

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20120208**

**Docket: A-253-11**

**Citation: 2012 FCA 42**

**CORAM: LÉTOURNEAU J.A.  
PELLETIER J.A.  
GAUTHIER J.A.**

**BETWEEN:**

**OP SIS, GESTION D'INFRASTRUCTURE INC.**

**Applicant**

**and**

**DEPARTMENT OF PUBLIC WORKS AND  
GOVERNMENT SERVICES CANADA**

**Respondent**

Hearing held at Montréal, Quebec, on January 19, 2012.

Judgment delivered at Ottawa, Ontario, on February 8, 2012.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
GAUTHIER J.A.**

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**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**Issues**

[1] Was the Canadian International Trade Tribunal (the Tribunal) justified in declining jurisdiction to conduct an inquiry into the complaint filed by the applicant concerning a procurement for the maintenance and operation of the mechanical and electrical systems at the Canadian Meteorological Centre (CMC) in Dorval, Quebec? The complaint was filed under

subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

[2] A further issue is which standard of review is applicable to the Tribunal's decision. This second issue is of less importance in the present matter since the Tribunal's decision was both correct and reasonable.

### **The facts underlying the Tribunal's decision**

[3] Since we need solely to determine the issue of the Tribunal's jurisdiction, it is not necessary for us to examine the facts regarding the merits of the complaint, the substance of which is that the Department of Public Works and Government Services allegedly did not properly evaluate the applicant's proposal submitted in response to a request for proposal subject to the *Agreement on Internal Trade*, (1995) 129 Can. Gaz. I, 1323 (AIT).

[4] According to the respondent, the CMC is a facility that houses the supercomputers of Environment Canada. These computers are seen as being essential to Canada's security. The CMC is at the heart of the operations of Environment Canada's weather forecasting system and telecommunications network.

[5] According to the respondent, obtaining and supplying weather data is essential for the following services:

- (a) strategic support for military operations;
- (b) support for Health Canada's operations when radioactive or dangerous materials are released into the atmosphere;
- (c) weather warnings for Canadians; and
- (d) services for marine and air carriers, including volcanic ash warnings.

[6] When the time came to renew this maintenance contract, it had been the applicant's since 2006. A cloud appeared on the horizon: the CMC's facilities had become too small, and, to improve services, the CMS had to move and obtain new supercomputers. The anticipated costs were high, possibly up to \$100 million: see Applicant's Record, Vol. 2 at page 495. But there was more. There were inevitable delays in making the new facility operational so that, in the meantime, the CMC continued to offer its services from its Dorval location.

[7] When the bidding process was completed, the applicant was informed that the maintenance contract had been awarded to another bidder. It therefore filed a complaint with the Tribunal, which decided to conduct an inquiry and informed the parties of this on March 3, 2011. On March 23, 2011, the respondent filed a motion asking the Tribunal to dismiss the applicant's complaint on the basis that the respondent had invoked the national security exception provided for in Article 1804 of the AIT, which reads as follows:

**Article 1804: National Security**

Nothing in this Agreement shall be construed to:

- (a) require the Federal Government to provide, or allow access to, information the disclosure of which it determines to be contrary to national security; or
- (b) prevent the Federal Government from taking any action that it considers necessary to protect national security interests or, pursuant to its international obligations, for the maintenance of international peace and security.

[8] By invoking Article 1804, the respondent precludes the procurement in question from the application of the AIT and consequently makes the procurement process rules and the bid challenge procedures provided by the AIT unenforceable.

[9] Confronted with the fact that the procurement the applicant complained about was exempt from the provisions of the AIT application for national security reasons and noting that none of the other trade agreements applied, the Tribunal found that the complaint did not concern a designated contract, as prescribed by subsection 30.11(1) of the Act. Consequently, it dismissed the complaint for lack of jurisdiction, in accordance with paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602.

**Analysis of the Tribunal's decision and parties' submissions**

[10] In line with its previous decisions, the Tribunal concluded that it did not have the jurisdiction to review “the federal government’s determination that a particular matter relates to national security”: see the Tribunal’s decision at paragraph 13. However, it could “satisfy itself that a national security exception has actually and properly been invoked”: *ibidem*, at paragraph 14. Also, the exception had to be invoked by a person duly authorized by the government before the end of the procurement process and concern the procurement in question: *ibidem*, at paragraph 17. The applicant’s challenge concerns this last factor.

[11] In fact, the applicant argues that the invoked exception concerned solely any future procurements related to the purchase or leasing of new supercomputers and the facilities to house them and that it did not apply to the existing facilities in Dorval. Consequently, its complaint did fall under the Tribunal’s jurisdiction and should be ruled on by the Tribunal.

[12] The applicant bases its argument on its interpretation of the following excerpt (with emphasis added) from an exchange of correspondence between Environment Canada’s Assistant Deputy Minister and Chief Information Officer (Mr. Shawcross) and the Assistant Deputy Minister of the respondent’s Acquisitions Branch (Mr. Ring), specifically, a letter in which Mr. Shawcross asked that the national security exception be invoked: see Applicant’s Record, Vol. 1, at pages 199 to 201. Mr. Ring’s letter of acceptance reads as follows:

Dear Mr. Shawcross,

Thank you for your letter, dated June 15, 2012, requesting my approval to invoke a National Security Exception with respect to the extension of the existing contract, as well as with respect to any future procurements of supercomputers and the facilities to house them.

