disregarding such recommendations can expose a reviewed department to further scrutiny by other watchdogs, such as the Auditor General.

2) Provinces

A further example of corruption in public procurement is described in the findings of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, also known as the Charbonneau Commission.[292] The Charbonneau Commission was a public inquiry into corrupt public contracting practices in Quebec. The report of the Commission published in 2015 recounted that corruption and collusion in the awarding of government contracts were pervasive and that influence peddling was a serious issue in Quebec's construction sector.[293] The Commission recommended establishing a specialized, independent procurement supervisory body with a duty to monitor the integrity of the public procurement cycle.[294]

---

[291] *Ibid.*

[292] Ferguson, *supra* note 147 at 947–948.

[293] *Ibid*.

[294] France Charbonneau, "Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction" (November 2015), online: <s3.documentcloud.org/documents/2599890/charbonneau-report-final-recommendations.pdf>.

In 2017, following the Commission's recommendations, Quebec created a central public procurement supervisory body called the Autorité des marchés publics ("the AMP"). The AMP is described as one of the first authorities of its kind in Canada and globally.[295] Its duties include monitoring the integrity of the public procurement processes and applying the legal framework for public contracts in Quebec. The AMP has the power to issue orders and make recommendations to a public body, directing it to amend or cancel a public call for tenders or to suspend or cancel a public contract.[296]

Against the backdrop of public procurement scandals, other provincial governments also pushed for an increased role of specialized, internal watchdogs across all sectors of procurement.[297] In British Columbia, the Procurement Governance Office, a governance body within the Office of the Comptroller General, is responsible for "developing and revising corporate procurement policy and providing official communications and interpretations of this procurement policy"[298] and "monitoring and reporting for compliance with this procurement policy."[299]

---

[295] Clémentine Sallée, Liviu Kaufman & Alexis Beaudin-Fol, "Quebec Public Procurement – New Procurement Authority Ramps Up" (9 August 2018) Blakes (blog), online: <https://www.blakes.com/insights/bulletins/2018/quebec-public-procurement-new-procurement-authorit>.

[296] *Act respecting the Autorité des marchés publics*, c A-33.2.1, s 29 [*Act respecting AMP*].

[297] Emanuelli, *supra* note 143 at 1452.

[298] BC, *Core Policy*, *supra* note 250, s 6. 2.

[299] *Ibid.*

b. Alternative Dispute Resolution

Specialized procurement regulators have overlapping mandates. Most of them not only coordinate and monitor public procurement across government departments, but also address complaints of unsuccessful bidders and provide alternative dispute resolution services. On the one hand, these overlapping mandates can produce positive results because they allow one government agency to consolidate knowledge about a host of structural problems in government procurement. The amassed expertise translates into reform proposals that tackle such pervasive problems as a lack of transparency, duplication of functions, inefficiencies and waste. On the other hand, there are downsides to the consolidation of regulatory, policymaking and dispute resolution functions in one department. Particularly, such an institutional design may undermine the perception of impartiality of a dispute resolution process.[300] Nevertheless, consolidation of functions has proliferated in recent years in response to a number of factors, including redundancy, inefficiencies, and gaps resulting from decentralized regulatory supervision.[301]

At the federal level, the Office of the Procurement Ombudsman[302] provides an avenue for suppliers to raise complaints regarding: (1) the award of federal contracts under $26,400 for goods and under $105,700 for services and (2) the administration

[300] Freeman & Rossi, *supra* note 186 at 1150.

[301] *Ibid* at 1135.

[302] *PWGS Act, supra* note 214, s 22.1 (1).

of a contract, regardless of its dollar value.[303] The OPO also provides alternative dispute resolution services when disputes relating to the interpretation and application of the terms and conditions of a contract occur. One of the OPO's mandates is to evaluate the seriousness of any deficiency in complying with the procurement regulations made under the *Financial Administration Act*.[304] This means that the OPO, among other things, oversees the compliance of purchasing departments with the aforementioned *Government Contracts Regulations*,[305] the Treasury Board Contracts Directive,[306] and the Government Contracting Policy.

Provincial governments created their own quasi-judicial bodies and alternative dispute resolution mechanisms that review and enforce compliance with accountability norms. For example, in Quebec, the Autorité des marchés publics ("AMP"), oversees procurement complaints process for bidders that believe that they have been prejudiced by a call for tenders. [307] Disappointed bidders can file complaints with the AMP if they consider that tendering procedures do not comply with laws, regulations and policies promulgated by the government of Quebec.[308] The AMP has broad statutory powers, which include ordering a public body to amend its tender documents or cancel its public call for tenders; ordering a public body to call on an

---

[303] Office of the Procurement Ombudsman, online: < http://opo-boa.gc.ca/enquetes-investigations-eng.html>.

[304] *FAA, supra* note 199.

[305] *Government Contracts Regulations*, *supra* note 210.

[306] Canada, *Contracting Policy*, *supra* note 86, *Appendix C: Contracts Directive*.

[307] *Act respecting AMP*, *supra* note 296, s 46.

[308] *Ibid*, s 37.

independent process auditor; designating an independent person to act as a member of a selection committee; and suspending the performance of a public contract or canceling it.[309]

The Government of Ontario also created a dispute resolution process to respond to complaints from the private sector. Bidders may file a complaint with the Supply Chain Ontario which then initiates a review process. The review process is malleable and largely depends on the violations alleged in the complaint submitted by a disappointed bidder.[310] The review has two possible outcomes. If the complaint is received before a contract has been awarded, the government may try to preserve the bidder's opportunity to participate in the procurement. If the complaint is successful after a contract has already been awarded, a bidder may be eligible for a limited monetary compensation to cover the costs of preparing a proposal or making a complaint, or both. However, there is no compensation for lost profits and the procurement award decision cannot be overturned.

c. The Canadian International Trade Tribunal

At the federal level, the Canadian International Trade Tribunal ("the CITT") is a quasi-judicial body that frequently reviews complaints concerning the federal government's procurement practices under a number of comprehensive trade

---

[309] *Ibid*, s 29.

[310] Ontario, Central Forms Repository, Complaint Regarding an Ontario Government Procurement, online: <http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&SRCH=1&ENV=WWE&TIT=5205&NO=002-5205E>

agreements, such as the *Canadian Free Trade Agreement*, the World Trade Organization *Agreement on Government Procurement*, and the *Comprehensive Economic and Trade Agreement*. During the review of compliance with substantive national and international obligations, the CITT also frequently rules on public purchasers' compliance with procedural norms that flow from the government's self-imposed procurement duties. At this juncture, however, there is no need to focus on the CITT's practice in greater detail. Recently, the federal government, invoking national security reasons, announced that it plans to significantly limit the jurisdiction of the CITT to hear disputes arising out of IT procurement.[311] In all likelihood, tenders for CRMS no longer fall under the subject-matter jurisdiction of the CITT.

d. Courts

Despite a host of dispute resolution avenues examined above, government procurement decisions become the subject of litigation which is frequently initiated by unsuccessful bidders. Procurement directives, regulations, and policies examined above are ubiquitous. They apply to the tendering process and the relationships between a public purchaser and a private actor even when a tender call or a contract

[311] Marcia Mills, "Because We Said So: Invoking the National Security Exception to Reduce Access to Dispute Processes for Government Suppliers" (2019), online: *Canadian Global Affairs Institute* <https://www.cgai.ca/because_we_said_so_invoking_the_national_security_exception_to_reduce_access_to_dispute_processes_for_government_suppliers>; https://www.theglobeandmail.com/politics/article-procurement-rules-rewritten-to-give-ottawa-power-to-invoke-national/.

fail to refer to them directly. Therefore, the application of these rules can significantly affect the outcome of a dispute.[312]

1) Administrative Law Paradigm

Despite the academic debates about the acceptability of administrative law review in the context of government procurement,[313] courts acknowledge that in some cases disappointed bidders may be entitled to procedural review and substantive review of government's procurement decisions.[314]

In the public procurement context, judicial review cases often focus on whether a contract award process complied with the requirements of formal sources of law: applicable statutes and regulations.[315]At the same time, non-legislative instruments examined above – policy guidelines, procurement manuals, directives – also create legal obligations for contracting departments. Governmental compliance with rules contained in these so-called "soft law" instruments became one of the areas of judicial review.[316]

---

[312] Emanuelli, *supra* note 143 at 172.

[313] Morley, *supra* note 128 (arguing that Canada has developed a law of administrative contracts); Greene, *supra* note 156 (arguing that the principles of contract law should govern the tendering process); Hogg, Monahan & Wright, *supra* note 162 (arguing that the law of the Crown contract should be the ordinary law of contract at 306-307).

[314] *Thomas C Assaly Corp v R* (1990), 34 FTR 156; *Shell, supra* note 149. For a general discussion on the applicability of judicial review to government tendering and an overview of cases see Emanuelli, *supra* note 143 at 66-123.

[315] Emanuelli, *supra* note 143 at 1154-1216.

[316] *Ibid* at 95-96; Pottie & Sossin, *supra* note 200 at 151.

For example, in *Rapiscan Systems Inc v Canada (AG)*,[317] the Federal Court found that the Canadian Air Transport Security Authority ("CATSA") failed to conduct a fair and competitive process because it concealed "the minimum requirements and performance standards."[318] The court noted that CATSA's internal contracting policy called for an open, competitive bidding process to obtain the best value for money and to demonstrate that such value was obtained and to promote openness, transparency, and fairness in the contracting process. That policy also required the use of transparent evaluation criteria during the contract award decision.

In *Robert v Canada (AG)*,[319] the Federal Court interpreted the government's *pro forma* bid solicitation document to determine whether the bid was open only to natural persons or whether corporations were also eligible to participate.[320] By the same token, in S*elex Sistemi Integrati S.p.A. v Canada (AG)*,[321] the Federal Court of Appeal interpreted the Standard Acquisition Clauses and Conditions to determine if a corporate reorganization affected the rights of an unsuccessful bidder.[322] Moreover, in both *Robert* and *Selex*, the courts applied a less deferential, correctness standard of review to the public purchasers' decisions.[323] However, the application of this stricter

[317] *Rapiscan Systems Inc v Canada (AG)* 2014 FC 68.

[318] *Ibid* at para 83.

[319] *Robert v Canada (AG)*, 2012 FC 1227 [*Robert*].

[320] *Ibid* at para 15.

[321] *Selex Sistemi Integrati S.p.A. v Canada (AG)*, 2014 FC 263.

[322] *Ibid* at para 28.

[323] *Robert*, *supra* note 319 at para 19.

standard had no impact on the result.[324] Eventually, the courts upheld the government's interpretation of its internal documents.[325]

Although a less deferential standard of review does not automatically result in granting a remedy against the government,[326] these cases demonstrate the judges' propensity to pay careful attention to the government's compliance with self-imposed policies. This represents a shift from "the early decisions in the post-*Dunsmuir* era [that]...appeared to settle on a reasonableness standard of review for government procurement decisions."[327] The review challenges presented by the *Vavilov*[328] framework are yet to be fully explored by courts.

Depending on the type of violation, the courts may strike down a contract award decision, compel a government department to resume its dealings with a disappointed bidder (particularly if a contract has not yet been awarded) or award damages to an unsuccessful bidder.[329] At the same time, it is important to note that restrictions on procurement powers of government departments are not always strictly enforced by courts. Peter Hogg et al suggest that in the absence of a clearly formulated statutory restriction on a public purchaser's contracting powers, the normal rules of

---

[324] Emanuelli, *supra* note 143 at 96.

[325] *Robert*, *supra* note 319 at paras 23-29.

[326] Emanuelli, *supra* note 143 at 95.

[327] *Ibid* at 92–93.

[328] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[329] Emanuelli, *supra* note 143 at 1155.

agency prevail. [330] In other words, an act of an agent of the Crown – for example, a minister or a head of a department - will bind the Crown if it is concluded with respect to the matters within the scope of a department's normal operations. [331] Also, even if a statutory provision regulates the procurement powers of the head of the department, it may be interpreted by the courts as a directory rule of "indoor management," [332] rather than as a restriction. Therefore, if a reviewing court concludes that a decision-maker exceeded its statutory powers in the course of exercising its authority to enter into contracts, it does not necessarily follow that the contract becomes invalid. Directory rules "might form the basis of an injunction prior to the making of a contract, and their breach might expose civil servants to disciplinary action or even prosecution."[333] The goal of such interpretations is to preserve the integrity and stability of the procurement system and to prevent the Crown from abdicating its contractual obligations if contracts were concluded with procedural violations.

2) Contract Law Paradigm

Despite the increased judicial review of government procurement, not all government decisions are reviewable under the administrative law paradigm. Generally, the contract law paradigm applies to the tendering process and the resulting

[330] Hogg, Monahan & Wright, *supra* note 162 at 321.

[331] *Ibid.*

[332] *Ibid.*

[333] *Ibid*.

contract when the government's commercial dealings are not closely connected to the exercise of its statutory powers.[334]

The Supreme Court developed a special contract law framework for assessing government tendering. In *Ron Engineering*,[335] it held that the submission of a bid in response to a tendering call could in some circumstances create a special form of contract ("Contract A"). Unlike the resulting contract ("Contract B"), Contract A represents an agreement about the process. It includes implied common law terms of equal and fair treatment of bidders.[336] Therefore, under Contract A, a cause of action lies with unsuccessful bidders who believe that a public purchaser awarded a contract (i) to a non-compliant bidder or (ii) without fair and equal consideration of all bidders.[337] However, awarding damages to disappointed bidders under implied common law duties does not directly enforce the government's self-imposed procurement rules, so, there is no need to focus on it in more detail here.

Conclusion to Chapter I

This Chapter demonstrated how the regulatory regime for government contracts in federal and provincial law advances the principle of accountable spending of public funds. It was established that this regulation hinges on two elements: the centralized

---

[334] For a helpful discussion of the distinction between the exercise of residual contracting power and statutory power see *Glenview Corp v Canada (Minister of Public Works)* [1990] FCJ No 480; For a general discussion on the criteria that determine the applicability of judicial review to the tendering process see Emanuelli, *supra* note 143 at 66-124.

[335] *R v Ron Engineering*, [1981] 1 SCR 111 [*Ron Engineering*].

[336] *Martel Building Ltd v Canada*, 2000 SCC 60, [2000] 2 SCR 860 [*Martel*].

[337] Greene, *supra* note 156 at 52.

oversight of procurement activities and the uniform application of procurement rules across government departments. The analysis of the applicable statutes, regulations, and policies demonstrated that the regulation of government contracts may be viewed as a complex "framework of political and administrative accountability relationships with the legislature sitting at the apex of this hierarchical structure."[338]

These strict lines of accountability in government contracting contrast with the public purchasers' power to enter into contracts under the common law. While in theory public purchasers are free to enter into contracts, in practice, the accountability norms substantially limit this freedom. The requirement to comply with the rules on the accountable spending of public funds apply across all institutions that are funded from the public purse, including courts.

[338] Gratton, *supra* note 204 at 57.

Chapter II. Regulation of Government Contracts and the Privatization of Courts and Registry Management Services

This Chapter advances arguments in favor of rethinking the application of the aforementioned centralised regulations, policies, and procurement arrangements to contracts for the provision of CRMS instruments for courts. Studies of government contracting demonstrate that a more nuanced regulatory design is required when governments contract out the provision of services that may affect society's fundamental values.[339] Because CRMS instruments perform many administrative and support functions that may directly affect judicial independence and adjudication of disputes, there are good reasons to suggest that CRMS falls in the category of value-laden services. It is, therefore, necessary to supplement the existing centralised regulation of contracts for CRMS instruments with additional mechanisms that will help courts safely harnesses private ingenuity.

This Chapter starts laying the foundation for an alternative system of regulation of contracts for CRMS instruments that will account for the specific needs of the judiciary. Particularly, this Chapter identifies the quality standards for digitized and automated CRMS instruments and explains why these standards may assist the judiciary in harnessing private expertise.

[339] Freeman, "Public Law Norms", *supra* note 81 at 1291; Hansen, *supra* note 91 at 2469.

A. General Grounds for Rethinking the Regulatory Design

As described in Chapter I above, the regulation of government contracts adheres to a centralized design whose main goal is to constrain the discretion of separate public purchasers and private actors. This design emphasizes mechanisms – such as legislative and executive oversight, standard contract clauses, and judicial review - that ultimately render procurement departments accountable to taxpayers in whose interest government is supposed to undertake all of its privatization activities.[340]

The regulatory framework that places significant limits on the discretion of separate public purchasers and the front-line actors of government procurement is not an end in itself. Rather, strict, vertical lines of accountability are put in place to ensure that the procurement system acts in the public interest and not in the interests of a special few.[341] Admittedly, in the worst-case scenario, the unconstrained discretion of separate public purchasers is dangerous because it may lead to self-dealing and corruption.[342]

From a theoretical standpoint, this design of accountability relies on the public choice analyses of bureaucratic behaviour. In general terms, public choice theory

---

[340] *Shell, supra* note 149 at 240.

[341] At the same time, many commentators point out that the phrase "public interest" is too vague. See e.g. Davies, *The Public Law*, *supra* note 123 (describing public interest as "nebulous" at 66); Ann McDonald, "In the Public Interest: Judicial Review of Local Government" (1983) 9 Queens LJ 62 (commenting that public interest is a "fairly vague and controversial concept" at 100); Freeman, "Public Law Norms", *supra* note 81(describing public interest as a "notoriously ill-defined term" at 1303).

[342] Ferguson, *supra* note 147 at 942–1005.

understands bureaucratic decisions as "the product of interest group pressure brought to bear on bureaucrats"[343] seeking all sorts of personal rewards. Public choice theory assumes that relatively unconstrained front-line decision makers will not miss the chance to capitalize on discretionary authority in their own interests.[344] In Canada, however, the extreme cases of self-dealing and corruption in public procurement are relatively rare. More often, actors of privatization seek administrative convenience by curtailing the procedures that are necessary to protect the best economic interests of taxpayers.[345]

Despite the laudable goals of the prevailing accountability design, it is not difficult to notice that the resulting regulation of government contracts suffers from a lack of application to separate privatization programs.[346] Indeed, governments across Canada engage private contractors in the provision of many public services: from waste collection and road repair to the administration of welfare and social services. Due to

---

[343] Freeman, "The Private Role", *supra* note 124 at 561.

[344] For an overview of public choice theory see Symposium, (1988) 74 Va L Rev 167; Public choice theory has been abundantly criticized in legal and economic scholarship, see e.g. Michael D Wright, "A Critique of the Public Choice Theory Case for Privatization: Rhetoric and Reality" (1993) 25:1 Ottawa L Rev 1 (arguing that public choice theory provides poor justification for privatization of public services); Nicholas Mercuro & Steven G Medema, *Economics and the Law: From Posner to Postmodernism* (Princeton, NJ: Princeton University Press, 2006) (criticizing public choice theory for denying the possibility that government officials seek to act for common good at 163); Jerry L Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven, CT: Yale University Press, 1997) (pointing to legislation that cannot be entirely explained from the standpoint of public choice theory at 124-130).

[345] Greene, *supra* note 156 at 63.

[346] Emanuelli, *supra* note 143 at 1452–1463.

the diversity of privatization projects, many commentators suggest adjusting a one-size-fits-all accountability structure to separate privatization contexts. For example, Lester Salamon argues that "the nitty-gritty" of actual program implementation should guide the choice of accountability design[347] and offers "the law-and-economics-inspired 'choice of governing instruments' model"[348] for different privatization projects.

Similarly, Paul Emanuelli talks about the need to account for: "(1) the distinct challenges faced when contracting with specific industries; (2) the specific objectives of specific projects; and (3) the flexibility that is often required to ensure an effective outcome."[349] Against this backdrop

> [t]op-tier procurement organizations should implement proactive procurement measures aimed at striking the appropriate balance between centralization and decentralization by creating an appropriate framework of rules and tools to support front-line staff, subject-matter experts and government departments in the tactical exercise of case-specific decision-making.[350]

Jody Freeman also encourages governments to analyze the needs of particular institutions to prescribe effective accountability mechanisms for privatized public functions.[351] However, she maintains that prior to reforming the accountability design

---

[347] Lester M Salamon, "The New Governance and the Tools of Public Action: An Introduction" (2001) 28 Fordham Urb LJ 1611 at 1621.

[348] Macdonald, "Call-Centre Government", *supra* note 145 at 456.

[349] Emanuelli, *supra* note 143 at 1458.

[350] *Ibid* at 978–979.

[351] Jody Freeman, "Private Parties, Public Functions and the New Administrative Law," in David Dyzenhaus, ed, *Recrafting the Rule of Law: The Limits of the Legal Order* 333 at 368 (Oxford, UK: Hart Publishing, 1999).

it is necessary to understand what types of privatization projects require special attention of policy-makers, and, potentially, greater regulation.[352] This is required not only to save scarce regulatory resources, but also to appease the economists who tend to prefer market structures to government-sanctioned accountability norms.[353]

Having examined a host of privatization projects in the United States, Freeman suggests that the greatest challenges to the familiar accountability frameworks arise when privatization disrupts society's fundamental values, such as freedom, justice, equality, and fairness.[354] Usually, this happens when governments privatize the delivery of complex social or human services.[355] These services include welfare, social assistance, education, health care, incarceration, and others.[356] When governments privatize these services, they tend to extend additional legislative or regulatory requirements to private service providers in order to mitigate the possible negative effects of privatization for the end users of services (see Chapter III *infra* for an overview of legal mechanisms that constrain private actors).

B. Grounds for Rethinking the Regulatory Design Due to the Privatization of Courts and Registry Management Services

[352] Freeman, "Public Law Norms", *supra* note 81 at 1291.

[353] Economists writing about instruments of governance share the premise about the relative efficiency of the market in governing private actors and give preference to competition as promoting system-wide results, see Howlett & Ramesh, *supra* note 31.

[354] Freeman, "Public Law Norms", *supra* note 81 at 1291.

[355] *Ibid.*

[356] *Ibid.*

It is impossible to provide an exhaustive list of services which, when privatized, should alert legislators or regulators. Indeed, "one person's routine service might be crucially important to another."[357] The extent and the mode of state intervention into privatized activities are determined by a variety of factors, such as the nature of a privatized service, past experiences in dealing with similar privatization projects, political influences, public pressures, and even personal preferences of policy-makers.[358]

Thus, the question remains whether courts and registry management services can be considered important enough to attract special regulation in response to privatization. At first glance, it may seem that these services are rather routine and "hard to get excited about,"[359] especially when compared to adjudication. While adjudication has a direct impact on the rights and obligations of persons, court support services focus on matters of indoor management or purely administrative tasks. Indeed, due to the supposed absence of direct connections between judicial and administrative tasks, governments for a long time dismissed judicial participation in court administration as superfluous.

Historically, the work of courthouses across Canada was organized in a way to insulate the judiciary from the need to deal with the matters of court management.[360]

---

[357] *Ibid* at 1345.

[358] Howlett & Ramesh, *supra* note 31 at 13.

[359] Freeman, "Public Law Norms", *supra* note 81 at 1346.

[360] Pamela Ryder-Lahey & Peter Solomon, "The Development and Role of the Court Administrator in Canada" (2008) 1:1 Intl J Court Admin 31.

Professional court administrators had a sweeping authority not only to deliver court support services but also to determine what constitutes a quality service.[361] This form of organization of courts' work was based on the assumption that the judiciary should focus almost exclusively on the performance of the judicial function. The administrative personnel protected judges from participating in minute issues and helped them focus on adjudicating disputes. Pamela Ryder-Lahey and Peter Solomon observe that court administration reforms that took place across the country in the late 1960s were akin to the management reforms in hospitals:

> The emergence of the court administrator in Canada was tied to the movement to unify and streamline provincial courts that began in the late 1960s and reflected a realization that courts had fallen behind the rest of government in the process of administrative modernization. For example, at one time doctors administered hospitals, but as medically trained specialists many did not have the administrative skills needed to run a large and complex organization. Only in the 1960s was the job of running hospital transferred to hospital administrators, and then only because of agreement that persons trained in administration would run hospitals better than doctors, who should concentrate on treating the sick.[362]

It is noteworthy that over the years many commentators expressed their reservations about this strict bifurcation of functions between the judiciary and the administrative personnel. For example, Australian Professor Ian Scott noted that this approach to court administration is "useful in some respects but unsatisfactory in others."[363] On the one hand, it confirms the intuitive notion that court administration is

---

[361] *Ibid* at 36.

[362] *Ibid* at 31.

[363] IR Scott, "The Future of Judicial Administration" in Garrie J Moloney, ed, *Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive* (Canberra: Australian Institute of Judicial Administration Inc., 1986) 73 at 75–76.

not the exclusive province of the judiciary. Other actors of court administration, such as public administrators and organization and management experts may offer useful advice on the matters of court management.[364] On the other hand, Scott warned against implementing the bifurcation of administrative and judicial functions in practice because "even basic 'housekeeping' functions can affect the performance of judicial functions."[365] In other words, there is no way to "distinguish between the actual performance of the [judicial] function...and the existence of some other standing in relation to it (e.g. seeing that it is done by others, or being responsible for determining how a function should be discharged)."[366]

Similarly, in *Valente*,[367] the Supreme Court of Canada held that a number of administrative tasks performed by court management services may directly influence adjudication, and, therefore, cannot be regarded simply as matters of indoor management. Such tasks include: assigning judges to cases, determining the sittings of the court and court lists, allocating courtrooms, and directing administrative staff involved in the provision of these functions.[368] Later, in *Généreux*, the Supreme Court confirmed that because some tasks bear directly on the exercise of the judicial function, the principle of judicial independence requires that the judiciary controls the performance of such tasks:

---

[364] *Ibid* at 77.

[365] *Ibid* at 76.

[366] *Ibid*.

[367] *Valente, supra* note 166.

[368] *Ibid* at 709.

> it is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution.[369]

In both *Valente* and *Généreux*, the Supreme Court noted that the catalogue of administrative functions that may have a direct influence on the exercise of the judicial function remains open-ended. Moreover, in *MacKeigan v Hickman*,[370] the Supreme Court emphasized that the essential components of judicial independence – security of tenure, financial security, and administrative independence - were not "an exhaustive codification of the elements necessary for judicial independence" [371] and that "the conditions themselves may vary and evolve with time and circumstances."[372] Similarly, in 2010, Justice Moir of the Supreme Court of Nova Scotia concluded that *Valente* merely provides us with some handy examples of administrative functions that may affect the performance of the judicial function.[373] A judge should first and foremost consider whether a particular administrative function affects "directly and immediately ... the exercise of the judicial function"[374] and should be "free to accept

---

[369] *R v Généreux*, [1992] 1 SCR 259 at 286.

[370] *MacKeigan v Hickman*, [1989] 2 SCR 796.

[371] *Ibid* at para 56.

[372] *Ibid*; See also Margarida Garcia & Richard Dubé, "L'évolution récente du concept d'indépendance judiciaire et les menaces internes à la détermination de la peine juste" (2019) 64:3 McGill LJ 535 (discussing the development of the concept of judicial independence in the decisions of the Supreme Court of Canada at 542-546).

[373] *National Bank of Canada v Smith*, [2016] 216 NSSC 246 at para 36.

[374] *Ibid* at para 61.

more control"[375] over administrative issues if it is necessary to ensure the institutional independence of the judiciary.

1. Judicial Control over Case Flow Management

Among the administrative functions listed in *Valente* and subsequent cases, courts pay particular attention to the power of the Chief Justices to direct administrative staff helping them perform their case flow management duties, such as assigning judges to cases, determining the sittings of the court and court lists, and allocating courtrooms.

The administrative staff providing case flow management assistance wears two hats - that of a public servants and that of an officer of the court.[376] On the one hand, as public servants, they are part of the executive branch of government. As a rule, they are subordinate to provincial attorney-general departments or ministries and are bound by laws, regulations, and policies that govern public service.[377] On the other hand, as officers of the court, administrative staff must report to judges regarding the performance of a broad set of case flow management functions that relate to the adjudication of disputes. This special status of courts' administrative personnel

[375] *Ibid* at para 23.

[376] Pierre-E. Audet, *Les officiers de justice des origines de la colonie à nos jours* (Montréal: Wilson & Lafleur, 1986) at 220.

[377] *Ibid.*; Ryder-Lahey & Solomon, *supra* note 360 at 34.

sometimes results in jurisdictional conflicts between the judiciary and the executive branch.[378]

In *NAPE v Newfoundland & Labrador (Minister of Justice)*,[379] the Supreme Court of Newfoundland and Labrador determined that it was not necessary "to attempt to define the outer parameters of administrative independence [of the judiciary] as it relates to the direction and control of court staff"[380] and to define the personnel covered by that principle through specific legislative provisions. Instead, the province should adhere to the principle under which "all personnel working in the courts...no matter what their function or job description, are, in law, officers of the court."[381] This principle applies even if "the actual job description of a particular staff person does not include what one would expect would be performed by what was traditionally understood as an officer of the court ... [because] there is nobody else left in the court system ... who falls outside." [382] Moreover, the court confirmed that "the right to direct and control the administrative support provided by court staff of necessity falls under the protective umbrella of judicial independence"[383] and that "[a]nything that impinges on

[378] Audet, *supra* note 376 at 220.

[379] *NAPE v Newfoundland & Labrador (Minister of Justice)*, [2004] 2004 NLSCTD 54 at para 128 [*NAPE*].

[380] *Ibid* at para 128.

[381] *Ibid* at para 93

[382] *Ibid*.

[383] *Ibid* at para 127.

the ability of administrative staff to support the judiciary in the performance of those functions in itself will amount to interference with administrative independence."[384]

As was mentioned in Chapter I above, in some provinces, the right of the judiciary to direct the administrative personnel providing case flow management services is reflected in the texts of the MOUs concluded between the Attorneys General and the Chief Justices. These MOUs distinguish between "judicial administration" and "court administration." "Court administration" refers to "the management and direction of matters... assigned to the Attorney General by law,"[385] such as:

> the provision of financial, audit and other administrative and corporate support services to the Office of the Chief Justice, in accordance with government policy;
>
> the provision of human resource services, including benefits administration, advice and consultation regarding classification, recruitment and employee relations matters for Judicial Staff;
>
> the provision of resources for Information Systems and information support services, including repair and replacement of hardware and software when appropriate, in consultation with the Chief Justice;[386]

"Judicial Administration," on the other hand, refers to "the management and direction of matters related to judicial functions."[387] It includes "the scheduling and adjudication of proceedings in the Court, and all other matters undertaken by the

---

[384] *Ibid*.

[385] *MOU Alberta*, *supra* note 188, s 3.8; *MOU BC, supra* note 191, s 3.6.

[386] *MOU Alberta*, *supra* note 188, ss 5.3.1.3. - 5.3.1.5.

[387] *Ibid*, s 3.18.

judiciary as assigned by law or set out in ... [the] Memorandum of Understanding."[388] Judicial administration duties are performed by judicial staff and court administration falls within the jurisdiction of court administration staff. At the same time, MOUs acknowledge that these strict jurisdictional lines are in some cases impractical. Therefore, when court staff is engaged in the performance of case flow management functions they work under the direction of the Chief Justice.[389]

At the federal level, the *CAS Act* provides that the Chief Justices of the Federal Courts "are responsible for the judicial functions of their courts."[390] All "[o]fficers, clerks and employees of the Service shall act at the direction of a chief justice in matters that are assigned by law to the judiciary."[391] When these persons are "assigned to or present in a courtroom,"[392] they "shall act at the direction of the judge presiding over proceedings in the courtroom while the court is in session."[393]

2. Judicial Control over Case Flow Management and General Powers of Court in Quebec

Canadian commentators sometimes invoke the concept of inherent jurisdiction or inherent power of courts to support judicial claims for greater autonomy in matters

[388] *MOU Alberta*, *supra* note 188, s 3.18; *MOU BC, supra* note 191, s 3.12.

[389] *MOU Alberta*, *supra* note 188, ss 5.1.1. and 5.1.1.4.

[390] *CAS Act, supra* note 111, s 8 (1).

[391] *Ibid*, s 8 (3).

[392] *Ibid*, s 8 (4).

[393] *Ibid.*

of court administration, including greater control over courts and registry management services.[394] Frequently used in the United States, this concept

> encompasses those powers sometimes said to arise from the nature of the court...but more often thought to be powers implied from strict functional necessity...Historically, [the US Supreme Court] has viewed this particular power as 'essential to the administration of justice', and 'absolutely essential' for the functioning of the judiciary.[395]

In the United States, state courts resorted to the concept of inherent powers to assert judicial control over a range of administrative matters, including: "the hiring and firing of employees (registrars, secretaries, stenographers, ushers, research officers and so on), the maintenance of adequate premises for judicial functions and their upkeep, ... the purchase of equipment and services (telephone system, furniture and carpets, air conditioners, tape recorders, elevators, calendars and so on)."[396]

Unlike American courts, courts in Canada do not invoke inherent jurisdiction to establish control over administrative matters that may have a direct and immediate impact on the exercise of the judicial function. However, in Quebec, the courts referred to a similar concept of the general powers of court of law to require court administrators to provide ushers in courtrooms,[397] maintain judges' secretaries in their positions,[398] and even keep judges' parking places at a set price.[399] The judgments in

---

[394] CJC, *Alternative Models*, *supra* note 114 at 42-46.

[395] *Eash v Riggins Trucking Inc*, 757 F (2d) 557 at 562-563 (3d Cir 1985).

[396] CJC, *Alternative Models*, *supra* note 114 at 45.

[397] *Shatilla v Shatilla*, [1982] CA 511; *Gold v Quebec (AG)*, [1986] RJQ 2924.

[398] *Poirier v Québec*, [1994] RJQ 2299.

[399] *Bisson v Québec*, [1993] RJQ 2581.

these cases were rendered on the basis of article 46 of the old *Code of Civil Procedure* which read as follows:

> The courts and the judges have all the powers necessary for the exercise of their jurisdiction. They may, in the cases brought before them, even of their own motion, pronounce orders or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to cover cases where no specific remedy is provided by law.[400]

Although the court decisions in Quebec were made based on the interpretation of the old *Code of Civil Procedure*, the Canadian Judicial Council expressed an opinion that the Quebec judiciary could have also relied on the principle of administrative independence to substantiate the validity of their claims.[401]

3. Judicial Control over Case Management

Another administrative function performed by the courts and registry management services, which is of particular importance to the judiciary, is case management assistance. Unlike case flow management that refers to the administration of cases through the justice system, case management refers to the administration of individual cases.[402] Effective and efficient case management is one of the main ways of reducing delays in access to criminal and civil justice. In an often-cited passage

[400] *Code of Civil Procedure*, CQLR c C-25, art 46.

[401] CJC, *Alternative Models*, *supra* note 114 at 46.

[402] Canada, Senate, *Delaying Justice*, *supra* note 1 at 6.

from *Hryniak v Mauldin*,[403] Justice Karakatsanis stated the necessity of case management reforms to ensure timely and affordable access to civil justice:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.[404]

Many provinces have implemented rules that embrace the principle of procedural proportionality mentioned by the Supreme Court. These rules, in particular, encourage judges to spearhead effective case management.[405] For example, in Ontario, the *Rules of Civil Procedure* establish that "the court shall make orders and give directions that are proportionate to the importance and complexity of the issues and the amount involved in the proceeding."[406] In British Columbia, the objective of the *Rules of the Supreme Court* is "to secure the just, speedy and inexpensive determination of every proceeding on its merits"[407] which "includes, so far as is practicable, conducting the proceeding in ways that are proportionate to (a) the amount involved in the proceeding, (b) the importance of the issues in dispute, and (c) the complexity of the proceeding."[408] Case management occurs on a case-by-case basis pursuant to the Practice Direction adopted by the Supreme Court of British Columbia

---

[403] *Hryniak v Mauldin,* 2014 SCC 7.

[404] *Ibid* at paras 1- 2.

[405] College of Trial Lawyers, *Working Smarter*, *supra* note 1 at 19.

[406] RRO 1990, Reg 194, r 1.08.

[407] BC Reg 168/2009, r 1-3 (1).

[408] *Ibid,* r 1-3 (2).

in 2010.[409] Similarly, the *Code of Civil Procedure* of Quebec[410] entrusts judges with the responsibility to ensure that proceedings are proportionate to the outcome sought in terms of time and money, both for the parties and for the justice system as a whole. Particularly, s 18 of the *Code* provides that judges must "observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice."[411]

Similarly, discussing the management of criminal cases in *Jordan*,[412] the Supreme Court recognized that "[t]rial judges should make reasonable efforts to control and manage the conduct of trials"[413] to ensure that all persons charged with a criminal offence are tried within a reasonable time. This implies, among other things, that judges should unleash the potential of case management tools that are available to them under the *Criminal Code*. For example, Part XVIII.1 of the *Code* provides a case management judge with powers to establish schedules, impose deadlines on the

[409] British Columbia, The Supreme Court of British Columbia, *Practice Direction: Case Planning and Judicial Management of Actions*, PD-4, (1 July 2010).

[410] *Code of Civil Procedure*, CQLR c C-25.01.

[411] *Ibid.*

[412] *Jordan*, *supra* note 10.

[413] *Ibid* at para 139.

parties, and to decide preliminary issues, such as *Charter* arguments, disclosure motions, and the admissibility of evidence.[414]

Effective and efficient case management, entrusted to the judiciary under the aforementioned laws and rules, is not feasible without competent assistance of the CRMS employees. Habitually, the registry personnel are responsible for processing, recording, and directing the flow of all documents filed by parties in a case, recording all steps and events during the life of a case, and communicating procedural decision made by a judge to the parties in accordance with priorities determined by a judge. Thus, registry personnel work in close collaboration with individual judges.

The power of the judiciary to direct the administrative personnel providing case management services was not directly addressed by the Supreme Court in its administrative independence jurisprudence. This power, however, follows from the principle that the judiciary should control administrative matters related to the adjudication of disputes.[415]

4. Judicial Control over Documents and Information

The final administrative function performed by the courts and registry management services which is of importance to the judiciary is classifying, storing, and providing access to different types of documents and information generated by courts. Although there is no uniform definition of different categories of such

[414] *Criminal Code*, RSC 1985, c C-46, s 551.1.

[415] *Valente, supra* note 166 at 708

documents and information, the following classification developed by the CJC has been gaining traction in courts across the country.[416]

a. Case File

A case file contains the documents and information about a single court proceeding or a number of related court proceedings that have all been assigned the same case file number.[417] Generally, the information contained in a case file should be accessible only to the parties, the judge, and judicial personnel.[418] The court record, however, is the component of the case file that is generally accessible to the public. According to the SCC's policy on access to court records, "court record" includes "any document, correspondence, electronic communication, memorandum or note created or received by the SCC for the purpose of the processing of a judicial proceeding before the Court."[419] A court record usually consists of "a) case files; b) dockets; c) minute books; d) calendars of hearings; e) case indexes; f) registers of actions; and g) records of the proceedings in any form."[420]

---

[416] See e.g. Canadian Judicial Council, *Court Information Management Policy Framework to Accommodate the Digital Environment*, by Jo Sherman (Ottawa: Canadian Judicial Council, 2013) [CJC, *Information Management Policy*].

[417] *Ibid* at 34.

[418] *Ibid*.

[419] Supreme Court of Canada, *Policy for Access to Supreme Court of Canada Court Records* (Ottawa: Supreme Court of Canada, 2015), s 4, online: < https://scc-csc.ca/case-dossier/rec-doc/pol-eng.aspx>.

[420] Canadian Judicial Council, *Model Policy for Access to Court Records in Canada* (Ottawa: Canadian Judicial Council, 2005), s 1.3.3, online: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf> [CJC, *Model Policy for Access*].

In *Attorney General of Nova Scotia v MacIntyre*, the Supreme Court recognized that "every court has a supervisory and protecting power over its own records."[421] This means, in particular, that "access [to records] can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose."[422] In *MacIntyre*, the Supreme Court did not specify the constitutional foundation for the aforementioned supervisory power of courts. However, the Order of the Information and Privacy Commissioner of Ontario regarding the request to disclose statistics maintained by the department of the Attorney General on behalf of the Ontario Court of Justice makes it clear that a supervisory and protecting power of court over its own records flows from the principle of judicial independence. This power is instrumental in protecting the administrative independence of the judiciary against the encroachments of the executive branch of government:

> Canadian jurisprudence is very clear that any provincial statutory authority to carry out the ministry's duty for the administration of justice and courts administration must be exercised within the context of constitutionally protected judicial independence, including court control over court records and documents. Any suggestion that ministry staff exercising their core function in support of the judiciary might be interpreted to compromise the institutional independence of the judiciary would have grave consequences for the ministry and the administration of the court system in the province.[423]

---

[421] *Nova Scotia (AG) v MacIntyre*, [1982] 1 SCR 175 at 189 [*MacIntyre*]; The supervisory power of court over its own records was later confirmed by the Supreme Court in *Vickery v Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 SCR 671.

[422] *MacIntyre*, *supra* note 421 at 189.

[423] Ontario Information and Privacy Commissioner, *Order P-2739* (4 December 2008) at 15; See also *Ontario (AG) v Ontario (Information & Privacy Commissioner)*, 2011 ONSC 172; Roland Durand, "Les archives judiciaires et le juge :

The scope of the supervisory and protecting power of courts over their records has been subject to much research and discussion. On the one hand, there is some degree of consensus among judges and scholars that considerations of accountability, transparency, and the open courts principle create a presumption in favour of public access to court records.[424] On the other hand, this presumption can be rebutted in juvenile cases and family matters, to protect third parties, and limit the disclosure of confidential commercial information.[425] Therefore, the open courts principle does not detract from the supervisory and protecting power of courts over their records. Instead,

---

l'indépendance de la magistrature et la conservation de la mémoire des cours"(1991) 22:4 Archives 49 (pointing out that the institutional independence of courts ensures courts' custody over judicial archives at 50) .

[424] See e.g. Beverley McLachlin, "Courts, Transparency and Public Confidence – To the Better Administration of Justice", (2003) 8:1 Deakin Law Review 1 (Openness signifies that "court records and documents are available for public examination"); Peter A Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information" (2004) 79:1 Wash L Rev 307. See also Lynn E Sudbeck, "Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence— An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records" (2006) 51:1 SDL Rev 8; Natalie Gomez-Velez, "Internet Access to Court Records: Balancing Public Access and Privacy" (2005) 51:3 Loy L Rev 365; Andrew D Goldstein, "Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation" (2006) 81:2 Chicago-Kent L Rev 375; Kristen M Blankley, "Are Public Records Too Public? Why Personally Identifying Information Should Be Removed from Both Online and Print Versions of Court Documents" (2004) 65:2 Ohio St LJ 413.

[425] Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011) 56:2 McGill LJ 289 at 307; See also Nicolas Vermeys, "Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-examine Our Fundamental Values" in Karim Benyekhlef et al, eds, *eAccess to Justice* (University of Ottawa Press, 2016) 123; Jane Bailey & Jacquelyn Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2017) 48:1 Ottawa L Rev 147.

it serves as a useful guidance against which to assess the desirability of imposing limitations on disclosure of some categories of information.[426]

b. Court Operations Information and Judicial Office Information

The second category of documents and information which is generated by courts is court operations information and judicial office information. Court operations information includes listings of court proceedings, court calendars, court staff HR matters, facilities management, IT infrastructure management, statistics, and security.[427] Judicial office information includes judicial staff HR matters, judicial assignment information, statistics, and court policies.[428] Although the collection and storage of court operations information and judicial office information may fall within the jurisdiction of the executive branch, both categories of information cannot be made public unless expressly authorized so by the judiciary.[429]

c. Judicial Information

According to the classification of documents and information developed by the CJC, judicial information is the most sensitive category of information generated by courts. It "is created by judges, including judicial officers such as masters, registrars, and prothonotaries, and judicial staff, including any employees or contractors who work on behalf of judges and whose work includes the handling of judicial

---

[426] *Ontario (AG) v Ontario (Information & Privacy Commissioner)*, 2011 ONSC 172.

[427] CJC, *Information Management Policy*, *supra* note 416 at 66.

[428] *Ibid*.

[429] *Ibid.*

information, such as executive officers, law clerks, law students, judicial clerks or assistants and judicial secretaries."[430] The CJC distinguishes between three main types of judicial information – individual (work product created by separate staff lawyers, law clerks, and judicial officers), general (shared statistical information, research materials, professional development information), and personal (not associated with any particular case or adjudicative function).[431] All three sub-categories of judicial information should never be disclosed to third parties unless expressly authorized by the judiciary.[432]

5. Implications for Privatization Projects

Drawing on the above conducted analysis of court decisions, CJC policies, and MOUs, one can identify two reasons why the judiciary pays special attention to the courts and registry management services. First, the judicial ability to control a host of administrative matters and functions related to the adjudication of disputes is essential for the judiciary's substantive institutional independence from the executive branch. This conclusion directly follows from the aforementioned series of cases – the decisions of the Supreme Court in *Valente* and *MacIntyre*, more recent decisions of provincial courts in *NAPE v Newfoundland & Labrador (Minister of Justice)*, *National Bank of Canada v*

[430] *Ibid* at 32.

[431] *Ibid* at 68.

[432] *Ibid* (suggesting that "some Judicial Information may, at the discretion of the judge or through the application of court protocols and procedures, be effectively deposited onto a Case File or a Court Record" at 31).

Smith - affirming the power of the judiciary over administrative personnel and court records.

Importantly, the judicial ability to control administrative matters related to the adjudication of disputes is instrumental to the judiciary's independence not only from the executive branch but also from other third parties. As stipulated by the Supreme Court in *R v Généreux,* it is unacceptable that an external force "such as business or corporate interests or other pressure groups"[433] interferes "in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists."[434]

Second, the quality of courts and registry management services has direct implications for the adjudication of disputes (or, as formulated by the Supreme Court in *Valente*, "the exercise of [the] judicial function"[435]). In this respect, for example, Carl Baar notes that quality administrative support plays a particularly important role in the work of some courts, such as bail, traffic, family, and sentence appeal courts.[436] In these proceedings, "managing the flow of high-volume cases is intimately connected to their outcome and to the use of the court itself"[437] and "the impartiality of ... adjudication is

---

[433] *Généreux*, *supra* note 369 at 284.

[434] *Ibid* at 286.

[435] *Valente, supra* note 166 at 708.

[436] Carl Baar, "Judicial Independence and Judicial Administration: The Case of Provincial Court Judges Independence and Impartiality: The Case of Provincial Court Judges" (1997) 9 Const Forum Const 114 at 115.

[437] *Ibid* at 118.

directly linked not only to the judge, but to the timing of the proceedings."[438] For example, "[a] long wait for a small matter makes the cost prohibitive. The extra days before reaching a bail hearing preempt the judicial function itself."[439]

The above identified interconnectedness of the principle of judicial independence, adjudication of disputes, and courts and registry management services leaves no doubt that the delegation of these services to private actors should be taken seriously by the governments. Particularly, this means that governments need to somehow reconsider their centralised regulations, policies, and procurement arrangements to address the identified interconnectedness of judicial and administrative functions. As we will see in Chapter III below, this policy reform may take shape of the decentralization of procurement activities. However, the focus on decentralization assumes that we already know what quality standards for private CRMS instruments should be at the core of the proposed policy reform. The goal of the next sections of this Chapter is to determine these standards and to evaluate the feasibility of their implementation in private CRMS instruments.

C. Quality Standards

Apart from a number of policies issued by the CJC on separate issues, such as the security of information generated by courts and the use of cloud services, there is no comprehensive regulatory, legislative or soft law guidance regarding what

[438] *Ibid.*

[439] *Ibid.*

constitutes quality CRMS instruments.[440] For example, it was mentioned above that one of the indicators of quality courts and registry management services is that the judiciary can control an open-ended list of administrative matters and functions related to the adjudication of disputes. We know the implications of this requirement in the context of the provision of services by the administrative personnel inside a courthouse. The judiciary controls the scheduling of cases, the assignment of judges to cases, the storage and disclosure of documents, and case management by giving respective directions to the administrative personnel. But what does the requirement of judicial control over courts and registry management services mean in the context of digitized and automated CRMS instruments that make most administrative personnel redundant? It appears that answering this question requires translating the above identified administrative requirements flowing from the principle of judicial independence into technical specifications of CRMS instruments.

1. Quality Specifications regarding Documents and Information

As was described above, the principle of judicial independence requires that the judiciary exercise some degree of control over different types of documents and

[440] There are, however, some policies that help procurement departments determine the functional capabilities of CRMS instruments, see e.g. The Joint Technology Committee (JTC) of the Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM) and the National Center for State Courts (NCSC), *JTC Resource Bulletin: Introduction to the Next-Generation Court Technology Standards Application Component Model* (29 November 2017), online: <https://www.ncsc.org/__data/assets/pdf_file/0034/18979/nextgen-court-component-model-2017-12-08-final.pdf>.

information generated by courts. The extent of this control should be tailored in accordance with the category of documents and information in question. However, the implementation of CRMS instruments results in courts sharing their information and document management responsibilities with private service providers. From a technological standpoint, this means that electronic copies of court files may reside in multiple replicated locations - such as private servers and cloud - external to courts or government departments. Jo Sherman refers to this shift in information management paradigm as "fragmentation, distribution and duplication"[441]of information. While this shared jurisdiction over documents and information may lead to the economies of scale and scope, it also poses significant risks. First, in the case of a litigation between a private provider of CRMS instruments and a third party, an unscrupulous CRMS provider can access sensitive judicial information relating to the case and use this information to undermine the integrity of the judicial process.[442] Second, if a CRMS instrument fails to properly classify and store different categories of information and documents generated by courts, confidential or private information, such as court operations information, judicial office information, and judicial information may be released to the public.

Finally, open access to digitized court records stored in a CRMS database may facilitate judicial analytics – "the specific application of analytics technologies to judges

[441] CJC, *Information Management Policy*, *supra* note 416 at 5.

[442] Chapter IV *infra* discusses mechanisms for managing such conflicts of interest.

and judicial decision-making."[443] One of the outcomes of judicial analytics is the problematic practice of "judge profiling," which involves "the monitoring and prediction of the behavior of judges."[444]

It appears that the quality specifications of CRMS instruments should somehow address these concerns resulting from the digitization of judicial documents and processes. The following sections provide more details on how this quality requirement may be executed.

a. Access to Court Records

As was mentioned above, all documents, data, and information contained in CRMS instruments fall under two broad categories: publicly available and exempt from public dissemination. Publicly available information usually consists of a court record: "a) case files; b) dockets; c) minute books; d) calendars of hearings; e) case indexes; f) registers of actions; and g) records of the proceedings in any form."[445] This

---

[443] Jena McGill & Amy Salyzyn, "Judging by Numbers: How Will Judicial Analytics Impact the Justice System and Its Stakeholders?" (2020) Ottawa Faculty of Law Working Paper No 2020/13 at 4.

[444] Bart Jan van Ettekoven & Corien Prins, "Data Analysis, Artificial Intelligence and the Judiciary System" in Vanessa Mak, Eric Tjong Tjin Tai & Anna Berlee, eds., *Research Handbook in Data Science and Law* (Edward Elgar Publishing Ltd., 2018) 425 at 427.

[445] Canadian Judicial Council, *Model Policy for Access to Court Records in Canada* (Ottawa: Canadian Judicial Council, 2005), s 1.3.3, online: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf> [CJC, *Model Policy for Access*].

information is kept in open access to ensure public scrutiny of courts and, ultimately, to maintain the legitimacy of the justice system in the eyes of the public.[446]

1) Risks Posed by Predictive Analytics Tools

In the case of implementation of privately developed CRMS instruments, there is a good chance that court records will be stored in a publicly accessible CRMS database. While centralized storage of court records promotes the aforementioned principles of courts' openness and transparency, it also facilitates the production of predictive analytics tools that discern decision-making patterns of individual judges. For example, it is now possible to use natural language processing ("NLP") to model how certain judges decide particular matters or address certain arguments and to compare the behavior of different judges.[447] It is difficult to generalize about the use of NLP tools because sometimes they lead to beneficial results and other times they do not.[448]

On the one hand, these tools offer an opportunity to "examine whether a statistically significant difference exists in judicial decisions made with respect to minorities, women and other...groups."[449] One could also compare the performance of civil and criminal judges with respect to the same type of decisions in different regions

[446] *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at paras 10-11.

[447] Frank Pasquale & Glyn Cashwell, "Prediction, persuasion, and the jurisprudence of behaviourism" (2018) 68 UTLJ 63 at 67-72.

[448] For a detailed overview of the advantages and disadvantages of using judicial analytics see McGill & Salyzyn, *supra* note 443.

[449] Rabinovich-Einy, *supra* note 30 at 18.

of the country. From the public policy perspective, these types of analyses may be beneficial because they help policy-makers and the judiciary to better understand the systemic problems of the justice system and develop "guidance on how to generate increased predictability and equality in its decisions."[450] Similarly, the judiciary can order judicial analytics reports for educational and training purposes. In such cases, this information may be reported exclusively to a chief justice or to a judicial body.[451]

On the other hand, the Supreme Court's analysis in *Nova Scotia(AG) v MacIntyre*[452] suggests that the use of NLP-based tools may undermine the underlying goals of the open courts principle. First, NLP will not advance the goal of public scrutiny of courts, if these tools are used exclusively by lawyers with the objective to win cases for their clients. Second, the use of court records to produce predictive analytics tools without judicial consent may violate the courts' "supervisory and protecting power"[453] over their records. Finally, any preconceived notions about the decision-making patterns of individual judges may undermine public confidence in judicial impartiality. As Justice LeDain wrote in *Valente*, "[w]ithout that confidence

[450] *Ibid.*

[451] Riddell, Hausegger & Hennigar, *supra* note 170 at 420; See also Richard Devlin & Adam Dodek, "'Fighting Words': Regulating judges in Canada" in Richard Devlin & Adam Dodek, eds., *Regulating Judges: Beyond Independence and Accountability* (Massachusetts: Edwards Elgar Publishing, 2016) 76 at 94.

[452] *MacIntyre, supra* note 421.

[453] *Ibid* at 189.

the system cannot command the respect and acceptance that are essential to its effective operation."[454]

In light of the identified risks, recently, France became one of the first countries to limit the use of this type of predictive analytics tools. Article 33 of the *Justice Reform Act*[455] banned individuals and companies from using published court decisions in order to gather information about the behaviour of individual judges.[456] In Canada, the use of predictive analytics tools to discern decision-making patterns of judges is not yet subject to direct regulation and the prospects of such regulation are questionable.[457]

2) Implications for CRMS Quality Specifications

Even if "a French-style ban is not normatively defensible in Canada given our protection of freedom of expression and our strong open courts principle,"[458] it is still useful to consider how to ensure the quality of data stored in a CRMS database. As Jena McGill and Amy Salyzyn note, poor quality of data can lead to wrong results about judicial behavior:

---

[454] *Valente*, *supra* note 166 at 689.

[455] Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1), JO, 24 March 2019.

[456] Simon Taylor, "French Data Analytics Law Won't Stop Analytics" (7 June 2019) (arguing that the restrictions could be worked around relatively easily by tweaking algorithms), online: LegalWeek <https://www.law.com/legal-week/2019/06/07/french-data-analytics-law-wont-stop-analytics/>.

[457] McGill & Salyzyn, *supra* note 443 at 2.

[458] *Ibid.*

> For example, even if a case is reported, it may contain a typo or misspelling which results in it being improperly included or excluded from a certain data set. Inconsistencies can also generate problems … a judge's name may be written in a variety of different formats, even in related decisions from the same court that are published within short time frame. These types of issues within a data set can affect the quality of the insights generated by an analytics tool relying on that set.[459]

In order to minimize the risks posed by the inaccurate reporting of information, it appears reasonable to require the providers of CRMS instruments to ensure the quality of information published in their databases. They, for example, should proofread reported cases and adhere to courts' guidelines on document formats and spelling. Similar requirements are included in the requests for proposals for transcription, reporting, and registrar services for the Federal Courts.[460]

b. Information Protected from Public Access

As was noted above, some information generated by courts and stored in a CRMS database is protected from public access altogether. It may include, for example, juvenile cases, sealed indictments, documents containing trade secrets, communications between judges, parties, and counsel.[461] The presence of information other than the court record should also have direct implications for the quality standards applicable to private CRMS solutions. However, one of the biggest concerns expressed by the CJC is that government-wide policies regarding information security

---

[459] *Ibid* at 7-8 [footnote omitted].

[460] Canada, Courts Administration Service, *Request for Proposal: Court Transcription, Court Reporting and Court Registrar Services for the Province of British Columbia* (23 June 2016) at 31-32.

[461] Greenwood & Bockweg, *supra* note 25 at 6.

fail to: (1) distinguish between the types of information generated and stored by courts and (2) assign different legal status to different types of such information.[462] To afford adequate protections to different categories of information stored by courts, the CJC suggested adopting the aforementioned classification of documents and information that includes case file, court operations information and judicial office information, and judicial information.

d. Implications for CRMS Quality Specifications

What implications does this taxonomy of information have for CRMS quality specifications? It is submitted that any CRMS database that contains information generated by courts and judges should be designed in a way that draws clear barriers between the types of information that may and may not be released to different categories of users. This design can be achieved by introducing multi-level access rights depending on each individual's legal status (judge, clerk, attorney), role in a particular case (judge, plaintiff, defense, prosecutor, counsel), group permissions (general public, judicial staff, attorneys of record), and special permissions. Access should also be restricted based on case and docket entries and types of documents.

At the same time, a judge, or a person acting on her or his behalf, should be able to transfer information between these categories within a CRMS database. For example, information that falls under the most restricted category of "judicial

[462] See e.g. CJC, *Model Policy for Access*, *supra* note 445; Canadian Judicial Council, *Blueprint for the Security of Judicial Information*, by Martin Felsky (Ottawa: Canadian Judicial Council, 2013) at 11; CJC, *Information Management Policy*, *supra* note 416.

information," such as "correspondence between a judge and the parties," [463] "draft orders exchanged between the judge and the parties,"[464] can be transferred by a judge into a case file. In this instance, the policies applicable to that category of court information - including broader access rights - should supersede more restrictive rules applicable to judicial information.[465]

Finally, due to the growing popularity of cloud services, the security, privacy, and integrity of any information exempt from public access and stored in the cloud should be expressly addressed in any contract for CRMS instruments.[466] While the considerations of efficiency may weigh in favour of government or province-wide cloud services,[467] the inclusion of information exempt from public access into this shared infrastructure "raises concerns with respect to maintaining judicial independence—the separation of the judiciary from the executive and legislative branches of government."[468] It appears that in order to maintain judicial control over information exempt from public dissemination, requirements regarding governance, security, and location of information stored in the cloud should be included in the design of CRMS instruments. For example, if federal or provincial governments want to ensure that information exempt from public dissemination is stored on servers

[463] *Ibid* at 33.

[464] *Ibid*.

[465] *Ibid.*

[466] Canadian Judicial Council, *Blueprint for the Security of Judicial Information*, by Martin Felsky (Ottawa: Canadian Judicial Council, 2018), Policy 6a [CJC, *Blueprint*].

[467] Bailey & Burkell, *supra* note 69 at 263.

[468] *Ibid.*

located in Canada, they can exclude foreign companies from federal and provincial bids for CRMS instruments or require that any foreign provider of CRMS instruments stores information in Canada. Invoking such requirements, however, may not only undermine competition but also violate federal and provincial obligations under procurement agreements (see Chapter IV, Part A for a general discussion of the possible negative implications of public norms for competition).[469]

2. Quality Specifications regarding Judicial Intervention

The previous section identified the CRMS quality standards that follow from the digitization of court documents and processes. These standards include the quality of information contained in the court record, barriers between the types of stored information, and requirements regarding the housing of information exempt from public access. However, the implementation of CRMS instruments leads not only to the digitization of court documents and communications but also to the automation of many processes that had previously been performed by administrative personnel. For example, a recently published request for proposals for an Integrated Case Management System anticipates that the use of technology will "[i]ncrease efficiency by eliminating redundant and manual processes through automated workflow, enterprise content management and e-filing."[470] Another description claims that a

[469] Nicolas Vermeys, Julie M Gauthier & Sarit Mizrahi, *Étude sur les incidences juridiques de l'utilisation de l'infonuagique par le gouvernement du Québec* (Montreal: Cyberjustice Laboratory, 2014) at 129-131.

[470] State of North Carolina, Administrative Office of the Courts, *Request for Proposal*, *supra* note 26, s 7.2.

CRMS instrument will "drive [the] escalation process when timelines are not adhered to,"[471] send automatic reminders and notifications to the participants in the proceedings, schedule court rooms and hearings,[472] automatically assign cases,[473] and force users to adhere to standardized forms, templates, interfaces, and timelines.[474] As such, the automation of procedures seeks to ensure that tasks are performed quickly and efficiently.[475]

Despite the perceived efficiency gains resulting from automation, these technical characteristics of CRMS instruments may be problematic in light of the principle of judicial independence. As was mentioned above, this principle requires that no third party, including the private providers of CRMS instruments, can encroach upon the judiciary's powers to control the performance of a number of administrative tasks related to the adjudication of disputes – scheduling of cases, assignment of judges to cases, case management (which also includes judges' inherent rights to prioritize their workloads[476] and decide at their own pace any pre-trial or mid-trial procedural issues[477]).

---

[471] Senate, *Submission by RedMane*, *supra* note 27 at 4.

[472] *Ibid.*

[473] The Council of Europe's European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems: Efficiency and Quality of Justice* (Thematic report: Use of information technology in European Courts CEPEJ STUDIES No. 26, 2018) at 27, online: <http://www.coe.int/T/dghl/cooperation/cepej/evaluation/default_2016_en.asp>.

[474] Contini & Cordella, *supra* note 29.

[475] Rabinovich-Einy, *supra* note 30.

[476] *R v K (K.G.)*, 2017 MBQB 96 at para 51.

[477] *R v Mamouni*, 2017 ABCA 347 at para 91.

Of course, this opposition of efficiency and the principle of judicial independence does not suggest that the automation of CRMS represents a zero-sum game. In other words, the judiciary, the government departments, and private service providers might find ways to execute automation in a way that allows them to strike a balance among competing values.[478] For example, one can argue that to comply with the principle of judicial independence, automated CRMS instruments should embrace flexibility inherent in the case and case flow management powers of the judiciary. This implies that CRMS instruments should include several scenarios that allow the judiciary to extend, expedite and, when necessary, avoid certain procedural actions altogether. Essentially, the design of CRMS instruments should be contingent upon a judge's decision to override automatically generated dates, times, deadlines, forms, and docket entries and edit prepopulated forms. The right to override the decisions of an automated CRMS system should be incorporated by design as a baseline requirement.

These proposals to introduce human intervention into automated processes are not unprecedented: they have been gaining traction in policies on automated decision-making and automated processing of personal data. In the context of automated decision-making, the federal government's recent directive[479] provides that any technology that either assists or replaces the judgement of human decision-makers

[478] Arthur Cockfield & Jason Pridmore, "A Synthetic Theory of Law and Technology" (2007) 8 Minn J L Sci & Tech 475 at 494; Rabinovich-Einy, *supra* note 30.

[479] Government of Canada, *Directive on Automated Decision-Making* (Ottawa: Treasury Board of Canada, 2019), online: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>.

should allow for human intervention at least in those contexts when the decisions will likely have irreversible or difficult to reverse impacts on individuals, communities, and ecosystems.[480]

Similarly, the European Union guarantees the right to human intervention in decisions based on automated processing of personal data. Article 22(3) of the *GDPR*, which addresses safeguards against automated decision-making, provides that "the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision."[481]

To clarify, the aforementioned provisions on human intervention in the decisions of automated decision-making systems do not apply to the CRMS instruments directly. Although these instruments provide important support functions, they do not replace a human decision-maker. The judiciary continues to make decisions affecting the rights and obligations of persons. For the purposes of this thesis, however, the right to

---

[480] *Ibid*, Appendix B.

[481] Recital 71 of the *GDPR* also states that a person who has been subject to automated decision-making "should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention", see *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ, L 119/1 [*GDPR*]; See also Sandra Wachter, Brent Mittelstadt & Luciano Floridi, "Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation" (2017) 7:2 International Data Privacy Law 76 (arguing that the right to obtain human intervention should not be confused with the right to explanation of automated decision-making).

human intervention in the decisions made by automated systems is important to keep in mind because it confirms a notion that preprogrammed instruments need to be adapted to contexts and circumstances.[482]

3. Result: Judicial Independence by Design

The previous sections of this thesis have sought to translate the requirements of the principle of judicial independence into quality specifications of a digitized and automated CRMS instrument. In essence, the resulting specifications on data and information management and human intervention in automated procedures seek to incorporate the principle of judicial independence by design into privately developed CRMS instruments.[483] Perhaps such specifications will be met with skepticism by public purchasers and the private sector delivering CRMS instruments. While the latter ones may oppose the idea of having to develop and comply with additional specifications, the former ones may lack time and resources to monitor private compliance. These anticipated objections are serious and they will be addressed in Chapter IV, Part A of this thesis.

---

[482] To bridge the gap between automation and court performance, the European experts suggested shifting to more contextualized solutions, see CEPEJ, *European Judicial Systems*, *supra* note 473 ("When computerisation is not associated with a specific organisation, it appears, as such, to be less efficient...the integration of IT in an organisational process of performance, coupled with a policy of change management involving all stakeholders could be a success factor…Other external parameters, sometimes intrinsic to each ... entity, can play a major role and must therefore be considered" at 66).

[483] For a similar suggestion see Sossin, "Boldly Going", *supra* note 145 (arguing that any bureaucratic design that operationalizes our fundamental values should be evaluated against the principles of public law, such as reasonableness and fairness at 414).

At the same time, it is noteworthy that design-based solutions that confront technological threats to privacy, data integrity, and democracy have gained traction with scholars and policymakers. For example, the notion of privacy by design ("PbD"), coined by Ann Cavoukian, denotes the philosophy and methodology for embedding privacy into the design specifications of various technologies.[484] Modern design-based solutions to privacy focus on concepts such as "data minimization, security, information policy, and disclosure of information practices."[485] This proactive approach to privacy has crystallized in the privacy-by-design movement, which seeks to build "the principles of Fair Information Practices (FTPs) into the design, operation and management of information processing technologies and systems."[486] Later, Woodrow Hartzog and Frederic Stutzman developed a notion of obscurity by design that complements PbD by affording special protections to the users of social software and social technology. According to Hartzog and Stutzman, information is obscure online if it exists in a context missing one or more key factors that are essential to discovery or comprehension: "(1) search visibility, (2) unprotected access, (3) identification, and (4) clarity."[487]

---

[484] Ann Cavouklian, *Privacy by Design: The 7 Foundational Principles Implementation and Mapping of Fair Information Practices* (May 2010) at 1, online: < https://www.ipc.on.ca/wp-content/uploads/resources/pbd-implement-7found-principles.pdf>.

[485] Woodrow Hartzog & Frederic Stutzman, "Obscurity by Design" (2013) 88 Wash L Rev 385 at 390.

[486] *Ibid* at 395-402.

[487] *Ibid* at 397.

In the United States, voting machine failures fueled policy proposals on design-based standards that private machine manufacturers must follow to protect the integrity of elections, and by extension, democracy. The main goal of these standards is to ensure that the technology and software used in all voting machines is transparent and available for inspection in cases of contested elections. The most prominent proposals, for example, advocate some form of voter-verified paper trails,[488] which would require attached printers to generate a contemporaneous paper record for voters to review,[489] and open-source technology.[490]

For the purposes of this thesis, these proposals are important to consider because they confirm two things. First, design-based specifications play an important role in protecting public values. In order for design-based specifications to achieve their promise, they are mainstreamed through legislation, regulation, standard industry practices, and internal corporate norms. Second, designed-based specifications may have direct implications for public procurement – the allocation of funds for privatization projects and the content of bid solicitation documents and resulting contract provisions. For example, Jennifer Nou proposed amending the *Help America*

---

[488] Clifford A Jones, "Out of Guatemala?: Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election" (2006) 5 Election LJ 121 at 136; Daniel P Tokaji, "The Paperless Chase: Electronic Voting and Democratic Values" (2005) 73 Fordham L Rev 1711 at 1738; National Conference of State Legislatures, *Voting System Paper Trail Requirements* (27 June 2019) (an overview of state-by-state paper trail requirements), online: <https://www.ncsl.org/research/elections-and-campaigns/voting-system-paper-trail-requirements.aspx>

[489] Tokaji, *supra* note 488 at 1780.

[490] Joseph Lorenzo Hall, *Transparency and Access to Source Code in Electronic Voting* 12-13 (2006) at 1, online: <http://www.josephhall.org/papers/jhall_evt06.pdf>.

Vote Act of 2002,[491] to condition the allocation of federal election funds on the specifications of state contracts for voting machines.[492] In the EU, the European Data Protection Supervisor issued the Preliminary Opinion on Privacy by Design that recommended integrating appropriate PbD requirements in public procurement at the level of the EU and in the member states.[493] Article 25 of the *General Data Protection Regulation* that came into force in 2018 explicitly incorporated PbD and privacy by default[494] principles into the European data protection regime and mandated data controllers be able to demonstrate compliance with them.[495] This implies, that any technology that is used for processing personal data, whether it is developed by data controllers in-house or procured from third parties must incorporate specifications that meet PbD requirements.

In the context of CRMS privatization projects, embracing judicial independence by design requires a departure from a results-oriented approach to the modernization of the justice system that has been central to previous projects. In this regard, a special task force appointed by the Minister of Government Services of Ontario in the aftermath of the failed IJP project recommended paying greater attention to the design stages of complex modernization projects:

---

[491] 42 USC §§15.301-15.545 (2002).

[492] Nou, *supra* note 121.

[493] EU, European Data Protection Supervisor, *Preliminary Opinion 5/2018 on Privacy by Design* (31 May 2018) at 21.

[494] *Ibid* ("Privacy by default" means that personal data is automatically protected without any action from the data subject at 4).

[495] *GDPR*, *supra* note 481.

> In the spirit of keeping projects and project steps small, we recommend that Ontario explore a practice that British Columbia is currently testing. When developing an IT solution, British Columbia separates the design phase from the build phase. It uses two or more private sector vendors to design a solution in partnership with the government. The province then uses the best design as the basis for the build phase of the project. It would be interesting to pursue this approach - and also to have the ability to pay two or more vendors for a solution design; pick the best one; and, sign a vendor (and not necessarily the firm with the winning design) to a contract for the build or implementation phase of the project.[496]

Conclusion to Chapter II

This Chapter described the main arguments against the existing regulation of contracts for court support services. Studies of government contracting establish that the greatest challenges to the familiar accountability frameworks arise when governments privatize the delivery of complex, social or human services, such as welfare, social assistance, education, health care, incarceration, and others. In these instances of privatization, contracting departments need to pay careful attention to how they formulate quality standards and monitor contract performance.

While at first, it may seem that the privatization of court support services is a relatively simple endeavour, the interconnectedness of judicial and administrative functions places nuanced requirements on public purchasers. Specifically, the privatization of courts and registry management services requires that governments depart from a familiar regulatory framework for public procurement that applies to courts. This Chapter laid the foundation for reforming private-public cooperation in court administration by sketching out the quality standards for digitized and automated

[496] Ontario, *Report of Ontario's Special Task Force on the Management of Large-Scale Information & Information Technology Projects* (July 2005) at 26, online: <https://collections.ola.org/mon/11000/254912.pdf>.

court support services. Particularly, it was argued that the technical specifications of CRMS instruments need to comply with a number of specific requirements flowing from the principle of judicial independence. These requirements are, of course, only a first step.

The privatization of court support services raises other questions. For example, what is the nature of the relationship between the members of the judiciary, the judicial staff, and the outsourced service providers? As was mentioned in the Introduction to the thesis, one of the features of privatization of court support services is that the judiciary is not directly involved in the contracting process. Although technologies are purchased for the courts, the procurement duties fall to the executive branch of government. Moreover, resulting, *pro forma* government contracts discussed in Chapter I are concluded between a public purchaser - the Department of the Attorney General, the Minister of Justice, the Courts Administration Service, or the Department of Public Works - and a private service provider. Such contracts formalize the relationship between the contracting parties by establishing their respective rights and obligations. These *pro forma* contracts, however, fail to frame the relationship between the judiciary, the judicial staff, and private providers of goods and services.

The focus on the relationships between a purchasing department and a private party misses the lessons of studies on court management. These studies demonstrate that internally integrated and hierarchical administrative structures reporting to the Chief Justice are required to improve court performance and transform courts from organizations of professionals into professional organisations. The latter ones are "characterised by a more vertical and central command of all administrative

processes."[497] This organizational structure promotes innovation, workflow integration, and delegation of tasks.[498]

The absence of clearly defined relationships between the Chief Justices and judges, administrative personnel, and the private contractors complicates the coordination of work inside the courthouse. Charles Sabel and William Simone call this dilemma of informal systems "the problem of tacit knowledge" and identify several issues flowing from it: "tacit premises are harder to test, and efficacy cannot be rigorously assessed across sites unless they are fully articulated..., it is more difficult to achieve accountability without explicit practices and measures of performance."[499] In addition, it is unclear if outside contractors successfully internalize legal and ethical obligations attached to the status of court support staff.[500]

Recognizing that there is much left to do, successful implementation of judicial independence by design examined in this Chapter will be a significant step towards protecting judicial independence in an era of privatization.

---

[497] Tin Bunjevac, "Court Governance in Context: Beyond Independence" (2011) 4:1 Intl J Court Admin 35 at 39.

[498] *Ibid.*; see also Charles F Sabel & William H Simon, "Democratic Experimentalism" in Christopher L Tomlins & Justin Desautels-Stein, eds, *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 477 (describing the difficulty of dealing with tacit premises in organizations at 483).

[499] Sabel & Simon, *supra* note 498 at 483.

[500] For an overview of these obligations see Audet, *supra* note 376 at 137 – 148.

Chapter III. Mechanisms for the Enforcement of Quality Standards

This Chapter considers which mechanisms are better suited to ensure that the private actors comply with the requirements of judicial independence by design identified in Chapter II above. It argues that the most popular compliance mechanisms flowing from public law and torts - extending constitutional obligations to private activities, regulating private actors and their activities, and the principle of non-delegable duty - have substantial limitations in the context of privatization of court support services. This Chapter then demonstrates that, absent effective public law and tort mechanisms, the competitive procurement process and the resulting contract can be avenues for enforcing judicial independence by design in the privatized segment of court administration.

A. The Limitations of Traditional Mechanisms

As was mentioned in Chapter II, commentators concerned about the privatization of important social and human services invoke good reasons for extending additional accountability requirements to private service providers. If relatively unaccountable private actors make decisions that affect both individual rights and broader public interests, it seems reasonable to suggest that these actors should be subject to accountability controls traditionally applicable only to government.[501] From the perspective of public law, the most popular additional mechanisms for constraining private power are extending constitutional obligations to

[501] Sossin, "Boldly Going", *supra* note 145; Freeman "The Private Role", *supra* note 124 at 591.

private activities and legislating private actors and private activities.[502] Torts, to a lesser extent, also may indirectly constrain private actors. However, the question remains whether these seemingly thorough legal mechanisms have limitations in the context of privatization of court support services.

1. Extending the *Charter* to Private Actors and Private Activities

Generally, the *Charter* binds governments, rather than private actors. Section 32 (1) of the *Charter* provides that it applies:

> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province [503]

In *McKinney*, Justice LaForest noted that

> [t]he exclusion of private activity from the *Charter*...was a deliberate choice that must be respected... Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom.[504]

However, as privatization efforts were gaining traction across the country, the Supreme Court considered whether certain private actors and private activities should

[502] Mullan & Ceddia, *supra* note 145.

[503] *Charter*, *supra* note 7; See also *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 [*Dolphin Delivery*]; *McKinney v University of Guelph*, [1990] 3 SCR 229 [*McKinney*].

[504] *McKinney, supra* note 503 at 262.

be subject to the *Charter*. In *Eldridge*,[505] the Supreme Court set out the basic approach to determining whether the *Charter* applies to entities other than the federal Parliament, provincial legislatures and federal and provincial governments.

First of all, an entity can be part of "government," either by its very nature (for example, municipalities and their actions or government officials)[506] or due to extensive governmental control over its activities. Specifically, an entity may be considered part of the apparatus of government when its activities are subject to "routine or regular control" by the government. Each situation must be examined on its facts to determine the level, degree, and purpose of control exercised by government.[507] In determining whether an entity, such as a hospital, a university or a transit authority, is a "government entity" that attracts the application of the *Charter* it is important to distinguish between "routine or regular control" by government over the day-to-day operations of an entity and "ultimate or extraordinary control."[508] The *Charter* applies to the former type of control. The instances of "routine or regular control" can manifest themselves in the following features: the administrators of an entity are chosen, appointed and removable at pleasure by government[509] and government may at all times by law direct the operations of an entity.[510] However,

---

[505] *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 [*Eldridge*].

[506] *Godbout v Longueuil (City)*, [1997] 3 SCR 844; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038.

[507] *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 [*Douglas*].

[508] *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 [*Stoffman*].

[509] *Douglas*, *supra* note 507.

[510] *Ibid.*

"routine or regular control" does not follow from high levels of government funding,[511]extensive government regulation of the entity's activities,[512] or government appointment of administrators for a fixed term, through a mechanism designed to ensure the balanced representation of the groups and organizations.[513]

Second, even if an entity is not part of government, the *Charter* might apply to certain actions of that entity. Persons or entities that implement a specific government policy or program must generally comply with the *Charter* in performing the relevant activity but not in respect of their non-governmental or private activities. In these instances, the analysis hinges on whether an action performed by a private entity has a meaningful connection to the government.[514] A private activity becomes that of the government when it furthers a specific "statutory scheme or government program."[515] For example, in *Eldridge*, the Supreme Court extended the reach of the *Charter* to a private clinic that was providing the state sponsored medical services. Justice La Forest, writing for the Court, noted that

> [t]here are myriad public or quasipublic institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy.[516]

---

[511] *McKinney, supra* note 503.

[512] *Ibid.*

[513] *Harrison v University of British Columbia*, [1990] 3 SCR 451; *Stoffman*, *supra* note 508.

[514] *Eldridge*, *supra* note 505 at 655.

[515] *Ibid* at 662.

[516] *Ibid* at 643.

Accordingly, he concluded that "a private entity may be subject to the *Charter* in respect of certain inherently governmental actions."[517] Therefore, the fact that the provider of health services in that case was a private clinic did not alter the fact that its decisions were "governmental actions."

Despite the attempts of the Supreme Court to define the instances of a broader application of the *Charter*, the review of cases demonstrates that the reach of constitutional norms in the face of privatization remains unclear. Generally, "[t]he factors that might serve to ground a finding that an activity engaged in by a private entity is 'governmental' in nature do not readily admit of any *a priori* elucidation."[518] That a private entity is performing a public function "will not be sufficient to bring it within the purview of 'government'"[519] and will not require the application of the *Charter*. In *Eldridge*, the Supreme Court maintained that an entity should perform a governmental act - the implementation of a specific statutory scheme or a government program.[520] In this case "the hospital had been delegated the statutory authority to decide which services should receive social insurance funding, which was a public act as it was in furtherance of a specific government objective."[521] These cases must be distinguished from those in which non-governmental actors do not deliver a specific

---

[517] *Ibid* at 655.

[518] *Ibid* at 659.

[519] *McKinney, supra* note 503 ("[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32" at 269).

[520] *Eldridge*, *supra* note 505 at 662.

[521] Gavin W Anderson, "Social Democracy and the Limits of Rights Constitutionalism" (2004) 17:1 Can JL & Jur 31 at 44 [footnote omitted].

governmental program or policy, but rather perform "generic state functions" such as offering post-secondary education, health-care, and adjudication.[522] Also, the fact that a certain policy developed by a private actor received governmental approval does not warrant the application of the *Charter* to these policies. A "more direct and a more precisely- defined connection"[523] must be shown.

The limitations on the *Charter* application are justified for several reasons. As Justice LaForest notes in *McKinney*, government power is perceived by the Supreme Court as more dangerous than private power. This is because government has the legitimate authority to enact formal rules that can encroach upon persons' rights and freedoms.[524] Although a full analysis of this argument is beyond the scope of this thesis, suffice it to say that today private and non-governmental actors – transnational corporations, providers of healthcare, social, and educational services - wield substantial power over the exercise of rights and freedoms established under the *Charter*. However, as David Mullan and Antonella Ceddia point out, the shifts in the

---

[522] See e.g. Linda McKay-Panos, "Universities and Freedom of Expression: When Should the Charter Apply?" (2016) 5 CJHR 59 at 70–71; Noura Karazivan, "L'application de la Charte canadienne des droits et libertés par les valeurs : l'article 32", in Errol Mendes & Stéphane Beaulac, eds, *Charte canadienne des droits et libertés*, 5th ed (LexisNexis, 2013) 241 at 266-267; Anderson, *supra* note 521 ("a future court following Eldridge would gain little guidance on how to answer questions such as how we differentiate between generic state functions, like health and education, where the Charter does not automatically apply, and specific governmental objectives, like providing medically necessary services, where it does" at 49); David Beatty, "Canadian Constitutional Law in a Nutshell" (1997) 36 Alta L Rev 605–629 at 621 (commenting that the courts perform an inherently governmental function and that common law should be subject to the *Charter* contrary to the decision of the Supreme Court in *Dolphin Delivery*).

[523] *Dolphin Delivery, supra* note 503, para 36.

[524] *McKinney, supra* note 503.

constitutional doctrine in light of these developments are contingent on the Supreme Court's desire to "espous[e] the philosophy that the Canadian Charter of Rights and Freedoms is more of a social charter than has generally been supposed."[525] This, however, may be problematic due to countervailing economic considerations. As Justice LaForest noted in *McKinney*, the application of constitutional norms to a broader set of activities could "strangle the operation of society and...'diminish the area of freedom within which individuals can act'."[526] Along these lines, some scholars of privatization also maintain that the application of public law norms to private activities may undermine the economic benefits of privatization or discourage private actors from conducting business with the government.[527]

Regardless of the arguments that support or detract from extending the *Charter* to a broader set of actors and activities, the focus of constitutional law is on regulating the privatization of public services delivered directly to citizens, such as healthcare and education. The focus of this thesis, however, is on indirect public services that support internal operations of an institution. Although Chapter II above demonstrated that the distinction between direct (adjudication) and indirect (court administration) services is at best unclear, the constitutional law is generally irrelevant when significant components of private activity are directed not at interacting with citizens, but at improving efficiency within the government. For example, in *Stoffman,* the

---

[525] Mullan & Ceddia, *supra* note 145 at 200.

