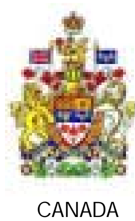
Federal Court of Appeal


CANADA

Cour d'appel fédérale

Date: 20100720

Dockets: A-298-09
A-299-09

Citation: 2010 FCA 193

CORAM: **NADON J.A.**
TRUDEL J.A.
STRATAS J.A.

Docket: A-298-09

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ALMON EQUIPMENT LIMITED

Respondent

Docket: A-299-09

BETWEEN:

ALMON EQUIPMENT LIMITED

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

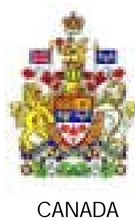
Heard at Ottawa, Ontario, on February 9, 2010.

Judgment delivered at Ottawa, Ontario, on July 20, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Before this Court are two applications for judicial review of a decision of the Canadian International Trade Tribunal. The Tribunal decided to uphold, in part, a complaint brought by

Almon Equipment Limited ("Almon") against a procurement process supervised by the federal Department of Public Works and Government Services ("Public Works").

[2] The procurement process concerned aircraft de-icing services. It was a significant procurement, with implications not only for the bidders and the federal government, but also for the Canadian taxpayer: contracts worth over $10 million ultimately were awarded.

[3] The two applications for judicial review before this Court assert two fundamental defects against the Tribunal's decision. The parties raised other issues that this Court need not address, given my proposed disposition of these applications. The applications are:

(1) *Almon's application for judicial review (A-299-09).* This focuses on the Tribunal's exercise of remedial decision.

(2) *Public Works' application for judicial review (A-298-09).* This focuses on the Tribunal's findings of fact.

These reasons for judgment concern both applications for judicial review.

[4] For reasons set out below, the standard of review in both applications for judicial review is the deferential standard of reasonableness. Nevertheless, in my view, the Tribunal committed reviewable error in its remedial discretion and in certain findings of fact, thereby reaching a result

outside of the range of possible, acceptable outcomes open to it. Therefore, I would grant both applications for judicial review, quash the Tribunal's decision and remit the matter back to the Tribunal for redetermination.

A. Background

[5] At Canadian Forces Base Trenton, ice and snow must be removed from aircraft so they can fly safely. This "de-icing" is done by applying glycol to the air surfaces of the aircraft. Some glycol ends up on the ground; it must be collected and satisfactorily managed.

[6] In 2008, the federal Department of Public Works and Government Services began a procurement process for the de-icing services and the glycol collection services. It invited tenders. Almon, among others, responded.

[7] Following evaluations and assessments, two of Almon's competitors succeeded. One won a contract for the de-icing services. Another won a contract for the glycol collection services. Almon was wholly unsuccessful.

[8] Almon complained to the Tribunal, alleging unfairness and deficiencies in the procurement process. The Tribunal held an inquiry into the complaint under section 30.11 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47 (the "Act").

[9] The Tribunal accepted Almon's complaint in part and ordered that Public Works compensate Almon in part. Its reasons for doing so will be examined in more detail below.

B. The Tribunal's regulatory jurisdiction over procurement issues

[10] Sections 30.1 to 30.19 of the Act and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 (the "Regulations") set out a regulatory regime concerning federal government procurement.

[11] The Tribunal has oversight jurisdiction under this regulatory regime. In response to a complaint, it can conduct an inquiry and recommend remedies. The process leading up to an inquiry, and the conduct of the inquiry itself, is as follows:

(a) *Complaints* (sections 30.11 and 30.12 of the Act). A potential supplier may file a compliant with the Tribunal. The complaint must be regarding "any aspect of the procurement process" that relates to "a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution" or a contract designated in the regulations. "Interested parties" are notified of the complaint.

(b) *Screening* (subsection 30.13(5) of the Act). The Tribunal may decide not to conduct an inquiry into the complaint.

(c) *Inquiry* (subsections 30.13(1), 30.13(2) and 30.14(1) of the Act). If the Tribunal decides to conduct an inquiry, it gives notice to the complainant, the relevant government institution and interested parties. They have an opportunity to make representations. The Act does not require the Tribunal to hold a hearing as part of its inquiry, but can do so. The Tribunal's inquiry is limited to the subject-matter of the complaint.