Based on the reasons set out in your letter dated June 15, 2010, I agree to invoke the National Security Exception to exempt the extension of the existing contract as amended, as well as with respect to any future procurements of supercomputers and the facilities to house them from the provisions of Canada's international trade agreements, current and future, including the World Trade Organization – Agreement on Government Procurement, Article XXIII(1), the North American Free Trade Agreement, Article 1018(1), the Canada-Chile Free Trade Agreement, Article Kbis-16(1) and the Agreement on Internal Trade, Article 1804, for all purposes.

It is intended that the applicable project will be managed, on your behalf, in PWGSC Acquisitions Branch by Levent Ozmutlu, Senior Director, Informatics and Telecommunications Systems Procurement Directorate. Mr. Ozmutlu can be reached at 819-956-9514, if you have any questions. This letter does not constitute either an approval or rejection of a sole source procurement strategy. Any procurement strategy must be in accordance with Government Contracts Regulations and applicable policies. I would recommend that your staff discuss proposed procurement strategies with Mr. Ozmutlu.

[Emphasis added.]

[13] After analyzing the evidence in the record and the submissions filed, the Tribunal concluded that the national security exception invoked in Mr. Ring's letter agreeing to Mr. Shawcross's request could reasonably be interpreted to refer to the services that were the subject of the complaint and that it was sufficiently broad and general to reasonably include the CMC in Dorval.

[14] Here is how the Tribunal dealt with this issue at paragraphs 19 and 20 of its decision:

19. With regard to the first issue, the Tribunal is of the opinion that the national security exception invoked in Mr. Ring's letter can reasonably be interpreted to refer to the services that are the subject of the complaint and to the subject procurement. The Tribunal notes that Mr. Ring's letter states that the exception concerns ". . . any future procurements of supercomputers and the facilities to house them." The Tribunal is of the opinion that this statement is sufficiently broad and general to reasonably concern and include future procurements relating to the facilities that house the supercomputers, that is, the Canadian Meteorological Centre in Dorval, as well as future government procurements relating to the possible acquisition of new supercomputers and to the facilities to house them, whether they be located in Dorval or elsewhere.

20. The Tribunal therefore accepts PWGSC's arguments that the wording of the August 6, 2010, letter meant to exempt from the scope of the AIT all future procurements relating to the facilities that house the supercomputers whose operation is necessary to protect Canada's interests in respect of national security. Since the exception concerns all future procurements relating to those facilities, it necessarily applies, according to the Tribunal, to the procurement of qualified labour for the operation, maintenance and performance of minor repairs at those facilities. The Tribunal notes that the subject Request for Proposal provided that the contractor's responsibilities relating to that service involve the operation, maintenance and repair of the mechanical, electrical and architectural systems of the building in Dorval, services that are clearly related to the facilities. As well, the subject procurement clearly indicate that those services must be provided while maintaining, at the same time, all operational, computer, development, research and administrative activities of the Canadian Meteorological Centre in Dorval. While there may be other contracts in place for aspects relating to those facilities, this does not take away from the fact that the subject services do relate to the facilities in Dorval. Therefore, the Tribunal finds that the exception invoked on August 6, 2010, is specific to the context of the present complaint that involves a procurement for the maintenance and operation of the mechanical and electrical systems of the Canadian Meteorological Centre in Dorval, including the maintenance of the mechanical, electrical and architectural systems of the building or of that facility, as well as minor repairs.



[15] Whether the Tribunal’s interpretation of Mr. Ring’s letter raises a pure question of law reviewable on correctness or a question of mixed fact and law reviewable on reasonableness is, in my opinion, of no importance in the present case since it meets both standards.

[16] I end by noting that, in its effect, the invocation of the national security exception carries the potential for serious abuse. When invoked, the exception results in protecting the procurement from any challenges before the Tribunal specialized in this matter. It may be concealing oblique or improper motives that distract from the real purpose of the invocation and justify a judicial review. I hasten to add that there is no evidence of this in the matter before us.

### **Conclusion**

[17] For these reasons, I would dismiss the application for judicial review with costs.

“Gilles Létourneau”

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J.A.

“I agree.

J.D. Denis Pelletier J.A.”

“I agree.

Johanne Gauthier J.A.”

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-253-11

**STYLE OF CAUSE:** OPSIS, GESTION D'INFRASTRUCTURE INC.  
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**REASONS FOR JUDGMENT:** LÉTOURNEAU J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
GAUTHIER J.A.

**DATED:** February 8, 2012

**APPEARANCES:**

Patrice Gladu  
Bernard Mahoney

FOR THE APPLICANT

Alexandre Kaufman

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Dunton Rainville, LLP.  
Montréal, Quebec

FOR THE APPLICANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT