

Date: 20081127

Docket: A-102-08

Citation: 2008 FCA 378

**CORAM: LINDEN J.A.
RYER J.A.
TRUDEL J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**DAVIS PONTIAC BUICK GMC (MEDICINE HAT) LTD. and
MURRAY CHEVROLET CADILLAC MEDICINE HAT**

Respondents

Heard at Calgary, Alberta, on November 27, 2008.

Judgment delivered from the Bench at Calgary, Alberta, on November 27, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Calgary, Alberta on November 27, 2008)

RYER J.A.

[1] Two applications for judicial review have been brought by the Attorney General in relation to a complaint that was made to the Canadian International Trade Tribunal (the “Tribunal”) by Davis Pontiac Buick GMC (Medicine Hat) Limited (“Davis”). The complaint relates to a contract for the supply of military vehicles that was awarded to Murray Chevrolet Cadillac Medicine Hat Ltd.

[2] This application contests the decision of the Tribunal to dismiss a motion brought by the Attorney General seeking dismissal of the complaint because the Tribunal lacked jurisdiction to hear the complaint. The second application (A-223-08) relates to the decision of the Tribunal on the merits of the complaint.

[3] The standard of review of the decision of the Tribunal with respect to its jurisdiction to hear the complaint is correctness. (See *Dunsmuir v. New Brunswick*, 2008 SCC 9).

[4] The pivotal issue in the application contesting the jurisdiction of the Tribunal to hear the complaint is whether the contract that was awarded to Murray is a designated contract, within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (the “Act”) and paragraph 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 as amended (the “Regulations”) a (“designated contract”). An essential requirement of a designated contract is that it must have been awarded by an entity that is a government institution, within the meaning of section 30.1 of the Act and subsection 3(2) of the Regulations (a “government institution”).

[5] Those provisions read as follows:

30. 1 in this section and in sections
30.11 to 30.19.

...

“designated contract” means a contract
for the supply of goods or services that
has been or is proposed to be awarded

30.1 Les définitions qui suivent
s’appliquent au présent article et aux
articles 30.11 à 30.19.

...

«contrat spécifique» Contrat relatif à un
marché de fournitures ou services qui a
été accordé par une institution fédérale

by a government institution and that is designated or of a class of contracts designated by the regulations;

“government institution” means any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations;

...

Designations

3. (1) For the purposes of the definition “designated contract” in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in article 502 of the Agreement on Internal Trade or in Article 1 of the Agreement on Government Procurement, by a government institution, is a designated contract.

(2) For the purposes of the definition “government institution” in section 30.1 of the Act, the following are designated as government institutions:

(a) the federal government entities set out in the Schedule of Canada in Annex 1001.1a-1 of NAFTA, under the heading “CANADA” in Annex 502.1A of the Agreement on Internal Trade or under the heading “CANADA” in Annex 1 of the Agreement on Government Procurement;

— ou pourrait l’être — , et qui soit est précisé par règlement, soit fait partie d’une catégorie réglementaire;

«institution fédérale» Ministère ou département d’État fédéral, ainsi que tout autre organisme, désigné par règlement;

...

Désignations

3. (1) Pour l’application de la définition de «contrat spécifique» à l’article 30.1 de la Loi, est un contrat spécifique tout contrat relatif à un marché de fournitures ou services ou de toute combinaison de ceux-ci, accordé par une institution fédérale – ou qui pourrait l’être – et visé, individuellement ou au titre de son appartenance à une catégorie, à l’article 1001 de l’ALÉNA, à l’article 502 de l’Accord sur le commerce intérieur ou à l’article premier de l’Accord sur les marchés publics.

(2) Pour l’application de la définition de «institution fédérale» à l’article 30.1 de la Loi, sont désignés institutions fédérales:

a) les entités publiques fédérales énumérées dans la liste du Canada de l’annexe 1001.1a-1 de l’ALENA, à l’annexe 502.1A de l’Accord sur le commerce intérieur sous l’intertitre «CANADA» ou à l’annexe 1 de l’Accord sur les marchés publics sous l’intertitre « CANADA »;

- | | |
|---|---|
| <p>(b) the government enterprises set out in the Schedule of Canada in Annex 1001. 1a-2 of NAFTA or under the heading “CANADA” in Annex 3 of the Agreement on Government Procurement;</p> | <p>b) les entreprises publiques énumérées dans la liste du Canada de l’annexe 1001. 1a-2 de l’ALÉNA ou à l’annexe 3 de l’Accord sur les marchés publics sous l’intertitre «CANADA»;</p> |
| <p>(c) any provincial government entities that may be set out in Annex 1001.1a-3 of NAFTA or under the heading “CANADA” in Annex 2 of the Agreement on Government Procurement; and</p> | <p>c) les entités publiques des provinces énumérées à l’annexe 1001. 1a-3 de l’ALÉNA ou à l’annexe 2 de l’Accord sur les marchés publics sous l’intertitre «CANADA»;</p> |
| <p>(d) if a procurement that results in the award of a designated contract by a government entity or enterprise referred to in paragraph (a), (b) or (c) is conducted by the Department of Public Works and Government Services or its successor, that Department or its successor.</p> | <p>d) dans le cas d’un marché public relevant du ministère des Travaux publics et des Services gouvernementaux ou de son successeur et donnant lieu à l’adjudication d’un contrat spécifique par une entité publique ou une entreprise publique visée aux alinéas a), b) ou c), ce ministère ou son successeur.</p> |
| <p>(e) [Repealed, SOR/2005-207, s. 2]</p> | <p>e) [Abrogé, DORS/2005-207, art. 2]</p> |

[6] It is common ground that the Tribunal lacks jurisdiction to hear the complaint made by Davis in relation to the awarding of the contract for the supply, service and maintenance of the military vehicles unless the entity that awarded the contract is a government institution.

[7] The applicant argues that the contract was awarded by the Department of National Defence (“DND”) in its capacity as agent for the British Army Training Unit Suffield (“BATUS”) in accordance with an agreement to that effect between the Canadian and U.K. governments, a

Memorandum of Understanding between DND and its U.K. counterpart and a Letter of Understanding between DND and the Department of Public Works and Government Services. The applicant further argues that because as a matter of law, the act of an agent is the act of the principal, BATUS, and not DND, must be regarded as having awarded the contract to Murray. The argument concludes that because BATUS is not a government institution (a matter that is not in dispute), it follows that the contract in respect of which Davis complains cannot be a designated contract.

[8] The majority of the Tribunal found that DND was not, in fact, acting as agent for BATUS in the procurement of the military vehicles. In our view, the record does not support this finding. The Request for Proposal states that the military vehicles were to be supplied and delivered to BATUS. As well, the detailed specifications for the vehicles in the Request for Proposal were provided by BATUS. Finally, Davis does not contend that it was unaware that the Request for Proposal was for the supply of the vehicles and related services to BATUS. In our view, there is no doubt that DND, in participating in the procurement of the military vehicles, was acting as agent for BATUS and not for its own account.

[9] In support of its argument that the actions of DND in participating in the procurement and awarding the contract to Murray as agent for BATUS are, at law, the actions of BATUS, the applicant cites the decision of this Court in *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 93. In that case, Canada Post, which was not a government institution, undertook a procurement in respect of which the Department of Indian Affairs and Northern Development

(“DIAND”), which was a government institution, provided some financial support and other input to Canada Post. At paragraph 17, Sharlow J.A. stated:

If DIAND had engaged Canada Post as its agent to conduct the procurement of air transportation services for DIAND, then in fact and law the procurement would have been by DIAND and not Canada Post, and the CITT would have had the jurisdiction to consider the complaint of Canadian North. [Emphasis added].

[10] Davis argues that this case is inapplicable because it only establishes that where an entity that is not a government institution undertakes a procurement as an agent for an entity that is a government institution, the Tribunal will have jurisdiction to hear a complaint. Davis contends that in the present circumstances, the agent, DND, is a government institution and that this fact alone should be sufficient to engage the Tribunal’s jurisdiction.

[11] With respect, the contentions of Davis misconstrue the finding of this Court in *Canadian North*. In our view, *Canadian North* informs that where an agency relationship exists, the procurement actions of the agent including the awarding of the contract are, as a matter of law, the actions of the principal and not the actions of the agent.

[12] In the present circumstances, this means that, as a matter of law, the procurement was undertaken and the contract was awarded by BATUS itself and not by its agent DND. Since BATUS is not a government institution, it follows that the contract for the supply, service and maintenance of the military vehicles is not a designated contract. Accordingly, the Tribunal had no jurisdiction to hear the complaint made by Davis.

[13] For these reasons, the application for judicial review will be allowed, with costs payable by Davis to the applicant, and the decision of the Tribunal will be set aside.

“C. Michael Ryer”

J. A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-102-08

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(Medicine Hat) Ltd. and Murray Chevrolet Cadillac Medicine Hat

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: November 27, 2008

REASONS FOR JUDGMENT OF THE COURT BY: (LINDEN, RYER, TRUDEL JJ.A.)

DELIVERED FROM THE BENCH BY: RYER J.A.

APPEARANCES:

David M. Attwater

FOR THE APPLICANT

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Davis Pontiac Buick GMC
(Medicine Hat) Ltd.

No Appearance

FOR THE RESPONDENT
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Hat

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No Appearance

FOR THE APPLICANT

FOR THE RESPONDENT
Davis Pontiac Buick GMC

FOR THE RESPONDENT
Murray Chevrolet Cadillac Medicine
Hat