[12] At the end of the inquiry, under subsection 30.14(2) of the Act, the Tribunal must determine whether the complaint is valid, based on particular grounds:

30.14. (2) At the conclusion of an inquiry, the Tribunal shall determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed.	**30.14.** (2) Le Tribunal détermine la validité de la plainte en fonction des critères et procédures établis par règlement pour le contrat spécifique ou la catégorie dont il fait partie.

[13] Section 11 of the Regulations empowers the Tribunal to assess the complaint based on other grounds:

11. If the Tribunal conducts an inquiry into a complaint, it shall determine whether the procurement was conducted in accordance with the requirements set out in whichever of NAFTA, the Agreement on Internal Trade, the Agreement on Government Procurement, the CCFTA or the CPFTA applies.	**11.** Lorsque le Tribunal enquête sur une plainte, il décide si la procédure du marché public a été suivie conformément aux exigences de l'ALÉNA, de l'Accord sur le commerce intérieur, de l'Accord sur les marchés publics, de l'ALÉCC ou de l'ALÉCP, selon le cas.

[14] In this case, the Agreement on Internal Trade is the relevant agreement. Article 100 provides that one of the purposes of the Agreement on Internal trade is "to establish an open, efficient and stable domestic market." Article 506(6) of the Agreement is the provision that is most relevant to this case. The relevant portion of article 506(6) is as follows:

506. (6)…The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.	**506.** (6) […] Les documents d'appel d'offres doivent indiquer clairement les conditions du marché public, les critères qui seront appliqués dans l'évaluation des soumissions et les méthodes de pondération et d'évaluation des critères.

[15] At the conclusion of its inquiry, the Tribunal is obligated to issue findings and recommendations: subsection 30.15(1) of the Act. Often administrative tribunals are required to give reasons as part of the common law obligation to afford parties with procedural fairness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158. But here, Parliament considered the interests at stake to be significant enough to eliminate all doubt and expressly impose a requirement under subsection 30.15(1) to give reasons.

[16] Where the Tribunal finds the complaint to be valid, it may recommend remedies. Subsections 30.15(2) and 30.15(3) govern these remedies.

[17] Subsection 30.15(2) of the Act is a list of remedies that the Tribunal may award:

30.15. (2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate,	**30.15.** (2) Sous réserve des règlements, le Tribunal peut, lorsqu'il donne gain de cause au plaignant, recommander que soient prises des

including any one or more of the following remedies:

mesures correctives, notamment les suivantes :

(*a*) that a new solicitation for the designated contract be issued;

a) un nouvel appel d'offres;

(*b*) that the bids be re-evaluated;

b) la réévaluation des soumissions présentées;

(*c*) that the designated contract be terminated;

c) la résiliation du contrat spécifique;

(*d*) that the designated contract be awarded to the complainant; or

d) l'attribution du contrat spécifique au plaignant;

(*e*) that the complainant be compensated by an amount specified by the Tribunal.

e) le versement d'une indemnité, dont il précise le montant, au plaignant.

[18] Subsection 30.15(3) is a mandatory recipe that the Tribunal must follow when considering its recommendation on remedies:

30.15. (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

30.15. (3) Dans sa décision, le Tribunal tient compte de tous les facteurs qui interviennent dans le marché de fournitures ou services visé par le contrat spécifique, notamment des suivants :

(*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;

a) la gravité des irrégularités qu'il a constatées dans la procédure des marchés publics;

(*b*) the degree to which the complainant and all other interested parties were prejudiced;

b) l'ampleur du préjudice causé au plaignant ou à tout autre intéressé;

(*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;

c) l'ampleur du préjudice causé à l'intégrité ou à l'efficacité du mécanisme d'adjudication;

(*d*) whether the parties acted in good faith; and	*d*) la bonne foi des parties;
(*e*) the extent to which the contract was performed.	*e*) le degré d'exécution du contrat.

