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IN THIS ISSUE —

Analysis of the Procedures and Recent Decisions Relating to the Agreement on Internal Trade and Discriminatory Business Practices Act

This analysis is not intended to evaluate in detail the requirements or processes of the *Agreement on Internal Trade* or the *Discriminatory Business Practices Act*, but rather to review recent decisions which provide insight into the principles which should guide procurement practices for public agencies.

I - AGREEMENT ON INTERNAL TRADE

In 1995 the Canadian Federal Government and the Provincial Governments entered into the *Agreement on Internal Trade* (the "*AIT*"). The *AIT* is meant to, among other things, promote an open, efficient and stable domestic market for long-term job creation, economic growth and stability, and to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada.

i) Canadian International Trade Tribunal

Chapter 5 of the *AIT* addresses government procurement. Disputes under Chapter 5 are heard by the Canadian International Trade Tribunal ("CITT"). The CITT is a quasi-judicial tribunal and its decisions may be appealed to the Federal Court. Since the *AIT* came into force in the summer of 1995, there have been hundreds of Chapter 5 decisions made by the CITT and the Federal Court. An examination of the CITT and Federal Court decisions over the course of one year, 2008, is instructive with respect to some of the central principles of the paradigm the *AIT* has established for government procurement. These decisions are particularly revealing with respect to the authority of the CITT and to the tendering process as it relates to government procurement.

Jurisdiction and Decisions

In order to have standing before the CITT, a complainant bidder must establish that its complaint is within the provisions of the *AIT*. In the case of *Canada (AG) v. Northrop Grumman Overseas Services Corp.*, the Federal Court clarified that to fall within the provisions of the *AIT*, the contract at issue must be between a government entity and a Canadian supplier.[1] A Canadian supplier is one that meets the permanent establishment requirements of the *AIT* and has sufficient presence in Canada to enable it to fulfill its end of the procurement agreement from inside Canada.[2] If the complainant bidder cannot establish that the contract is one between a government entity and a Canadian supplier, it will not properly have standing before the CITT.

This issue can be relevant to other public-sector agencies which may do business with Provincial or Federal Governments as a supplier. As a result, there is a potential for a provincial public-sector agency to be a complainant bidder or supplier.

In *Canada (AG) v. Davis Pontiac Buick GMC (Medicine Hat) Ltd.*, the Federal

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1 *Canada (AG) v. Northrop Grumman Overseas Services Corp.*, [2008] F.C.J. No. 798 (C.A.) at para. 56.

2 *Ibid.* at para. 62.

Court of Appeal made it clear that the application of Chapter 5 of the *AIT* is to be restricted to circumstances where it is a government entity that is procuring goods or services.[3] Thus, where a government body acts as an agent for a non-governmental body in procuring goods or services, the *AIT* is not engaged. Conversely, where a non-governmental agent acts on behalf of a governmental body in procuring goods and services, the *AIT* is engaged. Because the *AIT* is only engaged in circumstances of government procurement, the CITT does not have any jurisdiction in regard to other procurement disputes.

Chapter 5 of the *AIT* includes the procurement of services as well as goods. Annex 502.1B details which services fall within the scope of Chapter 5. In *Immeubles Yvan Dumais Inc. v. Canada (Department of Public Works and Government Services)*, the CITT determined that leasing of real property is included in the definition of services and furthermore, all services except those expressly excluded by Annex 502.1B are subject to Chapter 5 obligations.[4]

The CITT has considerable discretion in determining whether or not it will investigate a complaint. The CITT has refused to investigate a complaint where the Complainant did not permit itself enough time to meet a clearly specified requirement that was a condition for submitting the tender.[5] The CITT will exercise its discretion not to investigate a complaint where there is no evidence that the evaluators of the tenders did not evaluate the complainant's proposal properly. The CITT will not substitute its judgment for that of the evaluators.[6] This is similar to a principle that is applied in administrative law with respect to review. It may also be possible to convince a court that similar principles should be applied to the award of bids and tenders.

Once the CITT does decide that it will investigate a complaint, it must consider all relevant evidence before it. The CITT does not have discretion to set aside a portion of the evidence while investigating a closely-connected facet of the same bidding process.[7]

The cases decided under Chapter 5 of the *AIT* in 2008 clarify the authority and reach of the CITT. The CITT may only investigate matters within the provisions of Chapter 5 of the *AIT* and it has significant discretion in deciding which matters to investigate, but once it has decided to investigate a complaint it may not disregard relevant evidence. The CITT's scope is restricted to matters of procurement between government and a Canadian supplier, and includes the procurement of services as well as goods. The CITT may exercise its discretion to refuse to investigate a complaint where the complainant did not follow all of the requirements of the tendering process or where there is no evidence of fault on the part of the evaluator of a bid. Again, this

3 *Canada (AG) v. Davis Pontiac Buick GMC (Medicine Hat) Ltd.*, [2008] FCA 378.

4 *Immeubles Yvan Dumais Inc. v. Canada (Department of Public Works and Government Services)*, [2008] C.I.T.T. No. 52

5 *ComXel(Re)*, [2008] C.I.T.T. No. 59.