[526] *McKinney, supra* note 503.

[527] Jack Beermann, "Administrative-Law-Like Obligations on Private[ized] Entities" (2001) 49 UCLA L Rev 1717 at 1736; Donahue, *The Privatization Decision, supra* note 82 at 128-129.

Supreme Court came to the conclusion that the *Charter* did not apply to a hospital's mandatory retirement rules because they were a matter of internal hospital management.[528] In *Eldridge*, by contrast, the hospital was said to be carrying out an "inherently governmental action" in providing the treatments and services specified by the Medical Services Commission directly to the citizens.[529] Ian Harden observes that "many indirect services have always been procured through contract and close analogies can be drawn with the 'core business' approach of the private sector, in which companies focus on the activity they can do best and buy support services from outside suppliers."[530]

It follows from these decisions of the Supreme Court that the *Charter* requirements on judicial independence do not apply directly to the providers of CRMS instruments. However, these decisions confirm an intuitive notion that the governments should carefully consider how to organize the delegation of public services to private actors to ensure that privatization does not undermine the work of public institutions.

2. Regulating Private Actors and Their Activities

Despite the limits on the application of the *Charter*, there exists a myriad of alternative avenues to extend specific requirements to private actors that provide public services. In fact, in some instances, privatization leads to "little or no change in

[528] Stoffman, *supra* note 508 at

[529] Beatty, *supra* note 522 at 616.

[530] Harden, *supra* note 125 at xi.

the application of relevant legal liability or accountability principles"[531] because legislators and regulators may require private actors to disclose information publicly, hold public hearings and take public comment, justify their decisions with reasons that would be subject to judicial review. Alternatively, legislators might minimize the discretion of private contractors through direct regulation: by specifying performance procedures or dictating substantive contractual terms, including requirements for regular and detailed reporting, licenses, permits or approvals from local authorities or government departments.[532] They may also demand extensive monitoring of private contractors by specialized regulators for the purposes of cost and quality control or fraud prevention and provide for supplementary contract enforcement mechanisms by granting third parties rights of action.[533]

For example, Ontario's *Ministry of Correctional Services Act*[534] states that contractors and their employees "shall, for the purposes of the Act, be deemed to be

[531] Mullan & Ceddia, *supra* note 145 at 211.

[532] The following non-exhaustive list offers examples of major sectors that are subject to specific regulations and of their regulators: Aviation (Transport Canada); Consumer credit (Financial Consumer Agency of Canada and the Office of the Superintendent of Financial Institutions (Canada)); Education and childcare (various provincial bodies); Energy (National Energy Board and various provincial bodies); Food (Canadian Food Inspection Agency); Gambling (various provincial bodies); Healthcare (various provincial bodies); Pensions (Office of the Superintendent of Financial Institutions (Canada) and various provincial bodies); Rail (Transport Canada); Road transport (Transport Canada and various provincial bodies); Water and sewage (Environment Canada), see John P Beardwood et al, *supra* note 129.

[533] Freeman, "Public Law Norms", *supra* note 81 at 1315–1317.

[534] *Ministry of Correctional Services Act*, RSO 1990, c M-22.

employed in the administration of the Act"[535] and that any contractors employed by the Correctional Services of the province fall within the jurisdiction of the provincial Ombudsman.[536] As Mullan and Ceddia point out, "the particular form of legislative model that Ontario has chosen to permit the use of private correctional facilities clearly bespeaks their operation under the dictates of specific government policies."[537] In Alberta, when the government decided to privatize the sale of liquor, the relevant legislation extended to private liquor stores the rules that applied to the sale of liquor for consumption on premises by bars, clubs, and restaurants. Under these rules, private sellers may be subject to stricter accountability for the delivery of substandard services and products than state-run stores.[538]

When utilities like water, gas, and electricity are privatized, legislators demand that private contractors ensure "universal access, comply with antidiscrimination norms, and put procedures in place to prevent arbitrariness in termination decisions."[539] Tony Prosser notes that in the United Kingdom the privatization of such utilities as gas, rail, telecommunications, and electricity led to the emergence of a new

[535] *Ibid*, s 57.1.

[536] *Ibid,* s. 57.7.

[537] Mullan & Ceddia, *supra* note 145 at 216.

[538] *Ibid* at 212.

[539] Freeman, "Public Law Norms", *supra* note 81 at 1346.

area of law called "public service law"[540] that consists of a set of obligations to "make basic public services available to all citizens without discrimination."[541]

In Ontario, when the government decided to privatize the provision of electricity, the regulatory framework also became more complex. A crown corporation called the Independent Electricity System Operator Independent (formerly known as the Independent Electricity Market Operator) was created to control competition and ensure continuity of services. The Electrical Safety Authority was established to set and ensure safety standards and issue certificates.[542] Moreover, the privatization legislation was guided by the common-law principle that imposes upon the utility the duty to make services available on a non-discriminatory basis.[543] Section 1 of the *Electricity Act* contains evidence of continuing government responsibility for the overall functioning of the industry. It promises "to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service."[544] To ensure private compliance with public law principles, the Ontario Energy Board can review pricing and assess practices of various private and public actors who participate in the provision of services.[545]

---

[540] Tony Prosser, "Public Service Law: Privatization's Unexpected Offspring" (2000) 63:4 Law and Contemp Probls 63.

[541] *Ibid* at 63–64.

[542] Mullan & Ceddia, *supra* note 145 at 214.

[543] Prosser, *supra* note 540.

[544] *Electricity Act*, 1998, SO 1998, c 15, s 1 (f).

[545] *Ontario Energy Board Act,* 1998, SO 1998, c. 15, Sched. B.

Due to the increasing role of private actors in the provision of court support services, constraining private power over courts with direct legislation and regulation seems tempting. Legislators may amend federal and provincial laws granting broad court administration powers to relevant departments and ministers and require that the contracting out of court support services is carried out in accordance with the requirements of the principle of judicial independence. This implies, among other things, that private service providers will be required to respect the powers of the Chief Justices and judges over court administration flowing from the common law,[546] the MOUs that were mentioned in Chapter I above, and any other relevant norms.

At the same time, increased regulatory burden may have a similar effect on private actors as the application of constitutional norms – it may stifle private operations[547] and even discourage the private sector from doing business with the government in the first place. [548] In this regard, economic analysis of different instruments of governance suggests that even though direct regulation may best protect the end users of a privatized service, the efficiency of privatization programs will suffer as a result. it may negatively affect and may also be ineffective, particularly because it tends to be difficult to manage in separate privatization contexts.

---

[546] *Valente, supra* note 166 at 709.

[547] *McKinney, supra* note 503.

[548] Freeman, "Public Law Norms", *supra* note 81 (pointing out that "adherence to public law norms might be costly for private providers, and those costs might undermine the potential for efficiency gains to some extent" at 1339–1340).

Also, broadly worded statutory provisions on the application of the principle of judicial independence to private actors delivering CRMS instruments are of little help if private actors do not understand how to implement these provisions. Therefore, even if legislators were willing to introduce amendments reflecting the requirements of the principle of judicial independence in the context of automation and digitization of services, new legislative provisions would merely be a starting point for the subsequent implementation of specific quality standards that were defined in Chapter II above. Given that these standards will constantly evolve in the face of rapid technological change, legislation is not the most effective and efficient standard enforcement mechanism.[549]

Finally, it is not clear if legislators and regulators will be willing to adopt specific measures regarding CRMS instruments. Although these instruments are used increasingly frequently in court administration, they still represent "a niche technological market, unlike, for example, new technologies with broader reach, like drones or autonomous vehicles, which are much more likely to attract government attention."[550]

3. Non-Delegable Duty

The common law principle of non-delegable duty has been described as particularly pertinent in the circumstances of aggressive procurement practices of

[549] McGill & Salyzyn, *supra* note 443 (the authors make a similar point regarding the potential regulation of judicial analytics tools at 23).

[550] *Ibid.*

governments.[551] This principle originates in tort law and it has been invoked by courts to find governments liable for the negligent acts of independent contractors. It is therefore understood as a derogation from the general common law rule that provides that "an employer is not liable for harm flowing from the contractor's negligence as long as the employer was not negligent in hiring and in supervising the contractor and did not hire the contractor to do something unlawful."[552] Despite this general rule, courts recognize that if a non-delegable duty is established, an employer is not released from liability for negligent actions of an independent contractor. In other words, the work may be delegated, but the duty of care for this work rests with the government. Although the duty applies to contracting departments and does not directly constrain private actors, it might affect them indirectly, for example, through stricter quality and reporting requirements imposed by the contracting department. Therefore, it is worthwhile to say a few words about this principle in this section.

The principle of non-delegable duty limits aggressive and irresponsible outsourcing practices of government by placing upon it the responsibility for the performance of inherently governmental functions even if these functions are performed by private entities. Although the government may avoid financial liability by adding an indemnification clause in its contract with an independent contractor, legally, the government will remain the responsible and liable party for the contractor's

---

[551] Mullan & Ceddia, *supra* note 145 at 223.

[552] *Lewis (Guardian ad litem of) v British Columbia*, [1997] 3 SCR 1145 at 1171[*Lewis*]; See also Mullan & Ceddia, *supra* note 145 at 224; Kumaralingam Amirthalingam, "The Non-Delegable Duty - Some Clarifications, Some Questions Comments and Case Notes: Case Note" (2017) 29 SAcLJ 500 at 500.

negligence. However, the application of the principle has many limitations.[553] The analysis of the case law suggests that for a non-delegable duty to be recognized by the courts, at least three conditions must be met.

First, the government department's enabling statute must indicate that its duty of reasonable care cannot be satisfied by delegating the work to an independent contractor. The prohibition against delegating the duty of reasonable care can be expressed through assigning the responsibility for a certain activity to a Ministry or directly to a Minister. The general rule is that "[t]he more *precise and specific the legislative grant* is in granting paramount authority and control to the Minister, the more likely there will be agreement that a non-delegable duty may exist."[554] For example, in *Lewis*,[555] the Supreme Court found that several provisions of the *Highway Act*[556] and the *Ministry of Transportation and Highways Act*[557] ("*MTH Act*") of British Columbia assigned the authority for the repairs and maintenance of the highway to the Ministry. The *Highway Act* conferred upon the Ministry the duty to control "the construction and maintenance of every arterial highway."[558] The *MTH Act* provided that, "[t]he minister shall direct the construction, maintenance and repair"[559] of all highways. Section 14 of the *MTH Act* provided that "[t]he minister has the

[553] Mullan & Ceddia, *supra* note 145 at 231.

[554] *Ibid* at 231–232 [emphasize added].

[555] *Lewis, supra* note 552.

[556] *Highway Act*, RSBC 1979, c.167, as repealed by *Highway Act*, RSBC 1996, c188.

[557] *Ministry of Transportation and Highways Act*, RSBC 1979 c 280, as repealed by *Government Buildings Act*, RSBC 1996, c.311) [*MTH Act*].

[558] *Highway Act*, *supra* note 556, s 33 (1).

[559] *MTH Act*, *supra* note 557, s 48.

management, charge and direction of all matters in relation to the acquisition, construction, repair, maintenance, alteration, improvement and operation of ... highways."[560]

The analysis of the Supreme Court in *Lewis* raises the issue of statutory formulations. Precisely, how specific the legislative grant of authority should be? Moreover, there is a possibility that policy-makers, "recognizing that a grant of power may lead to a non-delegable duty... [may] deliberately draft underspecified statutes to forestall such a finding."[561] For example, the provisions of the *CAS Act* that establish that the Chief Administrator has all the powers necessary for the overall management and administration of court facilities[562] and for the overall management and administration of libraries[563] may not be specific enough to determine the existence of a non-delegable duty of the Chief Administrator. Similarly, the power-conferring statutes in provinces enable provincial Ministers of Justice and Attorneys General to exercise all powers necessary to administer justice in their jurisdictions.[564]

Second, even if a specific legislative grant of authority has been established, "the facts [of the case] must also give rise to a duty of care, either recognized at law or worthy of recognition at law."[565] The protection of the public interest, which is a stated

---

[560] *Ibid.*

[561] Mullan & Ceddia, *supra* note 145 at 232.

[562] *CAS Act*, *supra* note 111, s 7 (2).

[563] *Ibid*.

[564] See Chapter I *supra.*

[565] *Anns v Merton London Borough Council* [1977] UKHL 4, [1978] AC 728.

objective of most statutes, does not automatically trigger the duty of care.[566] To establish this duty, the courts will consider the context in which the government exercised its statutory authority.[567] Usually, the duty of care is salient in cases concerning public safety, such as road construction, repair, and maintenance, or "other serious consequences for the public interest."[568] Only when the duty of care has been established, the court determines whether the statute imposes a non-delegable duty on the government.

Finally, "policy reasons - including the reasonable expectations of the public in question" [569] must indicate that the duty should remain with the government. Analyzing this question involves consideration of the vulnerability of the public in question, including their lack of knowledge about the delegation of duties and their tendency to rely upon the government in certain matters, such as, for example, the maintenance of public infrastructure and utilities.[570]

Based on this analysis, it is highly unlikely that the principle of non-delegable duty applies to contracts for CRMS instruments. It appears challenging, if not impossible, to establish specific and precise legislative grants of authority under applicable statutes conferring broad court administration powers upon federal and provincial government departments. Moreover, it will be difficult to prove that the

---

[566] Mullan & Ceddia, *supra* note 145 at 233 [footnotes omitted].

[567] *Lewis, supra* note 552 at 1159.

[568] Mullan & Ceddia, *supra* note 145 at 232 [footnote omitted].

[569] *Lewis, supra* note 552 at 1159.

[570] *Ibid* at 1166.

delegated functions satisfy the criteria of public importance. While the non-delegation principle focuses on constraining the delegation of functions that may pose threats to public safety and well-being, the focus of this thesis is on indirect public services that support internal operations of public institutions.

B. Beyond the Traditional Mechanisms: The Decentralization of Procurement and the Role of Procurement Contracts

As was established in the previous section, traditional legal mechanisms are ineffective in the context of the privatization of court support services because they fail to adequately constrain the actions of private service providers. This, however, does not mean that public purchasers cannot utilize alternative methods to impose the requirement of judicial independence by design upon private actors delivering CRMS instruments. Over the years, policymakers have amassed a set of alternatives to traditional regulation – such as tax expenditures, contracts, subsidies, and public information campaigns - that allow governments to navigate the cases of increased public-private interconnectedness and fill in the gaps of public law.[571]

The government's choice of alternative instruments of governance is determined by many factors - the form of privatization (from the sell-off of public enterprises to a deregulation of an industry), the perceived effectiveness and efficiency of alternative instruments, past experiences in dealing with similar privatization projects, political

[571] Salamon, *supra* note 347; see also Macdonald, "Call-Centre Government", *supra* note 145 at 458; Hansen, *supra* note 91 at 2480.

influences, public pressures, and even personal preferences.[572] The analysis of these factors, however, is beyond the scope of this thesis. Suffice it to say that various instrument selection methodologies confirm that what was mentioned in Chapter II above: a careful design of a governance framework for a privatization project can be instrumental to its success.[573]

Because this thesis focuses exclusively on the privatization of courts and registry management services through contracting out, it is submitted that the procurement contract itself is an important alternative instrument for extending the requirement of judicial independence by design to the private providers of CRMS instruments. As will be demonstrated in the following sections, a combination of intrinsic public and private principles makes procurement contracts a suitable instrument of governance in an era of privatization of court support services.

However, using procurement contracts to advance judicial independence by design requires that we first address one of the main drawbacks of government procurement: the centralization of procurement efforts. As was mentioned in Chapter II above, a stringent, top-down approach to regulating government procurement fails to account for the distinct challenges and objectives of specific projects and precludes separate public purchasers from incorporating sector-specific requirements into their contracts.[574]

---

[572] Howlett & Ramesh, *supra* note 31 at 13.

[573] Freeman, "Public Law Norms", *supra* note 81 at 1342.

[574] Emanuelli, *supra* note 143 at 1458.

1. Centralized v Decentralized Procurement

In Canada, like in many other countries, a central issue in the debates on how to improve the system of public procurement is how much public procurement should be centralized.[575] In other words, should purchasing activities be mostly supervised and administered by one (or several) government departments or rather delegated to separate public purchasers? This issue was addressed in the findings of the *Bellamy Report*, also known as the *Toronto Computer Leasing Inquiry*:

> Most jurisdictions reviewed for this study recognize that it is neither efficient nor effective to make all purchases centrally and that the key is achieving the right balance. The typical standard in place involves a centralized purchasing authority as well as a certain amount of delegation to line departments. The central purchasing authority's responsibilities typically include:
>
> - Organization-wide purchasing policies, standards, training and certification requirements, etc.
> - Responsibility for establishing standing agreements, vendor of record arrangements, blanket contracts, procurement cards, etc.
> - Managing the procurement of goods and services over an established dollar value threshold.
> - Monitoring compliance across the organization and reporting on performance to senior management.
> - Continually analyzing the organization's business requirements and identifying opportunities for additional savings, more strategic approaches, etc.
>
> In addition to working with the central purchasing authority on centrally managed purchasing opportunities, trained/certified staff in line

[575] Olga Chiappinelli, "Decentralization and Public Procurement Performance: New Evidence from Italy" (2020) 58:2 Economic Inquiry 856 (discussing the issue of procurement decentralization in the European Union and in Italy); Meehan, Ludbrook & Mason, *supra* note 219 (discussing the factors that prevent the UK public purchasers from greater centralization of procurement activities).

> departments usually have responsibility for making purchases of particular types and below specific thresholds in-department. [576]

In general, the organisation of the procurement process at the federal and provincial levels follows the recommendations of the Report, which leads to a rather centralized system of procurement examined in Chapter I. As will be discussed in more detail in Chapter IV below, resource-strapped front-line procurement officers working in separate government departments tend to rely on centralized procurement arrangements and policies, rather than advocate for sector-specific solutions even when opportunities to incorporate these solutions may be available.

The cited passage from the *Bellamy Report* confirms that procurement centralization decisions are based on the assumptions about the economic and accountability benefits of delegating purchasing authority to one or several centralised government buyers.[577] And even though centralization may lead to positive system-wide results, its benefits are less obvious for separate procurement projects. In an era of increased private-public cooperation for the provision of many specialized and complex services, including integrated CRMS instruments, it behooves government regulators to find an appropriate balance between centralized and decentralized

---

[576] Denise E Bellamy, *Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry* (City of Toronto, September 2005), vol 2, "Good Government", Addenda, *Toronto Computer Leasing Inquiry Research Paper* (December 2003), "Procurement, Volume 1: Common Risk Areas" at xii-xiii.

[577] For example, considerations of efficiency drive the Ontario government's recent plans to create a centralized procurement system across government and the broader public sector, see Ontario, Office of the Premier, *Ontario Launching New Agency to Centralize Government Procurement* (November 16, 2020), online: <https://news.ontario.ca/en/release/59227/ontario-launching-new-agency-to-centralize-government-procurement>.

procurement. It appears that decentralized procurement should be a standard practice not only for purchases below a certain threshold but also when contracting out a department's core functions. For example, if one of the core functions of a department is court administration (as is the case of the CAS and the provincial departments of Attorney General), this department should take the leading role in conducting procurement activities and determining applicable policies and specifications for solicited goods and services. When outsourcing a department's core functions, decentralization is best explained by the fact that centralized government buyers may not have sufficient expertise and resources to meet the needs of separate government departments.

This kind of proposal is not unprecedented. Similar decentralization requirements are contained in the internal agreement on the *Division of Responsibilities between PSPC and the Department of National Defense ("DND") for the Quality Assurance of Materiel and Services*.[578] In accordance with the agreement, the DND specialists may designate any procured good or service as Military or Non-Military in procurement documents. The DND specialists are assigned overall responsibility for determining quality standards when procurement concerns the core military functions performed by the department.

Of course, suggestions about conferring greater procurement authority on separate public purchasers may be met with criticism by the proponents of the

[578] PWGSC, *Supply Manual*, *supra* note 227, s 1.1.2.2. Section B: Division of Responsibilities between PWGSC and DND for the Quality Assurance of Materiel and Services, online:< https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/annex/1/1/2/2>.

centralized accountability framework that was examined in Chapter I. This criticism will be addressed in Chapter IV below.

2. The Role of Contract in Decentralized Procurement

Most frequently, private actors get an opportunity to deliver public services on the basis of a contract entered into as a result of an open bid solicitation process. For this reason, a notion that in a somewhat decentralized system of procurement a contract can be an important vehicle for introducing sector-specific quality standards into privately delivered public services has gained momentum among procurement scholars and practitioners.[579]

From a theoretical standpoint, the proponents of using contracts to extend sector-specific requirements to private actors rely on the New Governance approach to structuring public-private relationships.[580] This approach provides that in an era of increased private-public cooperation alternatives to traditional regulation may be better equipped to deliver desired results. For example, Saule Omarova recounts that

> [t]he concept of governance in our polycentric world embodies a collaborative, cooperative enterprise of shaping social outcomes through negotiation among numerous public and private actors ... : nongovernmental organizations, business and trade associations, labor

[579] See e.g. Nou, *supra* note 121 at 770; Freeman, "The Private Role", *supra* note 124 (arguing that "[i]n an era of contracting out, it behooves administrative law scholars to pay closer attention to contract as a vehicle for the exercise of authority and as an instrument of regulation" at 549); Harden, *supra* note 125.

[580] See e.g. Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 Minn L Rev 342; Scott Burris, Michael Kempa & Clifford Shearing, "Changes in Governance: A Cross-Disciplinary Review of Current Scholarship" (2008) 41 Akron L Rev 1.

> unions, technical standard-setting bodies, professional groups, and so on.[581]

From the perspective of New Governance, the regulatory state not only seeks to control private actors but also aims to harness private ingenuity to deliver public services.[582] Hence, in many situations, governments will benefit from alternatives to traditional "command and control" regulation, "including more flexible forms of traditional regulation (such as performance-based and incentive approaches), co-regulation and self-regulation schemes, incentive and market based instruments (such as tax breaks and tradable permits) and information approaches."[583]

In an era of privatization, procurement contracts emerge as one of the most feasible alternatives to traditional regulatory mechanisms because they "encompass an important hybridization of traditionally public and private principles well-suited to mimicking market relationships through bargaining and maintaining important baselines through mandatory clauses."[584] On the one hand, a contracting process involves two autonomous parties – a contracting department and a private actor - that negotiate contractual terms in a competitive environment. From the economic standpoint, competition promotes system-wide results:

> In the standard market model, private firms provide services better than government because they must compete with each other for business, driving down prices and improving quality. Under this model, market

[581] Saule Omarova, "Wall Street as Community of Fate: Toward Financial Industry Self-Regulation" (2011) 159 U Pa L Rev 411 at 427–428 [footnote omitted].

[582] Freeman, "The Private Role", *supra* note 124 at 549.

[583] Organization of Economic Development, *Alternatives to Traditional Regulation*, by Glen Hepburn (Paris: OECD, 2006) at 4.

[584] Nou, *supra* note 121 at 770.

> accountability furthers the goals of all involved in the contracting system by promoting efficiency through competitive bidding and contract monitoring.[585]

On the other hand, this competitive process is accompanied by an exercise of public power. As was mentioned in Chapter I above, procurement contracts often force contractors to comply with requirements that stem from government's internal procurement policies and regulations that are designed to achieve a set of public goals. Rights and obligations conferred upon the parties under a contract are legal rights and they can be enforced by courts and other institutions.[586] (This thesis addresses the enforcement of contracts for court support services in Chapter IV below).

The idea that a contract can be used to buttress public values is not new. Some commentators find the origins of this idea in constitutional law, particularly, in the federal government's authority to stimulate provincial conformity to federal goals through its spending power.[587] As Sue Arrowsmith points out,

> it is accepted that the federal government cannot intervene in the areas ... given by the constitution to the provinces, by enacting regulations on these matters backed by sanctions. However, it may implement its own policies in these areas by making grants to the provincial governments subject to their complying with the desired policies, or by making agreements to the same effect directly with individuals or institutions.[588]

---

[585] Hansen, *supra* note 91 at 2470.

[586] Harden, *supra* note 125 at 3.

[587] Freeman, "Public Law Norms", *supra* note 81 at 1285-1286; Arrowsmith, "Government contracts", *supra* note 128 at 235-236; On the federal spending powers see Hoi Kong, "The Spending Power, Constitutional Interpretation and Legal Pragmatism" (2008) 34 Queens LJ 305.

[588] Arrowsmith, "Government contracts", *supra* note 128 at 235-236.

Arrowsmith observes that since the Second World War the federal exercise of the spending powers resulted in the federal government becoming more involved in the areas allocated by the *Constitution Act* to the provinces.[589] Absent constitutional limitations, the federal government has even greater freedom to constrain the discretion of private contractors who receive federal funds to deliver public services.[590]

Similarly, the previous sections of this thesis demonstrated that provincial legislators and regulators may resort to a number of mechanisms to extend public values to private service providers. Importantly, public values can guide not only the conditions of service delivery, but also the tendering process. For example, legally binding obligations regarding the tendering process arise out of the comprehensive land claim agreements between the federal government, Aboriginal groups and territorial and provincial governments. All government procurements are first reviewed against these modern treaties to provide additional opportunities for Aboriginal small and medium enterprises.[591]

However, it is less common to use government contracts to buttress public values when there is a lack of comprehensive guidance in legislation or regulation or an absence of standard government practices. In such instances, it becomes more difficult for the privatization stakeholders to reach an agreement about the underlying public

---

[589] *Ibid.*

[590] Freeman, "Public Law Norms", *supra* note 81 at 1286.

[591] Canada, House of Commons, *Modernizing Federal Procurement for Small and Medium Enterprises, Women-Owned and Indigenous Businesses: Report of the Standing Committee on Government Operations and Estimates*, 42nd Parl, 1st Sess (June 2018) at 23.

values that should guide the privatization process and determine the relationship between public values, quality standards, and expected outcomes of privatization projects. Therefore, when contracting parties start their project from scratch, referencing a contract as a mechanism for buttressing public values is not limited to the content of a resulting, legally enforceable agreement. In more complex projects, such as the procurement of integrated technological systems for courts, the consultations and negotiations stages that precede the formation of a legally binding contract become particularly important. In government contracting this is also known as the public procurement cycle (see Annex IV for a description of different stages of the procurement cycle). The next sections explain in more detail why the procurement cycle may be a successful alternative to direct regulation in the context of contracting for the provision of CRMS instruments for courts.

a. Effectiveness

New Governance scholars measure the effectiveness of different instruments of public-private cooperation by the extent to which these instruments can achieve their "intended objectives."[592] According to this characteristic, the most effective instruments of governance are the ones that always accomplish the required result. However, it may be difficult to gauge the effectiveness of different instruments.[593] As was examined in Chapter II, public purchasers often face challenges when determining the quality specifications for different services, which, in turn, complicates measuring

[592] Salamon, *supra* note 347 at 1647.

[593] *Ibid*.

the results. The identified challenges emphasize the importance of selecting an instrument of governance that combines both process-based and design-based evaluations, allows for some flexibility during the CRMS implementation process, and communicates the baseline quality standards to private actors in the clearest way possible.

From this perspective, contracts may be more effective than legislation or regulation because they allow separate government departments to communicate objectives of specific projects directly to a service provider.[594] The communication process becomes more agile because it omits complex bureaucratic procedures and connects the end users, a contracting department, and a potential supplier of services directly. In essence, contracts drive down the information costs of conducting business. Importantly, given that quality standards constantly evolve in the face of rapid technological change, contract also facilitates direct renegotiations of contractual specifications.

b. Efficiency

When choosing alternatives to traditional forms of regulation, public purchasers must ensure that these alternative instruments are not only effective but also efficient. Unlike effectiveness that focuses on achieving results, efficiency balances results against the costs of achieving them.[595] From the standpoint of public purchasers, the

[594] Emanuelli, *supra* note 143 at 1458.

[595] Salamon, *supra* note 347 at 1648.

most efficient instrument of governance is the one that obtains high-quality services at the lowest possible cost.

In government procurement, competition is the main source of efficiency.[596] Competition "denotes the desirability of awarding contracts after competitive bidding processes, in order to ensure that the best (cheapest, or best quality, or some combination of the two) bid is accepted by the public authority."[597] Conducting a competitive bidding process is often the best way to demonstrate to taxpayers and the internal government watchdogs that a public purchaser obtained the best value for money. The competition requirement is directly incorporated in the federal government's *Contracting Policy*:

> Whenever practical, an equal opportunity must be provided for all firms and individuals to compete, provided that they have, in the judgement of the contracting authority, the technical, financial and managerial competence to discharge the contract.[598]

Government contracting policies know many ways of stimulating competition for an opportunity to provide services to the public. These include using competitive procurement procedures, formulating reasonable quality standards, preventing discrimination on nationality grounds, and avoiding other protectionist policies.[599]

Canada and its provinces are parties to comprehensive trade treaties that create procurement rights and obligations for the public purchasers at different levels of

---

[596] Donahue, *The Privatization Decision, supra* note 82 at 80.

[597] Davies, *The Public Law*, *supra* note 123 at 125.

[598] Canada, *Contracting Policy*, *supra* note 86, s 4.1.3.

[599] Swick, *supra* note 85.

government.[600] In addition to international treaties, intragovernmental agreements regulate procurement within the country.[601] The main goal of these instruments is to ensure that government contracts are awarded after a competitive process which includes, as the case may be, firms from other states, provinces, and territories, as well as local firms.[602] Generally, by entering into these agreements "the government[s] can be taken to have agreed that the benefits of free trade...outweigh the benefits of protectionism."[603] For example, both the *World Trade Organization's Agreement on Government Procurement* and the *Canadian Free Trade Agreement* contain general prohibitions against discrimination in the procurement of goods and services based on the country of origin and prohibits the use of criteria that favour local goods, services and contractors.[604] Also, as part of the accountability framework under these

[600] See e.g. World Trade Organization Revised Agreement on Government Procurement (30 March 2012); Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (21 September 2017); Canada is not a party to the government procurement chapter in CUSMA that replaced NAFTA, see Canada, Treasury Board Secretariat, *Contracting Policy Notice 2020-2: Replacement of the North American Free Trade Agreement (NAFTA)* (June 30, 2020).

[601] Canadian Free Trade Agreement (1 July 2017); Atlantic Procurement Agreement (18 January 2008); Agreement on the Opening of Public Procurement for New Brunswick and Quebec (2 December 2008); Ontario-Quebec Trade and Co-Operation Agreement between Quebec and Ontario (1 October 2009).

[602] Emanuelli, *supra* note 143 at 6–7; Trepte, *supra* note 82 at 208–260.

[603] Davies, *The Public Law*, *supra* note 123 at 275-276.

[604] See e.g. World Trade Organization Revised Agreement on Government Procurement, *supra* note 600, art IV; Canadian Free Trade Agreement, *supra* note 600, art 503.5; see also Emanuelli, *supra* note 143 at 11.

agreements, contracting authorities are required to report statistics on the tendering method, the reasons for limited tendering, and the contract award details.[605]

Moreover, common law prohibits public purchasers from creating limits for competition during the procurement process. For example, the duty to avoid unfair advantage or bias (for example, through specifications and evaluation criteria) and the duty to guard against improper incumbent advantage seek to reduce barriers to entry for new bidders.[606] The federal government's *Supply Manual* provides that "[r]equirements are best defined in a manner that allows competition and ensures best value. Contracting officers may be able to suggest wording, which defines requirements in terms of operational requirements rather than using brand names or proprietary technical specifications."[607]

In government procurement, competition may also further public goals. Private actors, knowing that competition for an opportunity to provide services to the government is high, may be more willing to commit to public goals - such as accountability, non-discrimination, sustainability - to win the bid.[608] For example, in the market for court support services transcription, court reporting, and translation services are highly competitive.[609] The resulting contracts for the provision of these services include pages of standard terms and conditions including the obligation of a

---

[605] Canada, *Contracting Policy*, *supra* note 86, s 5.1.3.

[606] Emanuelli, *supra* note 143, c 7.

[607] PWGSC, *Supply Manual*, *supra* note 227, s 2.1.d.

[608] Davies, *The Public Law*, *supra* note 123 at 260.

[609] See Chapter IV *infra.*

contractor to voluntarily submit to discretionary government audit regarding the integrity and accuracy of its time recording and internal accounting system.[610]

c. Receptiveness to Private Ingenuity

As was mentioned above, the competitive procurement process plays an important role in limiting private discretion, particularly when government engages in long-term and complex privatization projects. In such cases, a winning bidder acquires a long-term monopoly on providing a service which may result in abuses of power or inadvertent, prolonged violations of contractual terms and public law norms.[611] Careful planning and contract design, therefore, may help governments mitigate these risks prior to signing a binding contract with a successful bidder.

On the other hand, a well-designed procurement process can operate not only as a constraining mechanism, but also as a means of accessing information on "desired features of the service, possibilities for quality improvements, and opportunities for cost cutting"[612] that may otherwise reside beyond the expertise of procurement officers.

---

[610] Canada, Courts Administration Service, *Request for Proposal regarding Court Reporting and Transcription Services* 5X001-14-09199 (January 2015), s 6.6 (b), online: < https://buyandsell.gc.ca/cds/public/2014/12/01/ce609498ed90d3ac30c873b993e8a72f/5x001-14-0919_-_rfp_court_reporting_transcripts_v5.pdf>.

[611] Donahue, "The Transformation of Government Work", *supra* note 92 at 58.

[612] Freeman, "Public Law Norms", *supra* note 81 at 1328–1329.

1) Consultative Approach to Contract Design

When contracting out long-term, complex services, a consultative approach to contract design may help procurement officers strike a balance between exacting quality standards and availing themselves of the creative potential of the private sector. For this reason, negotiated procurement formats, also known as negotiated requests for proposals, are becoming increasingly popular both in Canada and internationally.[613] Negotiated RFP formats have been recognized as one of the acceptable tendering formats under the *UN Model Procurement Law* since it was first enacted in 1993. The 2011 *UN Model Procurement Law* recognizes that "public institutions can meet their mandates for open, transparent procurement and value-for-money by using a varied array of procurement formats."[614]

The Canadian Free Trade Agreement, which applies to "trade, investment, and labour mobility within Canada,"[615] also introduces rules for using negotiations during a procurement process. It requires that the government discloses the intent to use a negotiation process, utilizes transparent criteria during the elimination of non-compliant bids, and treats bidders fairly during the negotiation process.[616]

---

[613] *Model Law on Procurement*, GA Res 66/95, UNCITRAL, 2011, UN Document, A/66/17, annex I, arts 49-50.

[614] Paul Emanuelli, "Demystifying Dialogue RFPs", online: <https://procurementoffice.com/demystifying-dialogue-rfps/>

[615] Canadian Free Trade Agreement, *supra* note 601, art 101.

[616] *Ibid*, art 512.

Depending on the context, a contracting department can conduct a consecutive or a concurrent NRFP. The consecutive NRFP format ranks bidders' proposals based on price and non-price factors and allows a purchasing department to negotiate a contract with the top-ranked proponent. If the parties cannot reach an agreement, the public purchaser can start negotiations with the next bidder on the list.[617] Unlike the consecutive NRFP, the concurrent NRFP allows a purchasing department to conduct parallel discussions with multiple shortlisted proponents:

> The dialogue stage allows for the development or refinement of potential solutions through direct discussions between the purchaser and each proponent, and may result in a single viable solution or several viable solutions. At the close of the dialogue phase, the public institution invites each shortlisted finalist to submit its best and final offer. The final ranking is based on those final offers and, in most cases, the award goes to the final top-ranked proponent.[618]

The concurrent and consecutive NRFPs differ from a traditional RFP that had been prevalent in government procurement in Canada.[619] The traditional RFP bans negotiations between a contracting department and a pool of bidders.[620] The successful bid is chosen in accordance with a set of criteria disclosed in advance to all participating bidders.[621] This approach seeks to ensure "a level play field between

---

[617] Emanuelli, *supra* note 143 at 1315 - 1316.

[618] *Ibid* at 1309.

[619] *Ibid*, Chapter 9.

[620] *Ron Engineering*, *supra* note 335; *Martel*, *supra* note 336; The civil law of Quebec follows the principles of tendering developed by the Supreme Court of Canada, see *MYG Informatique inc c René-Lévesque (Commission scolaire)*, 2006 QCCA 1248; *3051226 Canada inc c Aéroports de Montréal*, 2008 QCCA 722.

[621] *Martel, supra* note 336.

competing bidders"[622] and transparency of the bid selection process. For this reason, the common law contains two general prohibitions that apply to the bid solicitation process: against changing the requirements of a solicitation document[623] and against modification of submitted proposals. Soliciting government departments are also precluded from engaging in discussions or negotiations with bidders prior to awarding a contract. These prohibitions help ensure that the successful bid is chosen in accordance with the criteria disclosed by the government department in the tender call.[624] Ideally, the purchaser must disclose all material information about the contemplated contract, which includes technical specifications and security obligations applicable to the service provider.

Due to the trend toward contracting out long-term and complex services, traditional RFPs attract criticism from the procurement community.[625] Particularly, critics note that when procurement involves complex projects, the government's initial solicitation documents are flawed. Often, they fail to "take into account the range of available products or services that might be available."[626] The difficulty of drafting solicitation documents is exacerbated by the fact that procurement officers may not have the required expertise in delivering the service. If procurement officers adhere to

---

[622] Emanuelli, *supra* note 143 at 833.

[623] Paul Emanuelli, *Using Treaty-Compliant NRFPs* (20 September 2017), online: < http://procurementoffice.com/event/using-treaty-compliant-nrfps/> (the decision of the Supreme Court in *Ron Engineering* entrenched practices of the construction industry, where it is common to draft detailed specifications for projects).

[624] *Martel*, *supra* note 336

[625] Emanuelli, *supra* note 143 at 1306-1307.

[626] *Ibid* at 1306.

a traditional, non-negotiated procurement format, they will be forced to accept the best proposal among several bad ones and then, upon the conclusion of a contract, amend the specifications of a requested service or product. Amending existing contracts and renegotiating contract terms is not an effective way of managing public resources. The NRFP process offers procurement officers an opportunity to examine available options prior to concluding a binding contract and to negotiate contract terms that are more attractive to the government. Finally, consultations with contractors increase the likelihood of compliance with contractual terms, "especially if the consultative process is ongoing and explicitly aimed at facilitating performance *ex ante*." [627]

The NRFP process does not contradict the applicable law as long as the purchaser clearly indicates in the procurement documents that it intends to depart from a more conventional bid solicitation process that bans negotiations with a number of interested bidders.[628] This is achieved by adjusting the terms and conditions of a traditional solicitation document to permit negotiations and the submission of best and final offers.

2) Innovations during the Life of a Contract

Opportunities to capitalize on private ingenuity arise not only during the negotiation stages but also throughout the life of a binding contract. The resulting contract clauses may impose upon the provider of services an obligation to identify potential opportunities for quality improvements and communicate them to a

[627] Freeman, "Public Law Norms", *supra* note 81 at 1329.

[628] *MJB Enterprises Ltd v Defence Construction (1951) Ltd,* [1991] 1 SCR 619 at para 23.

contracting department and the end users. Periodic upgrades are important not only because they can improve the quality of services, but also because they may drive down the costs. For example, the agreement for the provision of CRMS services for the courts of the Australian state of Victoria establishes an obligation of the service provider to periodically submit an innovation report. In this report, the service provider not only identifies innovations, but also analyzes how the potential implementation of upgrades may affect the current services that it provides to the courts.[629]

d. Legitimacy

In the context of privatization, legitimacy is understood as acceptance of a privatized service by the end users. The instrument of public-private cooperation affect the legitimacy of privatization decisions because they "determine which actors, and hence which interests, get to shape program implementation, and therefore which are most likely to support or oppose program passage." [630]

As was mentioned in different parts of this thesis, the current organization of the contracting process poses significant legitimacy concerns. One of the features of the privatization of court support services is that the judiciary is not directly involved in the contracting process. Although technologies are purchased for the courts, the procurement duties fall to the executive branch of government. This results in government procurement officers assuming full control over private service providers

---

[629] *Court Services Victoria CMS*, *supra* note 103 at 40.

[630] Salamon, *supra* note 347 at 1649.

throughout the procurement cycle: from determining the acceptable procurement method (competitive, restricted, soul-source procurement) to evaluating contract performance. However, the judicial acceptance of technology is instrumental to the successful modernization of courts. Therefore, it behooves those in charge of court administration to establish avenues for meaningful judicial participation – directly or through proxies - in the procurement process. Particularly, the design specifications for CRMS cannot be drafted in isolation, but only after consultation with judicial stakeholders who could provide more information about their concerns.

The CJC's policies regarding the security of judicial information offer useful ideas for bridge-building. For example, in 2013, the CJC suggested that each court in Canada should create "a governance group comprising judicial representation"[631] to manage, among other things, the security of judicial information.[632] Along these lines, the already existing courts' committees on information management and information technology can be vested with the authority to participate in internal consultations and meetings with potential CRMS providers and to develop specific internal policies regarding the CRMS quality standards. Ideally, policies developed and approved by court committees should pre-empt any alternative standards promulgated by government departments. Alternatively, quality standards sanctioned by court committees should be incorporated in the risk-aversion frameworks that are utilized for assessing the reliability of potential CRMS solutions.