[19] In addition to the above remedies, the Tribunal also may provide "comments and observations on any matter…in connection with the procurement process" to a government institution: section 30.19 of the Act.

[20] After receiving the Tribunal's recommendation under subsection 30.15(3) of the Act, the affected government institution shall, subject to the Regulations, "implement the recommendations to the greatest extent possible" and report on its progress. If it "does not intend to implement them fully," it must set out "the reasons for not doing so": section 30.18 of the Act.

C. The purposes of this regulatory regime

[21] The purposes of this regulatory regime are relevant to this Court's consideration of what the Tribunal has done in this case. The purposes can affect the interpretation of the relevant provisions, here subsections 30.15(2) and 30.15(3), that the Tribunal must follow: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 at paragraph 26. They can also affect this Court's overall assessment of whether the Tribunal has reached a result outside of the range of possible, acceptable outcomes open to it. A tribunal that makes a decision contrary to the purposes of the regulatory regime is more likely to be found to be outside of the range of possible, acceptable

outcomes open to it: *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 at paragraphs 42 to 47.

[22] The purposes of this regulatory regime can be deduced from the substantive content of the provisions set out above. Under this regime, in a federal government procurement, the government must announce its requirements, criteria and evaluation methods in its request for proposals and associated documents (subject to possible appropriate amendment later) and must adhere to those requirements, criteria and evaluation methods when it receives and evaluates proposals submitted to it. Overseeing this is the Tribunal, with its statutory jurisdiction: if the Tribunal conducts an inquiry, it must examine the government's adherence to the requirements, criteria and evaluation methods the government announced and the overall "integrity and efficiency of the competitive procurement system." As section 11 of the Regulations, above, makes clear, this all takes place under the umbrella of the Agreement on Internal Trade which, in article 100, aims at "establish[ing] an open, efficient and stable domestic market."

[23] The purposes of this regulatory regime, deduced from the above provisions, are as follows:

(1) *Fairness to competitors in the procurement system.* A fair procurement system that applies one set of transparent rules to all bidders increases confidence in the system, and encourages increased participation in competitions. This maximizes the probability that the government will get good quality goods and services that meet

its needs, at minimum expense to the taxpayer. In short, fairness gives taxpayers value for the taxes they pay.

(2) *Ensuring competition among bidders*. When bidders are placed on a level playing field and compete, it is more likely that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. Competition also gives taxpayers value for the taxes they pay.

(3) *Efficiency*. This speaks directly to the government getting good quality goods and services at minimum expense. This also speaks to the need for a procurement system to run in a timely, practical manner without causing unnecessary expense.

(4) *Integrity*. A procurement process with integrity increases participants' confidence in the procurement system and enhance their participation in it. This increases the probability that government will get good quality goods and services that meet its needs, at minimum expense to the taxpayer. A procurement process with integrity also gives taxpayers value for the taxes they pay.

These four purposes, and the overarching concept of value for taxpayers, are essential aspects of good governance. Important as they are, they must be at the front of the Tribunal's mind when it finds facts, evaluates their significance, interprets its legislation, applies that legislation to the facts, and grants remedies.

D. The Tribunal's decision

[24] Almon's complaint to the Tribunal triggered the Tribunal's decision in this matter. It contained seven grounds. The Tribunal accepted for inquiry only one main ground of complaint: whether Public Works properly evaluated Almon's proposal concerning the two requirements, the de-icing requirement and the glycol collection requirement. In this Court, the parties did not attack this screening decision by the Tribunal.

[25] Under the procurement process in this case, a jury of three evaluators evaluated the proposals that were submitted by assigning scores to them. What these three evaluators did and the reasons for their scores were very much the focus of argument before the Tribunal and also in this Court.

[26] The Tribunal found that it had to "first determine the reasons for which the evaluators awarded Almon the scores that they did" (at paragraph 35). That was a logical first step towards determining whether the evaluators followed the criteria announced in Public Works' request for proposals and associated documents.