6 *Competition Composites Inc. (Re)*, [2008] C.I.T.T. No. 19. and *JMPCONSULTANTS* (Re), [2008] C.I.T.T. No. 46.

7 *Systèmes Equinox Inc. v. Canada (Minister of Public Works and Government Services)*, [2008] F.C.J. No. 129 (C.A.).

principle may also be applied by a court or in an arbitration.

The Tendering and Negotiation Process

The cases decided under Chapter 5 of the *AIT* in 2008 demonstrate the need for clear language in tendering documents and when it may be necessary for bids to be retendered.

If a government entity seeks to procure a product or service for which multiple versions exist, it must clearly specify the version to be included in the tender. The importance of specificity was confirmed in the case of *Cifelli Systems Corporation v. Department of Public Works and Government Services*.[8] In *Cifelli*, Canada issued a call for tenders for "Windows XP" on behalf of the Department of National Defence. The Complainant submitted the lowest tender bid based on the cost of Windows XP Home Edition, but the respondent required Windows XP Professional Edition. The CITT held that it was not obvious from the context of the procurement that the tender was for the Professional version and, therefore, that the respondent had breached its obligations under Chapter 5. This case emphasizes that it is crucial for a government entity to precisely specify its needs in its call for tenders (or RFPs).

While a government entity should take care to be specific about its procurement needs, it is not compelled to disclose the monetary limits of its budget with the successful bidder. Such an obligation may only be imposed on the procuring entity if it is clearly required in the tendering documents.[9]

The CITT has established that there are circumstances which require retendering of bids or separate tendering. An alteration in a contract which changes the services provided must be retendered. In determining whether new services have been provided, the CITT may examine whether the target customer has changed.[10] Additionally, the CITT will consider whether the services in question were in the contemplation of the parties at the time that the solicitation was issued. In *Colley Motorships v. Canada (Department of Public Works and Government Services),*[11] the CITT found that the later addition of services ought to have been the subject of a new competition and not simply granted to the successful bidder of the original contract. It was clear that the additional services were not in the contemplation of the procuring entity at the time of the tender.

Although the requirements of a tender should be clearly laid out by the procuring entity, this does not require an explicit requirement that there should be an absence of a conflict of interest. In *Serco Facilities Management Inc. v. Defence Construction Canada,*[12] the CITT held that

8 *Cifelli Systems Corporation v. Department of Public Works and Government Services,* [2008] C.I.T.T. No. 23.

9 *Zenix Engineering Ltd. v. Defence Construction (1951) Ltd.*, [2008] F.C.J. No 497 (C.A.).

10 *Bell Mobility v. Canada (Department of Public Works and Government Services),* [2008] C.I.T.T. No. 56.

11 *Colley Motorships v. Canada (Department of Public Works and Government Services),* [2008] C.I.T.T. No. 54.

12 *Serco Facilities Management Inc. v. Defence Construction Canada*, [2008] F.C.J. No. 912. See "Absence of conflict of interest does not need to be specified in tender documents", Procurement Law Newsletter, Nov. 2008.

if absence of a conflict is to be part of the evaluation criterion of tenders this must be explicitly stated. The Federal Court overturned the CITT's decision, determining that even if not explicitly stated by the procuring entity, in assessing bids it is proper for the procurer to disqualify those which raise a conflict of interest.

It is necessary that government entities seeking to procure goods or services be explicit about their procurement requirements. Furthermore, if those requirements change, they may be required to request bids be retendered or to issue additional calls for tenders to meet new needs. While the criteria upon which bids will be evaluated must generally be explicitly stated, the procuring entity need not explicitly state that it will disqualify bids where a conflict of interest arises.

Conclusion

Chapter 5 of the *AIT* provides, through the CITT, a complaint process for eligible bidders in relation to government procurement. The decisions of the CITT and the Federal Court in 2008 illuminate the scope of CITT jurisdiction, and provide guidance with respect to the tendering process.

Before bringing a complaint to the CITT, a complainant bidder should ensure that it falls within the scope of the Chapter 5 complaints process and has grounds to assert that its bid was not evaluated properly. Furthermore, a complainant should ensure that it met the tendering requirements and must recognize that it is within the CITT's discretion to decide whether or not to investigate a complaint.

Government entities attempting to procure goods and/or services must take care to provide sufficient detail with regard to the goods/services they wish to procure, as well as the grounds on which tenders will be evaluated. Both parties should be cognizant of the fact that alteration of the character of the goods/services requested or the addition of goods/services may require a retendering or separate tendering process be embarked upon.

ii) Panel Decisions Under the Agreement on Internal Trade

Disputes under the *AIT* that do not fall within the scope of Chapter 5 (i.e. Procurement) are handled through the dispute mechanism process established under Chapter 17 of the *AIT*. Ultimately, a dispute that is not resolved may find itself before an *AIT* Panel. The decisions of the Panel are reported in the *Asper Review of International Business and Trade Law* and are available on the *AIT* website.

Since the inception of the *AIT*, the Panel has heard and reported on eight cases. These cases clarify the purpose of the *AIT* and its dispute resolution procedures, as well as illuminate the interplay between the *AIT* and the constitutional powers of the parties.

Alberta –and- Canada Regarding the Manganese-based Fuel Additives Act[13]

In the Panel's first decision under the *AIT*, Alberta (the "Complainant") alleged that Canada (the "Respondent") failed to comply with its obligations under the *AIT* in enacting the *Manganese-based Fuel*

13 *Report of the Article 1704 Panel Concerning a Dispute Between: Alberta –and- Canada Regarding the Manganese-based Fuel Additives Act,* (2003) 3 Asper Rev. of Int'l Bus. and Trade Law 347. [*Manganese*]

Additives Act (the "*Act*"). The governments of Quebec, Saskatchewan and Nova Scotia intervened in support of Alberta.

The purpose of the *Act* was to prohibit importation and inter-provincial trade in certain manganese-based automotive fuel additives as listed by schedule. At the time, the only additive listed in the schedule was Methylcyclopentadienyl Manganese Tricarbonyl (MMT). MMT had been used in unleaded gasoline to increase octane levels since 1977. Automobile manufacturers contended that MMT negatively affected emissions control devices.

Alberta requested consultations with Canada under Chapter 15, Environmental Protection, of the *AIT*. Chapter 15 provides that the Canadian Council of Ministers of the Environment ("CCME") can facilitate harmonization and consultation between parties, and that the CCME is the proper forum to resolve environmental measures affecting inter-provincial trade.

In making its decision with respect to this matter, the Panel clarified the relationship between Chapter 15 and the General Rules listed in Chapter 4 of the *AIT*. Additionally, the Panel provided some guidance with respect to the interpretation of the *AIT*.

Relationship Between Chapter 15 and Chapter 4

The panel found that Chapter 15 makes it clear that the CCME is the proper forum for harmonization of environmental measures affecting inter-provincial trade. Furthermore the Panel found that Canada had failed to exhaust the process established by Chapter 15 before turning to the Panel.[14] If an inconsistency exists between Article 405 (i.e. Reconciliation) and Chapter 15, the provisions of Chapter 15 prevail.

General Guidance

(a) General Test for Trade Legislation

In deciding this case, the Panel established a test to discern whether or not a piece of trade legislation should be considered legitimate. The two-part test asks:[15]

(1) Is the legislation within the constitutional authority of the Party (i.e. is it within the powers granted to the government in question in the *Constitution Act*)?

(2) Is the legislation consistent with the *AIT*?

Legislation will only pass the test if it meets both parts. Thus, legislation that is within the constitutional power of the Party, but is inconsistent with the *AIT* should not be considered legitimate trade legislation.

(b) Test for Reciprocal Non-Discrimination (Article 401):[16]

The Panel also used this matter as an opportunity to establish a test with respect to the Reciprocal Non-Discrimination Article (Article 401). The two-part test asks:

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14 *Ibid.* at para. 42.

15 *Ibid.* at para. 26.

16 *Ibid.* at para. 32.

(1) Does the measure discriminate against the goods of one Party to the benefit of the goods of another Party?

(2) Are the goods discriminated against "like, directly competitive or substitutable" with the goods of another party?

By establishing these tests, the Panel clarified the application of the *AIT* for future parties.

In the result, the Panel found that there were inconsistencies between the *Act* and the *AIT*. The Panel recommended that Canada remove the sections of the *Act* that were inconsistent with the *AIT*.

Nova Scotia –and- Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations[17]

Farmers Cooperative Dairy Limited ("Farmers") of Bedford, Nova Scotia acquired Health Pasteurized Milk Limited ("Health") of Hunter River, P.E.I. At the time of purchase, Health had licenses allowing it to manufacture dairy products and process certain fluid milk products in P.E.I. When some of the equipment in the Health plant stopped working and was deemed non-repairable, Health began to distribute an increased amount of Farmers' product. After several months of review, P.E.I. introduced amendments to the *Dairy Industry Act* Regulations, cancelling all existing licenses for dairy producers and distributors and mandating a reapplication process. The same day P.E.I. issued a letter to Farmers ordering it to remove its Class I milk products from the P.E.I. market. Both Health and Farmers applied for and were granted licences. The licences allowed for the distribution of Farmers products, however, they contained a directive to remove products sourced in Nova Scotia from the P.E.I. market.

Nova Scotia ("Complainant") alleged that in amending the regulation, P.E.I. ("Respondent") failed to comply with its obligations under the *AIT*, and the inconsistencies could not be justified under the *AIT*. The long-standing policy of the Respondent was to restrict the importation of milk products that were in competition with P.E.I. products. The Panel held that the policy upon which the regulation was based was contrary to Article 402 (i.e. Right of Entry and Exit) and inconsistent with Article 403 (i.e. No Obstacles) of the *AIT*.

In making its decision, the Panel confirmed the tests it established in the *Manganese* case regarding the legitimacy of trade legislation and Non-Reciprocal Discrimination.[18] In addition, the Panel concluded that the definition of "measure" under the *AIT* was broad enough to include not only regulations, but also policies upon which regulations were based.[19]

In the result, the Panel recommended that the Respondent take all measures necessary to ensure that regulations respecting fluid milk standards and distribution were consistent with the *AIT*.[20] Pending such action, the Panel

17 *Report of the Article 1704 Panel Concerning a Dispute Between: Nova Scotia –and- Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations*, (2003) 3 Asper Rev. of Int'l Business and Trade Law 313. [*Dairy*]

18 *Ibid.* at para. 32-33.

19 *Ibid.* at para. 30.

20 *Ibid.* at para 68.

recommended that the Respondent remove all existing licence conditions for distribution of milk based on province of origin.[21]

Certified General Accountants Association of Manitoba –and- Ontario Regarding the Public Accountancy Act[22]

The Certified General Accountant Association of Manitoba ("the Complainant"), alleged that Ontario's *Public Accountancy Act* (the *"PAA"*), the applicable Regulations, and the manner in which they were administered were inconsistent with the labour mobility provisions, particularly Article 707 (Licensing, Certification and Registration of Workers), of the *AIT*. The Complainant alleged that the *PAA* and Regulations effectively limited the right to practice public accounting in Ontario ("the Respondent") to Chartered Accountants ("CAs") and that Certified General Accountants ("CGAs") who were licensed to provide public accounting services in Manitoba could not do so in Ontario. The Respondent argued that public accounting was a financial service and, therefore, exempt from the *AIT* under Article 1806.

The Panel found that accounting was not a service or product of a financial nature under Article 1806 and, therefore, was not exempt from the *AIT*. The Panel noted that Parties were bound to recognize equivalent competencies in the occupation of public accounting acquired by accountants in other provinces. The obligation arose from a combination of the purpose of the *AIT*, Articles 707, 708 and Annex 708.[23] The *PAA* did not establish a reasonable or accessible mechanism by which non-Ontario accountants could demonstrate their competency.

In the result, not only did the Panel find that the *PAA* was unduly restrictive with respect to mobility of workers, it also found that the Respondent could not establish a legitimate objective for the measure. In coming to its decision, the Panel emphasized that obligations under the *AIT* are not limited to licensed workers, but apply to all workers qualified in an occupation. Thus, recognition of a person's competency in their occupation may be determined by means other than a licensing regime.

This case demonstrates that a central purpose of the *AIT* is not only to facilitate the trade of goods across Canada, but also to increase the mobility of the country's workers. It will be interesting to monitor whether the current recession raises more challenges between Provinces.

Farmers Co-operative Dairy Limited of Nova Scotia –and- New Brunswick Regarding New Brunswick's Fluid Milk Distribution Licensing Measures[24]

The Farmers Dairy Co-operative ("the Complainant") brought a request for a Panel under Article 1716 of the *AIT*.

21 *Ibid.* at para. 69.

22 *Report of the Article 1716 Panel Concerning a Dispute Between the Certified General Accountants Association of Manitoba –and- Ontario Regarding the Public Accountancy Act (R.S.O. 1990, Chapter P-37) and Regulations*, (2003) 3 Asper Review of Int'l Bus. and Trade Law 273. [*Accountants*]

23 *Ibid.* at para. 72.

24 *Report of the Article 1716 Panel Concerning a Dispute Between Farmers Co-operative Dairy Limited of Nova Scotia –and- New Brunswick Regarding New Brunswick's Fluid Milk Distribution Licensing Measures*, (2003) 3 Asper Rev. of Int'l Bus. and Trade Law 239. [*Farmers*]

Consultations between New Brunswick and Nova Scotia, on the Complainant's behalf, failed to resolve the issue.

The Complainant applied to the New Brunswick Farm Products Commission ("NBFPC") for a milk distribution licence. The NBFPC refused to grant a licence stating that it was not in the interest of the general public as required under s. 46(2) of the *New Brunswick Natural Products Act* (the "*Act"*). The Complainant alleged that the *Act* granted discretion to the NBFPC in a manner that allowed it to breach Articles 401 (Reciprocal Non-Discrimination), 402 (Right to Entry), and 403 (No Obstacles) without satisfying the requirements under Articles 404 (Legitimate Objectives) and 101(4)(a) (Mutually Agreed Principles).

The Panel found that the measures under the *Act* breached the *AIT* as alleged by the Complainant and that it did not satisfy the legitimate objectives requirement of Article 404. The Panel found that the *Act* and the manner in which it was applied by the NBFCP impaired internal trade and caused injury to the Complainant.

The Panel recognized that it did not have the authority to vary, modify or override the constitutional powers of the Parties to pass legislation and thus, it could not compel New Brunswick to modify the *Act* or the manner in which it was applied. The Panel stated, however, that in signing the *AIT*, the Parties recognized that constitutionally valid measures may be contrary to the *AIT* and may need to be changed in order to achieve the objectives of the *AIT*. The Panel stated that the Parties to the *AIT* should rigorously respect the commitments it contains.[25]

25 *Ibid*. at paras. 126-130.

The Panel also used this case as an opportunity to articulate the burden of proof a complainant is required to meet in bringing its allegations before the Panel. A party must convince the Panel, based on the material filed, of the legitimacy of its position. Determining whether or not a party's position is sound requires the Panel to apply a standard that is neither legalistic or technical.[26]

Dispute by Alberta, Quebec, and British Columbia with Canada regarding the Federal Bank Act – Cost of Borrowing (Banks) Regulations[27]

Under Article 807 (Reconciliation of Consumer-Related Measures and Standards), Parties to the *AIT* are under a duty to reconcile the consumer-related measures and standards listed in the Annex to the Article to the greatest extent possible. A Committee ("CMC") was established under Chapter 8 to facilitate the process of reconciliation for consumer-related measures and standards. The Parties finally agreed on, and the CMC approved, the *Agreement for Harmonization of Cost of Credit and Disclosure Laws in Canada: Drafting Template*. At the time, both Canada and Alberta seemed to have similar timelines for implementing their regulations to comply with the Agreement. In its report to the Ministers, the CMC cited the confidence the smaller jurisdictions would gain from a critical mass of larger jurisdictions, including Canada, Alberta,

26 *Ibid*. at para. 136.

27 *Report of the Article 1074 Panel Concerning a Dispute by Alberta, Quebec, and British Columbia with Canada regarding the Federal Bank Act – Cost of Borrowing (Banks) Regulations*, (2004) Asper Rev. of Int'l Bus. and Trade Law 237. [*Banks*]

Ontario and Quebec, moving forward with implementation.

Alberta implemented the legislation and regulations shortly after receiving the first draft of the *Cost of Borrowing (Banks) Regulations* ("the Regulations"). After the first draft of the Regulations had been implemented Canada chose to exclude lines of credit from the requirements of the Agreement. Alberta, British Columbia and Quebec felt that Canada's action stalled the implementation process. At the time of the Panel, none of the other provinces had brought legislation or regulations into effect.

The Agreement for Harmonization contained an exclusion clause allowing the Parties to exclude any class of credit agreement or modify the application of any of the provisions with respect to any class of credit agreement. This clause was, however, inconsistent with the rest of the Agreement which sought 'real harmonization'.

The Panel held that the Agreement for Harmonization had to be read in light of the *AIT*'s general objective, any relevant mutually agreed principle, any applicable substantive obligation, and the stated objectives of the agreement negotiations.[28] The Panel also reiterated that the provision in the *AIT* prohibiting the *AIT* from overriding legislative authority could not be used as a defence by the Parties when acting contrary to the *AIT*.[29]

The Panel recognized the limited applicability of the *AIT*. The Panel accepted Canada's argument about the need to allow parties the necessary flexibility to meet requirements of their legislation and regulation making process, and to respond to rapid changes in the financial sector.[30] The Panel also noted that the Agreement was reached after a long and involved negotiation process.[31]

The Panel held that Canada's exercise of the exclusion clause was outside the reasonable expectations of the Parties to the Agreement and the *AIT*. Furthermore, the Panel found that Canada had acted inconsistently with its obligations under the Agreement and the *AIT*.[32] The Panel found that Canada was also under a duty to bring material changes to the attention of the Parties and the Committee.[33] The notification must be direct and explicit.[34] In the circumstances of this case, the notification fell short of what was required.[35]

The duty to reconcile under Article 405 and Chapter 8 of the *AIT* only includes the duty of the parties to co-operate in reconciling differences, duplications or overlap in regulatory measures or regimes. There is nothing mandating a specific outcome.[36] Nevertheless, the Panel found that Canada failed in its duty to co-operate

28 *Ibid.* at para. 99.

29 *Ibid.* at para. 102.

30 *Ibid.* at paras. 104-106.

31 *Ibid.* at para. 108.

32 *Ibid.* at para. 111.

33 *Ibid.* at para. 145.

34 *Ibid.* at para. 147.

35 *Ibid.* at para. 152

36 *Ibid.* at paras. 167-168.

in light of the special circumstances of this case, namely the potential denouement of an ambitious attempt to harmonize cost of credit disclosures across the country.[37]

The Panel found that the Regulations did or would have caused injury to the *AIT* and federal-provincial relations in general, as well as to provincially regulated financial institutions and consumers. The Panel accepted the principle that complainants are not required to establish a dollar amount for their injury and the Panel is not required to rule as to the extent of the injury.[38] The injury to consumers was the lack of clarity and simplicity.[39]

A number of principles, thus emerged from this decision: a reiteration that the Panel may not override legislative authority; that material changes to a party's position in a given agreement should be directly and explicitly brought to the attention of the other party or parties; and that complainants are not required to establish a dollar amount for the injury sustained as a result of a respondent's impugned measure. Ultimately, the Panel recommended that the Parties return to the negotiating table and revisit the implementation process.[40]

37 *Ibid.* at para. 169.

38 *Ibid.* at para. 201.