---

[631] CJC, *Information Management Policy*, *supra* note 416 at 7.

[632] *Ibid* at 43.

If these options are for some reason out of reach, then *ad hoc* intersectional committees comprising the representatives of the judiciary, the executive branch, and private contractors could elaborate a set of quality standards for the design of a CRMS instrument. The benefit of this approach is that it would draw upon the expertise of judicial and non-judicial stakeholders to design a feasible solution. However, it may be more difficult for multiple stakeholders to reach a consensus on the system's required features.

Regardless of the ultimate decision about the format of cooperation, judicial participation is particularly important at the initial stages of the CRMS procurement process: formulating quality requirements, choosing the procurement format, and conducting negotiations with potential bidders. At these stages, clearly formulated quality standards help attract qualified service providers and facilitate the process of customizing off-the-shelf case management software to the specific needs of courts.

Effectively, the procedural safeguards discussed in this section not only increase the legitimacy of the procurement process, but may also prohibit uninformed procurement by granting the judiciary a *de facto* power to veto procurement projects of the government.[633] In this case, these procedural safeguards will operate more like substantive requirements.

e. Feasibility

[633] Anastasia Konina, "Technology-Driven Changes in an Organizational Structure: The Case of Canada's Courts Administration Service" (2020) 11:2 Intl J Court Admin 6 at 9-10.

Finally, it is also practically feasible for separate public purchasers to rely on contracts to advance sector-specific public values. As noted above, even in a highly centralized system of regulation contracts afford separate public purchasers some discretion regarding specific quality standards. For example, under the Onario's VOR framework discussed in Chapter I above, government departments and organizations may be eligible to develop separate agreements with the vendors of record.[634] At the federal level, the Courts Administration Service is exempt from the requirement to purchase information technology services through Shared Services Canada.[635] The Federal Courts can independently choose the suppliers of IT services related to "email, data centres and networks"[636] and "end-user information technology."[637]

Relatively minor adjustments to the established system of managerial accountability will be sufficient to further capitalize on the potential of the procurement process and the resulting contract. Particularly, it will be necessary to modify *pro forma* contracts to reflect judicial requirements regarding information security, case management design, and control over private service providers. Also, the use of more complex tendering procedures will require that public purchasers embrace negotiated RFPs that are still not that commonly used in Canada. The

---

[634]Ontario, Ministry of Government and Consumer Services. *Operational Guidelines for Use of Enterprise-wide Vendor of Record Arrangements and Volume Licensing Agreements by OPS Clients and Non-OPS Clients* (1 February, 2019) at 4, online: < https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/Attachments/Operational_Guidelines-ENG/$FILE/Operational_Guidelines-ENG.pdf>.

[635] PC 2015-1071, *supra* note 224.

[636] *Ibid*, (f).

[637] *Ibid*, (b).

prospects for the success of the alternative mechanisms will largely depend on the willingness of those in charge of court administration to advocate that courts be exempt from the vendor of record agreements and other arrangements that further the economies of scale and scope.

Conclusion to Chapter III

This chapter examined different legal mechanisms that may directly or indirectly constrain private actors that participate in the delivery of public services. It was demonstrated that these mechanisms either do not apply to the companies delivering private CRMS instruments (as is the case with the *Charter* and the non-delegable duty principle) or that they would be ineffective if they applied to private service providers (as is the case with legislation and regulation).

In light of these gaps of legal redress, this Chapter turned to contract as an alternative mechanism for navigating public-private cooperation for the provision of courts and registry management services. It was demonstrated that contract emerges as an alternative to the traditional forms of regulation because it combines market and hierarchical controls over private activities and, at the same time, offers courts an opportunity to avail themselves of private ingenuity. Such features of the government's contracting cycle as effectiveness, efficiency, receptiveness to private ingenuity, legitimacy, and feasibility make it a successful alternative for advancing judicial independence by design in an era of privatization of CRMS.

Chapter IV. Response to Anticipated Criticism and Application of the Proposal

The previous Chapters of the thesis argued that the decentralization of procurement efforts by way of a contracting process has advantages especially compared to the alternatives - preserving the regulatory *status quo* or relying on the familiar forms of regulation of public-private cooperation. To demonstrate how the proposed decentralization of procurement activities may play out in practice, Part B of this Chapter will examine a case study – the procurement of an integrated CRMS instrument for the Federal Courts. However, before turning to the application of these mechanisms to this privatization project, it is necessary to address some objections that may be levelled against the measures proposed in this thesis.

A. Anticipated Criticism

It is anticipated that the critics of using the contracting process and the resulting contract to advance the principle of judicial independence will raise the following concerns : (1) decentralization of accountability design promotes abuses of power; (2) competition has limited potential for advancing public values; (3) additional accountability standards undermine the benefits of competition; (4) additional accountability standards reduce administrative efficiency; (5) government departments lack incentive to capitalize on the potential of the public procurement

cycle to protect public values; and (6) quality specifications for CRMS instruments are difficult to define. [638]

In essence, this list represents a helpful set of considerations against which to assess the desirability of privatization and the relative strengths and weaknesses of the chosen privatization strategy. While it is true that most privatization strategies are imperfect, there is every reason to expect that a carefully targeted and managed privatization of CRMS can help courts capitalize on private expertise, without compromising the values of accountability and efficiency.

1. Abuses of Power

The contract-centred framework suggested in this thesis decentralizes the familiar accountability design that was examined in Chapter I above. As was mentioned, the prevailing framework of accountability suggests that the best way to achieve decision-making in the public interest is through a system of hierarchical controls. It might appear that, by invoking the alternative tools of governance, this thesis endorses the arbitrary exercise of power by separate public purchasers. Particularly, instead of narrowing the range of discretion left to the front-line procurement officers, it calls for granting them more powers to advance the objectives of a given privatization project. Arguably, the proponents of the traditional accountability design may suggest that the decentralization of procurement powers creates opportunities for administrative

[638] Freeman, "Public Law Norms", *supra* note 81 (expecting that "[t]he notion that privatization can be a means of extending public norms to private actors will invite skepticism" at 1329).

convenience, that is for neglecting requirements and procedures that protect the best interests of taxpayers.[639]

One way to address this concern is to argue that the ideal of accountability informs the traditional accountability framework and the contract-centred framework in equal measure. However, these two approaches use different means of achieving accountability. The prevalent approach examined in Chapter I above adheres to strict lines of accountability between parliaments, spending departments, specialized procurement departments, separate contracting departments, and private service providers.[640] The contact-centred framework attracts a broader range of accountability measures, sometimes labelled aggregate accountability[641] or overlapping controls.[642] They come from such sources as controls within a contracting department, ethical obligations of the front-line procurement officers, market pressures, contracts' indemnity and sanctions provisions, private actors' internal policies, professional accountability norms, and public and client pressures.[643]

a. Internal Accountability and Project Management

[639] Ferguson, *supra* note 147 at 942–1005.

[640] Gratton, *supra* note 204 at 59.

[641] Freeman, "The Private Role", *supra* note 124 at 664–667.

[642] Hansen, *supra* note 91 at 2479–2481.

[643] Jody Freeman, "Private Parties, Public Functions and the New Administrative Law" (2000) 52:3 Administrative Law Review 813 at 819; Hansen, *supra* note 91 at 2479–2481.

In the decentralized procurement framework, internal lines of accountability within a contracting department play a particularly important role.[644] Procurement officers remain accountable to their line managers and department heads for compliance with procurement procedures, financial accountability rules, and ethical norms. For example, the procurement officers of the Courts Administration Service are public servants appointed under the *Public Service Employment Act*.[645] They work under the supervision of the Chief Administrator[646] who is also employed in the public service.[647] The obligations flowing from the status of a public servant require that all the employees of the CAS comply with an array of accountability provisions, ethical norms, and performance indicators that are imposed on them by the federal government. For example, the *Values and Ethics Code for the Public Sector*[648] imposes the obligations of integrity[649] and stewardship[650] on all public servants, including the employees of the CAS. It is noteworthy that the provisions of the Code provide that public servants may not fully satisfy the obligation of integrity "by simply acting within the law."[651] In addition to complying with applicable legal requirements, public

[644] Macdonald, "Call-Centre Government", *supra* note 145 at 457.

[645] *Public Service Employment Act*, SC 2003, c 22, ss. 12, 13.

[646] *CAS Act*, *supra* note 111, s 7 (1).

[647] *Ibid*, s 6 (2).

[648] Government of Canada, *Values and Ethics Code for the Public Sector* (Ottawa: Treasury Board of Canada, 2011).

[649] *Ibid* at 4.

[650] *Ibid*.

[651] *Ibid* at 5.

sector employees must act in such a way as to maintain their employer's and public trust.[652]

Moreover, acting in accordance with the *Public Servants Disclosure Protection Act*,[653] in 2014, the CAS's Executive Committee approved a code of conduct for the employees of the Service.[654] A section of the Code of Conduct describes the ethical standards and expected behaviours of CAS employees specifically with respect to contracting and procurement activities.[655] These requirements repeat the provisions of the *Values and Ethics Code for the Public Sector* that apply to all government departments.

To maintain accountability in a decentralized procurement system, separate government departments can supplement these important, yet broadly worded ethical obligations with specific trainings on effective contract administration and requirements and expectations of the end users of government services. In this regard, some commentators suggests that, unlike for-profit actors, government departments have not been paying sufficient attention to contract administration due to a lack of resources and expertise.[656] Meanwhile, readily available best practices for government contracts' management may result in substantial savings for government departments

---

[652] *Ibid.*

[653] *Public Servants Disclosure Protection Act*, SC 2005, c 46, s 6(1).

[654] OPO, *Procurement Practice Review*, *supra* note 215 at 8.

[655] *Ibid*.

[656] Kelman, *supra* note 268 at 173; Emanuelli, *supra* note 143 at 1284ff.

and improve private compliance down the line.[657] According to Steven Kelman, these best practices include the following components:

> (1) strategy and goal-setting, (2) inspiring those doing the work, including contractors, with commitment, enthusiasm and public purpose, (3) performance management, including traditional 'monitoring' (financial and nonfinancial) where appropriate given the type of contract, (4) managing horizontal interfaces between the contractor and end users of the contractor's services, and (5) managing interfaces with higher organizational levels and the external environment.[658]

If government departments adhere to various tactics of contract management, a decentralized contracting process has the potential to enhance rather than diminish system-wide accountability.[659]

b. Make-or-Buy Framework

Another way to allay the concerns of those who fear that the decentralization of procurement activities reduces accountability is to introduce a framework that governs the decisions of separate public purchasers to perform a service themselves or to externalize the performance of a service to a third party. In government contracting this is known as a framework for make-or-buy decisions. For example, in the United States, the decisions of separate federal agencies to externalize or internalize a service are regulated by the *Federal Activities Inventory Reform (FAIR) Act* of 1998[660] and the

---

[657] *Ibid* at 174.

[658] *Ibid.*

[659] Thomas, *supra* note 201 at 52.

[660] 31 USC §501 (2000) [*FAIR Act*].

Office of Management and Budget (OMB) Circular A-76.[661] The framework created by these instruments aims to find the best source – public or private - of service provision.[662] The *FAIR Act* introduces the obligation for federal agencies to keep and publish annual inventories of their activities.[663] These inventories divide activities into "inherently governmental functions" and "commercial services." According to the *FAIR Act*, an inherently governmental function "is so intimately related to the public interest as to require performance by Federal Government employees."[664] The term includes "activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements."[665] An inherently governmental function involves, among other things, "the interpretation and execution of the laws of the United States."[666] The term, however, does not normally include "gathering information for or providing advice, opinions, recommendations, or ideas to Federal Government officials"[667] as well as "any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations

---

[661] United States, Office of Management and Budget, *Performance of Commercial Activities*, *Circular No. A-76 (Revised)* (Washington, DC: Executive Office of the President, 2003).

[662] Mathew Blum, "The Federal Framework for Competing Commercial Work between the Public and Private Sectors" in Freeman & Minow, *supra* note 92, 63 at 65.

[663] *FAIR Act*, *supra* note 660, s 2.

[664] *Ibid*, s 5 (2)(A).

[665] *Ibid*, s 5 (2)(B).

[666] *Ibid*.

[667] *Ibid*, s 5 (2)(C)(i).

and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services)."[668]

Similarly, in the United Kingdom, internal government guidance plays a central role in regulating make-or-buy decisions of government departments.[669] The *Outsourcing Playbook of the Cabinet Office* provides public purchasers with guidelines for the delivery model assessment also known as the "Make versus Buy assessment."[670] To determine which service delivery model – internal or external - offers best value for money, public purchasers need to undertake a detailed analysis of the costs and benefits of each option. This should include "a comprehensive evaluation of the risks, and the possible consequences – economic, human and technological – of outsourcing, insourcing, and/or adopting a mixed economy approach."[671] Delivery

[668] *Ibid*, s 5 (2)(C)(ii); see also Harden, *supra* note 125 (observing that "many indirect services have always been procured through contract and close analogies can be drawn with the 'core business' approach of the private sector, in which companies focus on the activity they can do best and buy support services from outside suppliers" at xi).

[669] A C L Davies, *The Public Law, supra* note 123 (guidance "is not enacted by Parliament, nor does it stem from authoritative judicial decisions. Nor does government guidance constitute delegated legislation" at 33); see also Sue Arrowsmith, "Reimagining Public Procurement Law after Brexit: Seven Core Principles for Reform and Their Practical Implementation, Part 1"(2020), online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523172 > (In general, the UK government issues two types of guidances "explanatory guidance - to explain to stakeholders points that are clear in the legislation but need transmitting to stakeholders in a different way - and interpretative guidance, to deal with unclear legal issues" at 2).

[670] United Kingdom, Cabinet Office, *The Outsourcing Playbook* (June 2020) at 8.

[671] *Ibid* at 20.

model assessments are considered good practice for all projects, but they are required in the following circumstances:

> 1. Upon the introduction of new public services.
>
> 2. The identification of a significant new development to an existing service (such as a new technology requirement).
>
> 3. Where there is a need to re‑evaluate the delivery model of existing services, for example due to deteriorating quality of delivery, a major policy or regulatory change, departmental cost reduction, significant change in strategic direction or transformation programmes.[672]

For the purposes of this thesis, it is important to note that the US and the UK make-or-buy frameworks do not prohibit contracts for CRMS instruments. Also, in the US, the principle of separation of powers protects the Administrative Office of the U.S. Courts from the obligation to follow the make-or-buy framework that applies to the agencies of the federal government.[673] The Administrative Office, however, may choose to adhere to this framework voluntarily.

Make-or-buy frameworks, however, are beneficial for two reasons. First, they improve the provision of public services by forcing government departments to consider different service delivery options prior to embarking on a complex

---

[672] *Ibid.*

[673] The Administrative Office is an agency within the judicial, rather than within the executive branch of the US government. It provides a broad range of legislative, legal, financial, technology, management, administrative, and program support services to federal courts, see United States Courts, *Judicial Administration*, online: < https://www.uscourts.gov/about-federal-courts/judicial-administration >

privatization project.[674] As such, make-or-buy frameworks advance enlightened outsourcing of public services. Second, make-or-buy frameworks that equip third parties with effective mechanisms for contesting governments' privatization decisions may improve decision-making transparency and promote propriety in public spending.[675]

In Canada, this important decision-making phase remains under-regulated. Research of publicly available documents did not identify any clear, publicly-available legislative or regulatory frameworks for make-or-buy decisions at the federal and provincial levels. An absence of well-defined constraints on make-or-buy decision is perhaps best explained by the desire of government departments to exercise considerable discretion in the choice of service delivery methods. Also, federal and provincial governments may believe that internal accountability frameworks promulgated by spending departments provide sufficient protection against over-contractualization of public services. Even if in some instances separate make-or-buy frameworks may result in redundancies, the Office of the Procurement Ombudsman is of the opinion that, "[g]iven the volume and complexity of procurement at CAS"[676]

---

[674] See e.g. Willem A Janssen, "The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?" (2014) 10:5 Utrecht L Rev 168 (at 183; Elisabetta Manunza & Wouter Jan Berends, "Social Services of General Interest and the EU Public Procurement Rules" (2013) in Ulla Neergaard et al, eds, *Social Services of General Interest in the EU* (The Hague: Springer, 2013) 347.

[675] Janssen, *supra* note 674 (suggesting that "the absence of an objective and transparent balance of the advantages and disadvantages of different public service delivery modalities can lead to public contracts being awarded directly, or services being performed in-house, without them leading to the best value for society" at 183).

[676] OPO, Procurement Practice Review, supra note 215 at 17.

such a framework will be beneficial. Following the review of the procurement practices of the CAS, the Procurement Ombudsman recommends that CAS:

> Formally document, approve and implement departmental procurement guidance, including procedures and guidelines. Consideration should also be given to documenting the process and controls for contracting for legal services.
>
> Document the process for assessing procurement risk and the use of risk information to support decision making.
>
> Develop, implement and maintain a departmental procurement plan.
>
> Establish formal documented mechanisms for monitoring procurement activities.[677]

c. Market Pressures

Finally, the proponents of centralized regulation of government's procurement efforts should not dismiss the fact that private actors' accountability results not only from government oversight but also from market pressures. The standard market model of service delivery holds that that, regardless of government regulation, private firms provide quality and affordable services because they must compete with each other for potential customers.[678] As John Donahue explains, when competition is high, government departments can relatively easy replace non-compliant and inefficient contractors with their competitors.[679] Therefore, under the standard market model, competition ensures not only efficient but also accountable service delivery. Of course, competition as a means of achieving accountability has particular limitations as it applies

---

[677] *Ibid* at 17-18.

[678] Hansen, *supra* note 91 at 2470.

[679] Donahue, *The Privatization Decision, supra* note 82 at 79-80

to new and complex privatization projects. These limitations will be addressed in section three (3) below.

2. Proposals Undermine Competition

The proposals advocated in this thesis may be met with scepticism by the front-line procurement managers who are "faced with the task of providing high-quality services in a cost-effective way."[680] The literature on the privatization of public services indicates that government procurement managers are pragmatic privatizers tasked with ensuring the efficiency of the procurement cycle.[681] As was mentioned above, competition is the main means of achieving efficient government procurement. Ideally, it results in the delivery of high-quality services at a reasonable cost. In this respect, efficiency-oriented procurement officers may argue that the implementation of additional, project-specific procedural guarantees and quality standards will reduce competition for an opportunity to provide public services.[682] Elliott Sclar, for example, suggests that complex quality standards introduced at the bid solicitation stage may create the so-called "barriers to entry"[683] and discourage interested companies from participating in the tendering process. In fact, too complex or specific quality standards impose on private

[680] Freeman, "Public Law Norms", *supra* note 81 at 1295.

[681] *Ibid.*

[682] *Ibid* at 1288–1289.

[683] Elliott D Sclar, *You Don't Always Get What You Pay For* (Cornell University Press, 2000) at 69-93.

contractors "obligations going beyond general statute that [they] may avoid by refraining from contracting with government in the first place."[684]

Also, if a contracting department imposes demanding quality standards on potential bidders, there is a risk that competition may be limited to few contractors that specialize in government procurement or already have case-management contracts with the government. These experienced contractors may be better prepared to deal with additional legal and administrative burdens that stem from doing business with the government. Reduced competition, in turn, minimizes the governments' opportunities for choosing the option that produces the best quality for money.

The arguments about the negative effects of additional procedural and substantive rules on competition are serious and they should be carefully addressed by the project management team. When considering the relative strengths and weaknesses of these additional rules, it is important to keep in mind that such values as accountability and efficiency are not always fundamentally irreconcilable in practice. While it is true that accountability and efficiency are often pitted against each other in the scholarship on privatization of public services,[685] there is a good chance that privatization does not represent "a zero-sum game between public norms and private power."[686] In fact, this opposition of values "oversimplifies the choices presented by any privatization decision. It erroneously suggests that we must sacrifice one set of

[684] Kelman, *supra* note 268 at 183.

[685] Freeman, "Public Law Norms", *supra* note 81 at 1288.

[686] *Ibid* at 1290.

goals entirely to the other because the two sets are fundamentally incompatible."[687] Instead, most privatization decisions answer the following question: how to maximize value for money without significantly sacrificing accountability? As will be demonstrated below, the prospect for finding a balance between these competing values largely depends on the talent of the project management team.[688]

Finally, as Anne Davies points out, it is dangerous to formulate a procurement strategy based on the assumptions about contractors' negative attitudes to particular accountability requirements.[689] Such factors as the size of the market, the number of shortlisted companies, the readiness of shortlisted providers to customize their off-the-shelf software should be taken into consideration while introducing new accountability requirements. Flexible procurement formats that were discussed in Chapter III of this thesis help government departments better evaluate their options.

3. Limitations of Competition

As was mentioned in Chapter III above, a competitive contracting process may force bidders to commit to various public goals to win a bid. However, competition takes place only during the bidding process; having won the bid, the successful bidder acquires a long-term monopoly on the provision of services. This observation is certainly true when governments privatize the delivery of integrated services. The

---

[687] *Ibid.*

[688] Stan Soloway & Alan Chvotkin, "Federal Contracting in Context: What Drives It, How to Improve It" in Freeman & Minow, *supra* note 92, 192 at 198.

[689] Davies, *The Public Law*, *supra* note 123 at 330.

distinctive feature of integrated systems scrutinized in this thesis is that they act "as a single service point for all IT service needs that an organization is willing to outsource [and] integrate various information systems, providing hardware and software, and training and support."[690] In other words, following the completion of implementation procedures, CRMS becomes an integral part of court operations. Because the "disentangling"[691] process is disruptive and costly, government departments tend to replace integrated system providers only when there is evidence of "egregious performance or blatant exploitation."[692] Also, even if the government wants to replace the service provider, this may be difficult to do. Competition virtually disappears as soon as the winning bidder invests in the customization of off-the-shelf technology for the specific needs of courts.[693]

While potential abuse of *de facto* monopoly powers raises serious concerns, careful contract design can help mitigate these risks. It is imperative that procurement officers: (1) anticipate a possibility that the courts may wish to replace a service provider because, for example, they are unhappy with the quality of services; (2) negotiate exit strategies, such as disengagement plans and transitioning out of services.[694] Also, quality control monitoring and effective indemnification

---

[690] Yu-Che Chen & James L Perry, "IT Outsourcing: A Primer for Public Managers" in Mark A Abramson & Roland S Harris III, eds, *The Procurement Revolution* (Rowman & Littlefield, Lanham, 2003) 127 at 131.

[691] Donahue, "The Transformation of Government Work", *supra* note 92 at 58.

[692] *Ibid.*

[693] Kelman, *supra* note 268 at 156.

[694] *Court Services Victoria CMS*, *supra* note 103 at 84-87.

mechanisms are central to compliance with contractual terms (these considerations are explored in more detail in Part B of this Chapter *infra*).

4. Proposals Undermine Administrative Efficiency

Several commentators suggest that efficiency in government procurement is achieved not only through competition but also by driving down the overall costs of the procurement process.[695] In government procurement this is also known as administrative efficiency of the procurement process.[696] Simon Domberger and Paul Jensen, for example, recount that

> Whether it be buying fruit in a local market or purchasing complex information technology (IT) services, every transaction involves a cost in addition to the price: finding the right supplier or negotiating the final purchase price. With regard to contracting, transaction costs include the writing of specifications and contracts, evaluating tenders, and negotiating the final contract with the winning tenderer— the administrative elements of the transaction.[697]

Similarly, Justice Bellamy's report on Toronto Computer Leasing Inquiry acknowledges that any accountability design should strive to achieve a balance between competing centralization and decentralization tendencies to spend the least amount of resources in the process of purchasing.[698] In many instances, "[t]aking advantage of economies of scale to achieve better pricing and creating process

[695] See e.g. Schooner, *supra* note 82; Domberger & Jensen, *supra* note 79 at 70.

[696] Davies, *The Public Law*, *supra* note 123 at 127.

[697] Domberger & Jensen, *supra* note 79 at 70.

[698] Bellamy, *supra* note 576 at xii-xiii.

efficiencies facilitates the achievement of value for money."[699] As was mentioned in Chapter I above, the pursuit of administrative efficiency is reflected in the centralization and standardization of public procurement through Vendor of Record arrangements, Standing Offer Agreements, and Corporate Supply Arrangements.[700]

In light of these considerations, it may appear that the decentralization of procurement activities detracts from administrative efficiency.[701] Even though additional procedures - drafting nuanced specifications and contracts, conducting negotiations and internals consultations - may seem costly and counterproductive in the short-term perspective, they may pay for themselves later. For example, careful contract design "might produce better ideas about how to provide services effectively and at lower cost." [702] In addition, a more "inclusive drafting process could conceivably save costs down the line by reducing to some extent future conflict over the meaning of contractual terms."[703]

5. A Lack of Incentive

[699] Newfoundland and Labrador, Public Procurement Agency, *Public Procurement Policy*, s 2, online: <https://www.gov.nl.ca/ppa/division/policy/>.

[700] Emanuelli, *supra* note 143 at 978–979.

[701] Freeman, "Public Law Norms", *supra* note 81 at 1310.

[702] *Ibid* at 1339.

[703] *Ibid* at 1339–1340.

The aforementioned arguments about the benefits of administrative efficiency and competition stem from the economic analysis of government contracting. At the same time, government procurement managers may not be motivated exclusively by the economic benefits of the current regulatory design that governs contracts for CRMS instruments. There is a chance that procurement managers may simply lack incentive to avail themselves of an opportunity to utilize the contracting process and the resulting contract as vehicles to buttress judicial independence in an era of privatization.

Considering that procurement managers operate under fiscal, time, and legal constraints, they may be more willing to solve immediate service-provision problems rather than seek to address potential concerns. So far, the privatization of separate court support services has been running somewhat smoothly. In one instance, judicial discontent with government contracting policies broke out into a public debate. In 2016, the Federal Courts and the Supreme Court of Canada were exempt from the *Order in Council* that required them to procure IT through Shared Services Canada.[704] In the absence of procurement controversies, court administrators are unlikely to advocate for more decentralized procurement arrangements because any departures from standard rules must go through a long bureaucratic process. Thus, it is easier and less time-consuming for departments to follow the rules established by the centralized accountability framework.

[704] Karim Benyekhlef & Nicolas Vermeys, "Technological Procurement as a Component of Judicial Independence – Slaw", online: Slaw <http://www.slaw.ca/2016/01/29/technological-procurement-as-a-component-of-judicial-independence/> [Benyekhlef & Vermeys, "Technological Procurement"].

A lack of incentive to implement additional procedures proposed in this thesis may also stem from the fact that "relatively unfettered privatization might be in the interest of both the executive and legislative branches."[705] It is no secret that the problems of access to justice and procedural delays often emerge in the media and the political discourse as the biggest challenges facing the Canadian justice system. Against this backdrop, quicker privatization of courts and registry management services could allow governments to take credit for improved access to justice - which they can bring to the public's attention to score some political points. Here again, we may see the instrumentalist approach to technology at work. As Karen Eltis observes, "[p]olicy makers' general readiness to welcome new technologies... in want of in-depth discussions, arguably speaks to the desire for expediency or quick fixes to multi-faceted issues." [706]

Despite the political benefits of relatively unfettered privatization, the requirements of the principle of judicial independence may motivate governments to embrace proposals contained in this thesis. Policy-makers in fact have already exempted certain institutions that deal with judicial administration, judicial conduct, and remunerations from the requirements of government-wide procurement policies. For example, Quebec's *Act respecting Contracting by Public Bodies* does not apply to the Conseil de la magistrature and the judicial remunerations committees.[707] It was

[705] Freeman, "Public Law Norms", *supra* note 81 at 1331.

[706] Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Toronto: Irwin Law, 2012) at 18.

[707] *Act respecting contracting, supra* note 142, s 6.

also mentioned above that the federal Courts Administration Service is exempt from the *Order in Council* that requires procuring information technology services through Shared Services Canada.[708]

Moreover, it is unlikely that the judiciary will remain complacent about the emerging procurement trends that pose threats to judicial independence. In this regard, it seems important to refer to the interpretation of the principle of judicial independence by the Supreme Court of Canada. In *Valente*, Justice Le Dain explained that even under the most restrictive stance on administrative independence, the judiciary must assume full control over such administrative functions as assignment of judges, the sittings of the courts and court lists as well as allocation of court rooms.[709] This is because these functions may directly influence the exercise of the judicial function. This decision translates into substantive requirements that apply to government contracts. It can be interpreted to bar contracts for court support services unless these contracts meet certain quality standards set by the judiciary.

Another decision of the Supreme Court offers an instructive example of how the expansion of government contracting motivates the judiciary to treat privatization with greater caution. In *Société de l'assurance automobile du Québec v Cyr*,[710] Justice Bastarache stated that Court's task was to decide whether a public authority had "insulated itself from the requirements of administrative law by implementing a

[708] PC 2015-1071, *supra* note 224.

[709] *Valente, supra* note 166 at 709.

[710] *Société de l'assurance automobile du Québec v Cyr*, [2008] 1 SCR 338, 2008 SCC 13.

contract-based scheme to meet its statutory duties."[711] He also acknowledged that "[i]n an era of increased privatization of public services and the rise of public–private partnerships, this case provides an opportunity to consider whether a government body will avoid public law duties when delegating its functions by way of contract or other form of agreement."[712] By formulating the issues in these terms, Justice Bastarache left no doubt that the judiciary is fully aware of potential deleterious effects of contractualization in government on public values.

6. The Difficulty of Defining Quality

Finally, the proposal to prioritize the judicial notion of quality CRMS instruments may be met with scepticism by other actors of the justice system such as lawyers, litigants, prosecutors, and court administrators. Indeed, defining quality standards for services is one of the most challenging tasks of any complex privatization program. Scholars of privatization point out that it is much more difficult to specify the quality characteristics of integrated IT services (such as CRMS),[713] social services[714] or education,[715] than to define "satisfactory road repair [and] quality waste collection"[716] or quality videoconferencing and translation services:

> This difficulty is unavoidable... when reasonable people can easily differ over what constitutes quality, especially with functions or services that

[711] *Ibid* at para 1.

[712] *Ibid* at para 25.

[713] Donahue, "The Transformation of Government Work", *supra* note 92 at 57-58.

[714] Panet & Trebilcock, *supra* note 146 at 24.

[715] Freeman, "Public Law Norms", *supra* note 81 at 1343.

[716] *Ibid.*

> implicate deeply held beliefs and involve contestable value judgments. For example, some believe that education should focus on basic skills, while others believe it should prioritize citizenship values. Some parents are fans of standardized tests as a measure of performance, while others believe that only a portfolio of student work can accurately measure progress.[717]

Similarly, the actors of the justice system – judges, lawyers, litigants, prosecutors, and court administrators – may have different opinions about what constitutes quality courts and registry management services.[718] On the one hand, governments across the country tend to measure the quality of services delivered for courts by private actors in terms of productive efficiency. From this standpoint, quality CRMS instruments are those instruments that substantially reduce procedural delays in the justice system and increase the speed of case and case flow management.[719]

Upon closer consideration, however, it becomes clear that the automation of case management alone does not guarantee the productive efficiency of courts. For example, in 2016, the Council of Europe's European Commission for the Efficiency of Justice ("CEPEJ") evaluated the use of the following types of information technology in the Council of Europe's member states: IT tools for direct assistance to judges and court staff, IT for the administration of courts and case management, and

---

[717] *Ibid.*

[718] Daniel Mockle, "La justice, l'efficacité et l'imputabilité" (2013) 54:4 C de D 613.

[719] See e.g. Nicolas Vermeys & Karim Benyekhlef, "Premiers éléments d'une méthodologie de réformation des processus judiciaires par la technologie" in Daniel Le Métayer, ed, *Les technologies de l'information au service des droits : opportunités, défis, limites* (Bruxelles: Bruylant, 2010) 209 [Vermeys & Benyekhlef, "Premiers éléments d'une méthodologie"].

technologies that facilitate communication between courts and court users.[720] One of the goals of the research was to understand the impact of these tools on the efficiency and quality of justice.[721] The results of this study showed that investments in technology alone was not sufficient to improve court performance:

> Indeed, the most technologically advanced States do not always have the best indicators for efficiency. The reason for increased (or reduced) performance is in fact to be found in the combination of several factors such as the resources allocated…and the use of IT as a lever for improvement rather than as an end in itself.[722]

Similarly, Orna Rabinovich-Einy recounts how the prevailing efficiency agenda limited the potential of the Israeli New Generation Court System:[723]

> [T]he focus on efficiency has tended to overshadow other values and what used to be a means to an end has become an end in and of itself at the expense of other competing values. Because technology's impact has been reduced to that of rendering dispute resolution systems more efficient, its potential to generate improved systems that are successful in advancing additional values, other than efficiency, has not been fully realized.[724]

---

[720] The Council of Europe's European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems: Efficiency and Quality of Justice* (Thematic report: Use of information technology in European Courts CEPEJ STUDIES No. 24, 2016), online: <http://www.coe.int/T/dghl/cooperation/cepej/evaluation/default_2016_en.asp>.

[721] *Ibid* at 5.

[722] *Ibid*.

[723] Rabinovich-Einy, *supra* note 30 (The New Generation Court System is an advanced system for online document filing and case management that includes the following features: electronic file, work space, calendar, e-filing, and task assignment at 19).

[724] *Ibid* at 5.

On the other hand, parties to criminal and civil proceedings may measure the quality of courts and registry management services in terms of access to justice.[725] The digitization of services and automation of procedures can facilitate access to justice for vulnerable people in our communities: those who are accused of committing a crime but cannot have their day in court due to procedural delays; self-represented litigants or litigants from remote communities who must use their vacation days to appear in court for an adjournment hearing.

Finally, the difficulty of defining quality standards for digitized and automated court support services is exacerbated by the fact that the front-line procurement officers may lack expertise to formulate the required project specifications. With regards to purchasing integrated technology, they tend to rely on readily available private standards and practices for guidance. Some public purchasers use Requests for Information or Letters of Interest[726] to solicit comments, suggestions, and recommendations from the private sector. They use the responses from the IT industry to "develop achievable objectives and deliverables"[727] that are then included in the final bid solicitation document. While the feedback from the private sector may provide useful guidance at the initial stages of the project, the overreliance on private practices may obstruct the implementation of the quality standards that are important to the end users. Voluminous research demonstrates that a failure to incorporate user

[725] See e.g. Pierre-Claude Lafond, *L'accès à la justice civile au Québec : portrait général* (Cowansville, Que: Yvon Blais, 2012) at 261.

[726] Public Works and Government Services, *Letter of Interest*, *supra* note 67.

[727] *Ibid*, s. 4.5.5.

values may complicate the successful implementation of technology in an organization.[728]

Although reasonable people will disagree about the meaning of the phrase "quality CRMS", it behooves public purchasers to use best efforts to define their expectations about solicited services in the clearest possible terms for two reasons. First, as stipulated in the federal Supply Manual for the procurement officers "[i]dentifying the needs and carefully developing the requirements at the earliest stages of requirements definition are the greatest contribution in obtaining the right good or service and best price, and can minimize the need for changes later."[729]

Second, absent a clear definition of quality of solicited services, it is difficult for public purchasers to prove that a private actor provided substandard services. A lack of clear contract specifications "can create incentives for [service] providers to cut costs at the expense of quality because the quality loss may not technically violate the terms of the contract."[730]

Chapter II of this thesis defined the quality standards based on the review of the reports prepared by the CJC and court decisions. The standards, that may be labelled "judicial independence by design", are meant to protect judicial independence in an era of digitization and automation of courts and registry management services. Of

---

[728] For a list of references see footnote 68 *supra*.

[729] PWGSC, *Supply Manual, supra* note 227 s 2.1.c.

[730] Freeman "Public Law Norms", *supra* note 81 at 1345; See also Oliver Hart, Andrei Shleifer & Robert W Vishny, "The Proper Scope of Government: Theory and an Application to Prisons" (1997) 112:4 Quarterly Journal of Economics 1127 at 1133-1134.

course, these are not the exclusive quality standards to consider.[731] However, they seem to reflect the most pressing concerns of judicial perspective on the privatization of CRMS. The choice to prioritize the judicial notion of quality is informed by empirical research. A study conducted by Jane Bailey and Jacquelyn Burkell[732] demonstrates that judicial endorsement of technology is instrumental to the successful modernization of the justice system. Several factors explain this finding. First of all, "members of the judiciary have specific and important knowledge regarding the workings of the court and the justice system, and many comments stressed the importance of incorporating this knowledge and expertise in the technology planning and implementation."[733] Some participants of the study pointed out that "[t]he members of the judiciary... have specific needs, often not shared with or understood by other stakeholders."[734] This refers, first and foremost, to the need to "account for the security of judicial information"[735] before a CRMS project reaches the implementation stage. Lastly, judges have the final say about the use of technologies

[731] It is also necessary, for example, to consider the nature of the relationship between the judiciary, the administrative personnel, and private service providers, see Conclusion to Chapter II *infra.*

[732] Bailey & Burkell, *supra* note 69 (the authors interviewed eight key informants involved in technology implementation committees for both trial and appellate courts in six Canadian jurisdictions).

[733] *Ibid* at 261.

[734] *Ibid* at 262.

[735] *Ibid.*

in courts and "therefore many technologies would fail without the active support of the judiciary."[736]

B. Application of the Proposals at the Federal Level

The previous Chapters of this thesis described the shortcomings of a one-size-fits-all approach to the regulation of government procurement and the limitations of public law mechanisms that are invoked to constrain private actors that provide important social and human services. It was argued that the contracting process and the resulting contract possess a set of characteristics that fill the regulatory gaps. These characteristics include efficiency, effectiveness, receptiveness to private ingenuity, and legitimacy. This part of the thesis builds on the previous discussion and provides initial thoughts about how the proposal to utilize the contracting process and the resulting contract to buttress judicial independence may work in practice at the federal level and in the provinces.

1. An Overview of the Courts Administration Service's Contracting Agenda

In 2016, the CAS ranked 26th among 85 federal government organizations based on its volume of procurement transactions and 39th based on dollar value.[737] In recent years, due to a gradual shift from paper to paper-on-demand justice,[738] the CAS's

[736] *Ibid.*

[737] OPO, *Procurement Practice Review*, *supra* note 215 at 4.

[738] Canada, Public Works and Government Services. Tender Notice: *IT Architecture and Computing Environment Assessment (CON-13-060),* online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-13-00553085>

procurement strategy has been focusing on the procurement of information technology for the administration of the Federal Courts' work. Generally, the CAS has prioritized procurement of the following categories of goods and services:[739]

Direct assistance to judges and court staff - This category includes basic office tools and services, such as computers, transcription, reporting and translation services, and tools that provide intellectual assistance to judges (databases).

Communication between courts, litigants and their representatives, and the general public - This category focuses on IT that: (1) improves communication with court users by providing them with direct access to certain types of information, such as court decisions; (2) facilitates communication between courts, and between courts and litigants, such as video-conferencing and electronic discovery software.

Based on the analysis of the enabling statute and annual reports, one can conclude that the main goal of the CAS's procurement efforts is to compensate for a lack of expertise within the department. The *CAS Act* provides that "[t]he Chief Administrator may engage on a temporary basis experts or persons who have *specialized knowledge* for the purposes of advising and assisting the Chief Administrator in the performance of his or her duties and functions in any matter."[740] The CAS's IT procurement policy focuses "on attracting and engaging high potential *IT talent* with strong capabilities and leadership capacity, and on addressing projected

---

[739] This list of goods and services is based on a search of documents in the federal procurement database <https://buyandsell.gc.ca> using the phrase "courts administration service."

[740] *CAS Act*, *supra* note 111, s 11 [emphasis added].

gaps in *specific skills* that may pose a threat to the achievement of the CAS's current and future priorities and long-term business goals."[741] On balance, the CAS's focus on attracting specialized skills and knowledge implies that the best candidates for outsourcing are separate, definable functions and services that require technical expertise. Both lawyers and economists tend to agree with this privatization tactic:[742] because simple or commodity tasks are easy to define and supervise, contracting out poses less legal and economic uncertainties. The CAS resorts to several familiar procurement formats that are aligned with the goals of its procurement agenda.

Task-Based Informatics Professional Services Standing Offer and Supply Arrangement. The CAS often resorts to the Task-Based–Informatics Professional Services Standing Offer and Supply Arrangement ("TBIPS SA")[743] to address specific IT needs that are usually associated with a specified set of responsibilities. The services delivered under TBIPS SA are finite work assignments that require one or more consultants. A task involves a specific start date, a specific end date, and set of

[741] Canada, Courts Administration Service, *2015-16 Annual Report* at 15, online : < http://www.cas-satj.gc.ca/en/publications/ar/2015-16/pdf/COURTS_16-206_AR_e_final.pdf > [emphasis added].

[742] Donahue, "The Transformation of Government Work", *supra* note 92 at 44.