[27] But it is evident that the Tribunal was hampered in this task: a body of evidence before it suggested that the evaluators' record-keeping was less than desirable and that there was a lack of clarity about how they carried out their evaluations. Rather than viewing the evaluators' questionable record-keeping and procedures as being relevant to the integrity and efficiency of the procurement process, the Tribunal viewed it as only relevant to the credibility of some of the

testimony of the evaluators. More will be said about this below. In the view of the Tribunal (at paragraph 39), the evaluators' behaviour was not "credible behaviour on the part of three experienced professionals with access to advice from a [Public Works] procurement specialist." As a result, the Tribunal refused to accept the evaluators' testimony that their reasons for scoring Almon's proposal were expressed in various documents filed with the Tribunal. Instead, the Tribunal ruled (at paragraph 44) that their reasons were expressed only in comments they had made on "consensus scoring sheets." Based on what was written on the consensus scoring sheets, the Tribunal found that the evaluators had assessed Almon's proposal for the de-icing requirement and its proposal for the glycol collection requirement improperly: they had used criteria different from that set out in Public Works' request for proposals and associated documents (at paragraphs 54, 79 and 97).

[28] On the issue of remedy, the Tribunal denied Almon a remedy for the de-icing services, but granted Almon a remedy for the glycol collection services. In the case of the de-icing services, the Tribunal found that if the evaluators applied the correct criteria to Almon's proposal concerning the de-icing services and if Almon had received full marks, it still would not have won the competition. However, in the case of the glycol collection services, the Tribunal found that if Almon's proposal were evaluated properly, Almon might have won the competition. Therefore, Almon was deprived of the opportunity to be awarded the contract to supply glycol collection services and to earn profits from it. The Tribunal estimated Almon's chances of being awarded that contract as one in three. It awarded Almon one-third of the profit it would have earned had it been the successful bidder.

[29] As mentioned above, both parties have brought an application for judicial review of the Tribunal's decision, Almon challenging the Tribunal's remedies decision and Public Works challenging some of the Tribunal's fact-finding.

[30] Before this Court, there was a preliminary issue regarding the admissibility of affidavits filed by Almon in the two applications for judicial review. Those affidavits, in part, contain some extraneous opinions and observations. Normally, only the material that was before the tribunal being reviewed is admissible. Accordingly, in our consideration of these applications, we have only had regard to the material that was before the Tribunal, and nothing else.

E. The standard of review

[31] In both of the applications before this Court, the parties agreed that the standard of review of the Tribunal's decision is reasonableness.

[32] Almon urged this Court to apply less deference than usual, owing to the circumstances of this case. This is against the Supreme Court's conclusion in *Dunsmuir*, *supra* that there are only two standards of review, namely correctness and reasonableness, rather than correctness and a reasonableness standard embracing multiple degrees of deference: *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 at paragraphs 18 to 21; *International Association of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc.*, 2008 ABCA 400, [2009] 2 W.W.R. 215 at paragraph 12; *Guinn v. Manitoba*, 2009 MBCA 82, [2009] 9 W.W.R. 1 at paragraph 29.

[33] For the purposes of these applications, I shall simply apply the now classic formulation of the reasonableness standard of review in *Dunsmuir*, *supra* at paragraph 47: this Court can interfere only if the Tribunal's decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

F. Analysis

(1) The remedial issues

[34] As mentioned in paragraph 28, above, the Tribunal found that if the evaluators had applied the correct criteria to Almon's proposal concerning the de-icing services and if Almon had received full marks, it still would not have won the competition because of the other scores awarded by the evaluators. Inherent in this is an assumption: the evaluators' other scores could be relied upon because the overall evaluation process was sound.

[35] Almon questions this. It pointed to a number of issues concerning the process by which the three competitors' proposals were evaluated and how the evaluators conducted themselves, concentrating on paragraphs 35-44 of the Tribunal's reasons. It submits that the Tribunal should have found that the integrity of the procurement process was fundamentally and detrimentally affected and should have awarded it a different, more sweeping remedy. Before the Tribunal, Almon had sought such remedies: among other things, the re-evaluation of the rival proposals, the termination of the contracts that were awarded to its competitors, and/or full compensation for not being awarded the contracts: Tribunal reasons, at paragraph 3.

[36] The core of the Tribunal’s remedies reasoning under subsection 30.15(3) of the Act is found in paragraphs 109-111:

> [109] The Tribunal considers that not evaluating a proposal in accordance with the criteria provided in the RFP represents a serious deficiency in the procurement process. Bidders need to rely on the prescribed evaluation criteria to formulate their proposals. If they are not being informed of all the “rules of the game”, bidders are unable to optimize their efforts to be the successful bidder. The Tribunal believes that such a serious deficiency in evaluation prejudices the integrity and efficiency of the competitive procurement system. The Tribunal notes that there was no evidence that the technical evaluators were not acting in good faith when they conducted their evaluations.
>
> [110] Regarding Requirement 1 [the de-icing services], the Tribunal considers that, due to the relative scores of Almon’s and [a competitor’s] proposals, [the competitor] would still have been awarded the contract even if Almon had been awarded full marks regarding each of the criteria for which the Tribunal found that [Public Works] had not conducted the evaluation properly. Therefore, because Almon has not, in the Tribunal’s view, suffered prejudice as a result of [Public Works’] actions in relation to Requirement 1, the Tribunal will not recommend a remedy regarding Requirement 1.
>
> [111] However, regarding Requirement 2 [the glycol collection services], an appropriate evaluation of the criteria for which the Tribunal has found that [Public Works] did not conduct the evaluation properly could well have resulted in Almon being the successful bidder. Accordingly, it is clear to the Tribunal that Almon was deprived of the opportunity to be awarded the contract and to earn the associated profit. Accordingly, it is clear to the Tribunal that Almon was deprived of the opportunity to be awarded the contract and to earn the associated profit. In these circumstances, given that the three bidders were found to be compliant by [Public Works], the Tribunal estimates the opportunity lost by Almon to be one in three and the prejudice that it suffered to be equal to one third of the profit that it would have earned had it been the successful bidder regarding Requirement 2.

[37] In my view, there are two reviewable errors arising from this passage:

(1) The Tribunal considered whether the “integrity and efficiency of the competitive procurement system” was affected (paragraph 30.15(3)(*c*) of the Act), as it was obligated to do under Parliament’s mandatory recipe set out in subsection 30.15(3) of the Act. But the Tribunal restricted its consideration of this to whether the

evaluators applied the proper criteria to Almon's proposal. The Tribunal did not consider whether the evaluators' record-keeping and procedures might have affected the "integrity and efficiency of the competitive procurement system" more broadly.

(2) The Tribunal awarded Almon a compensatory remedy. But it did not deal with any of the other remedies sought by Almon, described in paragraph 35, above.

I shall deal with these in turn.

The first reviewable error

[38] As mentioned in paragraph 18, above, subsection 30.15(3) of the Act is a mandatory recipe that the Tribunal must follow when considering remedies. Put in the language of the law of standard of review set out in *Dunsmuir*, *supra*, the range of possible, acceptable outcomes open to the Tribunal includes only those outcomes that are reached in accordance with this mandatory statutory recipe.

[39] Turning to this statutory recipe, the word "shall" in subsection 30.15(3) requires the Tribunal, when considering remedies, to consider all of the criteria in that subsection. If the Tribunal fails to consider meaningfully or completely any of these criteria, or if it artificially cuts down or limits any of these criteria, it is disobeying Parliament's requirement in the subsection and is not reaching an outcome that can be viewed by a reviewing court as within the range of the possible or acceptable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748

at paragraphs 39 and 41. Finally, as mentioned in paragraph 23, above, while considering these criteria, the Tribunal must have the purposes of this regulatory regime front of mind.

[40] In this case, the Tribunal did touch on all of the matters under subsection 30.15(3) of the Act, including the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*) of the Act. But it inappropriately narrowed its examination under that paragraph, and in so doing, failed to follow, meaningfully and completely, all parts of Parliament's mandatory recipe under subsection 30.15(3). Under paragraph 30.15(3)(*c*), the Tribunal looked at whether the evaluators applied the proper criteria to Almon's proposal. But there was a larger live issue potentially casting into doubt the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*). Before the Tribunal was an entire body of evidence, which it largely accepted, showing that the evaluators' record-keeping and procedures during the evaluation were less than desirable, and perhaps unacceptable.