39 *Ibid.* at para. 203.

40 *Ibid.* at para. 122.

Dispute Brought Forward by Alberta and B.C. against Ontario Regarding Ontario's Measures Relating to Dairy Analogs and Dairy Blends[41]

Alberta and British Columbia ("the Complainants") brought a complaint against Ontario ("the Respondent") claiming that the Respondent's *Edible Oil Product Act* ("*EOPA"*) was contrary to the *AIT*. The Complainants alleged that the *EOPA* was contrary to Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit) and Article 403 (No Obstacles) and that these inconsistencies could not be justified under Article 404 (Legitimate Objectives). The *EOPA* was originally scheduled to be repealed on June 1, 2003. The repeal was delayed until January 1, 2005, just over three months from the time of the Panel hearing. The *EOPA* made it illegal to sell any edible oil product, other than margarine, that resembled a dairy product and combined vegetable oil with any amount of dairy ingredients without a license (Dairy Blends). The *EOPA* also had special licensing requirements for Dairy Analogs (i.e. imitation dairy products made from edible oil). The Complainants also alleged that to the extent that the *Milk Act* restricted trade of edible oil based products it was contrary to the *AIT*.

The Complainants made additional requests before the Panel related to the *Milk Act* and the ability of the Respondent to adopt or amend measures that were

41 *Report of the Article 1704 Panel Concerning a Dispute Brought Forward by Alberta and British Columbia against Ontario Regarding Ontario's Measures Relating to Dairy Analogs and Dairy Blends*, (2005) Asper. Rev. of Int'l Bus. and Trade Law 243. [*Ontario Dairy*]

inconsistent with the *AIT* or affected trade in Dairy Analogs and Dairy Blends. The Respondent argued that the Panel could not hear the additional issues as they had not been part of the consultation process required under the *AIT*. The Panel held that the Complainants brought the complaint forward in good faith and had made reasonable efforts to make clear the extent of their complaint. The Panel did not believe that the Respondent could be surprised by the additional issues or had been denied the opportunity to subject all of the issues to the consultation process.[42]

The Panel rejected the Respondent's submission that the issue was moot as the *EOPA* was scheduled to be repealed. The Panel noted that the *EOPA* was still in effect, acted as a barrier to trade, and that there had been a pattern of delay in the repeal of the *EOPA*.

In the result, the Panel held that the *EOPA* was contrary to Articles 401, 402, and 403 and could not be justified under Article 404.[43] In addition, the Panel articulated the principle that it had the authority to make findings with respect to proposed measures, including proposed amendments or regulations.[44]

The Panel found that it was reasonable to conclude that producers of Dairy Analogs and Dairy Blends had been and were being injured by the prohibitions in the *EOPA* and, as in the *Cost of Borrowing (Banks) Regulations* case, it was not necessary to assign the injury a dollar amount.

42 *Ibid.* at para. 48.

43 *Ibid.* at paras. 62-69.

44 *Ibid.* at para. 103.

Dispute Between Alberta, Manitoba and Saskatchewan with Quebec Regarding Quebec's Measure Prohibiting Sale in Quebec of Margarine Coloured the Same Pale Yellow Hue as Butter[45]

Under Quebec's *Regulation Respecting Dairy Products Substitutes*, margarine was only permitted to be coloured to a degree that it was still noticeably lighter than the colour of butter. Quebec objected to the notification that Dairy Analogs were a technical barrier to trade with policy implications because the notification was sent one month after the deadline established under the *AIT*.

Ultimately, the Panel found that the Regulation breached Article 401 (Non-Discrimination) and could not be justified as serving the purpose of consumer protection. The Panel found that the measure impaired and caused injury to margarine producers and their upstream suppliers.[46] Perhaps most noteworthy about this particular decision however, is the manner in which the Panel treated previous Panel decisions and the decisions of other tribunals.

The Panel agreed with Quebec's assertion that its objection should be considered on its merits without deferring to the decisions of prior panels as these decisions are not binding in the sense of the legal principle of *stare decisis* (i.e. that previous decisions must be followed).[47] The Panel

45 *Report of the Article 1704 Panel Concerning a Dispute Between Alberta, Manitoba and Saskatchewan with Quebec Regarding Quebec's Measure Prohibiting Sale in Quebec of Margarine Coloured the Same Pale Yellow Hue as Butter*, (2005) Asper Rev. of Int'l Bus. and Trade Law 295. [*Quebec*]

46 *Ibid.* at para. 144.

47 *Ibid.* at para. 67.

also stated, however, that the reasons of prior panels may be examined in order to promote jurisprudential consistency and, therefore, a greater common understanding of the *AIT*.[48] Furthermore, the Panel looked to both the GATT (*General Agreement on Tariffs and Trade*) and WTO (World Trade Organization) decisions in conducting its analysis of the purpose of Articles 401 and 403. This suggests that although the Panel is not bound by precedent or international sources, it may look to these for guidance in its decision making.