[743] Public Services and Procurement Canada, *Task-Based Informatics Professional Services* (30 June 2020), online: <https://www.tpsgc-pwgsc.gc.ca/app-acq/sptb-tbps/index-eng.html>

deliverables.[744] For example, this arrangement is used to solicit video-conferencing services.[745]

Request for Proposals. Another procurement format frequently used by the CAS, the Request for Proposals ("RFP"), also includes a careful description of the expertise sought by the Federal Courts. For example, an RFP regarding court transcription, reporting, and registrar services contains specific requirements regarding the qualifications of a service provider: a minimum of three years of experience providing court reporting and transcription services; twelve months of experience using proven digital or verbatim reporting techniques (for example, Stenotype, Steno mask or Shorthand).[746]

An RFP for the provision of complex consulting services regarding machine-aided translation is more demanding. It requires a successful candidate to have, at minimum, a Master's degree in translation, linguistics, or other related fields; to be fluently bilingual; to have a recent demonstrated experience with the implementation of machine-aided translation environment; have a minimum eight years of demonstrated experience in the field of machine-aided translation, including research

---

[744] *Ibid.*

[745] Canada, Courts Administration Service, *TBIPS SA - I.9 - Systems Administrator Level 1 (TBIPS SA - Solicitation - 5X001-16-1090)* (15 February 2017), online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-17-00769004>.

[746] Canada, Courts Administration Service*, Request for Proposal: Court Transcription, Court Reporting and Court Registrar Services for the Province of British Columbia* (23 June 2016) at 19 [CAS, *Court Transcription*].

or development machine translation software and publications in peer-reviewed journals. [747]

The requirement of specificity also applies to the contractual deliverables. For example, the CAS's RFP regarding court transcription, reporting, and registrar services imposes very specific requirements on the transcripts. The deliverable must meet the following criteria: conform to the precise transcript specifications for paper (margins, lines per page, font, spaces between colons, Canadian English spelling) and electronic (software to be used) copies.[748] The CAS's statement of work for the services of a consultant in machine-aided translation includes an obligation to submit, for the duration of the contract on a weekly basis, an electronic copy of a report outlining the accomplishments for the given period, open issues, and upcoming milestones.[749]

Advance Contract Award Notice. Finally, the CAS resorts to the non-competitive Advance Contract Award Notice ("ACAN")[750] for the procurement of certain types of information technology services. ACAN is an instrument that signals to the public that a department of a federal government intends to award a contract to a pre-identified supplier because it reasonably believes that only this supplier can

---

[747] Canada, Courts Administration Service, *Request for Proposal: Machine-Aided Translation Consultant, Annex "A" Statement of Work* (27 February 2015), s 4.1.1.1 [CAS, *Translation Consultant*].

[748] CAS, *Court Transcription*, *supra* note 746 at 31-32.

[749] CAS, *Translation Consultant*, *supra* note 747, s 2.4.

[750] PWGSC, *Supply Manual*, *supra* note 227 ("An ACAN process...does not constitute a 'competitive' process for the purposes of the trade agreements and any Canadian International Trade Tribunal (CITT) challenge" at s 3.15.5(a)).

perform the work required by the government. [751] Such reasons as absence of competition and alternative or substitute are invoked to justify a non-competitive procurement process.[752] However, other suppliers are not entirely ousted from the bidding process: they may indicate their interest in bidding by submitting a statement of capabilities based on the specific requirements provided by the soliciting department. If no other supplier submits a statement of capabilities that meets the needs of the government, the contract will be awarded to the pre-identified supplier.

The CAS uses ACAN to periodically award contracts for self-publishing and hosting of the Federal Courts' decisions. In this case, the CAS uses a non-competitive process because it believes that Decisia is the only known "online platform dedicated to automated extraction of information from legal documents, meeting the standards in the field."[753] Despite the non-competitive nature of the process, ACAN imposes strict requirements of specificity on the services provided by Decisia. These requirements include: the interoperability of the software with existing court websites, conversion between text formats, recognition of two of Canada's official languages, and extraction of metadata (title, neutral citation number, date, docket number, judge,

---

[751] *Ibid.*

[752] Canada, *Agreement on Internal Trade*, 1995, art 506.12(b), online:< https://www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf>, repealed by *Canadian Free Trade Agreement*, 1 July 2017, online: <https://www.cfta-alec.ca>.

[753] Public Works and Government Services Canada, *ACAN - Publishing Court Decisions Online (5X001-15-1316)* (10 February 2016), online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-16-00721333>

counsel, parties, date of publishing).[754] Also, Decisia's compliance with these requirements is relatively easy to evaluate.

2. Case Study: Procurement of the Courts and Registry Management System by the Courts Administration Service

As was mentioned in the Introduction to the thesis, the governments across the country implement the elements of digitized and automated CRMS. However, in the medium-term perspective the implementation of a full-fledged, integrated CRMS system will most likely take place in the Federal Courts. Recently, the CAS secured federal funding in the amount of $58 million to support the acquisition, implementation, and operation of a modern CRMS.[755]

This is not the first time that the Federal Courts have sought to implement instruments that digitize some processes. For example, in 2008, the Federal Court started using the Electronic Filing Service developed by LexisNexis.[756] This service allowed the parties to file court documents in PDF or TIFF formats. Following the submission of a document, they were provided with a web link to the Court's copy of the e-filed document to satisfy themselves that it conformed to the original. Only

---

[754] *Ibid.*

[755] Canada, The Courts Administration Service, *2018-19 Annual Report* at 23, online: < https://www.cas-satj.gc.ca/en/publications/ar/2018-19/pdf/CAS_2018-19_Annual%20Report_EN_Web.pdf >.

[756] Nicolas Vermeys, "Code source et sources codifiées : pour une cyberjustice québécoise ouverte et accessible", online: (2010) 14:3 Lex Electronica <https://www.lex-electronica.org/en/s/586> [Vermeys, "Code source et sources codifies"].

parties, counsel, and court support staff could view electronic documents pertaining to the proceeding. However, the paper copies of electronic filings that have not been sealed by the Court could be reviewed by any person at any Registry office.[757]

The Tax Court implemented a less sophisticated e-filing system. It allowed parties to file a limited number of documents (such as notice of appeal, request for an extension of time to file a notice of appeal, notice of change of address and change of counsel, and consent to judgment).[758] The system did not allow the parties or their lawyers to modify or examine submitted documents. Most importantly, the e-filings systems of the Tax Court and the Federal Court were provided by two different entities which posed interoperability challenges.[759]

The procurement of a CRMS system represents a shift away from the Federal Courts' familiar "pattern of engaging specialized contractors for separate tasks, and toward comprehensive contracts with large 'integrated system providers'."[760] To implement CRMS, the CAS and the Federal Courts will engage in a multi-stage, multi-year procurement process that consists of market research, negotiations, executing a binding contract, and a phased implementation of the project. In 2019, the CAS started the market research phase of the process and, in 2020, it extended the deadline for

[757] The Canadian Forum on Civil Justice, *Federal Electronic Filing Service*, online: < https://cfcj-fcjc.org/inventory-of-reforms/federal-electronic-filing-service/>

[758] Vermeys, "Code source et sources codifies," *supra* note 756 at 9.

[759] *Ibid*.

[760] Donahue, "The Transformation of Government Work", *supra* note 92 at 57.

receiving feedback from a number of interested bidders.[761] This Part of the thesis discusses the outcomes of the market research phase and envisions the design of the future stages of the procurement process in line with the proposals about the quality standards, the contracting process, and the resulting contract discussed in Chapters II and III above.

a. The Stages Preceding the Binding Contract

As was mentioned in Chapter II above, procurement departments should avoid formulating a procurement strategy for complex projects based on their own assumptions about particular issues.[762] A contracting department may be overly optimistic about the privatization's gains and may adopt the view that privatization should be the default option for service delivery.[763] Additionally, a contracting department may assume that specific accountability requirements may discourage private actors from participating in a tendering process, whereas private companies may be willing to commit to these requirements to get a long-term, profitable contract with the government.

---

[761] Public Works and Government Services Canada, *Notice of Proposed Procurement (NPP)*: *Courts and Courts Registry Management System (CRMS) (5X001-181157/B)* (18 August 2020), online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-XL-138-38407> [PWGSC, *NPP*].

[762] Davies, *The Public Law*, *supra* note 123 at 330.

[763] Freeman, "Public Law Norms", *supra* note 81 at 1300.

1) Market Research

To better examine the market for required services, federal procurement departments can conduct independent market research, seek services of a specialized consultancy firm, or solicit direct feedback from potential service providers. The CAS chose the last option. In 2018, the CAS together with the department of Public Works and Government Services issued a Letter of Interest ("LoI") to solicit the feedback of the IT companies about available CRMS software. The document describes the following preliminary specifications of CRMS:

- One integrated, user-centric and adaptable solution serving four distinct and independent Courts.
- The business of the Courts and CAS is mostly done in a paperless and digital environment with self-serve capability where applicable.
    - o Court users and the public have access to court information and documents from anywhere at any time, through the internet.
    - o Court users submit court proceeding documents and evidence through an online channel.
    - o Interactions, processes and correspondence between the Courts, the registries and court users are facilitated by efficient tools and systems.
    - o Court hearings can be paperless.
- Workflows and processes are adaptable to court rules changes and most changes can be done by the business owner.
- Court information is electronically and centrally held, readily available and safeguarded against loss and damage.
- Members of the Courts Judicial and Registry Services are supported by a technical team that is responsive to the demands brought forward by a digitized environment in a court context.
- Judicial and Registry Services employees are trained and equipped to leverage technology to better support the Courts and their users.

- CAS and the Courts monitor key performance indicators and track registry activities with complete, reliable and readily available data provided by the solution. [764]

The LoI asks potential bidders "to provide their comments, suggestions, concerns and, where applicable, alternative recommendations regarding how the requirements or objectives...could be satisfied."[765] The LoI includes question on the best implementation strategy, the risk factors that the public purchasers should consider during the project implementation, the main phases of the project, and the testing requirements.[766] It is specified that the responses of the private sector may be used by the government "to develop or modify procurement strategies and/or any contracting documents, clauses, terms and conditions." [767] It is important to emphasize that the LoI does not constitute an offer and cannot be utilized to form a binding contract for a CRMS instrument.[768] Furthermore, it bans communications between interested suppliers and procurement officers and prohibits interested suppliers from engaging in anti-competitive conduct.[769]

The market research phase identified four suppliers that may be interested in providing CRMS instruments for the Federal Courts.[770] Although it may seem that

---

[764] Public Works and Government Services, *Letter of Interest*, *supra* note 67 at 6.

[765] *Ibid* at 9.

[766] *Ibid* at 16.

[767] *Ibid* at 9.

[768] *Ibid* at 5.

[769] *Ibid* at 6.

[770] Public Works and Government Services Canada, *List of Interested Suppliers for Courts and Registry Management System* (5X001-181157/A), online:

such a small number of potential bidders reduces the CAS's bargaining power, the particular context of required services makes competition seem possible. Scholars that center competition in their studies of privatization maintain that for some government functions five or even three bids can constitute a bare minimum of competition.[771] For example, when New Brunswick published its first RFP for an integrated justice project in 1994, four proposals from IT companies satisfied the competition requirement.[772]

In fact, only in rare circumstances – usually, when the private sector provided a service in the past – contracting departments might receive a substantially higher number of bids.[773] In other cases, when privatization involves new and complex services, many bidders may be discouraged from participating in a tendering process by a number of factors, such as "overly complex legal terms and conditions, ... unlimited contractor liability, [and] onerous administration obligations such as frequent and detailed reporting."[774]

<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-XL-127-34555/list-of-interested-suppliers>.

[771] Kevin Lavery, *Smart Contracting for Local Government Services* (Westport, CT: Praeger, 1999) at 150.

[772] Baar, "Integrated justice", *supra* note 32 at 49.

[773] Susan Vivian Mangold, "Protection, Privatization, and Profit in the Foster Care System" (1999) 60 Ohio St LJ 1295 at 1313.

[774] Marcia Mills, Daniel Fabiano & Shannon Kristjanson, "Consolidation Creep: How the Federal Government's Canadian Collaborative Procurement Initiative Will Impact Suppliers at All Government Levels" (20 December 2019), online: <https://www.mondaq.com/canada/Government-Public-Sector/877376/Consolidation-Creep-How-The-Federal-Government39s-Canadian-Collaborative-Procurement-Initiative-Will-Impact-Suppliers-At-All-Government-Levels>.

2) Internal and External Consultations

In August 2020, following the completion of the initial market research phase under the LoI, the CAS and the PSPC issued a Notice of Proposed Procurement ("NPP") to engage in additional external consultations with the interested bidders.[775] An NPP represents "a summary of the solicitation that briefly describes the requirement, and provides pertinent information that will assist suppliers to determine their interest in fulfilling the requirement and their ability to successfully meet any key conditions for participating."[776] This notice confirms that the two departments – the CAS and the PSPC - plan to depart from the traditional RFP process that puts a ban on negotiations with interested bidders and instead will adhere to a consultative approach to CRMS design.[777] In fact, the NPP signals that the purchasing departments plan on conducting a concurrent NRFP with up to three top-ranked bidders.[778] As was mentioned in Chapter III above, under the concurrent NRFP process purchasing departments can conduct parallel discussions with multiple shortlisted proponents:

> The dialogue stage allows for the development or refinement of potential solutions through direct discussions between the purchaser and each proponent, and may result in a single viable solution or several viable solutions. At the close of the dialogue phase, the public institution invites each shortlisted finalist to submit its best and final offer. The final ranking is based on those final offers and, in most cases, the award goes to the final top-ranked proponent.[779]

---

[775] PWGSC, *NPP, supra* note 761.

[776] PWGSC, *Supply Manual*, *supra* note 227, s 4.75.15.

[777] PWGSC, *NPP, supra* note 761 at 7.

[778] *Ibid*.

[779] Emanuelli, *supra* note 143 at 1309.

The winning bidder for the CRMS project will be chosen "based on the combined highest score [consisting] of technical, financial and [Capability and Usability Assessment scenarios]."[780]

It is noteworthy that the concurrent negotiations process chosen by the CAS and the PSPC has been gaining traction in other countries. For example, in Australia, Court Services Victoria ("CSV") chose the successful bidder for the delivery of the Case Management System following the Competitive Dialogue process which is similar to the concurrent NRFP process.[781] Perhaps the CSV's and the CAS's choice to use a more complex negotiation process is best explained by two reasons. First, both departments are confident that a substantial number of potentially competent bidders are interested in providing the required service. Second, both departments believe that they have sufficient expertise and resources to effectively manage the concurrent negotiations process with several interested bidders.[782]

For the purposes of this thesis, these negotiation strategies are important to keep in mind not only because they confirm the complexity of contracting for integrated services, but also because they suggest that the best bid may not necessarily be the one

[780] PWGSC, *NPP, supra* note 761 at 7.

[781] Court Services Victoria, *Annual Report 2018-2019*, at 26, online: < https://www.courts.vic.gov.au/sites/default/files/publications/csv_annual_report_2018-19.pdf >.

[782] Emanuelli, *supra* note 143 at 1309.

with the lowest price.[783] As was mentioned throughout this thesis, if the CAS wants to design a CRMS instrument that responds to the requirements of judicial independence by design, it cannot rely exclusively on the advice of private service providers. In this respect, the CAS's senior committee structure provides many opportunities for ongoing consultations and collaborations between the judiciary and the front-line procurement officers regarding any strategic and operational issues.[784]

For example, the Chief Justices Steering Committee membership includes representatives of each of the courts and the CAS.[785] The mandate of the CAS Chief Justices Steering Committee is to provide a forum to discuss decisions that affect the governance of the Federal Courts and questions which pertain to the CAS' relations with federal partners[786] It is supported by three National Judges Committees (on Security, Information Management/Information Technology and Accommodations).[787] The committees submit their recommendations to the CAS Chief Justices Steering Committee for consideration and endorsement. The Chief Administrator chairs all three committees. [788]

---

[783] PWGSC, *Supply Manual*, *supra* note 227 (stipulating that in order to determine which bid guarantees the overall best value, public purchasers must follow "a logical systematic evaluation procedure covering all aspects of the evaluation process." s 5.5.b).

[784] CAS, *2017-18 Annual Report*, *supra* note 113 at 3.

[785] *Ibid.*

[786] *Ibid.*

[787] *Ibid.*

[788] *Ibid.*

It is important to note that beyond participating in consultations, the Chief Justices of the Federal Courts have the responsibility to intervene in administrative planning when they think that it may negatively affect the judicial system.[789] Particularly, the Chief Justices can order the Chief Court Administrator to perform certain tasks or activities to reach or maintain an acceptable level of court administrative support or to ensure the achievement of broader court goals and objectives. [790] These powers are reflected in the provisions of the *Courts Administration Service Act*. For example, according to section 9 (1) of the Act "[a] chief justice may issue binding directions in writing to the Chief Administrator with respect to any matter within the Chief Administrator's authority."[791] This authority of the Chief Justices of the Federal Courts translates into substantive requirements that apply to government contracts. It can be interpreted to bar binding legal commitments regarding court support services without the Chief Justices' approval.

b. Binding Contract

Negotiations are followed by the execution of a binding contract between the contracting department and the highest-ranked bidder. When government contracts out the provision of complex, integrated services, the goals of the resulting contract clauses are two-fold: (1) to mitigate the potential risks arising out of a *de facto* long-term monopoly on the provision of services; (2) to help the contracting department and

[789] CJC, *Alternative Models*, *supra* note 114 at 103.

[790] *Ibid* at 102.

[791] *CAS Act*, *supra* note 111, s 9 (1).

the end users to avail themselves of private ingenuity throughout the life of a contract. Therefore, from the perspective of the contracting department and of the end users, the resulting contract can be envisioned as a set of *ex ante* risk-aversion mechanisms and *ex post* remedies that become available in the event of a breach of a contract.

1) Phased Implementation

When privatization concerns complex services, the risks following the execution of a binding contract can be mitigated through the incremental implementation of a project. Usually, this implies that a project is broken into stages and reviewed at each successive stage before being allowed to pass to the next stage.[792] The analysis conducted following the Ontario's unsuccessful IJP recommended that contracts for complex services contained so-called "off-ramps" or an "option of terminating a vendor or a project at different stages along the way."[793] Off-ramps, "allow for benefits to accrue along the way while keeping open the option of an exit, thus reducing overall risk."[794]

Incremental implementation of complex projects through acceptance testing of each stage by the end users seems like an obvious risk-mitigating measure. In those cases when parties cannot agree upon reaching the quality specification of each phase of a project, contracts for complex services often provide for a dispute resolution

[792] Ontario, "Report of Ontario's Special Task Force", *supra* note 496 at 18-19.

[793] *Ibid* at 27.

[794] *Ibid.*

procedure.[795] Of course, phased implementation may postpone the commissioning of a project. Nevertheless, studies on privatization confirm that a phased implementation of complex projects can result in benefits down the line by reducing future conflicts over the quality of services between the end users and private contractors.[796]

2) Diligent Provision of Services

Federal *pro forma* government contracts usually contain clauses that require contractors to perform the work diligently and efficiently in accordance with standards of quality acceptable to Canada and in full conformity with contract specifications.[797] The standard acquisition clauses and conditions also impose upon a service provider an obligation to use "quality assurance procedures, inspections and controls generally used and recognized by the industry to ensure the degree of quality required by the Contract."[798]

However, references to acceptable industry procedures and standards become less relevant when privatization involves new services, for which there are no established practices. In cases of contracts for integrated court support services, a resulting contract may include technical specifications that were identified in Chapter

[795] *Court Services Victoria CMS*, *supra* note 103, at 25-26.

[796] Freeman, "Public Law Norms", *supra* note 81 at 1339.

[797] Public Works and Government Services Canada, *General Conditions - Higher Complexity – Services*, 2035 05 (2012-03-02) Conduct of the Work, online: < https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/3/2035/17#conduct-of-the-work >

[798] *Ibid.*

II above, as well as a general obligation of private service providers to perform services at the direction of the judiciary.

3) Continuity of Services

As was mentioned in Chapter III above, a competitive contracting process may force bidders to commit to public goals to win a bid. However, having won a bid, a successful bidder acquires a long-term monopoly on the provision of services. Following the completion of implementation procedures, CRMS becomes an integral part of court operations. John Donahue points out that the process of "disentangling an organization from [an] integrated system provider"[799] is disruptive and costly. This is because a private party does not only provide a service, but also ensures ongoing support for the use of the integrated system and develops practice guidelines and training material. For example, the CAS recently issued a non-competitive procurement notice – ACAN – to notify the market of its intention to enter into a contract for the provision of professional support services for its Evidence Management System ("EMS"). The non-competitive procurement process stems from the fact that the company that provides EMS can deliver the required support services. These services include providing "support and guidance to Judges and Law Clerks for the use of [EMS] in hearings deliberations and decision writing."[800]

---

[799] Donahue, "The Transformation of Government Work", *supra* note 92 at 58.

[800] Canada, Courts Administration Service, *Advance Contract Award Notice (ACAN): E-Trial Toolkit (5X001-18-0659/A)* (01 November 2018), online: < https://buyandsell.gc.ca/procurement-data/tender-notice/PW-18-00849454>.

Research on privatization confirms that government purchasers are unlikely to replace service providers unless there is evidence of "egregious performance or blatant exploitation."[801] While abuse of a *de facto* monopoly power raises serious concerns, careful contract design can help mitigate risks. In this regard, it is imperative that the CAS procurement officers: (1) anticipate a possibility that the Federal Courts may wish to replace a service provider because they are unhappy with the quality of services; (2) negotiate exit strategies, such as disengagement plans and transitioning out of services.

Usually, long-term contracts contain survival clauses – on licencing and assignment of intellectual property rights, security, privacy, and confidentiality obligations of the parties. Such clauses can help courts avoid service disruptions and violations of quality specifications that follow from the principle of judicial independence.[802] Also, courts should be able to use any training materials and guidelines and rely on private actors for the provision of the technical support services notwithstanding any contract performance disputes that may arise between the parties. To minimize the risk of service interruptions in the event of a potential dispute with a service provider, courts that have completed transitioning to CRMS prefer to use "a non-proprietary, generic Operating System ... with technical vendor support and open

[801] Donahue, "The Transformation of Government Work", *supra* note 92 at 58.

[802] *Court Services Victoria CMS*, *supra* note 103, at 84-85.

source software libraries, and [have]adopted non-proprietary software and open published technical standards (e.g.; Adobe Corp. PDF, Sun-Oracle Corp. JAVA)."[803]

4) Conflicts of Interest

Even though technical specifications and sophisticated negotiation strategies may minimize violations of judicial independence by design, there are still significant risks that unscrupulous private actors may breach their contractual obligations. The possibility of violations may be particularly high when a company that provides services to the Federal Courts is a party to litigation before one of the courts.[804] In such cases, private parties may take advantage of sensitive judicial information discussed in Chapter II above – such as communications between the parties, judicial drafts and memos - to undermine the integrity of the judicial process.[805]

In light of these potential breaches, government procurement officers should conduct careful due diligence of the ownership structures of their counterparties. Sometimes, due diligence yields interesting results. For example, in the US, research conducted by a non-profit public benefit corporation "Free Law Project" revealed that

[803] Greenwood & Bockweg, *supra* note 25 at 7.

[804] Benyekhlef & Vermeys, "Technological Procurement", *supra* note 704.

[805] Nicolas Vermeys et al, "Étude relative à l'incidence des technologies de l'information et des communications sur la gestion de l'information dans l'administration judiciaire québécoise" (January 2017) at 65-66, online: < https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/ministere/Etude_janvier_2017_Transformation_Justice.pdf> [Vermeys et al, "Étude relative à l'incidence des technologies de l'information"].

part of the Public Access to Court Electronic Records ("PACER")[806] help desk services is outsourced to a corporation whose final beneficiary is one of the largest military subcontractors in the United States.[807]

In privatization, corporate due diligence is a driver of greater accountability primarily through the disclosure of information about immediate owners.[808] The federal Standard Acquisition Clauses and Conditions Manual developed by the department of Public Works and Government Services contains helpful Integrity Provisions, which require that the prospective bidders disclose information about their directors and owners. At the same time, the Integrity Database Services has discretion to require additional information.

As the US PACER privatization experience demonstrates, the requirement to disclose information not only about the immediate owners, but also about the ultimate beneficiaries of service providers can shed light on the potential conflicts of interest. The requirement to disclose final beneficiaries usually entails the disclosure of individuals who hold, directly or indirectly, interests in a contracting party, including through corporate and partnership structures, and an obligation to provide regular

[806] Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, see online:< https://www.pacer.gov>.

[807] Free Law Project, *Facts About PACER and CM/ECF*, online: <https://free.law/pacer-facts/>.

[808] PWGSC, *Supply Manual*, *supra* note 227, s 4.21. (Integrity Provisions).

updates about the change in corporate ownership and beneficiaries.[809] Applicable rules may also require that contracting parties who provide court support services have conflict of interest rules in place. [810] These measures, as well as significant remedies for violations of conflict of interest rules, will reduce the possibility of information security breaches and other threats to judicial impartiality and independence.

5) Effective Monitoring

Closer and more extensive monitoring of private contractors not only for cost control and fraud prevention purposes, but also for quality control may limit potential abuses of their *de facto* monopoly power. Quality of a CRMS instrument can be measured in many ways, such as "the degree of adoption by courts, legal community, and the public; the volume and extent of usage both transmitting documents to and from the courts; the reliability, validity and dependability of the service; the efficiency and effectiveness of the service and productivity of staff; and improvements in the overall quality of justice."[811]

Ian Harden points out that effective monitoring can also be based on a system of customer complaints. Numbers of received complaints can be used as a starting point to determine other acceptable forms of monitoring. Alternatively, they can be used "as

[809] Corporate beneficiary disclosure requirements not only reduce the risk of unauthorized disclosure of information, but also prevent tax evasion, fraud and money laundering. See Michael Ventresca & Steven Dhesi, "Transparency Is Coming: B.C. Passes Real Estate Beneficial Ownership Disclosure and Public Registry Law" (10 June 2019) Mondaq (blog), online: < http://www.mondaq.com/article.asp?articleid=813468&email_access=on>

[810] Kelman, *supra* note 268 at 182.

[811] Greenwood & Bockweg, *supra* note 25 at 2.

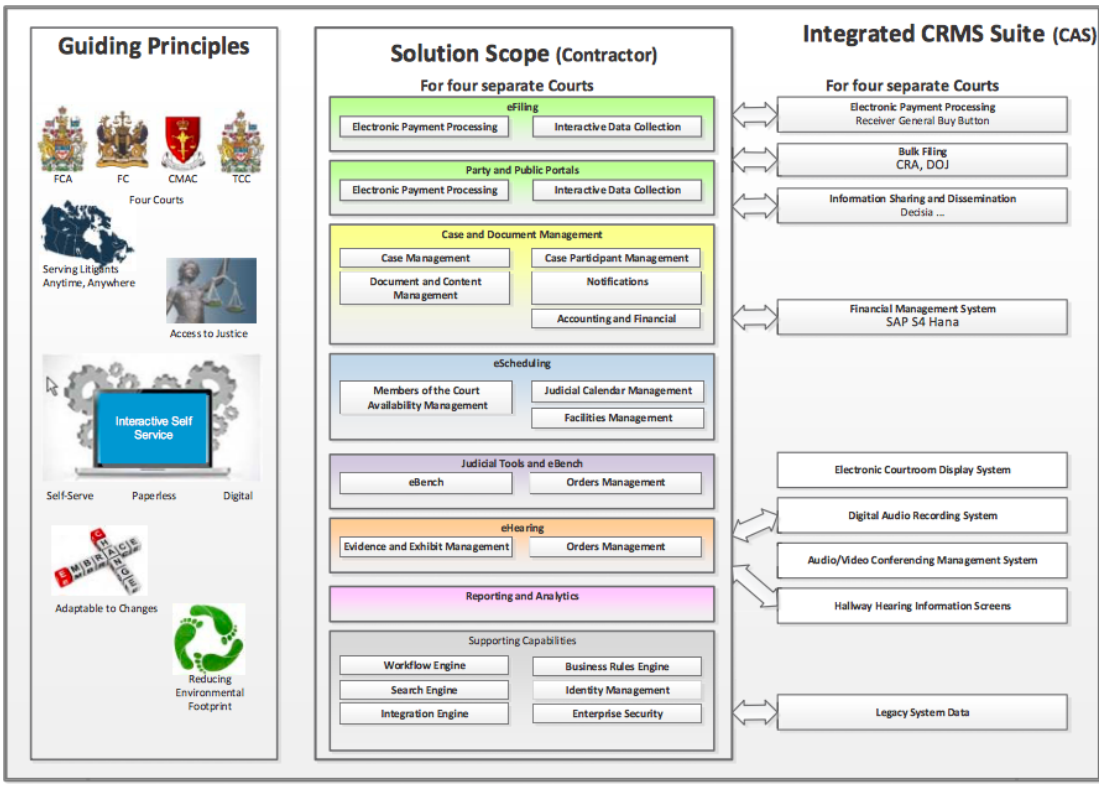
an objective in their own right." [812] In other words, a certain number of amassed complaints can trigger contractual provisions on penalties or remedies due to the provision of services of substandard quality.

6) Design-based v Performance-based Specifications

As was mentioned above, a familiar problem of providing quality court support services takes on new importance as courts adapt to the digitization and automation of processes. In this context, the Federal Courts, the CAS, and their federal partners need to ensure that CRMS's technical specifications comply with judicial independence by design examined in Chapter II above and other requirements that ensure proper functioning of the system. As presented in Figure 2 below, these additional requirements fall under several categories: case initiation, court participants management, listings management, evidence management, program management, records management, reporting and analytics, and management of financial transactions.

[812] Harden, *supra* note 125 at 66.

Figure 2 CRMS Requirements of the Federal Courts[813]



The main advantage of design-based specifications is that they are relatively easy to implement and to enforce.[814] Usually, it is sufficient to carefully inspect or test a final product to determine compliance with these specifications. However, the main shortcoming of *ex-ante*, design-based specifications is that they constrain private ingenuity. For this reason, final specifications for complex services often consist of a combination of design-based and performance-based specifications. The latter ones

[813] Public Works and Government Services Canada, *Notice of Proposed Procurement (NPP) Courts and Registry Management System (CRMS) for the Courts Administration Service (CAS)* (18 August 2020), online: < https://buyandsell.gc.ca/cds/public/2020/08/18/94c65bb0b75e5f9c2ae90a90e849d105/ABES.PROD.PW__XL.B138.E38407.EBSU000.PDF>.

[814] Nou, *supra* note 121 at 778.

identify the kinds of outcomes a final product should achieve. In the context of a CRMS, performance-based specifications may include: "an electronic case record which acts as a single source of truth," "integration and connectivity for the whole of justice system," "minimal reliance on paper."[815] The principal advantage of performance-based specifications is that they allow private actors to participate in creating and upgrading a product.[816] Motivated by competition, they may develop new software features that will drive down the costs and improve the quality of services.

In the resulting contract, performance-based specifications can be formulated in a number of fragmented clauses located in different parts of the document. For example, the introductory provisions of the contract may require a private service provider to do all things necessary to achieve the overall goals of a project, such as improving access to justice and reducing procedural delays.[817] More specific provisions may require that a private service provider periodically informs a public purchaser of any available updates and innovations that facilitate the achievement of the project's goals.

[815] *Court Services Victoria CMS*, *supra* note 103 at 17.

[816] Nou, *supra* note 121 at 778.

[817] *Court Services Victoria CMS*, *supra* note 103 at 17.

c. Enforcement of the Procurement Cycle by the Judiciary

When contract is the principal instrument regulating the conditions of service provision, the question arises how the end users of the service, in our case the judiciary, can enforce their right to receive services that comply with the requirements of judicial independence by design discussed in Chapter II above. For example, should they be entitled to contest the procurement process and sue the providers of services directly?

As was mentioned in Chapter I above, contracts for the provision of court support service formalize the relationship between a public purchaser and a service provider. Thus, as a party to a contract, that is the CAS, can invoke familiar contract law mechanisms, such as "the rules on penalty clauses, ... the rules on mistake, misrepresentation, and frustration ... remedies for breach"[818] to enforce contract performance by a private service provider. Despite a variety of mechanisms available to contracting parties, upon closer consideration it becomes clear that these mechanisms are insufficient. First, contract provisions do not afford the judiciary, as the end user of services, any opportunities to enforce or challenge contract performance by a private service provider. Second, there are no formal mechanisms that allow the judiciary to challenge violations of the tendering process and the CAS's contract award decisions.

[818] Davies, *The Public Law*, *supra* note 123 at 42.

1) Enforcement of the Resulting Contract by the Judiciary

The common law doctrine of privity of contract provides that a contract cannot confer rights or impose obligations on any person except the parties to it.[819] The first part of the doctrine (under which a contract cannot confer rights on anyone except a party to it) has been the subject of much discussion by courts,[820] legal scholars,[821]and law reform commissions.[822] The analysis of these discussions falls out of scope of this thesis. For our purposes suffice it to say that perhaps a key criticism of the doctrine of privity of contract is that the many exceptions that have been created by statutes and the courts to mitigate the doctrine have resulted in complex law – it is not always clear whether a third party can enforce a right under a contract.[823] In the context of government contracting, there is some clarity - Canadian courts have not welcomed the idea of giving standing to third parties to enforce such contracts in

[819] Joseph Chitty, *Chitty on Contracts,* 33d ed (London: Sweet & Maxwell, 2019), C 18.

[820] The leading Canadian case on the doctrine of privity of contract is *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 (The Supreme Court introduced a "principled exception" to the doctrine that applies if two conditions are met. First, the parties must have intended the benefit to extend to the third party seeking to rely on the contractual provision. Second, the actions of the third party must come within the scope of the contract between the initial contracting parties).

[821] See e.g. M.H. Ogilvie, "Re-Defining Privity of Contract: *Brown v Belleville (City)*" (2015) 52:3 Alta L Rev 731 (general overview of the doctrine and its application in Ontario); John D McCamus, "Loosening the Privity Fetters: Should Common Law of Canada Recognize Contracts for the Benefit of Third Parties?" (2001) 35:2 Can Bus LJ 173 (advocating the abolition of the doctrine through judicial reform); JW Neyers, "Explaining the Principled Exception to Privity of Contract" (2007) 52 McGill LJ 757 (arguing that the principled exception is merely an application of conventional estoppel to the facts found in privity cases).

[822] See e.g. Maria Lavelle, *Privity of Contract and Third Party Beneficiaries* (Uniform Law Conference of Canada, Civil Law Section, 2007).

[823] *Ibid*, at para 25.

the absence of explicit statutory provisions granting rights to third-party beneficiaries.[824] Thus, the probability that the judiciary can directly enforce contract performance under contracts entered between, for example, the CAS or PSPC and private actors remains at best very low. However, in the context of contracts for court support services, enforcement of contractual obligations through courts is unlikely in any event. Private actors delivering CRMS services have access to judicial information – such as judicial e-mails, draft decisions, private schedules, and productivity reports. In the event of litigation, private companies may leverage this information for retaliatory purposes.[825] In the worst-case scenarios, litigation may undermine the continuity and integrity of services delivered to courts, although carefully drafted contract clauses may provide reasonable protections against such risks. On balance, negotiations, mediation and alternative dispute resolution seem like safer options for resolving disagreements about performance of contracts for the provision of CRMS tools.

2) Enforcement of the Contracting Process by the Judiciary

Admittedly, the judiciary, as the end users of court support services, may have serious grievances not only about the performance of a contract by a private actor, but also regarding the government's procurement process. These grievances may arise if, for example, the CAS fails to conduct appropriate consultations regarding the solicited services with designated judicial representatives or if the specifications of the

[824] Mullan & Ceddia, *supra* note 145 at 243.

[825] Benyekhlef & Vermeys, "Technological Procurement", *supra* note 704.

tendering documents fail to reflect the requirements flowing from the principle of judicial independence. In those instances when the judiciary is unhappy with the procurement process, it should have access to mechanisms that protect its procedural rights. The question remains: how to ensure that the judiciary has formal and structured opportunities to voice their concerns?

Litigation. In some instance, a third party that does not directly participate in a procurement process, but who nevertheless considers that their procedural rights were violated, can lodge a complaint against the procurement department that conducted the tender.[826] This does not mean, however, that the judiciary, if given an opportunity, will be willing to sue the CAS over the procurement process. As Lorne Sossin points out, any litigation between the judiciary and the executive entails "conflicts of interest on both sides."[827] Because judicial administration budgets are allocated by parliaments upon the recommendation of the executive, "[j]udges may have a reasonable fear that a decision at odds with the executive could lead to cuts in other areas of court administration."[828] Also, judges presiding over the case may be perceived by the public as having a personal stake in the outcome of the litigation.[829] Finally, litigation

[826] Greene, *supra* note 156 at 52.

[827] Lorne Sossin, "Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism" in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto, Ont: Irwin Law, 2010) 63 at 82 [Sossin, "Between the Judiciary and the Executive"].

[828] *Ibid.*

[829] L'honorable juge en Chef Pierre A Michaud « L'administration de la justice et les tribunaux : quelques réflexions sur la perception du public » in Jean-Maurice Brisson & Donna Greschner, eds, *Public Perceptions of the Administration of Justice* (Montréal: Éditions Thémis, 1995) 27 at 33.

undermines relationships of trust and cooperation between the branches of government and "is expensive, time-consuming, and ultimately unpredictable."[830]

The Commission Process. Beyond litigation, the judiciary and the governments have attempted to resolve their disagreements through a commission process. The commission mechanism was developed in two decisions of the Supreme Court that concerned judicial remunerations. The first decision, the *Remuneration Reference*,[831] was made within the framework of the judicial review of the provincial salary-reduction legislation affecting provincial court judges in several provinces. In this case, the Supreme Court determined that to uphold the independence of provincial judges, decisions regarding their remuneration must be made by special commissions[832] comprised of the representatives of the judiciary and provincial governments. Although the *Remuneration Reference* introduced limited deference to judicial opinions on the issue of remuneration, the commission process came undone. Provincial governments frequently rejected the commissions' recommendations, the associations representing the judiciary challenged these decisions in courts, and courts often overturned the governments' decisions on judicial review.[833] In 2005, in the

[830] Sossin, "Between the Judiciary and the Executive", *supra* note 827 at 84.

[831] *Remuneration Reference*, *supra* note 167.

[832] *Ibid* ("The constitutional function of this body would be to depoliticize the process of determining changes to or in judicial remuneration" at 13).

[833] Courts often imposed more rigorous standards of review than required by the Supreme Court in *the Remuneration Reference*, see Lori Sterling & Sean Hanley, "Judicial Independence Revisited" (2006) 34 SCLR 57 at 64-66.

second remuneration decision,[834] the Supreme Court tried to mitigate the tensions between the branches of government. It affirmed that the courts should defer to the justified decisions of the governments to depart from the remuneration commissions' recommendations.[835]

The commission process provoked much criticism. First of all, critics argue that the committees failed to depoliticize the relationships between the judiciary and the executive branch. From a practical point of view, "the failure of the remuneration commissions to 'depolitisize' the executive-judicial relationship makes this approach to dispute resolution unlikely to appeal to many."[836] Critics also point to the obvious failure of the process to boost cooperation between the government and the judiciary. The commission process has been described as "typically formal, sporadic and confrontational"[837] resembling "a trial or arbitration process, which is normally a course of last resort used only when negotiation and consensus building have failed."[838] A less formal setting, possibly involving a mediator, can promote "interest-

---

[834] *Provincial Court Judges Assn of New Brunswick v New Brunswick (Minster of Justice); Ontario Judges Assn v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec(AG); Minc v Quebec (AG)*, [2005] 2 SCR 286.

[835] Sterling & Hanley, *supra* note 833 ("The Court also dealt specifically with the standard of review for decisions on compensation, and set a very high threshold of deference to the government's decision" at 58).

[836] Sossin, "Between the Judiciary and the Executive", *supra* note 827 at 64.

[837] Sterling & Hanley, *supra* note 833 ("In reaffirming the commission process as integral to the determination of judicial compensation, the [second remuneration] decision provides little incentive for the development of any less adversarial relationship between government and the judiciary, comparable to that which arises in traditional labour relations" at 58).

[838] *Ibid.*

based discussions" and "narrow issues in dispute." [839] Particularly relevant is the suggestion to "revisit the strict limits placed on negotiations in the 1997 Provincial Judges Reference,"[840] and create more opportunities for the parties to discuss their difference informally. Finally, an alternative dispute resolution process that so often results in litigation is not suitable for the settlement of disputes between the executive and the judicial branches. As was discussed above, conflicts of interest transpire during litigation.

The Office of the Procurement Ombudsman. Among the existing mechanisms, the Office of the Procurement Ombudsman ("the OPO") model may have adequate expertise to resolve disputes about the procurement process between the judiciary and the CAS. However, using the existing OPO model for addressing judicial complaints will require broadening the OPO's jurisdiction. Currently, the OPO is not authorized to resolve procurement disputes that arise between different branches of government. It provides an avenue for the resolution of disputes between government departments and contractors. Also, if the OPO was to become a venue for resolving disputes between the judiciary and the CAS, it would be necessary to raise the threshold of the maximum value of the matter in controversy. Currently, the OPO has jurisdiction over procurements relating to a specific tender that do not exceed the following thresholds: $26,400 for goods and $105,700 for services.[841] Although some types of procurements

[839] *Ibid* at 77.

[840] *Ibid.*

[841] Office of the Procurement Ombudsman, online: < http://opo-boa.gc.ca/enquetes-investigations-eng.html>.

for the federal Courts may fall below these thresholds, the procurement of more complex, integrated services exceeds them.

Finally, the critics of the OPO dispute resolution process suggest that it lacks full independence from the executive.[842] Despite several measures that have been introduced to ensure that the OPO does not act as an investigator for the government,[843] the Ombudsman is a public servant appointed by the Governor in Council. Both the complaint review process and the dispute resolution process are carried out by the public servants employed by the federal government. Given the shortfalls of the OPO in terms of impartiality and limits of its jurisdiction, it is unlikely that it will become an effective forum for addressing judicial grievances.

3) Potential Solutions

What would be a workable alternative to litigation, commissions, and the OPO when judges are dissatisfied with the tendering process and the CAS's choice of a service provider? Lorne Sossin provided a useful set of features for a mechanism for the resolution of disputes between the executive and the judiciary: permanent, rather than *ad hoc*, with responsibilities and composition clearly defined in a statute, and with

[842] Dustin Kenall, "Administrative Remedies for Administrative Disputes: Perfecting Public Control of Public Procurement" (2018) 31:2 Can J Admin L & Prac 177 at 190 [footnote omitted].

[843] *Ibid* (according to the Memorandum of Understanding between the Ombudsman and the Deputy Minister of Public Works and Government Services, the OPO obtains separate budget approval from Treasury Board, retains separate legal advisors, conducts its own internal audits and risk management at 192).

some meaningful authority over the participants of the dispute resolution process.[844] To clarify, this last characteristic does not imply that the decision of a dispute resolution body should be final and binding. A recommendation or an advisory opinion can be effective, provided that all the parties acknowledge the legitimacy of the decision-making institution. In this regard, the impartiality of decision-makers plays a critical role. For this reason, the statute regulating the constitution of a dispute resolution body should describe the members' appointment process, the participation of each party to a dispute in the selection of decision-makers, and establish minimum guarantees of impartiality. When it comes to the settlement of procurement disputes, it seems reasonable to supplement the list with the requirement of expertise. The resolution of procurement disputes requires knowledge of technical issues, a good understanding of the procurement process and the markets, knowledge of the principles of contract and administrative law.

On balance, Lorne Sossin suggests that it would be reasonable to establish "a venue for executive-judicial collaboration and consultation."[845] This venue could focus on dispute avoidance, and when necessary, will have "statutory authority to resolve executive-judicial disputes."[846] The proposed mechanism - that Sossin calls "the Conference Board of Court Administration" [847] - is modeled after the courts' rules committees which sit across the country. The committees "feature executive and

[844] Sossin, "Between the Judiciary and the Executive", *supra* note 827 at 82–88.

[845] *Ibid* at 91.

[846] *Ibid.*

[847] *Ibid.*

judicial collaboration, often with outside membership, to work constructively on improving the justice system."[848] Unlike the aforementioned remuneration commissions, the proposed mechanism does not involve an adversarial process and does not accept competing submissions of the parties. Given that the jurisdiction of the suggested body remains flexible, it could potentially hear judicial grievances stemming from the public procurement process.

C. Application of the Proposal in the Provinces

The case study presented in this Chapter has focused on reforming the procurement cycle for the Federal Courts administered by the CAS. However, all levels of provincial courts – trial, superior, and appellate - are administered by provincial governments.[849] For this reason, it is important to consider how these courts can avail themselves of the contracting process and the resulting contract to safely harness private ingenuity.

1. Modernization Priorities and Approaches

Canada's busiest courts are located in four most populated provinces - Ontario, Quebec, British Columbia, and Alberta.[850] Amongst these provinces, Ontario, Quebec,

---

[848] *Ibid.*

[849] See Figure 1 in the Introduction to this thesis.

[850] Statistics Canada, *Population estimates, quarterly*, online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901>.

and British Columbia actively, albeit not always successfully, cooperate with the private sector to implement the components of a digitized and automated CRMS for all levels of courts.[851] The government of Alberta prefers to develop its courts and registry services projects in-house and outsources separate tasks to private companies. For example, the Court Case Management project for the Provincial Court of Alberta largely relied on the expertise of the internal talent - the IT experts of the government departments, the judiciary, the representatives of provincial legal aid services, and the prosecution. Off-the-shelf document management and e-signature software was purchased at a later stage of the project.[852]

At the same time, not all CRMS modernization projects are concentrated in the most populated provinces. For example, the Provincial Court of Newfoundland and Labrador successfully implemented the Small Claims e-Filing system that accepts the most frequently used documents: statement of claim, reply, proof of service, application for default judgment, application for summary judgment, and judgment.[853] In 2017, the final adjustments were made to the Computerized Automated Scheduling System ("CASS") which works in tandem with the Case Assignment and Retrieval System ("CAAR"). The recent upgrades allow the judiciary to use CASS to collect

[851] See Annex II *infra* for a description of modernization priorities of courts across the country.

[852] Provincial Court of Alberta and Ministry of Justice and Solicitor General, *Court Case Management 2015/18 Project Charter* (14 January 2016), online: < https://albertacourts.ca/docs/default-source/pc/ccm-project-charter.pdf?sfvrsn=cbdadf80_4>

[853] The Provincial Court of Newfoundland and Labrador, *Small Claims Electronic Filing*, online:<https://court.nl.ca/provincial/courts/smallclaims/efiling.html>.

real time information about the workload of the court as well as to generate historical data and management reports regarding judicial performance.[854]

Amongst the Atlantic provinces, the courts of Newfoundland and Labrador lead the modernization movement. Perhaps this trend is best explained by the organizational culture which fosters innovations in the justice sector. First of all, there is evidence that the courts of the province have transitioned from organizations of professionals into professional organizations.[855] As was mentioned, in *NAPE v Newfoundland & Labrador*, the Supreme Court of the province established strict reporting lines between the judiciary and all personnel working in the courts regardless of their function or job description.[856] The empirical studies on court management demonstrate that this organizational structure fosters innovation and creates clear patterns of work delegation.[857]

Moreover, the Public Procurement Policy of Newfoundland and Labrador facilitates decentralized procurement of goods and services that accounts for the specific needs of separate departments and institutions. Particularly, the Policy

---

[854] The Provincial Court of Newfoundland and Labrador, *Annual Report 2017-2018*, online: <https://court.nl.ca/provincial/publications/ProvCourtAnnReport17_18.pdf>.

[855] Chapter II *supra* explains the difference between two types of organizations.

[856] *NAPE*, *supra* note 379 at para 93.

[857] See Chapter II *supra*.

encourages but does not require separate public purchasers to adhere to the shared services model.[858]

2. Incremental v Aggressive Approach to Court Modernization

Currently, provincial courts adhere to the incremental approach to the modernization of their CRMS. In other words, they implement different elements of the system – electronic scheduling, e-filing, case tracking - and then gradually integrate them. This approach is different from a more aggressive modernization strategy of the CAS that prioritizes the implementation of an integrated system simultaneously in all Federal Courts. The implementation of integrated systems has its benefits because it helps solve the interoperability problem. Often, the interoperability challenges arise due to the fragmented implementation of technological systems by separate government departments. Many commenters point out that a lack of interoperability between systems impedes effective exchange of information within the government.[859] In the context of the Canadian judicial system, the interoperability concerns transpired when the Federal Tax Court and the Federal Court implemented two

---

[858] Newfoundland and Labrador, Public Procurement Agency, *Public Procurement Policy*, online: <https://www.gov.nl.ca/ppa/division/policy/>, s 3.2.

[859] Fabien Gélinas, "Interopérabilité et normalisation des systèmes de cyberjustice : Orientations", online: (2006) 10:3 Lex Electronica <https://www.lex-electronica.org/files/sites/103/10-3_gelinas.pdf>; Ernani Marques dos Santos & Nicolau Reinhard, "Electronic Government Interoperability: Identifying the Barriers for Frameworks Adoption" (2012) 30:1 Social Science Computer Review 71; José Marcelo A P Cestari, Eduardo R Loures & Eduardo Alves Portela Santos, "Interoperability Assessment Approaches for Enterprise and Public Administration" in Yan Tang Demey & Hervé Panetto, eds, *On the Move to Meaningful Internet Systems: OTM 2013 Workshops* (Berlin: Springer, 2013) 78.

different electronic filing systems instead of using a single system that would link the Federal Tax Court, the Federal Court, and the Federal Court of Appeal.[860]

Despite the benefits of an integrated CRMS system, one can imagine several reasons why provinces may prefer incremental modernization. First, given the complexity and scale of provincial justice systems, it may be difficult to find an integrated, off-the-shelf software that can be seamlessly adapted for the use in provincial courts. For example, "Ontario is one of the largest court jurisdictions in North America with extensive criminal, family, civil, small claims, and provincial offences operations."[861] Given the complexity of the provincial justice system, any off-the-shelf software will require substantial customization and testing prior to its final implementation in the courts of the province.

Second, the failures of integrated justice projects of the 1990s may have discouraged some provincial governments from participating in ambitious public-private justice modernization partnerships later on. Carl Baar recounts that, in the early 1990s, several private-public partnerships in British Columbia, New Brunswick, and Nova Scotia were cancelled before the governments could draw conclusions about important differences between privatizing commodity and custom tasks. [862] This lack of government experience with major justice privatization projects may have resulted

---

[860] See e.g. Vermeys, "Code source et sources codifies", *supra* note 756; Vermeys & Benyekhlef, "Premiers éléments d'une méthodologie", *supra* note 719 at 213.

[861] Glenn Kauth, "Ontario Lagging in Court Technology", *Law Times* (31 December 2012), online: < https://www.lawtimesnews.com/news/general/ontario-lagging-in-court-technology/259806>.

[862] Baar, "Integrated justice", *supra* note 173 at 65.

in false optimism about the success of Ontario's IJP initiative.[863] From this standpoint, incremental modernization has certain benefits, like providing a form of insurance against big failures.

Third, the research on the implementation of technology in organizations supports the idea about the benefits of "staged development and implementation of technological change."[864] Commentators suggest that the following steps should precede the implementation of a new process: "process identification, review and analysis of the current process, and new process design and testing."[865] The British Columbia court modernization experience confirms the relevance of these studies to CRMS implementation projects. In British Columbia, two systems, JUSTIN and CEIS, "evolved from case tracking mechanisms to case management mechanisms, with the addition of functions such as a document repository, and document and workflow management."[866] Subsequently, these systems became the "essence" of BC's eCourt project: "an electronic court file with electronic document management and hooks from front end systems into back end case management."[867]

Of course, the incremental modernization strategy does not imply that provincial courts should ignore the design specifications regarding information security and

---

[863] *Ibid*.

[864] Bailey & Burkell, *supra* note 69 at 257-258 [footnotes omitted].

[865] *Ibid.*

[866] Andrew Clark, "E-Court: Status Update from BC" (September 2009), slide 4, online: http://www.slideshare.net/djaar/bc-presentation-ctc-2009.

[867] *Ibid.*

human intervention that were identified in Chapter II above. On the contrary, the audit of JUSTIN system in British Columbia demonstrates that the enforcement of these specifications remains as relevant as ever.[868] The Auditor General of British Columbia recounted that there was "a serious lack of controls to protect JUSTIN information from inappropriate access, and virtually no controls for detecting or preventing unauthorized disclosure."[869] Similar issues were identified by the Auditor General earlier, during an audit into the management of access to the Corrections Case Management System ("CORNET").[870]

At the same time, the incremental modernization strategy will most likely facilitate the monitoring of private compliance with technical specifications. It will also be easier for contracting departments and other stakeholders, for example the judiciary, to specify the delegated tasks in advance. [871] Also, the more specific an outsourced task is, the easier it is to replace a disappointing contractor with a competitor.

3. Modernization and Models of Judicial Administration

Beyond the modernization strategy, the second factor that may affect the application of proposals contained in this thesis is the model of judicial administration.

---

[868] Auditor General of BC, *Securing the JUSTIN*, *supra* note 34.

[869] *Ibid* at 4.

[870] *Ibid.*

[871] Donahue, "The Transformation of Government Work", *supra* note 92 (pointing out that "the easier it is to monitor performance and assess the quality of the work, the more safely can a task be delegated" at 45).

Over the years, Canadian courts have seen a certain harmonization of the basic principles of court administration. In *Valente*,[872] the Supreme Court mandated direct judicial control over "matters of administration bearing directly on the exercise of its judicial function"[873] such as "assignment of judges, sittings of the court and court lists."[874] The Supreme Court, however, acknowledged that due to a variety of local court administration arrangements it would not be possible to elaborate more specific requirements.

Although some baseline requirements for court administration were harmonized by the Supreme Court at the federal level, section 92 (14) of the *Constitution Act* confers upon provincial legislatures the exclusive legislative power to administer justice in the provinces.[875] This legislative power encompasses all courts sitting in the provinces, including provincial courts staffed by the federally appointed judges.[876] Beyond specifying the exclusive jurisdiction of the provinces, the *Constitution Act* does not say anything about the external and internal dimensions of court administration. As Peter McCormick notes, "[t]here is nothing about the managing of

[872] *Valente, supra* note 166.

[873] *Ibid* at 709.

[874] *Ibid*.

[875] *The Constitution Act, 1867*, *supra* note 107.

[876] Millar & Baar, *supra* note 24 at 47.

relations between judges and government, or between judges and court staff; and nothing about the setting or administration of the budget."[877]

Some commentators suggest that the choice in favor of the executive model of judicial administration was rooted in politics, rather than in law.[878] The judicature sections of the *Constitution Act* created an integrated judicial system that, despite Canadian federalism, "leans strongly in the direction of the judicial system of a unitary state"[879] because federally appointed judges work in provincial courts of appeal and in superior courts.[880] The provincial governments perceive federally appointed judges as federal officials who are "not competent to administer something that is a provincial responsibility."[881] As a result, many provinces prefer to administer courts as divisions of the provincial Ministries of Justice.

Although most provincial courts are governed by the executive model, some courts shifted to the so-called "limited autonomy model."[882] There are several variations of this model, however, in all of them a significant measure of court administration

---

[877] Peter McCormick, "New Questions about an Old Concept: The Supreme Court of Canada's Judicial Independence Decisions" (2004) 37:4 Canadian Journal of Political Science 839 at 843.

[878] Baar, "Patterns and Strategies", *supra* note 173 at 243–244.

[879] Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw Hill Ryerson, 1987) at 49.

[880] Peter H Russell, "Judicial Recruitment, Training, and Careers" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2012) 522 at 530.

[881] Baar, "Patterns and Strategies", *supra* note 173 at 249.

[882] CJC, *Comparative Analysis*, *supra* note 106 at 8.

authority "is transferred by statute or written agreement... from the executive to the judiciary."[883] This model is reflected in the aforementioned Memorandums of Understanding concluded between the Chief Justices of some courts and the Attorneys General. These MOUs acknowledge, among other things, that the judiciary, often represented by the Chief Justices, should supervise all matters related to judicial information and scheduling systems.[884] The MOUs also establish mixed supervisory bodies that consist of the members of the judiciary and the government. For example, Ontario's Court of Justice Judicial Information Technology Office is responsible for:

> - Advising, and consulting with, the Court on information technology and telecommunications services;
> - Coordinating the development of multi-year strategic technology plans for the Office of the Chief Justice and implementing management information systems to meet the operational needs of the Office of the Chief Justice and all regional offices;
> - Storing, maintaining and archiving, and releasing and providing access to, Judicial Information...;
> - Assessing new information technology systems and changes to existing systems to ensure compliance with judicial information security requirements.[885]

Similarly, the internal governance structure of the Court of Queen's Bench of Alberta includes the Information Management and Technology Steering Committee. The mandate of this committee is to advise the Executive Board of the court on all

---

[883] *Ibid* at 9.

[884] See e.g. *MOU Alberta*, *supra* note 188, ss 5.1.1.1.-5.1.1.13.

[885] *Memorandum of Understanding between The Attorney General of Ontario and The Chief Justice of the Ontario Court of Justice* (24 August 2016), s 3.8, online: < https://www.ontariocourts.ca/ocj/memorandum-of-understanding/>

matters relating to information management and technology management that affect the Court.[886]

This does not imply that courts administered by the executive model do not have specialized information technology committees. On the contrary, many courts provide for some sort of judicial involvement in the strategic planning of IT requirements.[887] Courts could draw on these arrangements to bolster judicial participation in procurement negotiations and supervision of the process. Potentially, these judicial committees may also be involved in some sort of end user testing or "licensing" of IT infrastructure.

The main difference between these courts and those that shifted to the limited autonomy model is that in the latter ones any privatization projects that involve transfer, storage, and disclosure of judicial information are automatically subject to judicial scrutiny. Particularly relevant for the purposes of this thesis is that the MOUs create clear lines of responsibility for different types of judicial information, provide that the Chief Justices and the Attorneys General will maintain a technology environment in compliance with comprehensive security and privacy specifications and adhere to the principles outlined in the Canadian Judicial Council's Blueprint for the Security of Judicial Information.[888]

---

[886] Court of Queen's Bench of Alberta, *Annual Report 2017 – 2018* at 30, online: <https://albertacourts.ca/docs/default-source/qb/abqb-annual-report-2017-18.pdf?sfvrsn=7d96b180_0>.

[887] CJC, *Blueprint*, *supra* note 466.

[888] *Ibid.*

Because of differences in organization and institutional culture, the courts that shifted from the executive to the limited autonomy model may quicker embrace contract as a mechanism for buttressing public goals. Due to the defined areas of judicial responsibility, the judiciary represented by the Chief Justice is better positioned to intervene in privatization matters. Also, the judiciary governed by a limited autonomy model have a stronger incentive to ensure that the privatization of services runs smoothly. Because the MOUs assign to the judiciary the authority to manage judicial information, the responsibility of ensuring private compliance with appropriate rules falls on the judiciary as well. However, this separation of responsibilities presents an opportunity as much as a burden for the judiciary by making them at least partially accountable for potential information management failures.

The increase in public/private collaborations in matters of court administration raises another important question: will the privatization of court support services drive further shifts in court administration models? As a predictive matter, this outcome is possible. The closest analogy is to the aforementioned technology- driven changes in the organizational structure of many courts. Yet the prospect of achieving shifts in administration models is partly contingent upon the willingness of judges to take on more administrative responsibility and to be more involved in private/public cooperation.

Conclusion to Chapter IV

This Chapter began by addressing the main objections that may be levelled against using the procurement process and the resulting contract as vehicles for

ensuring private compliance with the principle of judicial independence. The first part of this Chapter suggested that, despite the possible arguments of sceptics, government contracting has greater potential for upholding judicial independence than the familiar model of regulation examined in Chapter I. Of course, the contract's potential depends on the ability of public purchasers to strike a balance between efficiency and accountability, as well as on their willingness to operate in a more decentralized environment.

The second part of this Chapter demonstrated how negotiation and consultation tactics, as well as resulting contract clauses, may successfully fill the regulatory gaps identified in Chapter III. Essentially, the case study of the CAS procurement process confirms the hypothesis that procurement contracts marshal public and private mechanisms to advance public goals. Moreover, most of the identified mechanisms are available to courts regardless of their privatization strategy, although certain procedural mechanisms become redundant when privatization concerns separate services rather than integrated projects.

Conclusions

Contracts for the provision of goods and services are an integral part of modern court administration. They can be found in virtually every sphere of court administration, from transcription and translation services to video-conferencing services to publication of judicial decisions. The key advantage of privatization is the potential to harness the expertise of private actors. Generally, public purchasers assume that privatization will result in efficiency, improve the quality of services, and allow courts to get access to state of the art technology. However, privatization's potential cannot be fully realized, if public purchasers fail to address the challenges posed by private actors. Particularly, this thesis demonstrated that the privatization of courts and registry management services raises serious concerns about the unfettered private access to certain types of information and services that are directly related to adjudication. It is, thus, necessary to prepare our system of regulation of government contacts to address the mounting pressure exerted by private actors on the core value of court administration: judicial independence. This thesis suggested relying on the alternative instruments of governance – such as the procurement process and the resulting contract clauses - to fill the regulatory gaps.

A. Summary of Chapters

Chapter I introduced the accountability design in public procurement and examined how it is implemented at the federal and provincial levels. It was demonstrated that the regulation of government contracts adheres to a centralized design whose main goal is to constrain the discretion of separate public purchasers and, by extension, of private actors. The accountability framework that places

significant limits on the discretion of the front-line agents of government procurement pursues a laudable goal: it seeks to ensure that procurement departments and private actors act in the public interest.

Despite the purported benefits of the prevailing accountability design, the regulation of government contracts suffers from a lack of application to separate privatization activities, including contracts for CRMS instruments. For this reason, Chapter II made the case for reforming the prevailing accountability framework, in particular, in those instances when government privatizes the delivery of value-laden services. Further, Chapter II demonstrated that CRMS instruments perform many administrative and support functions that may directly affect judicial independence and the adjudication of disputes. Therefore, there are good reasons to suggest that CRMS falls in the category of value-laden services. It is, therefore, necessary to supplement the existing centralised regulation of contracts for CRMS instruments with additional mechanisms that will help courts safely harnesses private ingenuity. In conclusion, this Chapter described several quality standards that should apply to private CRMS instruments.

Chapter III began where Chapter II left off. It considered whether public law and torts are equipped to enforce the identified quality standards. The analysis demonstrated that the most popular mechanisms – constitutional law, legislation and regulation, and the principle of non-delegable duty - were subject to substantial limitations. Due to the inadequacies of these mechanisms, this Chapter examined the potential of the contracting process and the resulting contract to uphold the principle of judicial independence in an era of privatization.

Chapter IV addressed the criticism that may be advanced by the opponents of the proposed measures. Essentially, it was argued that the effectiveness of the contract-centered framework is plausible. The implementation of the proposals contained in this thesis largely depends on the will of separate government departments and the judiciary to advocate for the reforms. Having addressed the anticipated criticism, Chapter IV demonstrated the feasibility of the proposals by relying on the CAS procurement process.

It is important to note that the gap-filling tactics suggested in this thesis do not undermine the prevailing regulatory frameworks for government contracting. For example, the requirements regarding regular financial reporting as well as the requirements to adhere to the competitive procurement process remain in place. Similarly, the implied common law terms of equal and fair treatment of bidders will continue to provide procedural protections to disappointed bidders. If anything, technical specifications regarding information security and case management procedures suggested in this thesis will extend to private actors requirements that public law fails to clearly define and enforce.

Relatively minor adjustments to the established system of accountability will be sufficient to implement the proposals regarding the procurement process and the resulting contract clauses contained in Chapters II and IV. Most changes will be focused on two areas. First, it will be necessary to modify the *pro forma* contracts to reflect judicial requirements regarding information security, procedural design and the status of private service providers. Second, the use of complex tendering procedures

will require that public purchasers embrace negotiated RFPs that are still not that commonly used in Canada.

The prospects for the utilization of the alternative mechanisms will largely depend on the willingness of separate public purchasers – such as the Courts Administration Service, Ministers of Justice and Attorneys General - to advocate that courts be exempt from the vendor of record agreements and other arrangements and policies that further the economies of scale and scope. Given that the volume and complexity of contracts for court support services will likely increase in the next few years, it would be worthwhile to begin advocating for changes now.

Also, as was noted, publicization requires that policy-makers trust the alternative instruments of governance and rely on separate public purchasers to implement these instruments in the best interests of taxpayers. Admittedly, both tasks present a significant challenge to policy-makers who still, for the most part, envision accountability "in terms of nested principal-agent relationships [in which] the general public is the principal for elected representatives, elected representatives are principals for a public agency, [and] the agency is the principal for private contractors."[889]

B. The Role of Contract in Public Law

Though this thesis addressed concerns arising from the privatization of court support services, it also pursues a deeper, conceptual goal by drawing attention to the

[889] Freeman, "Public Law Norms", *supra* note 81 at 1326.

role of contract in public law, and, particularly, to contract's potential for promoting public values and for buttressing the separation of powers.

1. Contract's Potential to Promote Public Values

This thesis did not engage in familiar debates about the advantages and disadvantages of contractualization in government. The identified risks of contracting do not suggest that governments should abandon their privatization efforts altogether. In fact, it would be naïve to make such a suggestion given that governments do not have the capacity and the resources to move the provision of IT services for courts in-house.[890] Moreover, it does not seem that the judiciary is idealizing the capacity of the governments to produce the IT equipment or to replace private actors.[891]

Given that many functions and tasks must be outsourced, it seems more productive to ponder how the contracting process and the resulting contract can be organized to extend the obligation to respect the principle of judicial independence and other public values to private service providers. There are many examples of how privatization, rather than compromising public norms, can extend these norms to

[890] *Ibid* (pointing out that "it seems unrealistic to think that direct government provision of services is a panacea or even, at this point, a viable alternative...we ought not romanticize the capacity of public agencies, without very significant reform, to directly produce the services and perform the functions that are now provided by this [public/private] network" at 1339).

[891] Gillian E Metzger, "Private Delegations, Due Process, and the Duty to Supervise" in Freeman & Minow, *supra* note 92 ("prohibiting private delegations altogether is too blunt a response to the legitimate concerns that they raise" at 294); See also Vermeys, "Étude relative à l'incidence des technologies sur la gestion de l'information", *supra* note 805 (suggesting that the courts of Quebec do not have sufficient technological capacity to store their own digitized records at 65).

private actors. As was mentioned in Chapter III, contracts may incorporate public values that flow from legislation and regulation, such as the cases of privatization of correctional facilities or utilities. Contracts can also embed standard industry practices, which is often the case in construction and engineering projects.

The proposals contained in this thesis extend beyond these familiar ways of using contract as a secondary instrument for furthering public values that flow from legislation, regulation or established "soft law" norms. This thesis suggests that a contract can perform a gap filling function by extending public values to realms where they did not exist before. In these instances, contract facilitates the process of "publicization"[892] of private actors. Publicization is a "counterintuitive way to view ... privatization."[893] Instead of seeing privatization as a means of reducing the reach of government influence, publicization "imagine[s] it as a mechanism for expanding government's reach into realms traditionally thought private."[894]

With the growth of outsourcing and contracting out, publicization of private actors and their activities through contract occurs rather frequently. For example, Rory Van Loo observes that powerful corporations in the United States (Facebook, Citibank, Exxon, and others) often outsource the performance of various services to smaller private companies.[895] Administrative agencies require that these outsourcing contracts

---

[892] Freeman, "Public Law Norms", *supra* note 81 at 1285, pronounced [pŭb´lĭ-kĭ-zā´shən].

[893] *Ibid.*

[894] *Ibid.*

[895] Rory Van Loo, "The New Gatekeepers: Private Firms as Public Enforcers" (2020) 106 Virginia L Rev 56.

include obligations regarding privacy protections, audits, environmental safety standards, and others. This form of governance has given resource-strapped regulators promising tools of indirect control over otherwise under-regulated contractors of corporate giants. Initially, Van Loo explains, the government had no intention of using contracts to impose public norms on private service providers.[896] However, the unprecedented growth of outsourcing by big corporations triggered publicization of their contractors.

In Canada, similarly, the Office of the Superintendent of Financial Institutions ("OSFI") requires federally regulated entities ("FREs") that outsource their core business activities to impose public obligations on third-party service providers.[897] For example, *Guideline B-10* states that OSFI expects FREs to assess the materiality of all outsourcing arrangements and to follow risk management protocols for all outsourcing arrangements, except those that are deemed clearly immaterial.[898] The materiality of an outsourcing arrangement depends on the extent to which it can have an important influence "on a significant line of business of the FRE's consolidated operations, or the Canadian operations of a foreign branch or subsidiary."[899] For example, the

[896] *Ibid* (observing that traditionally, the firm has been private at its core and did not own a duty of public enforcement to the government at 496).

[897] Anita Anand & Andrew Green, "Regulating Financial Institutions: The Value of Opacity" (2012) 57:3 McGill L J 399 (demonstrating that, although OSFI guidelines are advisory in nature, FREs view them as requirements).

[898] Canada, Office of the Superintendent of Financial Institutions, *Outsourcing of Business Activities, Functions and Processes*, *No B-10*, (Guideline) (Ottawa: Office of the Superintendent of Financial Institutions, May 2001(Revised March 2009) at 2.

[899] *Ibid* at 10.

outsourcing of all or substantiality all management oversight functions to a third entity should always be considered material.[900] In essence, the framework established by OSFI's *Guideline B-10* is similar to the frameworks for make-or-buy decisions that were examined in Chapter IV, except that the OSFI requirements apply to private actors rather than government purchasers. If an outsourcing arrangement is considered material, FREs should create a number of obligations – on accountability, security, confidentiality - and impose them on their contractors using contracts for the provision of services as a publicization instruments.[901] If contractors had not been providing services to FREs, these obligations would not have emerged.

Admittedly, contract's publicization potential has several important limitations. As Paul Thomas points out, "there is plenty of evidence that problems can arise – problems such as poorly specified objectives and standards of performance, a lack of competitive tendering, inadequate monitoring of contractors, and nearly automatic renewals when contract periods expire."[902] Of course, the fact that a contract provides means for protecting public values does not mean that public purchasers should participate in integrated justice projects. For example, however eager the CAS may be to implement an integrated system, its previous procurement efforts have been focused on rather simple goods and services that meet the conditions of specificity and ease of evaluation. Technology that complies with these conditions performs relatively easy,

[900] *Ibid.*

[901] *Ibid* at 12-17.

[902] Thomas, *supra* note 201 at 52.

repetitive, and separate functions, sometimes labelled "commodity tasks,"[903] while the provision of more complex, or custom tasks, rests within the CAS. Integrated justice stands this distinction between commodity and custom tasks on its head.[904] Many descriptions of CRMS's characteristics confirm that private actors will be involved in the provision of plenty of complex services.

This new privatization pattern generates questions about the CAS's ability to embrace new contract negotiation strategies and shifts in the service delivery model. For example, is the CAS competent to monitor the performance of a private company that develops new systems? Given that an integrated justice project requires a wider consensus, does the CAS have resources to participate in potentially complicated negotiations and consultations? As Carl Baar observes, "[w]hen the focus shifts to the larger justice system, the players expand, the issues of stakeholder autonomy and independence become more critical, and the relationships grow in complexity. Solutions become less self-evident, costs and benefits more distant and harder to define, and risks of program and systems failure greater."[905] This does not imply that contract's publicization potential disappears when privatization concerns complex projects. This suggests, however, that to unleash contract's publicization potential public purchasers should carefully consider their privatization options and talents of their project management team.

---

[903] Donahue, "The Transformation of Government Work", *supra* note 92 at 42.

[904] Baar, "Integrated justice", *supra* note 32 at 48.

[905] *Ibid* at 54.

2. Contract's Potential to Buttress the Independence of the Judiciary

As was mentioned throughout this thesis, many provincial and territorial governments still retain substantial control over court administration under the executive model of judicial administration. This model, among other things, has been criticized for excluding the judiciary from "setting the expectations by which those who run the Court can be held accountable."[906] The Canadian Judicial Council determined that the executive model of judicial administration failed to meet the requirements of the principle of judicial independence. Particularly, the institutional independence requires that the judiciary takes over setting "the standards the Court should achieve regarding access to justice, time limits for disposing of different types of cases, other case management time standards, and workplace standards for judicial and administrative staff and the public."[907]

In recent years, the judiciary has obtained greater autonomy from the government in matters of court administration. It was mentioned that some courts and provincial governments entered into MOUs that define the judicial role in court governance. Moreover, the Federal Courts are administered by a separate body, the Courts Administration Service. However, many provincial and territorial courts still face substantial obstacles to operationalizing the recommendations of the CJC. In part, this is due to the fact that that in many courts judicial-executive cooperation remains

[906] For a summary of criticism, see CJC, *Alternative Models*, *supra* note 114 at 12.

[907] *Ibid* at 76.

informal and fragmented and the level of cooperation depends on the institutional culture and personal relationships between the judiciary, the administrative personnel and the executive.[908]

A well-organized contracting process has a genuine potential for addressing the identified drawbacks of the executive model of judicial administration. In an era of privatization, design specification formulated in accordance with the judicial notion of quality help increase substantive administrative independence of the judiciary not only from the government departments, but also from the private providers of CRMS tools. In essence, design specifications operate as a protection against the growing power of two contracting parties – a government department and a private company – to impose their own vision of court administration on the judiciary. Ian Harden also observes that in a well-organised contracting process "an organizational separation of decisions as to what services there should be from the delivery of those services" [909] operates as an additional mechanism against unwise, ideologically motivated, or corrupt privatization efforts of the government.

Moreover, by operating as a guardian of judicial independence in an era of privatization, a well-organized contracting process plays an important role within a broader constitutional framework. On the one hand, it promotes judicial independence through design-specifications; on the other hand, it does not detract from the accountability of government departments for court administration to parliaments.

---

[908] *Ibid* at 23.

[909] Harden, *supra* note 125 at 77.

C. Further Research Proposals

This thesis has relied on the analysis of the applicable law and so-called "soft law" instruments to criticize the existing regulation of government contracts for the provision of court support services and then to suggest contract as an alternative. This proposal challenges the routine of government contracting that is very well familiar to the front-line procurement officers. As such, they may be opposed to the idea of conducting reforms. Thus, to evaluate the prospects of decentralization of procurement efforts, it is useful to subject this assumption about bureaucratic pushback to empirical testing by conducting interviews with the front-line procurement officers who administer contracts for court support services.

With regard to procurement of technology for courts, contracts for risk assessment tools ("RA") present an interesting area of research at the intersection of government contracting and the performance of judicial function. In the United States, these RA tools are most commonly used to assist with judicial interim release decisions (conditional release applications) and post-trial sentencing decisions.[910] In both contexts, artificial intelligence is utilized to predict the likelihood of an accused reoffending or failing to appear in court for a future hearing.[911] Given that RA tools are used to make decisions about individual rights and freedoms, it is incumbent upon

---

[910] See e.g. Christopher Bavitz et al. *Assessing the Assessments: Lessons from Early State Experiences in the Procurement and Implementation of Risk Assessment Tools* (Harvard: The Berkman Klein Center for Internet & Society, 2018); Law Commission of Ontario, *The Rise and Fall of AI and Algorithms in American Criminal Justice: Lessons for Canada* (Toronto: October 2020).

[911] Bavitz, *supra* note 910 at 1; Law Commission of Ontario, *supra* note 910 at 15.

policymakers, justice stakeholders, and procurement officers to understand technical issues and risks associated with using artificial intelligence in the criminal justice system.[912]

Of course, a comprehensive system for protecting public norms in an age of AI requires a combination of different accountability mechanisms, depending on the context of solicited goods and services. For example, in Canada, the procurement of RA tools will fall under the constitutional ambit. All forms of pre-trial release are protected by section 11(e) of the *Charter*. The grant or denial of bail also implicates the accused's liberty and security of the person protected by section 7 of the *Charter*, as well as the presumption of innocence guaranteed by section 11(d). For example, section 7 can be invoked by the accused to challenge the technical specifications of procured RA tools if it is alleged that data discrimination results in a depravation of liberty or security of the person.[913] Similarly, section 15 of the *Charter* can be invoked to challenge an RA tool if it is alleged to disproportionately impact vulnerable groups on socioeconomic disadvantage, disability, race or other factors.[914]

Moreover, application of RA tools in the context of interim release must comply with sections 493.1 and 493.2 of the *Criminal Code*.[915] Section 493.1 provides that in

---

[912] Jon Kleinberg et al, "Discrimination in the Age of Algorithms" (2018) 10 J Leg Analysis 113 (arguing that only if the appropriate requirements are put in place, algorithms have the potential for preventing cases of discrimination).

[913] Law Commission of Ontario, *supra* note 910 at 22.

[914] *Ibid*.

[915] *Criminal Code*, RSC 1985, c C-46.

making decision on interim release a "justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with."[916] This provision of the *Criminal Code* implies that any assessment of the flight risk of particular individuals rendered by RA tools should be carefully weighed against the principle of judicial restraint that applies to bail decisions. In addition, section 493.2 of the *Criminal Code* requires a justice or judge to give particular attention to the circumstances of "(a) Aboriginal accused; and (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release."[917] Thus, procured RA tools that are trained on data that reflects structural racism and institutional inequity of the justice system fail to meet the principles that guide interim release decisions under the *Criminal Code.*

As a general rule, when private actors deliver services that affect individual rights and freedoms, constitutional, legislative, and regulatory provisions emerge as important constraining instruments on private delegations. Nevertheless, even in those cases when private activities require close regulatory supervision, a well-designed procurement process and the resulting contract can provide effective supplemental means for protecting public norms in an era of privatization. [918]

---

[916] *Ibid.*

[917] *Ibid.*

[918] Bavitz, *supra* note 910 at 13-14.

Bibliography

LEGISLATION

CANADA: FEDERAL

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK).

Competition Act, RSC 1985, c C-34.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

Criminal Code of Canada, RSC 1985, c C-46.

Courts Administration Service Act, 2002, SC 2002.

Department of Justice Act, RSC 1985, c J-2.

Department of Public Works and Government Services Act, SC 1996, c 16.

Federal Courts Act, RSC 1985, c F-7.

Financial Administration Act, RSC 1985, c F-11.

Judges Act, RSC 1985, c J-1.

Northwest Territories Act, SC 2014, c 2.

Nunavut Act, SC 1993, c 28.

Public Servants Disclosure Protection Act, SC 2005, c 46.

Shared Services Canada Act, SC 2012, c 19, s 711.

Tax Court of Canada Act, RSC 1985, c T-2.

Yukon Act, SC 2002, c 7.

CANADA: PROVINCIAL

British Columbia

Attorney General Act, RSBC 1996, c 22.

Highway Act, RSBC 1979, c.167, as repealed by *Highway Act*, RSBC 1996, c 188.

Ministry of Transportation and Highways Act, RSBC 1979 c 280, as repealed by *Government Buildings Act*, RSBC 1996, c311.

Newfoundland and Labrador

Public Service Collective Bargaining Act, RSN 1990, c P-42.

Public Procurement Act, SNL 2016, c P-41.001.

Ontario

Electricity Act, 1998, SO 1998, c 15.

Ministry of the Attorney General Act, RSO 1990, c M 17.

Ministry of Correctional Services Act, RSO 1990, c M-22.

Quebec

Act respecting the Ministère de la Justice, CQLR, c M-19.

Civil Code of Quebec, LRQ c C-1991.

Code of Civil Procedure, CQLR c C-25.01.

Act respecting the Governance and Management of the Information Resources of Public Bodies and Government Enterprises, CQLR c G-1.03.

Act respecting Contracting by Public Bodies, CQLR c C-65.1.

Public Administration Act, CQLR c A-601.

Act respecting the Autorité des marchés publics, CQLR c A-33.2.1.

FOREIGN SOURCES

Australia

Court Services Victoria Act 2014 (Vic).

European Union

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal

data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ, L 119/1.

France

Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1), JO, 24 March 2019.

United Kingdom: England and Wales

Carltona Ltd v Commission of Works [1943] 2 All ER 560 (CA).

United States

Federal Activities Inventory Reform (FAIR) Act, 31 USC §501 (2000).
Help America Vote Act, 42 USC §§15.301-15.545 (2002).

REGULATIONS

Government Contracts Regulations, SOR/87-402.

Procurement Ombudsman Regulations, SOR/2008-143.

Rules of Civil Procedure, RRO 1990, Reg 194.

Supreme Court Civil Rules, BC Reg 168/2009.

JURISPRUDENCE

3051226 Canada inc c Aéroports de Montréal, 2008 QCCA 722.

Al Enterprises Ltd v Brain Enterprises Ltd, 2014 SCC 12, [2014] 1 SCR 177.

Dignam v New Brunswick Liquor Corp, 2014 NBQB 109.

Douglas/Kwantlen Faculty Assn v Douglas College, [1990] 3 SCR 570.

Dunsmuir v New Brunswick, [2008] 1 SCR 190, 2008 SCC 9.

Edmonton Journal v Alberta (AG), [1989] 2 SCR 1326.

Eldridge v British Columbia (AG), [1997] 3 SCR 624.

Godbout v Longueuil (City), [1997] 3 SCR 844.

Harrison v University of British Columbia, [1990] 3 SCR 451.

H B Lynch Investments Inc v Canada (Minister of Public Works & Government Services), 2005 FCA 237.

Hryniak v Mauldin, 2014 SCC 7.

Hunt v Carey Canada Inc, [1990] 2 SCR 959.

I.M.P. Group Ltd v Canada (Minister of Public Works & Government Services), 2006 FC 1223.

Lewis (Guardian ad litem of) v British Columbia, [1997] 3 SCR 1145.

London Drugs Ltd v Kuehne & Nagel International Ltd, [1992] 3 SCR 299.

MacKeigan v Hickman, [1989] 2 SCR 796.

Martel Building Ltd v Canada, [2000] 2 SCR 860.

McKinney v University of Guelph, [1990] 3 SCR 229.

Metercor Inc v Kamloops (City of), 2011 BCSC 382.

MJB Enterprises Ltd v Defence Construction (1951) Ltd, [1991] 1 SCR 619.

MYG Informatique inc c René-Lévesque (Commission scolaire), 2006 QCCA 1248.

NAPE v Newfoundland & Labrador (Minister of Justice), [2004] 2004 NLSCTD 54.

National Bank of Canada v Smith, [2016] 216 NSSC 246.

North End Community Health Assn v Halifax (Regional Municipality), 2014 NSCA 92.

Nova Scotia (AG) v MacIntyre, [1982] 1 SCR 175.

Odhavji Estate v Woodhouse, 2003 SCC 69, [2003] 3 SCR 263.

Ontario (AG) v Ontario (Information & Privacy Commissioner), [2011] 2011 ONSC 172.

R v Bordo, 2016 QCCS 477.

R v Généreux, [1992] 1 SCR 259.