[41] This body of evidence (at paragraphs 39 to 41) could certainly be capable of casting into doubt the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*), especially when one recalls the important purposes underlying this regulatory regime.

[42] This body of evidence shows that the three evaluators considering the competitors' multi-million dollar proposals did not write their own comments on their own copies of the bids, nor did they make comments on separate sheets. Instead, they restricted their comments to a very small space on the consensus scoring sheets, except for one evaluator who scrawled additional

observations on “sticky notes” attached to one of the proposals. Before the Tribunal, the evaluators testified that “the comments on the consensus scoring sheets were not a complete list of the important factors taken into account in determining their scoring” (at paragraph 39); yet, the evaluators could not point to a single note of their own that would corroborate this.

[43] In this significant procurement, Public Works’ contracting officer did not give the evaluators any instruction on how to use the “comments” column and did not tell them to attach separate sheets, if necessary.

[44] Finally, the most basic characteristics of the evaluation process pursued by the evaluators remain a mystery. For example, did the evaluators considering this large procurement ever meet as a group of three to discuss the proposals and their evaluation? The Tribunal reviewed the conflicting testimony of the evaluators and could not make any finding on this elementary fact. In a general observation about the procedures that the evaluators followed, the Tribunal found a lack of “clear recollections [by the evaluators] of certain aspects of the evaluation process” (at paragraph 41). Looking at this body of evidence with the important purposes of this regulatory regime front of mind, this is a rather mild statement; the Tribunal may not have appreciated that this body of evidence could be significant to the broader “integrity and efficiency of the competitive procurement system” under paragraph 30.15(3)(*c*) of the Act.

[45] As mentioned above at paragraph 27, the Tribunal used this body of evidence to make credibility assessments about the evaluators’ testimony. But, in my view, the Tribunal was obligated

to analyze and use this body of evidence for another purpose: to consider whether the evaluators' modest record-keeping and the unknowable nature of the procedures they followed fundamentally compromised the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*) of the Act.

[46] There are three reasons for this conclusion.

[47] First, this issue was intimately related to Almon's complaint that the evaluators used improper criteria to evaluate Almon's proposal for the de-icing services and the glycol collection services. In order to consider this, the Tribunal had to know what criteria the evaluators actually employed in their scoring, assess whether the scores were credible and fair, and ensure that the evaluations were conducted as a result of a process with substance and integrity. The body of evidence, above, is relevant to all these matters.

[48] Second, evaluators and their evaluations of proposals are at the heart of the procurement system. How the evaluators conduct themselves in their evaluation process determines whether the system has integrity and whether the important purposes of this regulatory regime are met. If evaluators can shield themselves from scrutiny by refraining from making adequate records and by following procedures that are later unknowable, the Tribunal cannot discharge its oversight responsibilities. Parliament's regulatory regime is then frustrated, along with the purposes underlying it.

[49] Third, the Tribunal had to consider this body of evidence for a practical reason. The Tribunal declined to give Almon any remedy for the treatment of Almon's proposal for de-icing services because, based on the scores, Almon could not have won the competition. But what is the basis for saying that Almon could not have won the competition? Does this body of evidence show that the evaluation process was so deficient and the evaluators' records were so inadequate that no weight can be given to any of the evaluators' scores? These were questions raised by Almon that the Tribunal had to decide. But the Tribunal did not ask itself these questions.

[50] For all these reasons, the Tribunal erred by failing to consider whether the evaluators' record-keeping and procedures might have affected the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*) of the Act.

The second reviewable error

[51] As acknowledged by the Tribunal in paragraph 3 of its reasons, Almon had sought a broad range of remedies from the Tribunal. Among other things, it asked for the re-evaluation of the rival proposals, the termination of the contracts that were awarded to its competitors, and/or full compensation for not being awarded the contracts. The Tribunal simply considered the remedy of compensation and showed no awareness of the remedial options available to it under subsection 30.15(2) of the Act. In my view, the Tribunal did not follow subsection 30.15(2) of the Act, namely to assess what remedy out of the range of remedies suggested by Parliament would be appropriate in all the circumstances.

[52] This error may have been prompted by its failure to appreciate the potential significance of the body of evidence concerning the evaluators' conduct. It may have viewed the matter before it only in narrow terms, as a credibility issue affecting the testimony of the evaluators, rather than as an issue that could be relevant to the integrity of the procurement system, as I have explained above. Viewing the matter in unduly narrow terms might have led the Tribunal to choose a narrower remedy than it should have.

Conclusions on the remedial issues

[53] In these applications for judicial review, this Court must ask whether the Tribunal made a decision that is within the range of possible, acceptable outcomes which are defensible. The range of possible and acceptable decisions that was available to the Tribunal includes only those where the Tribunal has made its decision in accordance with the statutory recipe set out by Parliament. The elements of that recipe must be meaningfully and completely considered. Having not considered how the evaluators' conduct affected the integrity of this procurement process, the Tribunal did not meaningfully and completely consider subsection 30.15(3)(*c*) of the Act, as it was required to do. Further, the Tribunal did not consider the range of remedies available to it under subsection 30.15(2) of the Act, as it was required to do. As a result, the Tribunal has not reached a decision that is within the range of possible, acceptable outcomes which are defensible.

[54] So that there is no misunderstanding, I wish to emphasize that I have made no findings concerning what I have described above as "the body of evidence." That is for the Tribunal to do if the matter is remitted back to it, as I shall suggest. After the matter is remitted back to it, the

Tribunal's job will be to receive whatever additional evidence it considers appropriate in light of these reasons, examine all of the evidence including "the body of evidence", make appropriate findings from that evidence, and apply subsections 30.15(2) and 30.15(3) of the Act, all in accordance with the important purposes of this regulatory regime.

[55] For the foregoing reasons, I would allow Almon's judicial review and remit the matter back to the Tribunal for redetermination.

[56] Despite this proposed disposition, it is still necessary to determine the judicial review brought by Public Works. If the Tribunal's fact-finding must be set aside, as urged upon us by Public Works, the Tribunal will also have to address that when it redetermines this matter. I turn to this issue now.

(2) The tribunal's fact-finding

[57] Public Works submits that the Tribunal's fact-finding in paragraphs 35-44 of its decision was unreasonable and vitiated the decision. In particular, Public Works attacks the Tribunal's factual finding that the evaluators' reasons for their assessment were found exclusively in the consensus scoring sheets. Public Works submits that the Tribunal failed to take into account relevant evidence to the contrary and had insufficient evidence to make the factual finding that it did. In its view, the evaluators' reasons for the scores they gave to the proposals were evident in other documents. It says that when these reasons in other documents are properly examined, the

Tribunal could not conclude that the evaluators employed improper criteria. The evaluators used the appropriate criteria.

[58] As mentioned above, the Tribunal began by trying to determine "why the evaluators awarded Almon the scores that they did" (at paragraph 35 of the Tribunal's reasons). The Tribunal observed (also at paragraph 35) that "there are several potential sources of evidence on the record" concerning this:

(a) Item 1 - The comments of the evaluators on the consensus scoring sheets.

(b) Item 2 - The comments of the evaluators on the individual scoring sheets.

(c) Item 3 - The letter of January 28, 2009 from Public Works.

(d) Item 4 - The Government Institution Report.

(e) Item 5 - The testimony of the technical evaluators at the hearing held on April 22, 2009.

In particular, the Tribunal found (at paragraph 36) that Items 3, 4 and 5 "provide[d] more reasons for [Almon's] point deductions than are presented in the consensus scoring sheets [Item 1]."

[59] However, in the end, the Tribunal found that the reasons of the evaluators were present only in Item 1. In its words, "it will consider the [evaluators'] scoring only on the basis of the [consensus] scoring sheets [Item 1] and will not take into account any additional reasons that are indicated by other sources of evidence" (at paragraph 44).

[60] The other items were not relevant, according to the Tribunal. This was because the Tribunal found (at paragraph 42) that it could not rely on the evaluators' testimony "that there were significant reasons for their scoring that did not appear on the consensus scoring sheets." This was a key finding, central to its overall decision in this case. The Tribunal offered two reasons for it:

(a) The Tribunal found the evaluators' testimony was not credible; and

(b) The Tribunal found that the evaluators' "recollection of the evaluation process was less than clear in some respects."

Essentially, these two reasons are really one: lack of credibility on the part of the evaluators.

[61] This, however, is based on Tribunal findings that, without further explanation from the Tribunal in its reasons, appear arbitrary:

a. The Tribunal found that it could not believe any of the evaluators' statements that they had reasons other than those recorded on the consensus scoring sheets. But,

elsewhere, the Tribunal found the opposite: it found (at paragraph 41) that an evaluator made comments on a proposal elsewhere, on "sticky notes" affixed to the proposal. This is an inconsistency that, without further explanation from the Tribunal, appears to be arbitrary.

b. The Tribunal found (at paragraph 42) inconsistencies among the evaluators regarding whether the three actually met together. This alone, without further explanation from the Tribunal, does not automatically lead to the conclusion that the evaluators are not worthy of belief on an entirely different aspect, namely whether they relied on reasons other than those they set out on the consensus scoring sheets. Without further explanation from the Tribunal, this finding appears to be arbitrary.

[62] On judicial review, the Tribunal is entitled to deference in its fact-finding: *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 at paragraph 85; *Ross v. New Brunswick School Board, District No. 15*, [1996] 1 S.C.R. 825 at pages 849 and 852. The reviewing court is not to reweigh evidence but instead must show deference: *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, 2009 SCC 12 at paragraph 64; *Dunsmuir*, *supra* at paragraphs 47, 48 and 53. I accept that credibility determinations, in particular, are entitled to deference: *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53 at paragraph 72 (albeit in the context of an appeal, as opposed to a judicial review).

[63] But this is a situation where the findings made by the Tribunal, without further explanation from the Tribunal, appear to be internally inconsistent, incompatible or arbitrary, and do not necessarily lead to the Tribunal's ultimate conclusion (at paragraph 42) that the evaluators' reasons for their scores are only in the consensus scoring sheets. It is not clear from the Tribunal's fact-finding, as expressed in its reasons, that the Tribunal has "properly considered the matter" and has "gone through" the "proper thought processes" (*Crake v. Supplementary Benefits Commission*, [1982] 1 All E.R. 498 at page 508 (Q.B.)) or that it has "had regard to the totality of the material before it" (*Irarrazahal Olmedo v. Minister of Employment and Immigration*, [1982] 1 F.C. 125 at page 126 (C.A.)).

[64] If the matter is remitted back to the Tribunal, which I shall propose, the Tribunal may well be able to find a coherent basis for it to reach the conclusion it did. It may well make a justifiable finding about the evaluators' credibility. But given the important purposes underlying this regulatory regime, the Tribunal has to explain these matters to the parties and to the public in transparent, intelligible reasons that demonstrate that it is not taking arbitrary positions: *Dunsmuir*, *supra*, at paragraph 47. As yet, it has not done so.

[65] Therefore, for the foregoing reasons, I conclude that the Tribunal committed reviewable error in its fact-finding, as expressed in its reasons, and would set aside its decision on this ground as well.

G. Proposed disposition

[66] For the foregoing reasons, I would grant both applications for judicial review, quash the decision of the Tribunal, and remit the matter back to the Tribunal for redetermination in accordance with these reasons. The parties have prosecuted these two applications for judicial review together and, overall, success is divided. Therefore, I would order no costs of the applications.

"David Stratas"
J.A.

"I agree
M. Nadon"

"I agree
Johanne Trudel"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-298-09
STYLE OF CAUSE:	The Attorney General of Canada v. Almon Equipment Limited
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 9, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Nadon J.A. Trudel J.A.
DATED:	July 20, 2010

APPEARANCES:

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