In this decision, the Panel also elucidated the role Articles 100 and 101 were meant to play in the larger *AIT* context. Article 100 captures the object of the Agreement and reads: "It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal." Article 101 lists a number of mutually agreed principles to which the members of the Agreement subscribe. Alberta alleged that Quebec had breached Articles 100 and 101. The Panel stated that Articles 100 and 101 were intended to be contextual and could not stand as independent obligations. They were intended to act as interpretative aids.[49]

Dispute by the Certified General Accountants Association of New Brunswick with Quebec Regarding Quebec's Measures Restricting Access to the Practice of Public Accounting[50]

The Panel determined that in order for a party to commence an applicable dispute avoidance procedure it must directly refer to the dispute avoidance and resolution provisions of the *AIT* in initiating a process. The Panel held that the Complainant had initiated a process in its letter to the Government of New Brunswick requesting that the Government consult with the Respondent on its behalf. The Panel also found that the Complainant had knowledge of the measure allegedly inconsistent with the *AIT*. The Complainant was a member of CGA-Canada which had issued correspondence recognizing the huge differences in public accounting regimes in the various provinces. By virtue of its relationship with CGA-Canada, the Complainant knew or should have known of the alleged inconsistency prior to two years before commencing the action, that is, the limitation period.[51] The rules governing a dispute between a person and a Party under the *AIT*, however, require the person to demonstrate knowledge of loss or the denial of a benefit. There must be actual damage or denial of a benefit contrary to the provision governing a dispute between parties (which only requires a

48 *Ibid.* at para. 68.

49 *Ibid.* at para. 82.

50 *Report of the Article 1716 Panel concerning a Dispute by the Certified General Accountants Association of New Brunswick with Quebec regarding Quebec's Measures Restricting Access to the Practice of Public Accounting*, (2006) Asper Rev. of Int'l Bus. and Trade Law 385. [*Quebec Accounting*]

51 *Ibid.* at para. 42.

demonstration of potential injury).[52] Injury must have occurred before a person can commence dispute resolution proceedings. Knowledge of an allegedly inconsistent measure does not equate to the knowledge of actual denial of benefit.[53] The Complainant did not have actual knowledge of the denial of a benefit until May 2002. The proceeding was, therefore, commenced within the limitation period.[54] The Panel cautioned parties to preserve their right to invoke the limitation period notwithstanding consultations so as to avoid waiving the right by implication.[55]

The Panel found that public accounting was a distinct occupation and, therefore, subject to the *AIT*.[56] The Respondent's selection of chartered accountant as the occupational standard for public accounting was not itself a barrier to mobility.[57] However, Quebec had not satisfied its obligations under Article 707 as the province did not adequately recognize equivalent competencies in the occupation as recognized in other provinces. To require an accountant, other than a chartered accountant, who was qualified to practice public accounting in his or her province to apply to be a CA in Quebec did not recognize the occupational qualifications of workers in other jurisdictions where the qualifications had already been recognized. The measure also failed to recognize the variety of means through which adequate competency can be acquired through combinations of training, education and experience.[58] The Panel also reaffirmed the ruling of the *Farmers -and- New Brunswick* Panel (*supra*) that the Parties to the *AIT*, having recognized its importance, ought to rigorously respect its commitments.[59]

The Panel affirmed that the Respondent bears the onus of showing that the impugned measure pursued a legitimate objective and held that Quebec had failed to do so. The Respondent also failed to demonstrate that less mobility restrictive measures had been considered and found to be inadequate.[60] The Panel concluded that bringing Quebec's system into conformity with the *AIT* would not have a detrimental effect on the consumer as accountants practice under recognized national standards.[61] The accounting measures could not be justified under Article 709 as a legitimate objective.

The Panel found that the Complainant had been injured as the denial of opportunity or competitive disadvantage that cannot be justified constitutes injury.

Some Guiding Principles

A number of guiding principles and practice directions emerge from *AIT* Panel decisions. These principles provide greater understanding of the *AIT* as well as

52 *Ibid.* at para. 46.

53 *Ibid.* at para. 49.

54 *Ibid.* at para. 50.

55 *Ibid.* at para. 54.

56 *Ibid.* at para. 59.

57 *Ibid.* at para. 70.

58 *Ibid.* at para. 77.

59 *Ibid.* at para. 82-83.

60 *Ibid.* at para. 92.

61 *Ibid.* at para. 93.

clarification with respect to how the *AIT* will be interpreted by the Panel, and can also assist with other procurement disputes.

Tests, Definitions, and Interpretations

● To test the legitimacy of any piece of trade legislation ask:

(a) Is the legislation within the constitutional authority of the party that passed it?

(b) Is the legislation consistent with the *AIT*?

● Articles 100 (i.e. Objective) and 101 (i.e. Mutually Agreed Principles) are intended to be contextual and cannot stand as independent obligations.

● To determine whether or not there has been Reciprocal Non-Discrimination as per the *AIT* Article 401 ask:

(a) Does the measure discriminate against the goods of one Party to the benefit of the goods of another Party?

(b) Are the goods discriminated against "like, directly competitive or substitutable" with the goods of another party?