R v Harrison, [1977] 1 SCR 238.

R v Henderson [1898] 28 SCR 425.

R v Jordan, [2016] 1 SCR 631.

R v K.G.K, 2017 MBQB 96.

R v Mamouni, 2017 ABCA 347.

R v Ron Engineering, [1981] 1 SCR 111.

R v Transworld Shipping [1976] 1 FC 159 (CA).

Reference re Remuneration of Judges of the Provincial Court (PEI), [1997] 3 SCR 3.

Reference re Secession of Quebec, [1998] 2 SCR 217.

Robert v Canada (AG), 2012 FC 1227.

RWDSU v Dolphin Delivery Ltd, [1986] 2 SCR 573.

Selex Sistemi Integrati S.p.A. v Canada (AG), 2014 FC 263.

Shell Canada Products Ltd v Vancouver (City of), [1994] 1 SCR 231.

Slaight Communications Inc v Davidson, [1989] 1 SCR 1038.

Société de l'assurance automobile du Québec v Cyr, [2008] 1 SCR 338.

Stoffman v Vancouver General Hospital, [1990] 3 SCR 483.

Thomas C Assaly Corp v R (1990), 34 FTR 156.

Valente v R, [1985] 2 SCR 673.

Verreault & Fils Ltée v Quebec (AG) [1977] 1 SCR 41.

Vickery v Nova Scotia Supreme Court (Prothonotary), [1991] 1 SCR 671.

GOVERNMENT DOCUMENTS

FEDERAL

Canada. Commission of Inquiry into the Sponsorship Program and Advertising Activities. *Restoring Accountability: Recommendations* (Ottawa: Public Works and Government Services, 2006).

Canada. Commission of Inquiry into the Sponsorship Program and Advertising Activities. *Who is Responsible? Fact Finding Report* (Ottawa: Public Works and Government Services Canada, 2005).

Canada. Courts Administration Service. *Audit of Compliance of Procurement and Contracting Practices* (11 January 2013).

Canada. Courts Administration Service. *2009-10 Annual Report*, online : <http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/CAS/AR-RA_eng/AR-RA09-10_eng>

Canada. Courts Administration Service. *2011-12 Annual Report*, online : < http://www.cas-satj.gc.ca/pdf/Courts_12-296_DPR_2011-12_E_WEB_2.pdf >

Canada. Courts Administration Service. *2014-15 Annual Report*, online: <http://www.cas-satj.gc.ca/en/publications/ar/2014-15/images/cas-annual-report-eng.pdf>

Canada. Courts Administration Service. *2015-16 Annual Report*, online: < http://www.cas-satj.gc.ca/en/publications/ar/2015-16/pdf/COURTS_16-206_AR_e_final.pdf >

Canada. Courts Administration Service. *2017-18 Annual Report*, online: < http://www.cas-satj.gc.ca/en/publications/ar/2017-18/pdf/Annual_Report_Final_EN.pdf >.

Canada. Courts Administration Service. *Advance Contract Award Notice (ACAN): E-Trial Toolkit (5X001-18-0659/A)* (01 November 2018), online: < https://buyandsell.gc.ca/procurement-data/tender-notice/PW-18-00849454>.

Canada. Courts Administration Service. *TBIPS SA - I.9 - Systems Administrator Level 1 (TBIPS SA - Solicitation - 5X001-16-1090)* (15 February 2017), online: <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-17-00769004>.

Canada. House of Commons. *Modernizing Federal Procurement for Small and Medium Enterprises, Women-Owned and Indigenous Businesses: Report of the Standing Committee on Government Operations and Estimates*, 42nd Parl, 1st Sess (June 2018).

Canada. Office of the Prime Minister. *Mandate Letter to the Minister of Public Services and Procurement* (13 December 2019).

Canada. Office of the Procurement Ombudsman. *Procurement Practice Review: Review of the Procurement Management Control Framework of the Courts Administration Service* (September 2018), online: < http://opo-boa.gc.ca/praapp-prorev/2017-

2018/document/epa-ppr-09-2018-eng.pdf >.

Canada. Office of the Superintendent of Financial Institutions. *Outsourcing of Business Activities, Functions and Processes*, *No B-10*, (Guideline) (Ottawa: Office of the Superintendent of Financial Institutions, May 2001(Revised March 2009).

Canada. Privy Council. *Guidance for Deputy Ministers* (07 December 2017), online : <https://www.canada.ca/en/privy-council/services/publications/guidance-deputy-ministers.html#TOC1_5>.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42nd Parl, 1st Sess, No 6 (13 April 2016).

Canada. Senate, Standing Senate Committee on Legal and Constitutional Affairs. *Submission by RedMane Technology Canada Inc*. (30 January 2017).

Canada. Senate, Standing Senate Committee on Legal and Constitutional Affairs. *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (Ottawa: The Senate, 2017).

Canada. Treasury Board. *The Directive on Security Management*. "Appendix J: The Standard on Security Categorization" (1 July 2019), online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32614 >.

Canada. Treasury Board. *Contracting Policy* (Ottawa: Treasury Board of Canada, Secretariat, 2013), online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494&section=html>.

Canada. Treasury Board. *The Guideline on Service Agreements: Essential Elements* (4 July 2012), online: < https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25761>.

Corbett, Stan. "Ministerial Responsibility and The Financial Administration Act: The Constitutional Obligation to Account for Government Spending" in *Linkages*: *Responsibilities and Accountabilities, Restoring Accountability*, Research Studies, Volume 3, Commission of Inquiry into the Sponsorship Program and Advertising Activities (Ottawa: Public Works and Government Services Canada, 2006).

Government of Canada. *Directive on Automated Decision-Making* (Ottawa: Treasury

Board of Canada, 2019), online: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>.

Government of Canada. *Values and Ethics Code for the Public Sector* (Ottawa: Treasury Board of Canada, 2011).

Government of Canada. *Public Service 2000: The Renewal of the Public Service of Canada* (Ottawa: Minister of Supply and Services Canada, 1990).

Franks, C.E.S. "Ministerial and Deputy Ministerial Responsibility and Accountability in Canada", submission to the Public Accounts Committee of the House of Commons of Canada (11 January 2005).

Public Works and Government Services Canada. *Notice of Proposed Procurement (NPP) Courts and Registry Management System (CRMS) for the Courts Administration Service (CAS)* (18 August 2020), online: < https://buyandsell.gc.ca/cds/public/2020/08/18/94c65bb0b75e5f9c2ae90a90e849d105/ABES.PROD.PW__XL.B138.E38407.EBSU000.PDF>.

Public Works and Government Services Canada. *Letter of Interest* (23 January 2019), online: <https://buyandsell.gc.ca/cds/public/2019/01/23/ba0f82432f6e293e106f9d64aa9c3c7c/ABES.PROD.PW__XL.B127.E34555.EBSU000.PDF>.

Public Works and Government Services Canada. *Supply Manual* (4 June 2015 update), online:< https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/3/15/5>.

PROVINCES

British Columbia. *Core Policy and Procedures Manual Policy*, c 6, online: <https://www2.gov.bc.ca/gov/content/governments/policies-for-government/core-policy/policies/procurement>.

British Columbia, Ministry of the Attorney General. *Court Digital Transformation Strategy 2019-2023* (2019), online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf>.

Charbonneau, France. *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction* (November 2015).

Gouvernment du Québec. *La Politique de main-d'œuvre en technologies de l'inoformation* (Avril 2018), online: <https://www.tresor.gouv.qc.ca/fileadmin/PDF/publications/politique_main_doeuvre_TI.pdf>.

Ministère de la justice du Québec. *Rapport annuel de gestion 2016-2017*, online: <https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/ministere/rapp-annuels/rap1617.pdf>.

Ministère de la Justice du Québec. *Plan stratégique 2019-2023*, online: <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/justice/publications-adm/plan-strategique/PL_strat_2019-2023_MJQ.pdf?1575473414>.

Memorandum of Understanding between the Attorney General of Alberta and the Chief Justice of the Court of Queen's Bench of Alberta (30 January 2017), online: <https://albertacourts.ca/docs/default-source/qb/memorandum-of-understanding.pdf?sfvrsn=4473df80_0>

Memorandum of Understanding between the Minister of Justice and Attorney General of British Columbia, the Chief Justice of British Columbia, the Chief Justice of the Supreme Court of British Columbia and the Chief Judge of the Provincial Court of British Columbia (3 April 2013), online: <https://www.bccourts.ca/documents/Memorandum%20of%20Understanding%20(April%203%202013).pdf>.

Memorandum of Understanding between the Chief Justice of the Superior Court of Justice of Ontario and the Attorney General of Ontario (5 May 2008), online: <https://www.ontariocourts.ca/scj/news/mou/>.

Memorandum of Understanding between The Attorney General of Ontario and the Chief Justice of the Ontario Court of Justice (24 August 2016), online: <https://www.ontariocourts.ca/ocj/memorandum-of-understanding/>.

Newfoundland and Labrador, Public Procurement Agency. *Public Procurement Policy*,

online: <https://www.gov.nl.ca/ppa/division/policy/>.

Nova Scotia, Access to Justice Coordinating Committee. *Final Report 2018*, at 35, online: <https://courts.ns.ca/News_of_Courts/documents/A2JCCreport_WEB.pdf>

Nova Scotia, Department of Justice. *Accountability Report 2017-2018*, online: <https://novascotia.ca/government/accountability/2017-2018/2017-2018-Department-of-Justice-Accountability-Report.pdf>

Ontario, Ministry of the Attorney General, Court Services Division. *Annual Report 2016-17 and 2017-18*, online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_16_18/>.

Ontario, Ministry of the Attorney General, Court Services Division. *Annual Report 2015-2016*, online: < https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_15/>.

Office of the Auditor General of British Columbia. *Securing the JUSTIN System: Access and Security Audit at the Ministry of Justice* (January 2013), online: <https://www.bcauditor.com/sites/default/files/publications/2013/report_9/report/OAGBC%20JUSTIN%20Report.pdf>.

Office of the Auditor General of Ontario. *Annual Report 2018*, online: < https://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_314en18.pdf>

Office of the Auditor General of Ontario. *Annual Report 2003*, online: <https://www.auditor.on.ca/en/content/annualreports/arreports/en03/403en03.pdf>.

Ontario. *Report of Ontario's Special Task Force on the Management of Large-Scale Information & Information Technology Projects* (July 2005), online: <https://collections.ola.org/mon/11000/254912.pdf>.

Ontario, Ministry of Government and Consumer Services. *Operational Guidelines for Use of Enterprise-wide Vendor of Record Arrangements and Volume Licensing Agreements by OPS Clients and Non-OPS Clients* (1 February 2019), online: < https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/Attachments/Operational_Guidelines-ENG/$FILE/Operational_Guidelines-ENG.pdf>.

Vérificateur général du Québec. *Rapport du Vérificateur général du Québec à l'Assemblée nationale pour l'année 2012-2013* (Automne 2012), Chapitre 7, online < https://www.vgq.qc.ca/Fichiers/Publications/rapport-annuel/2012-2013-VOR-Automne/fr_Rapport2012-2013-VOR-Automne-Chap07.pdf >.

COURT REPORTS AND REPORTS OF THE CANADIAN JUDICIAL COUNCIL

Canadian Judicial Council. *Comparative Analysis of Key Characteristics of Court Administration Systems*, by Karim Benyekhlef, Cléa Iavarone-Turcotte & Nicolas Vermeys (Ottawa: Canadian Judicial Council, 2011).

Canadian Judicial Council. *Alternative Models of Court Administration* (Ottawa: Canadian Judicial Council, 2006).

Canadian Judicial Council. *Model Policy for Access to Court Records in Canada* (Ottawa: Canadian Judicial Council, 2005).

Canadian Judicial Council. *Blueprint for the Security of Judicial Information*, by Martin Felsky (Ottawa: Canadian Judicial Council, 2013).

Canadian Judicial Council. *Blueprint for the Security of Judicial Information*, by Martin Felsky (Ottawa: Canadian Judicial Council, 2018).

Canadian Judicial Council. *Court Information Management Policy Framework to Accommodate the Digital Environment*, by Jo Sherman (Ottawa: Canadian Judicial Council, 2013).

Court of Queen's Bench of Alberta. *Annual Report 2016 to 2017*, "Appendix 1: The Court of Queen's Bench of Alberta Strategic Plan 2016 to 2021", online: <https://albertacourts.ca/docs/default-source/qb/2016-2017-annual-report-with-appendix-jan-19-2018.pdf?sfvrsn=593aac80_0>

Nunavut Court of Justice. *A Statistical and Comparative Review of Court Operations in Nunavut 2017*, at 4, online: <https://www.nunavutcourts.ca/index.php/annualreports>

Provincial Court of Alberta and Ministry of Justice and Solicitor General. *Court Case Management 2015/18 Project Charter* (14 January 2016), online: <https://www.albertacourts.ca/docs/default-source/pc/ccm-project-

charter.pdf?sfvrsn=cbdadf80_4>

Provincial Court of British Columbia. *Annual Report 2017/2018*, online: <https://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2017-2018.pdf>

Supreme Court of British Columbia. *Annual Report 2018*, online: <https://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2018_SC_Annual_Report.pdf>.

Provincial Court of Newfoundland and Labrador. *Annual Report 2017-2018*, online: <https://court.nl.ca/provincial/publications/ProvCourtAnnReport17_18.pdf>

Provincial Court of Saskatchewan. *Biennial Report January 1, 2016 – December 31, 2017*.

INTERNATIONAL MATERIALS

Model Law on Procurement, GA Res 66/95, UNCITRAL, 2011, UN Document, A/66/17, annex I, arts 49-50.

FOREIGN GOVERNMENT DOCUMENTS

Australia, Court Services Victoria. *Annual Report 2018-2019*, online: < https://www.courts.vic.gov.au/sites/default/files/publications/csv_annual_report_2018-19.pdf >

Australia, Court Services Victoria. *Court Services Victoria & Journal Technologies, Inc. Court Services Victoria CMS Project Agreement 2019*, online: < https://www.tenders.vic.gov.au/contract/view?id=77171 >.

European Union, European Data Protection Supervisor. *Preliminary Opinion 5/2018 on Privacy by Design* (31 May 2018).

United Kingdom, Cabinet Office. *The Outsourcing Playbook* (June 2020).

United States, Office of Management and Budget. *Performance of Commercial Activities*, *Circular No. A-76 (Revised)* (Washington, DC: Executive Office of the President, 2003).

United States, State of North Carolina, Administrative Office of the Courts. *Request for Proposal No: 02-18055 Integrated Case Management System (ICMS)* (6 August

2018).

SECONDARY MATERIAL: MONOGRAPHS

Aikman, Alexander B. *The Art and Practice of Court Administration* (Boca Raton, Fla.: CRC Press, 2007).

Alford, John, Royston Gustavson & Philip Williams. *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004).

Arrowsmith, Sue & Steen Treumer. *Competitive Dialogue in EU Procurement* (Cambridge University Press, 2012).

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

Audet, Pierre-E. *Les officiers de justice des origines de la colonie à nos jours* (Montréal: Wilson & Lafleur, 1986).

Church, Thomas W & Peter A Sallmann. *Governing Australia's Courts* (Carlton South, Victoria, Australia: The Australian Institute of Judicial Administration Incorporated, 1991).

Davies, A C L. *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press, 2001).

———.*The Public Law of Government Contracts* (Oxford University Press, 2008).

Deschênes, Jules. *Masters in Their Own House: A Study on the Independent Judicial Administration of the Courts*, 4th ed (Ottawa: Canadian Judicial Council, 1981).

Donahue, John. *The Privatization Decision: Public Ends, Private Means* (New York: Basic Books, 1989)

Eliadis, Pearl, Margaret M Hill & Michael Howlett, eds. *Designing Government: From Instruments to Governance* (McGill-Queen's University Press, 2005).

Eltis, Karen. *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Toronto: Irwin Law, 2012).

Emanuelli, Paul. *Government Procurement*, 4th ed (Toronto: LexisNexis, 2017).

Evans, Bryan Mitchell & Carlo Fanelli, eds. *The Public Sector in an Age of Austerity: Perspectives from Canada's Provinces and Territories* (Montreal: McGill-Queen's University Press, 2018).

Feenberg, Andrew. *Transforming Technology: A Critical Theory Revisited*, 2d ed (Oxford University Press, 2002).

Ferguson, Gerry. *Global Corruption: Law, Theory and Practice* (University of Victoria, 2018).

Fountain, Jane E. *Building the Virtual State: Information Technology and Institutional Change* (Washington, DC: Brookings Institution Press, 2001).

Friedland, Martin. *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995).

Gee, Graham et al. *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015).

Greene, Ian. *The Courts* (Vancouver: UBC Press, 2006).

Harden, Ian. *The Contracting State* (Buckingham, UK: Open University Press, 1992).

Hausegger, Lori. *Canadian Courts: Law, Politics, and Process* (Don Mills, Ont.: Oxford University Press Canada, 2009).

Hogg, Peter. *Constitutional Law of Canada*, 2014 student ed (Toronto: Carswell, 2014).

Hogg, Peter, Patrick Monahan & Wade Wright. *Liability of the Crown*, 4th ed (Toronto, Ont.: Carswell, 2011).

Howlett, Michael. *Designing Public Policies: Principles and Instruments* (London, UK: Routledge, 2010).

Jones, David Phillip & Anne S De Villars. *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014).

Lafond, Pierre-Claude. *L'accès à la justice civile au Québec : portrait général* (Cowansville, Que: Yvon Blais, 2012).

Lavery, Kevin. *Smart Contracting for Local Government Services* (Westport, CT: Praeger,

1999.

Marshall, David T. *Judicial Conduct and Accountability* (Toronto: Carswell, 1995).

Martínez, Agustí Cerrillo i & Pere Fabra i Abat, eds, *E-Justice: Using Information and Communication Technologies in the Court System* (Hershey, PA: Information Science Reference, 2008).

Mashaw, Jerry L. *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven, CT: Yale University Press, 1997).

McCormick, Peter. *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System* (Toronto: James Lorimer & Company, 1994).

Mercuro, Nicholas & Steven G Medema, *Economics and the Law: From Posner to Postmodernism* (Princeton, NJ: Princeton University Press, 2006).

Millar, Perry S & Carl Baar. *Judicial Administration in Canada* (Kingston, Ont: McGill-Queen's University Press, 1981).

Pépin, Gilles & Yves Ouellette. *Principes de contentieux udminisrratifs* (Montreal: Yvon Blais, 1979).

Romanow, Roy J. *Canada... Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Carswell/Methuen, 1984).

Russell, Peter H. *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw Hill Ryerson, 1987).

Sclar, Elliott D. *You Don't Always Get What You Pay For* (Cornell University Press, 2000).

Smith, Gene Ann & Hélène Dumont, eds, *Justice to Order: Adjustment to Changing Demands and Co-ordination Issues in the Justice System in Canada* (Montreal: Édition Thémis, 1998).

Susskind, Richard E. *The Future of Law: Facing the Challenges of Information Technology* (Oxford: Clarendon Press, 1996).

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

Tiles, Mary. *Living in a Technological Culture: Human Tools and Human Values (Philosophical Issues in Science)* (London: Routledge, 1995).

Trebilcock, Michael J. *The Choice of Governing Instrument* (Ottawa: Economic Council of Canada, 1982).

———. *The Prospects for Reinventing Government* (Toronto: C.D. Howe Institute, 1994).

Trepte, Peter. *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004).

Turpin, Colin. *Government Contracts* (Harmondsworth: Penguin, 1972).

Weimer, David L & Aidan R Vining. *Policy Analysis: Concepts and Practice*, 6th ed (New York: Routledge, 2017).

Wheeler, Russell. *Judicial Administration: Its Relation to Judicial Independence* (Williamsburg, Virginia: The National Center for State Courts, 1988).

Winner, Langdon. *Autonomous Technology: Technics-out-of-Control as a Theme in Political Thought* (Cambridge, Mass: MIT Press, 1978).

SECONDARY MATERIAL: ESSAYS IN A COLLECTION

Baar, Carl & Ian Greene. "Judicial Administration" in Christopher Dunn, ed, *The Handbook of Canadian Public Administration*, 2nd ed (Oxford University Press, 2010) 131.

Beauchard, Renaud. "Cyberjustice and International Development: Reducing the Gap Between Promises and Accomplishments" in Karim Benyekhlef et al, eds*, eAccess to Justice* (University of Ottawa Press, 2016) 29.

Blum, Mathew. "The Federal Framework for Competing Commercial Work between the Public and Private Sectors" in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Cambridge: Harvard University Press, 2009) 63.

Bourgault, Jacques. "The Role of Deputy Ministers in Canadian Government" in Christopher Dunn, ed, *The Handbook of Canadian Public Administration*, 2nd ed (Oxford University Press, 2010) 504.

Camion, Clément. “Three Trade-Offs to Efficient Dispute Resolution” in Karim Benyekhlef et al, eds, *eAccess to Justice* (University of Ottawa Press, 2016) 317.

Chen, Yu-Che & James L Perry. “IT Outsourcing: A Primer for Public Managers” in Mark A Abramson & Roland S Harris III, eds, *The Procurement Revolution* (Rowman & Littlefield, Lanham, 2003) 127.

Contini, Francesco & Antonio Cordella. “Law and Technology in Civil Judicial Procedures” in Roger Brownsword, Eloise Scotford & Karen Yeung, eds, *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2017) 246.

Devlin, Richard & Adam Dodek. “‘Fighting Words’: Regulating judges in Canada” in Richard Devlin & Adam Dodek, eds., *Regulating Judges: Beyond Independence and Accountability* (Massachusetts: Edwards Elgar Publishing, 2016) 76.

Dodek, Adam & Lorne Sossin. “Introduction: Judicial Independence in Context” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 1.

Donahue, John. “The Transformation of Government Work: Causes, Consequences, and Distortions” in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 41.

Eltis, Karen. “The Impact of Technology on Courts and Judicial Ethics” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 337.

Freeman, Jody. “Extending Public Accountability through Privatization: From Public Law to Publicization” in Michael D Dowdle, ed, *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 83.

———. “Private Parties, Public Functions and the New Administrative Law,” in David Dyzenhaus, ed, *Recrafting the Rule of Law: The Limits of the Legal Order* 333 (Oxford, UK: Hart Publishing, 1999) 333.

Gélinas, Fabien. “Judicial Independence in Canada: A Critical Overview” in Anja Seibert-Fohr, ed, *Judicial Independence in Transition* (Heidelberg: Springer, 2012) 567.

Hogg, Peter. “The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 25.

Jan van Ettekoven, Bart & Corien Prins. “Data Analysis, Artificial Intelligence and the Judiciary System” in Vanessa Mak, Eric Tjong Tjin Tai & Anna Berlee, eds., *Research Handbook in Data Science and Law* (Edward Elgar Publishing Ltd., 2018) 425.

Karazivan, Noura. “L’application de la Charte canadienne des droits et libertés par les valeurs : l'article 32”, in Errol Mendes & Stéphane Beaulac, eds, *Charte canadienne des droits et libertés*, 5th ed (LexisNexis, 2013), 241.

Kelman, Steven. “Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective” in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 153.

Manunza, Elisabetta & Wouter Jan Berends. “Social Services of General Interest and the EU Public Procurement Rules” (2013) in Ulla Neergaard et al, eds, *Social Services of General Interest in the EU* (The Hague: Springer, 2013) 347.

Michaud, Pierre A L’honorable juge en Chef. « L’administration de la justice et les tribunaux : quelques réflexions sur la perception du public » in Jean-Maurice Brisson & Donna Greschner, eds, *Public Perceptions of the Administration of Justice* (Montréal: Éditions Thémis, 1995) 27.

Mitchell, Graeme. “‘Be Careful What You Wish For’: Administrative Independence and Alternative Models of Court Administration - The New Frontier” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 97.

Macdonald, Roderick & Hoi Kong. “Judicial Independence as a Constitutional Virtue” in Michel Rosenfeld & Andras Sajo, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2013) 831.

Macdonald, Roderick. “Access to Civil Justice” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2012) 492.

Mendelson, Nina. “Six Simple Steps to Increase Contractor Accountability” in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 241.

Metzger, Gillian. “Private Delegations, Due Process, and the Duty to Supervise” in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 291.

Noreau, Pierre. “The Old...and the New? Elements for a General Theory of Institutional Change: The Case of Paperless Justice” in Karim Benyekhlef et al, eds, *eAccess to Justice* (Ottawa: University of Ottawa Press, 2016) 263.

Ricard, Michel. “Le SIIJ: vers une administration de la justice sur support numérique,” in *Actes de la XVIe Conférence des juristes de l’état* (Cowansville, Que: Yvon Blais, 2004) 175.

Sabel, Charles F & William H Simon. “Democratic Experimentalism” in Christopher L Tomlins & Justin Desautels-Stein, eds, *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 477.

Sancton, Andrew. “Provincial and Local Public Administration” in Christopher Dunn, ed, *The Handbook of Canadian Public Administration* (Oxford University Press, 2002) 249.

Scott, Ian R. “The Future of Judicial Administration” in Garrie J Moloney, ed, *Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive* (Canberra: Australian Institute of Judicial Administration Inc., 1986) 73.

Cestari, José Marcelo A P, Eduardo R Loures & Eduardo Alves Portela Santos. “Interoperability Assessment Approaches for Enterprise and Public Administration” in Yan Tang Demey & Hervé Panetto, eds, *On the Move to Meaningful Internet Systems: OTM 2013 Workshops* (Berlin: Springer, 2013) 78.

Soloway, Stan & Alan Chvotkin. “Federal Contracting in Context: What Drives It, How to Improve It” in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, 2009) 192.

Sossin, Lorne. “Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism.” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 63.

———. “Democratic Administration” in Christopher Dunn, ed, *The Handbook of Canadian Public Administration*, 2nd ed (Oxford University Press, 2010) 268.

Tardi, Gregory. “Departments and Other Institutions of Government” in Christopher Dunn, ed, *The Handbook of Canadian Public Administration*, 2nd ed (Oxford University Press, 2010) 25.

Tegart, Gerald & Jeffrey Crawford. “Models of Court Administration: Administering Courts in the Interests of Justice” in Trevor CW Farrow & Patrick Molinari, eds, *The Courts and Beyond: The Architecture of Justice in Transition* (Canadian Institute for the Administration of Justice, 2012) 53.

Thomas, Paul G. “The Swirling Meanings and Practices of Accountability in Canadian Government” in David Siegel & Ken Rasmussen, eds, *Professionalism & Public Service: Essays in Honour of Kenneth Kernaghan* (University of Toronto Press, 2008) 34.

Russell, Peter. “Judicial Recruitment, Training, and Careers” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2012) 522.

———. “A General Theory of Judicial Independence Revisited” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 599.

———. “Toward a General Theory of Judicial Independence” in Peter Russell & David O’Brien, eds, *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, 2001) 1.

Vermeys, Nicolas. “Privacy v. Transparency: How Remote Access to Court Records Forces Us to Re-examine Our Fundamental Values.” in Karim Benyekhlef et al, eds, *eAccess to Justice* (University of Ottawa Press, 2016) 123.

Vermeys, Nicolas & Karim Benyekhlef, “Premiers éléments d’une méthodologie de réformation des processus judiciaires par la technologie” in Daniel Le Métayer, ed,

Les technologies de l'information au service des droits : opportunités, défis, limites (Bruxelles: Bruylant, 2010) 209.

Winner, Langdon. "Technology as Forms of Life" in David M Kaplan, ed, *Readings in the Philosophy of Technology* (Oxford: Rowman & Littlefield, 2004) 103.

SECONDARY MATERIAL: ARTICLES

Amirthalingam, Kumaralingam. "The Non-Delegable Duty - Some Clarifications, Some Questions Comments and Case Notes: Case Note" (2017) 29 SAcLJ 500.

Anand, Anita & Andrew Green, "Regulating Financial Institutions: The Value of Opacity" (2012) 57:3 McGill L J 399.

Anderson, Gavin W. "Social Democracy and the Limits of Rights Constitutionalism" (2004) 17:1 Can JL & Jur 3.

Arnold, William. "The Supreme Court of the United Kingdom (UKSC), an Exploration of the Roles of Judicial Officers and Court Administrators and how the Relationship between them may be improved and enhanced: a Case Study" (2014) 6:2 J Court Admin 19.

Arrowsmith, Sue. "Government contracts and public law" (1990) 10:3 LS 231.

Atwood, Evan & Michael Trebilcock. "Public Accountability in an Age of Contracting Out" (1996) 27 Can Bus LJ 1.

Baar, Carl. "Patterns and strategies of court administration in Canada and the United States" (1977) 20:2 Can Pub Admin 242.

———. "Judicial Independence and Judicial Administration: The Case of Provincial Court Judges Independence and Impartiality: The Case of Provincial Court Judges" (1997) 9 Const Forum Const 114.

———. "Integrated justice: privatizing the fundamentals" (1999) 42:1 Can Pub Admin 42.

Beatty, David. "Canadian Constitutional Law in a Nutshell" (1997) 36 Alta L Rev 605.

Bailey, Jane & Jacquelyn Burkell, "Revisiting the Open Court Principle in an Era of

Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2017) 48:1 Ottawa L Rev 147.

———. "Implementing technology in the justice sector: A Canadian perspective." (2013) 11:2 CJLT 253.

Bauman, Richard. "Foreword" (2000) 63:4 Law & Contemp Probs 1.

Beermann, Jack. "Administrative-Law-Like Obligations on Private[ized] Entities" (2001) 49 UCLA L Rev 1717.

Belton, Tom. "Custody, Control, and Confusion: Legal, Historical, and Territorial Aspects of Court Records in Ontario" (2010) 69 Archivaria 9.

Bermant, Gordon & Russell R Wheeler, "Federal Judges and the Judicial Branch: Their Respondence and Accountability Federal Judicial Independence Symposium" (1994) 46 Mercer L Rev 835 at 845.

Boudreau, Marie-Claude & Daniel Robey. "Accounting for the contradictory organizational consequences of Information Technology: Theoretical directions and methodological implications" (1999) 10:2 Information Systems Research 167.

Bunjevac, Tin. "Court Services Victoria and the New Politics of Judicial Independence: A Critical Analysis of the Court Services Victoria Act 2014" (2015) 41:2 Monash UL Rev 299.

———. "Court Governance in Context: Beyond Independence" (2011) 4:1 Intl J Court Admin 35.

———. "Court Governance: The Challenge of Change" (2011) 20 J Jud Admin 201.

———. "The Corporate Transformation of the Courts: Towards A Judicial Board of Executive Directors" (2016) 25:4 J Jud Admin 197.

Burris, Scott, Michael Kempa & Clifford Shearing, "Changes in Governance: A Cross-Disciplinary Review of Current Scholarship" (2008) 41 Akron L Rev 1.

Callaghan, Frank Woods. "The Financing and Administration of the Courts: A Threat to Justice" (1992) 11 Adv Society J 3.

Chemerinsky, Jeffrey M & Jonathan L Williams. “Foreword: Measuring Judges and Justice” (2009) 58:7 Duke LJ 1173.

Chiappinelli, Olga. “Decentralization and Public Procurement Performance: New Evidence from Italy” (2020) 58:2 Economic Inquiry 856.

Cockfield, Arthur & Jason Pridmore.“A Synthetic Theory of Law and Technology” (2007) 8 Minn J L Sci & Tech 475.

Cockfield, Arthur J. “Individual Autonomy, Law and Technology: Should Soft Determinism Guide Legal Analysis?” (2010) 30:1 Bulletin Sci Tech & Soc 4.

Colbran, Stephen. “A Comparative Analysis of Judicial Performance Evaluation Programmes” (2006) 4:1 J Commonwealth L & Leg Educ 35.

Constantinides, Panos. & Michael Barrett. “Large-Scale ICT Innovation, Power, and Organizational Change: The Case of a Regional Health Information Network” (2006) 42:1 Journal of Applied Behavioral Science 76.

Crandall, Erin & Andrea Lawlor. “The Politics of Judicial Appointment: Do Party Connections Impede the Appointment of Women to Canada’s Federally Appointed Courts?” (2017) 50:3 Can J Pol Science 823.

Devonshire, Peter. “Contractual Obligations in the Pre-Award Phase of Public Tendering” (1998) 36 Osgoode Hall LJ 203.

Domberger, Simon & Paul Jensen. “Contracting Out by the Public Sector: Theory, Evidence, Prospects” (1997) 13:4 Oxford Review of Economic Policy 67.

Durand, Roland. “Les archives judiciaires et le juge : l’indépendance de la magistrature et la conservation de la mémoire des cours” (1991) 22:4 Archives 49.

Eltis, Karen. “The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context” (2011) 56:2 McGill LJ 289.

Feigenbaum Harvey B & Jeffrey R Henig. “The Political Underpinnings of Privatization: A Typology” (1994) 46 World Pol 185.

Flinders, Matthew & Jim Buller. “Depoliticisation: Principles, Tactics and Tools” (2006)

1:3 British Pol 293.

Freedland, Mark. “Privatising Carltona: Part II of the Deregulation and Contracting Out Act 1994” (1995) Public Law 21.

Freeman, Jody. “The Private Role in the Public Governance” (2000) 75 NYU L Rev 543.

———. “Extending Public Law Norms through Privatization” (2002) 116 Harv L Rev 1285.

Freeman, Jody & Jim Rossi. “Agency Coordination in Shared Regulatory Space” (2012) 125:5 Harv L Rev 1131.

Freitas, Christiana Soares de & Janann Joslin Medeiros. “Organizational Impacts of the Electronic Processing System of the Brazilian Superior Court of Justice” (2015) 12:2 J Inf Systems & Tech Management 317.

Garcia, Margarida & Richard Dubé. “L'évolution récente du concept d'indépendance judiciaire et les menaces internes à la détermination de la peine juste” (2019) 64:3 McGill LJ 535.

Gélinas, Fabien, Clément Camion & Karine Bates. “Forme et légitimité de la justice – Regard sur le rôle de l’architecture et des rituels judiciaires” (2015) 73:2 RIEJ 37.

Gélinas, Fabien. “Interopérabilité et normalisation des systèmes de cyberjustice : Orientations”, online: (2006) 10:3 Lex Electronica <https://www.lex-electronica.org/files/sites/103/10-3_gelinas.pdf>.

Gibson, Dale. “Development of Federal Legal and Judicial Institutions in Canada” (1995) 23 Man LJ 450.

Greene, Ian. “The Politics of Court Administration in Ontario” (1982) 2 Windsor YB Access Just 124.

———. “The Doctrine of Judicial Independence Developed by the Supreme Court of Canada” (1988) 26:1 Osgoode Hall LJ 177.

Greene, Samuel. “Attorney General of Canada v Rapiscan Systems Inc.: Reflections on the Challenge of Judicial Review in Government Procurement” (2017) 75 UT Fac L Rev 48.

Greenwood, Michael & Gary Bockweg. “Insights to Building a Succesful E-filing Case Management Service: U.S. Federal Court Experience” (2012) 4:2 Intl J Court Admin 2.

Guilmain, Antoine. “Sur les traces du principe de proportionnalité : une esquisse généalogique” (2015) 61:1 McGill LJ 87.

Hansen, Janna. “Limits of Competition: Accountability in Government Contracting” (2003) 112:8 Yale LJ 2465.

Hart, Oliver, Andrei Shleifer & Robert W Vishny. “The Proper Scope of Government: Theory and an Application to Prisons” (1997) 112:4 Quarterly Journal of Economics 1127.

Janssen, Willem A. “The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?” (2014) 10:5 Utrecht L Rev 168.

Jones, Clifford A. “Out of Guatemala?: Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election” (2006) 5 Election LJ 121.

Jordan, Michael. “Ontario’s Integrated Justice Project: profile of a complex partnership agreement” (1999) 42:1 Can Pub Admin 26.

Kenall, Dustin. “Administrative Remedies for Administrative Disputes: Perfecting Public Control of Public Procurement” (2018) 31:2 Can J Admin L & Prac 177.

Kleinberg, Jon et al. “Discrimination in the Age of Algorithms” (2018) 10 J Leg Analysis 113.

Konina, Anastasia. “Technology-Driven Changes in an Organizational Structure: The Case of Canada’s Courts Administration Service” (2020) 11:2 Intl J Court Admin 6.

Lamer, Antonio. “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change” (1996) 45 UNBLJ 3.

Larkins, Christopher. “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis” (1996) 44 Am J Comp L 605

Lederer, Fredric I. “Judging in the Age of Technology” (2014) 53:4 Judges Journal 6.

Lemieux, Pierre. “Les récents développements en matière de contrats de l'administration” (1986) 16 RDUS 54.

Leonardi, Paul M. “Activating the Informational Capabilities of Information Technology for Organizational Change” (2007) 18:5 Organization Science 813.

Levinson, Sanford. “Identifying ‘Independence’” (2006) 86 BU L Rev 1297.

Lobel, Orly. “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2004) 89 Minn L Rev 342.

Loo, Rory Van. “The New Gatekeepers: Private Firms as Public Enforcers” (2020) 106 Va L Rev 56.

Lupo, Giampiero & Jane Bailey. “Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples” (2014) Laws 353.

Macdonald, Roderick. “Call-Centre Government: For the Rule of Law, Press #” (2005) 55:3 UTLJ 449.

Malkin, Alissa. “Government Reorganization and the Transfer of Powers: Does Certainty Matter” (2007) 39:3 Ottawa L Rev 537.

Malleson, Kate. “Judicial Training and Performance Appraisal: The Problem of Judicial Independence” (1997) 60:5 The Modern Law Review 655.

Mangold, Susan Vivian. “Protection, Privatization, and Profit in the Foster Care System” (1999) 60 Ohio St LJ 1295.

Marques dos Santos, Ernani & Nicolau Reinhard. “Electronic Government Interoperability: Identifying the Barriers for Frameworks Adoption” (2012) 30:1 Social Science Computer Review 71.

Martin AC, Chief Justice Wayne. “Court Administrators and the Judiciary - Partners in the Delivery of Justice” (2014) 6:2 International Journal for Court Administration 3.

Martin, John A, Brenda J Wagenknecht-Ivey & Brian Lynch. “Five Reasons Why Judicial Leaders Should Be Involved with and Support Strategic Planning in Their Courts” (2001) 40 Judges Journal 5.

McCamus, John D. “Loosening the Privity Fetters: Should Common Law of Canada Recognize Contracts for the Benefit of Third Parties?” (2001) 35:2 Can Bus LJ 173.

McCormick, Peter. “New Questions about an Old Concept: The Supreme Court of Canada’s Judicial Independence Decisions” (2004) 37:4 Canadian Journal of Political Science 839.

McDonald, Ann. “In the Public Interest: Judicial Review of Local Government” (1983), 9 Queens LJ 62.

McGarvie, Richard. “Judicial Responsibility for the Operation of the Court System” (1989) 63:2 Australian Law Journal 79.

———. “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 Journal of Judicial Administration 3.

McGill, Jena & Amy Salyzyn, “Judging by Numbers: How Will Judicial Analytics Impact the Justice System and Its Stakeholders?” (2020) Ottawa Faculty of Law Working Paper No 2020/13.

McKay-Panos, Linda. “Universities and Freedom of Expression: When Should the Charter Apply?” (2016) 5 CJHR 59.

McKenna, Mark. “Intellectual Property, Privatization and Democracy: A Response to Professor Rose Respondents” (2005) 50:3 St Louis U LJ 829.

McLachlin, Beverley. “Courts, Transparency and Public Confidence: To the Better Administration of Justice” (2003) 8 Deakin L Rev 1.

Metzger, Gillian E. “Privatization as Delegation” (2003) 103 Colum L Rev 1367.

Minow, Martha. “Public and Private Partnerships: Accounting for the New Religion” (2003) 116 Harv L Rev 1229.

Mockle, Daniel. “La justice, l’efficacité et l’imputabilité” (2013) 54:4 C de D 613.

Mohr, Lawrence B. “Organizations, Decisions, and Courts” (1976) 10:4 Law and Society Review 621.

Molot, Henry L. “The Carltona Doctrine and the Recent Amendments to the Interpretation

Act" (1994) 26 Ottawa L Rev 257.

Morley, Gareth. "Sovereign Promises: Does Canada Have a Law of Administrative Contracts?" (2010) 23:1 Can J Admin L & Prac 17.

Mullan, David J & Antonella Ceddia. "The Impact on Public Law of Privatization, Deregulation, Outsourcing, and Downsizing: A Canadian Perspective" (2003) 10:1 Ind J Global Leg Stud 199.

Neyers, JW. "Explaining the Principled Exception to Privity of Contract" (2007) 52 McGill LJ 757.

Nicholson, Robert. "Judicial Independence and Accountability: Can They Co-exist?" (1993) 67 Austl LJ 404.

Nou, Jennifer. "Privatizing Democracy: Promoting Election Integrity through Procurement Contracts" (2009) 118:4 Yale LJ 744.

Ogilvie, M.H. "Re-Defining Privity of Contract: *Brown v Belleville (City)*" (2015) 52:3 Alta L Rev 731.

Omarova, Saule. "Wall Street as Community of Fate: Toward Financial Industry Self-Regulation" (2011) 159 U Pa L Rev 411.

Orlikowski, Wanda J. "Using Technology and Constituting Structures: A Practice Lens for Studying Technology in Organizations" (2000) 11:4 Organization Science 404.

Panet, Philip de L. & Michael J Trebilcock, "Contracting-Out Social Services" (1998) 41 Can Pub Admin 21.

Pasquale Frank & Glyn Cashwell. "Prediction, persuasion, and the jurisprudence of behaviourism" (2018) 68 UTLJ 63 at 67-72.

Posner, Richard A. "The Law and Economics of Contract Interpretation" (2004) 6 Tex L Rev 1581

Pottie, Laura & Lorne Sossin. "Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare" (2005) 38 UBC L Rev 147.

Pound, Roscoe. "Organization of Courts" (1927) 11:3 Journal of the American Judicature

Society 69.

———.“Courts and Legislation” (1913) 7:3 The American Political Science Review 361.

Prosser, Tony. “Public Service Law: Privatization’s Unexpected Offspring” (2000) 63:4 Law & Contemp Probls 63.

———. “Social Limits to Privatization” (1995), 21 Brook J Intl L 213.

Rabinovich-Einy, Orna. “Beyond Efficiency: The Transformation of Courts Through Technology” (2008) 12:1 UCLA JL & T 1.

Rankin, Micah. “Access to Justice and the Institutional Limits of Independent Courts” (2012) 30 Windsor YB Access Just 101.

Richardson, Kristy. “Judicial independence: ls there a difference between administrative independence and adjudicative independence?” (2007) 17 J Jud Admin 5.

Riddell, Troy, Lori Hausegger & Matthew Hennigar. “Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy Commentary” (2012) 50 Osgoode Hall L J 403.

Ryder-Lahey, Pamela & Solomon, Peter. “The Development and Role of the Court Administrator in Canada” (20080101) 1:1 Intl J Court Admin 31.

Salamon, Lester. “The New Governance and the Tools of Public Action: An Introduction” (2001) 28:5 Fordham Urb LJ 1611.

Salyzyn, Amy. “A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario” (2012) 50:2 Osgoode Hall LJ 429.

Saunders, Cheryl. “Separation of Powers and the Judicial Branch” (2006) 11 Judicial Review 337.

Schooner, Steven. “Desiderata: Objectives for a System of Government Contract Law” (2002) 11 Pub Proc L Rev 103

Scott, Kyle. “The Link between Judicial Independence and Administrative Staffing: A Reappraisal” (2009) 25 JL & Pol 19.

Shetreet, Shimon. “Judicial Accountability: A Comparative Analysis of the Models and

Recent Trends" (1986) 2 Intl Leg Practitioner 38.

Skehill, Stephen. "Comment on Court Governance" (1994) J Jud Admin 28

Snider, Keith. "Procurement Leadership: From Means to Ends" (2006) 6:3 J Pub Proc 274.

Sossin, Lorne. "Boldly Going Where No Law Has Gone before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2004) 42 Osgoode Hall LJ 363.

Sossin, Lorne & Meredith Bacal. "Judicial Ethics in a Digital Age" (2013) 46 UBC L Rev 629.

Sourdin, Tania Bin Li & Donna Marie McNamara, "Court innovations and access to justice in times of crisis", online: (2020) Health Policy and Technology <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/>.

Sterling, Lori & Sean Hanley. "Judicial Independence Revisited" (2006) 34 SCLR 57.

Tokaji, Daniel P. "The Paperless Chase: Electronic Voting and Democratic Values" (2005) 73 Fordham L Rev 1711.

Trebilcock, Michael & Edward M Iacobucci, "Privatization and Accountability" (2003) 116 Harv L Rev 1422.

Vermeys, Nicolas. "Code source et sources codifiées : pour une cyberjustice québécoise ouverte et accessible", online: (2010) 14:3 Lex Electronica <https://www.lex-electronica.org/en/s/586>.

Volkoff, Olga, Diane M Strong & Michael B Elmes. "Technological Embeddedness and Organizational Change" (2007) 18:5 Organization Science 832.

Wachter, Sandra, Brent Mittelstadt & Luciano Floridi. "Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation" (2017) 7:2 International Data Privacy Law 76.

Wallace, Clifford. "An Essay on Independence of the Judiciary: Independence from What and Why" (2001) 58 NYU Ann Surv Am L 241.

Watson, Garry. "The Judge & Court Administration: The Respective Roles of the

Judiciary and the Executive in Court Administration in Canada, England & U.S.A." (1977) Intl Leg Practitioner 42.

Wheeler, Russell. "Roscoe Pound and the Evolution of Judicial Administration" (2007) S Tex L Rev 943.

Winn, Peter. "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information Symposium - Technology, Values, and the Justice System" (2004) 79 Wash L Rev 307.

———. "Judicial Information Management in an Electronic Age: Old Standards, New Challenges" (2009) 3 Fed Cts L Rev 135.

Wright, Michael D. "A Critique of the Public Choice Theory Case for Privatization: Rhetoric and Reality" (1993) 25:1 Ottawa L Rev 1.

SECONDARY MATERIAL: UNPUBLISHED MANUSCRIPTS

Bunjevac, Tin. *Transforming Court Governance in Victoria* (PhD Thesis, Victoria University College of Law and Justice, 2017) [unpublished].

Gratton, Susan. *Administrative Law in the Welfare State: Addressing the Accountability Gap in Executive Social Policy-Making* (JSD Thesis, University of Toronto, 2010) [unpublished].

Leroux, Isabelle. *A Study on the Particularities of Government Contracts* (Master of Laws Thesis, University of Toronto, 1997) [unpublished].

SECONDARY MATERIAL: REPORTS

American College of Trial Lawyers. *Working Smarter but not Harder in Canada: The Development of a Unified Approach to Case Management in Civil Litigation* (Irvine, CA: The American College of Trial Lawyers, 2016).

Arrowsmith, Sue. "Reimagining Public Procurement Law after Brexit: Seven Core Principles for Reform and Their Practical Implementation, Part 1"(2020), online: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523172 >.

Bailey, Jane. *Digitization of Court Processes in Canada* (Montreal: Université de Montréal, the Cyberjustice Laboratory, 2012)

Bavitz, Christopher et al. *Assessing the Assessments: Lessons from Early State Experiences in the Procurement and Implementation of Risk Assessment Tools* (Harvard: The Berkman Klein Center for Internet & Society, 2018).

Bellamy, Denise E. *Toronto Computer Leasing Inquiry/Totronto External Contracts Inquiry* (City of Toronto, 2005).

Cavouklian, Ann. *Privacy by Design: The 7 Foundational Principles Implementation and Mapping of Fair Information Practices* (May 2010) at 1, online: < https://www.ipc.on.ca/wp-content/uploads/resources/pbd-implement-7found-principles.pdf>.

Joint Technology Committee (JTC) of the Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM) and the National Center for State Courts (NCSC). *JTC Resource Bulletin: Introduction to the Next-Generation Court Technology Standards Application Component Model* (29 November 2017), online: <https://www.ncsc.org/__data/assets/pdf_file/0034/18979/nextgen-court-component-model-2017-12-08-final.pdf>.

Lavelle, Maria. *Privity of Contract and Third Party Beneficiaries* (Uniform Law Conference of Canada, Civil Law Section, 2007).

Law Commission of Ontario. *Executive Summary, The Rise and Fall of AI and Algorithms in American Criminal Justice: Lessons for Canada* (Toronto: October 2020).

Macdonald, David. *The Shadow Public Service: The swelling ranks of federal government outsourced workers* (Ottawa: Canadian Centre for Policy Alternatives, 2011).

Organization of Economic Development. *Alternatives to Traditional Regulation*, by Glen Hepburn (Paris: OECD, 2006).

Stobo, Gerry & Derek Leschinsky. *Pocketbook on the Canadian Public Procurement Regime* (Borden Ladner Gervais, 2009), online: <blg.com/en/News-And-Publications/documents/ publication_1799.pdf>.

Vermeys, Nicolas et al. "Étude relative à l'incidence des technologies de l'information et des communications sur la gestion de l'information dans l'administration judiciaire

québécoise" (January 2017), online: < https://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/ministere/Etude_janvier_2017_Transformation_Justice.pdf>.

Vermeys, Nicolas, Julie M Gauthier & Sarit Mizrahi. *Étude sur les incidences juridiques de l'utilisation de l'infonuagique par le gouvernement du Québec* (Montreal: Cyberjustice Laboratory, 2014).

SECONDARY MATERIAL: BLOGS

Beardwood John P et al. "Outsourcing: Canada overview", (01 February 2018), Thomson Reuters Practical Law (blog), online: <https://ca.practicallaw.thomsonreuters.com/2-501-6146?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

Benyekhlef, Karim & Nicolas Vermeys. "Technological Procurement as a Component of Judicial Independence – Slaw", online: Slaw <http://www.slaw.ca/2016/01/29/technological-procurement-as-a-component-of-judicial-independence/>.

Emanuelli, Paul. "Using Treaty-Compliant NRFPs – Procurement Office", online: Procurement Office <http://procurementoffice.com/event/using-treaty-compliant-nrfps/>.

Ha-Redeye, Omar. "Ontario Courts Finally Go Digital (Almost)", online: Slaw <http://www.slaw.ca/2019/02/03/ontario-courts-finally-go-digital-almost/>.

Mills, Marcia, Daniel Fabiano & Shannon Kristjanson. "Consolidation Creep: How the Federal Government's Canadian Collaborative Procurement Initiative Will Impact Suppliers at All Government Levels" (20 December 2019), online: <https://www.mondaq.com/canada/Government-Public-Sector/877376/Consolidation-Creep-How-The-Federal-Government39s-Canadian-Collaborative-Procurement-Initiative-Will-Impact-Suppliers-At-All-Government-Levels>

Sallée, Clémentine, Liviu Kaufman & Alexis Beaudin-Fol. "Quebec Public Procurement – New Procurement Authority Ramps Up - Blakes", online: Blakes <https://www.blakes.com/insights/bulletins/2018/quebec-public-procurement-new-

procurement-authorit>.

Swick, Brenda C. “Public procurement in Canada: Overview”, online: Thomson Reuters Practical Law <https://ca.practicallaw.thomsonreuters.com/4-521-6007?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

Annex I: Key Technical Components of a CRMS Instrument[1]

COMPONENT	DESCRIPTION
Case Opening & Case Dockets	Depending on type of the case, court personnel, counsel or litigants can open a case on-line by submitting a required procedural document. All docket entries and documents are submitted, reviewed and disseminated by parties electronically. The system is designed to control and validate the entry of required information into the computer system to insure a comprehensive record and permit standard well-structured case dockets and reports. Various case opening modules are offered depending on the type of litigation (civil, criminal, family, etc.) and the person opening the case (e.g.; private litigator, court personnel, government representative); and several automated functions (case numbering, judicial case assignment, calendaring including due dates) are created.
E-Documents	All documents stored in a case management system usually comport with Portable Document Format (PDF) standards. While any legal document filed with the judiciary may be composed on whatever device or format desired, these documents must be filed as a PDF document that will

[1] The information presented in this Annex draws from two sources: Canada, Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Submission by RedMane Technology Canada Inc.* (30 January 2017), online : < https://sencanada.ca/content/sen/committee/421/LCJC/Briefs/RedMane_Techn_e.pdf> and J Michael Greenwood & Gary Bockweg, "Insights to Building a Successful E-filing Case Management Service: U.S. Federal Court Experience" (2012) 4:2 Intl J Court Admin 2.

COMPONENT	DESCRIPTION
	permit any recipient to view and/or reproduce them. The system requires the filer to identify the proper document category from a drop down menu, to link the document(s) to appropriate case(s) and to other documents in the case (e.g., a response to a motion), and to have properly created a PDF version of the document. Each document accepted is electronically time stamped. Each submitted document can be linked to one or more cases; each document can be linked to other related documents within the same case or other cases within the same jurisdictions.
Digital Signatures	Standard digital signature technology may be incorporated into a case management system. However, the system can also use a different approach, such as a traditional login and password for user identification. The successful password authentication of the user is treated as a "signature" for any documents filed by the user. In addition, the system would generate a security stamp for each PDF document filed to detect any subsequent error or tampering that could alter a filed document.
Schedules & Deadlines	Most courts have prescribed schedules (e.g., arraignments, status conferences, pre-trial hearings, appointments, trials) or explicit deadlines that require litigants and parties to respond to previous submissions or events in a case (e.g., a response, answer or reply to an opposing party's motion or court notice). The program allows automatic generation of dates and times based on court rules and procedures, court activities and docket entries, and permits court personnel to modify and

COMPONENT	DESCRIPTION
	update these dates and times. Various case, judge or court-wide reports (daily, weekly, monthly calendars) and queries (pending deadlines/hearing, pending answers) can be generated.
Case Flags	The program allows each court to create a unique set of multiple identifiers: to be placed on the front cover of the docket; to be automatically entered or revised based on docketing or court activity in the case; and to produce special reports for any internal case management purposes; e.g., case statuses, lead or special cases, speedy trial, case differentiation.
Forms & Labels	Court-generated standard forms, orders, notices, and other standardized legal documents are produced based on case and docketing information inserted into a forms template produced by clerical or judicial staff; and these documents are, whenever possible, automatically e-mailed to recipients, or mailed, when necessary, using labels automatically produced by the system.
Fee Payments	Filing fees and other court costs are paid on the Internet by credit card; when payment is completed, an automatic entry is made into the case docket for auditing purposes.
E-Mail Notification	A Notice of Electronic Filing is automatically distributed within a few seconds of official docket entry usually by e-mail to all specified participants in the case. This notice also replaces the "process of service" that lawyers traditionally had to file verifying that other parties received

COMPONENT	DESCRIPTION
	notice of a submission. The notice contains the case title, case number, filer(s), docket text, list of recipients, original submitter's file name, unique electronic document stamp, and a docket document number with a hypertext link to the document(s) within the docket sheet in the court's database. Each recipient is permitted to view and, if desired, download the document(s) at no cost.
Transfer of Cases & Documents Among Courts	Case dockets, documents and data can be electronically transferred between and among courts. Each case can be associated with other cases within the same court and to other cases in other jurisdictions (cases transferred to/from a lower inferior court or higher appellate court or another comparable court).
Reports & Queries	The number, type, and style of reports will vary depending on court needs. Usually, they include: local and national statistical reports; case indexes separately classified by civil, criminal, appeals and other types of litigation (e.g., sealed case) or unique statuses (see case flags function); court activity reports such as trials, hearing, motions, orders, written opinions, judgments issued; judicial case assignment and case status reports, daily, weekly and monthly court calendars; and case scheduling, hearings and case deadlines reports. Most reports include a set of selection options to permit all users to precisely retrieve what they need and when they need a report. Preferred default options automatically appear on most selection screens, but the user is permitted to modify them. Court units are also provided a report writer to create unique local reports.

COMPONENT	DESCRIPTION
Quality Control	Editing options are available to designated administrative court personnel. A clerk ensures that the electronic entries and documents submitted by filers conform to court procedures and standards. Other utility functions are restricted to specialized administrative personnel or technicians who handle the most sensitive information.
Access Groups & User Accounts	There are multi-layers of access restrictions depending on each individual's legal status (e.g.; judge, clerk, attorney), involvement in a particular case (e.g.; judge, plaintiff, defense, prosecutor, counsel), group permission (judge's staff, clerical staff, attorneys of record), and special permission. Access can be restricted by case, docket entry, and/or document(s) for sealed, ex-parte, or private court-only viewed entries.
Privacy & Confidentiality: Redaction, Restricted Information	Most information in the system is public information. The system includes features to restrict access to information that should be available only to designated individuals. Some documents that are accessible to the public contain redacted information. When such documents are filed, by court rule, it is the responsibility of the filer to redact that sensitive information. The filer then submits the redacted version of the document that can be viewed by the public and an unredacted version with appropriate access restrictions.

COMPONENT	DESCRIPTION
Public Access	Public Access to Court Records is available to anyone who registers for the service via the court-operated service. The service allows a user to access, view and download any case dockets, documents, or audio courtroom recordings at a nominal cost. The central service bureau maintains and updates a national locator index that permits a search by name, case number, or nature of the suit (a nationwide case-type classification code) across all trial and appellate court jurisdictions. Case information (dockets and documents) is extracted directly from a court's operational database.

Annex II: The Role of the Private Sector in Court Modernisation in Provinces and Territories

Commodity tasks - straightforward functions that meet the requirements of specificity, ease of evaluation, and competition.[1]

Custom tasks – complex and sophisticated functions which fail to meet the requirements of specificity, ease of evaluation and/or competition .[2]

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
Alberta	**Provincial Court** – Remote Courtroom Scheduling (RCS) gives defence counsel electronic access to court information.[3] – Court Appearance Scheduling System (CASS) coordinates court dates between the court, the defence counsel and the Crown. [4]	**Commodity tasks:** – Consulting and advisory services regarding the implementation of various remote scheduling initiatives; – Procurement of off-the-shelf document management, e-

[1] John Donahue, "The Transformation of Government Work: Causes, Consequences, and Distortions" in Jody Freeman & Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* (Harvard University Press, Cambridge, Mass, 2009) 41 at 46.

[2] *Ibid.*

[3] Provincial Court of Alberta, Court Case Management Program, online: <https://www.albertacourts.ca/pc/about-the-court/innovation/ccm>

[4] *Ibid.*

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– Criminal e-File powered by OpenText Content Suite Platform[5] supports the intake, management and disclosure of electronic documents to the Alberta Crown Prosecution Service, provincial courts, police departments and defense counsel. [6] **Court of Queen's Bench** The goals of the court are: – to accept some documents electronically; – to implement online scheduling and adjournments for commercial matters and judicial dispute resolution; – to develop an accurate method to capture and record statistics of all matters brought before the Court across the province. – to implement online scheduling and adjournments for all court matters;	disclosure and e-signature software

[5] Tim Owens, *Alberta Justice and Solicitor General rehabilitate criminal case management,* online: <https://www.opentext.jp/file_source/OpenText/Customers/en_US/PDF/alberta-justice-0119-en.pdf>

[6] Provincial Court of Alberta and Ministry of Justice and Solicitor General, *Court Case Management 2015/18 Project Charter* (14 January 2016) at 4, online: <https://www.albertacourts.ca/docs/default-source/pc/ccm-project-charter.pdf?sfvrsn=cbdadf80_4>

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– to implement electronic documents and electronic filing for all court documents. [7] **Court of Appeal** The goals of the court are: – to adopt an e-filing system. – to automate and digitize case and document management systems.[8]	
British Columbia	**Provincial Court** The goals of the court are: – to enable the judges to access court material electronically (before, during and after a court proceeding).[9] **Provincial Court & Supreme Court**	**Custom & Commodity Tasks:** – Consulting and advisory services regarding the implementation of case and

[7] Court of Queen's Bench of Alberta, *Annual Report 2016 to 2017*, *Appendix 1: The Court of Queen's Bench of Alberta Strategic Plan 2016 to 2021*, at III-IV, online: <https://albertacourts.ca/docs/default-source/qb/2016-2017-annual-report-with-appendix-jan-19-2018.pdf?sfvrsn=593aac80_0>

[8] The Court of Appeal of Alberta, *Notice to the Profession: Alberta Court of Appeal's e-Filing Initiative* (20 March 2017), online: <https://www.albertacourts.ca/docs/default-source/ca/notice-to-the-profession---e-filing-initiativeb631bd391b316d6b9fc9ff00001037d2.pdf?sfvrsn=ba00d080_2>

[9] Provincial Court of British Columbia, *Annual Report 2017/2018*, at 54, online: https://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2017-2018.pdf.

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– JUSTIN, an integrated criminal justice system supported by a single provincial database for managing electronic court records.[10] – The Civil Electronic Information System ("CEIS"), a customized case management system facilitating information management for civil, family, and estates cases.[11] **Court of Appeal** – Web-based Court of Appeal Tracking System developed by OpenRoad.[12] **Supreme Court & Court of Appeal** The courts plan to implement: – Smart Online Guide which, amore other things, helps users complete court forms; – Intelligent Reviewer that organizes large amounts of information;	registry management services; – Development of integrated case management services; – Off-the-shelf, commercial software, including AI.

[10] Office of the Auditor General of British Columbia. *Securing the JUSTIN System: Access and Security Audit at the Ministry of Justice* (January 2013) at 4, online: <https://www.bcauditor.com/sites/default/files/publications/2013/report_9/report/OAGBC%20JUSTIN%20Report.pdf>; Giampiero Lupo & Jane Bailey, "Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples" (2014) Laws 353–387 at 371.

[11] Lupo & Bailey, *supra* note 9 at 371.

[12] Jane Bailey, *Digitization of Court Processes in Canada* (Montreal: Université de Montréal, the Cyberjustice Laboratory, 2012) at 20.

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– Smart Court Way-finder and Inquirer Platform that provides information- and document-finding assistance for court staff and court users; – A digital platform for court proceedings.[13] **Provincial Court & Supreme Court & Court of Appeal** – Court Services Online ("CSO") provides public access to the information contained in JUSTIN and CEIS and offers clients the ability to file court documents at any registry in the province.[14] – An fully integrated electronic filing and document management system will be implemented in the courts of the province in 2023.[15]	

[13]Supreme Court of British Columbia, *Annual Report 2018*, at 35, online: <https://www.bccourts.ca/supreme_court/about_the_supreme_court/annual_reports/2018_SC_Annual_Report.pdf>

[14] British Columbia, *Introduction to CSO Services*, online: < https://justice.gov.bc.ca/cso/about/introduction.do>

[15] British Columbia, Ministry of the Attorney General, *Court Digital Transformation Strategy 2019-2023* (2019) at 23, online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/digital-transformation-strategy-bc-courts.pdf>

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
Manitoba	Cancelled partnership with Legal Data Resources Corporation for the implementation of SharePoint eDocument Portal in the Court of Queen's Bench in Winnipeg. [16]	The Courts do not have any definite plans for collaborations
New Brunswick	**Court of Queen's Bench** – Electronic filing of separate legal documents – Videoconferencing.[17] **Court of Appeal** - eDiscovery.[18]	**Commodity Tasks** Video-conferencing services
Newfoundland and Labrador	**Provincial Court** – The Small Claims e-Filing system allows for the filing of Small Claims documents online.[19]	Most projects are developed in-house

[16] Manitoba Courts, Notice Service Changes Effective November 13, 2018, online: <http://www.manitobacourts.mb.ca/site/assets/files/1152/notice_-_change_in_services_november_13_2018_6.pdf>

[17] Jacques Poitrais, CBC News Jun 06, 2019, Province's newest chief justice calls for modern technology in courtrooms, online: <https://www.cbc.ca/news/canada/new-brunswick/new-chief-justice-call-modern-technology-1.5164578>

[18] The Law Society of New Brunswick, *2019 Annual Report*, online: <http://lawsociety-barreau.nb.ca/uploads/2019AnnualReport.pdf>.

[19] Provincial Court of Newfoundland and Labrador, *Small Claims Electronic Filing*, online: <https://court.nl.ca/provincial/courts/smallclaims/efiling.html>.

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– The Computerized Automated Scheduling System (CASS) and the Case Assignment and Retrieval System (CAAR).[20]	
Nova Scotia	**Provincial Court** – Use of videoconferencing and electronic disclosure of documents.[21] – Utilizing video conferencing for court appearances for persons in custody.[22]	**Commodity tasks** – Video-conferencing services – eDiscovery services
Ontario	**Court of Justice**[23] –Criminal Electronic Order Production of the three most common criminal court orders - Judicial Interim Release Orders, adult probation and conditional sentence orders, and youth probation orders.	**Custom & Commodity Tasks:** – Consulting and advisory services;

[20] Provincial Court of Newfoundland and Labrador, *Annual Report 2017-2018*, at 6, online: <https://court.nl.ca/provincial/publications/ProvCourtAnnReport17_18.pdf>.

[21] Nova Scotia, Access to Justice Coordinating Committee, *Final Report 2018*, at 35, online: <https://courts.ns.ca/News_of_Courts/documents/A2JCCreport_WEB.pdf>.

[22] Nova Scotia, Department of Justice, *Accountability Report 2017-2018*, at 14-15, online: <https://novascotia.ca/government/accountability/2017-2018/2017-2018-Department-of-Justice-Accountability-Report.pdf>.

[23] Ontario, Ministry of the Attorney General, Court Services Division, *Annual Report 2016-17*, "Chapter 3: 2015-16 Overview and Initiatives", online:< https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_15/>.

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– Electronic Youth Sentence Orders and the auto-population of half a dozen ancillary orders (relating to DNA analysis, the Sex Offender Information Registry Act, and driving and weapons prohibitions). – Pilot Electronic Family Order production tool in partnership with Legal Aid Ontario. – Electronic Scheduling Program (ESP) enables province-wide scheduling for criminal cases. ESP has been implemented in 4 sites: Milton, Oshawa, London, and Peterborough. A strategy for province-wide implementation is under development.[24] **Court of Justice & Superior Court of Justice** – "Next Day Court Dockets" website allows court users to obtain basic next day case information for criminal, civil, small claims, family, and divisional court matters. **Superior Court of Justice**[25]	– Off-the-shelf, commercial software; – Development of integrated case management services.

[24] Ontario, Ministry of the Attorney General, Court Services Division, *Annual Report 2016-17 and 2017-18*, "Chapter 3: 2016-17 & 2017-18 Overview and Initiatives", online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_16_18/>.

[25] Ontario, Superior Court of Justice, online: <https://www.ontario.ca/page/file-civil-claim-online?_ga=2.69848150.710319018.1499699637-198441128.1427746224>.

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– Small Claims Division E-Filing[26] The Small Claims Court e-filing launched in August 2014. There are two ways to file online: Through a Filing Wizard for self-represented litigants or through Quick File for legal professionals. – Civil Division E-Filing[27] The documents that can be filed online are: Statement of Claim; Notice of Action; Affidavit of Litigation Guardian of a Plaintiff under a Disability; Request for Bilingual Proceedings; Consent to file documents in French; Statement of Defence; Notice of Intent to Defend; Consent or Court Order required in support of filing a document online; Proof of Service for documents filed online.	

[26] Ontario, Ministry of the Attorney General, Court Services Division, *Annual Report 2016-17 and 2017-18*, "Chapter 3: 2016-17 & 2017-18 Overview and Initiatives", online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_16_18/>.

[27] *Ibid.*

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
Prince Edward Island	- Shared Solutions was awarded a contract to create a repository of searchable electronic court documents.[28] - Use of video-conferencing for hearings in urgent matters due to the COVID-19 pandemic.[29]	**Commodity Tasks:** Limited use of video-conferencing services
Quebec	**Court of Quebec & Superior Court & Court of Appeal** Integrated case and registry management technologies will facilitate communication and coordination between the main actors of the criminal justice system (courts, prosecutors, attorneys, police) and better time management. The Ministry of Justice expects that the solutions put in place in the criminal and penal justice will facilitate future innovations of the system of civil justice.[30]	**Custom & Commodity Tasks:** – Consulting and advisory services; – Off-the-shelf, commercial case management software.

[28] Innovation PEI, *Province supports three projects under the Pilot and Discovery Fund* (24 November 2011), online:< http://www.gov.pe.ca/ipei/index.php3?number=news&newsnumber=8129&lang=E>.

[29] Ryan Ross, "Courts must be accessible in time of crisis, says P.E.I.'s chief justice", *The Guardian (PEI)* (30 March 2020), online: <https://www.theguardian.pe.ca/news/local/courts-must-be-accessible-in-time-of-crisis-says-peis-chief-justice-431282/>.

[30] Ministère de la Justice du Québec, Plan stratégique 2019-2023, at 22-23, online: <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/justice/publications-adm/plan-strategique/PL_strat_2019-2023_MJQ.pdf?1575473414>.

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
Saskatchewan	Use of video-conferencing technology for conducting trials in the Provincial Court.[31]	**Commodity Tasks:** Video-conferencing services
Northwest Territories	Use of video-conferencing technology for conducting trials.[32]	**Commodity Tasks:** Video-conferencing services
Nunavut	**Court of Justice** – Development of in-house tools to access and interpret the statistical data contained in the Court Information System; [33] – Development of in-house performance measurement tools to better assist the Chief Justice and the Director of Court Services in allocating limited financial and human resources;[34]	**Commodity Tasks:** –Data management, including production of data for court's annual reports; –Video-conferencing services.

[31] Provincial Court of Saskatchewan, *Biennial Report January 1, 2016 – December 31, 2017*.

[32] Northwest Territories Courts, Clerk's Practice Directive No.13, *Equipment for Electronic Evidence Presentation or Appearances* (13 May 2011).

[33] Nunavut Court of Justice, *A Statistical and Comparative Review of Court Operations in Nunavut 2017*, at 4, online: <https://www.nunavutcourts.ca/index.php/annualreports>.

[34] *Ibid.*

Province /Territory	Modernization Levels and Priorities	The Role of the Private Sector
	– Video court is used for procedural appearances such as appearances for the purpose of entering an election or plea.[35]	
Yukon	**Territorial Court** The court prioritizes the development of its videoconferencing capabilities for different categories of users: victims that suffered physical or psychological harm;[36] individuals held in custody pursuant to a remand warrant or a detention order;[37] self-represented individuals held in custody.[38]	**Commodity Tasks:** Video-conferencing services

Annex III: Generic Matrix of Responsibilities between PSPC and Client Departments for the Procurement of Goods and Services*

[35] *Ibid* at 45.

[36] Chief Judge Ruddy, Practice Direction, Video Remand Appearances, 6 April 2018, online: < http://www.yukoncourts.ca/pdf/tech_6_video_remand.pdf>

[37] *Ibid.*

[38] *Ibid.*

* Public Works and Government Services Canada, *Supply Manual* (4 June 2015 update), Annex 1.1.1, online:< https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/annex/1/1>.

L: Lead Department C: Contributing Department S: Shared Responsibility

No.	Activities	Responsibility	
1 – Requirements Definition		**Client Department**	**PSPC**
1.1 Define operational requirements:			
1.1.1	Define essential characteristics (i.e., Statement of Requirements)	L	C
1.1.2	Consider all feasible solutions to meet client's operational needs	L	C
1.1.3	Develop preliminary project cost estimates and schedule	L	
1.1.4	Conduct cost benefit analysis of alternatives (including life cycle costing analysis)	L	C
1.1.5	Determine the total resource requirements and implications; for example, training, priority of allocation amongst operational needs and security requirements	L	
1.1.6	Obtain approval-in-principle to continue with project	L	
1.1.7	Develop Total Project Plan, including substantive cost estimates and schedules, special project management needs, project phasing, maintenance support requirements, etc.	L	

1.2	Define technical requirements:		
1.2.1	Develop Statement of Work (SOW) and/or performance specifications or standards, as appropriate, for the goods/services required in order to meet the operational needs.	L	
1.2.2	Define the technical requirements for quality assurance, acceptance, warranty, training, documentation, packaging, transportation, initial provisioning, etc.		
1.3	Raise the requisition:	L	
1.3.1	Prepare the funded requisition for goods/services to be forwarded to PSPC.	L	C
2 - Procurement Plan			
2.1	Assess potential sources of supply (Canadian vs. offshore, etc.)	C	L
2.2	Identify applicable major contracting policy issues/considerations, which must be resolved to accomplish the procurement.	C	L
2.3	Examine potential problems in relation to patents, licencing, royalties and technology transfer.	C	L

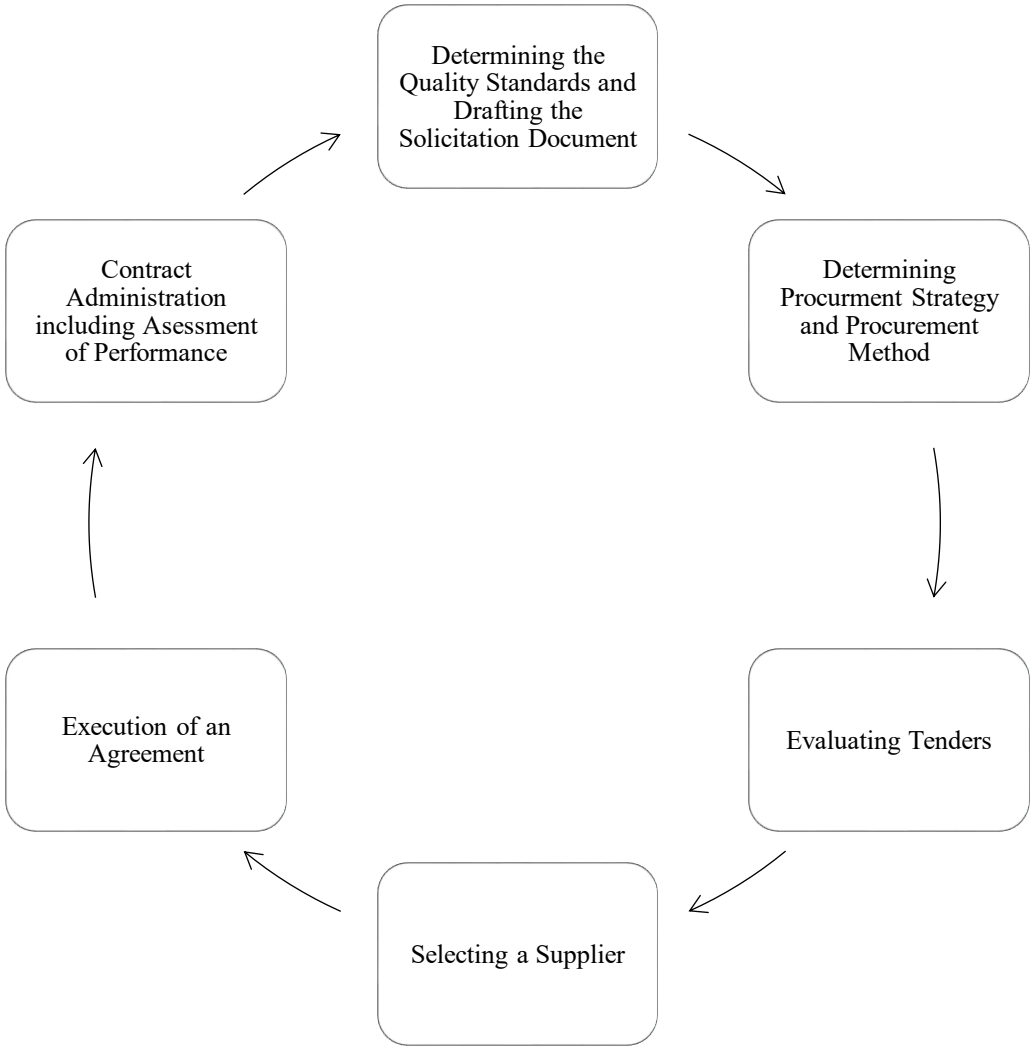
2.4	Develop Procurement Plan including:		
2.4.1	Delivery schedule and acceptance requirement	L	C
2.4.2	Contracting approach (including sourcing strategy)	C	L
2.4.3	Target cost and cash flow plan	C	L
2.4.4	Statement of appropriate quality and inspection system standards and qualification approvals	L	C
2.4.5	Communications strategy	C	L
2.4.6	Contractual risk management	C	L
2.4.7	Evaluation methodology and selection method	C	L
2.4.8	Industrial Benefits (IBs), where appropriate	C	L
2.4.9	Interdepartmental and international agreements related to procurement plan	L	C
2.5	Obtain Procurement Plan approval.		L

3 - Contracting Process			
3.1	Prepare the translation of procurement documents (the client is responsible for the translation of the SOW and/or performance specifications or standards and technical evaluation criteria)		
3.2	Prepare and distribute/post procurement notice on GETS (Government Electronic Tendering Service) and the bid solicitation package.		L
3.3	Prepare and distribute technical data packages, as required.	L	C
3.4	Receipt of bids on bid closing.		L
3.5	Evaluate technical elements of bids.	L	C
3.6	Evaluate time, cost and other contractual elements of bids.		L
3.7	Prepare consolidated evaluation and selection of the bidder.	C	L
3.8	Negotiate the contract, where applicable.	C	L
3.9	Obtain the contract approval.	C	L
3.10	Prepare and issue the contract.		L

3.11	Debrief unsuccessful bidders.	C	L
4 - Contract Administration			
4.1	General:		
4.1.1	Monitor work of the contractor; and receive the contract deliverables.	L	
4.1.2	Monitor the cash flow.	L	
4.1.3	Report any problems to the contracting authority.	L	
4.1.4	Resolve any contractual problems.	C	
4.1.5	Monitor compliance with the terms and conditions of the contract.	S	S
4.1.6	Determine that goods and services received are in accordance with the requirement.	C	L
4.1.7	Determine that goods and services received are in accordance with the contract.	C	L
4.1.8	Process the claims for payment.	L	C
4.2	Contract Amendments:		

4.2.1	Identify the need for additional work or revisions; confirm the funding.	L	
4.2.2	Confirm that the contract amendment is the appropriate vehicle.		L
4.2.3	Negotiate the contract amendment.	C	L
4.2.4	Obtain an approval for amendment/change order.		L
4.2.5	Prepare and issue the contract amendment.		L
5 -	**Contract Close-out**		
5.1	Settle the outstanding claims for payment.	C	L
5.2	Issue the contract closing amendment.		L
5.3	Finalize the disposition of Crown assets.		L

Annex IV: Stages of the Public Procurement Cycle



Step 1 Determining the Quality Standards and Drafting the Solicitation Document[1]

The contracting officer must understand completely what he/she is about to procure. When defining the requirement, client departments must keep in mind not only the goods and services needed, but also the legal framework regulating the goods and services being procured. Client departments can save significant time and money if there is a clear and well-prepared description of what is required. Identifying the needs and carefully developing the requirements at the earliest stages of requirements definition are the greatest contribution in obtaining the right good or service and best price, and can minimize the need for changes later. Requirements are best defined in a manner that allows competition and ensures best value. Contracting officers may be able to suggest wording, which defines requirements in terms of operational requirements rather than using brand names or proprietary technical specifications.

Step 2 Determining the Procurement Strategy and the Procurement Method[2]

A procurement strategy defines in general terms how goods and services will be procured, and includes the determination to proceed competitively or non-competitively and applicable details in support of industrial and regional benefits or other national objectives. The strategy could be quite straightforward, such as the decision to use a standing offer, or could be more detailed, which would be used for major projects. The development of a procurement strategy begins with the first meeting between PSPC and the client. It is the most important step in the procurement process as it influences the scope of the requirement and

[1] Public Works and Government Services Canada, *Supply Manual* (4 June 2015 update), s 2.1. (Requirements definition), online: < https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/2/1>.

[2] *Ibid*, s 3.1. (Procurement strategy – Introduction), online: < https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/3/1 >.

determines the extent of competition. Specifically, the procurement strategy must satisfy the client's operational requirements and comply with legal requirements, while achieving best value, and advancing national objectives.

Step 3 Selecting a Supplier[3]

The main purpose of bid evaluation is to determine the best bid, in accordance with the evaluation and selection methodology specified in the solicitation document, among the bids submitted before the bid closing time on the date specified in the bid solicitation. The responsive bid offering the best value may or may not necessarily be the one with the lowest price. In order to accurately determine best value, a logical systematic evaluation procedure covering all aspects of the evaluation process must be followed. The client is responsible for the evaluation of the technical portion of the bids, and, where applicable, the management portion. PSPC is responsible for the evaluation of the contractual terms and conditions and the financial portion of the bids.

Step 4 Execution of an Agreement[4]

Contract award may take place at any time, after bid closing and completion of the evaluation, and before the bid validity expiry date. The contract document will depend on the type of bid solicitation. Contracting officers should notify unsuccessful bidders as soon as possible after contract award. In the case of a complex procurement, when a solicitation is conducted in phases, the contracting officer will notify unsuccessful bidders at the end of each phase and provide a debriefing upon request.

---

[3] *Ibid*, s 5.5 (Evaluation procedures), online: < https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/5 >.

[4] *Ibid*, s 7.5 (Contract award), online: < https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/7>.

Step 5 Contract administration including assessment of performance[5]

a. Both the client department and Public Works and Government Services Canada (PWGSC) must administer the contracts. It is important that the client and the contracting officer understand and agree on who is responsible for managing and administering the various aspects of the contract.

b. Contracting officers responsible for the management of contracts should be aware of any institutional or personal sanctions. As per section 12.1.3 of the Treasury Board (TB) Contracting Policy, TB may require that sanctions be imposed on either the department or certain officials when contracting practices or contract administration is not acceptable.

c. Contracting officers should set up and maintain complete and up to date documentation on every aspect of the contract, both to provide a record of actions taken and to protect Canada's interests under the contract. The files will provide an organizational memory of activities and events and should include, where applicable, but not be limited, to the following:

   i. the procurement planning documents;

   ii. the requisition and any amendments;

   iii. the solicitation documents;

   iv. bid evaluation plan and resulting evaluation documents;

   v. professional and specialist's advice;

   vi. risk identification, assessment and mitigation;

[5] *Ibid*, s 8.5 (Contract administration), online: < https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/8 >.

vii. environmental considerations, impacts, and mitigation;

viii. conditions or sanctions imposed by the Vendor Performance Corrective Measure Policy or the Ineligibility and Suspension Policy;

ix. correspondence with clients;

x. contract conditions;

xi. contract amendments;

xii. work schedule, including milestones and deliverables;

xiii. payment schedules, invoices and payments;

xiv. other correspondence (written and email);

xv. records of phone discussions;

xvi. formal records of meetings, including minutes;

xvii. records of decisions;

xviii. warranties;

xix. management reports, including audit reports, and

xx. contract closeout documents.