● The definition of "measure" under the *AIT*, includes not only legislation and regulations, but also policy.

● One purpose of the *AIT* is to increase the mobility of the country's workers through recognition of the competency workers have attained within their occupation.

● Parties should rigorously respect the commitments they have made under the *AIT*.

Practice Before the Panel and Panel Powers

● In bringing a complaint, it is the burden of the Complainant to convince the Panel, based on the material filed, of the legitimacy of its position. This is not a technical or legalistic standard.

● If the Respondent contends that the contested measure is in place to fulfill a legitimate objective, it bears the onus of proving that the objective is a legitimate one.

● The Complainant may raise issues before the Panel that had not been previously addressed in consultations with the Respondent provided the Complainant raises those issues in good faith and has made a reasonable effort to make clear the extent of the complaint.

● Complainants are not required to establish a dollar amount for their injury and the Panel is not required to rule as to the extent of the injury.

● The Panel is not bound by precedent, but it may look to its own previous decisions, as well as the decisions of other trade tribunals (e.g. the WTO) for guidance in its decision making.

● The Panel does not have the authority to vary, modify or override the constitutional power of the Parties to pass legislation.

II - DISCRIMINATORY BUSINESS PRACTICES ACT

The *Discriminatory Business Practices Act* (the "*DBPA")* was created to "prevent discrimination in Ontario on the ground of race, creed, colour, nationality, ancestry, place of origin, sex or geographical location of persons employed in or

engaging in business.[62] The *DBPA* complements the *Ontario Human Rights Code* which provides similar protection for goods, services and facilities except for "geographical location". There is little case law discussing the *DBPA* and the case law that does exist emphasizes when the *DBPA* does not apply rather than when it does.

Beauchamp v. North Central Predators AAA Hockey Ass., clarifies what is and is not considered to be "engaging in business".[63] In *Beauchamp*, the plaintiffs wished to play on an AAA hockey team within the Greater Toronto Hockey League. They alleged that the residency requirements of the defendant association constituted a discriminatory business practice on the basis of geographic location contrary to s. 5(1) of the *Act*.

The Court found that the respondent hockey organizations were not "engaged in a business". The Court reaffirmed the test in *Caisse Populaires*[64] for determining whether an entity is carrying on a business. In *Caisse Populaires* it was established that to be carrying on business the preponderant purpose of the activity in which the entity is engaged must be for the purpose of profit or material gain. The court found that the preponderant purpose of the respondent organizations was to organize, foster, encourage and develop amateur minor hockey in Ontario as opposed to being for profit or gain.[65] Funds were raised in order to carry out these objects with a view to reducing costs to the teams and players. The court stated that an operation is not a business carried on for gain or profit where:[66]

- the entity is composed of members;
- its express purpose is not to carry on its operations for gain;
- any profits and accretions can only be used to advance the objects of the organization;
- any assets must be given to charity upon dissolution

The plaintiffs did not have a basis for their action under the *DBPA* because the *DBPA* did not apply to the activities of the respondent hockey organizations. Although the *DBPA* did not apply to the circumstances of the case, the Court went on to consider what types of orders were authorized under the *DBPA*. It found that the *DBPA* only authorizes prohibitive orders.

In another case, *Manos Foods International Inc. v. Coca-Cola Ltd*.,[67] the defendant stopped selling its products to the plaintiff after it was discovered that the plaintiff was grey-marketing. The court stated that a claim of discrimination contrary to the *DBPA* could not be supported in the context of this case.[68]

62 *Discriminatory Business Practices Act*, R.S.O. 1990, c. D.12 at s. 2.

63 *Beauchamp v. North Central Predators AAA Hockey Ass.* (2004), 247 D.L.R. (4th) 745.

64 *Ontario (Regional Assessment Commissioner) v. Caisse Populaire de Hearst Ltee*, [1983] 1 S.C.R. 57

65 *Beauchamp, supra,* at para. 74.

66 *Ibid.* at para. 75.

67 *Manos Foods International Inc. v. Coca-Cola Ltd*., [1997] O.J. No. 1877.

68 *Ibid.* at para. 21.

From the cases above it is possible to conclude that the *Discriminatory Business Practice Act* does not apply to non-profit organizations, does not apply to grey-marketing, and further, that it only authorizes the court to make prohibitive orders. It may be some time before an Ontario court rules on a case in which the *DBPA* is applicable.

III CONCLUSION

Together, the *Agreement on Internal Trade* and the *Discriminatory Business Practices Act* have the capacity to create a comprehensive trade and procurement regime. While the *DBPA* may have an impact on trade in the future, it has been thus far been largely ignored in trade and procurement disputes. The *AIT* on the other hand, through both the CITT and the *AIT* Panel, has provided significant direction to public procuring entities.

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Court confirms undisclosed requirements imposed after bid constitute unfair practice

In *Force Construction Ltd. v. Nova Scotia (Attorney General)*, [2008] N.S.J. No. 490, the Nova Scotia Court of Appeal reiterated the requirement that a tenderee treat all bidders fairly. Imposing an additional requirement on one bidder, particularly a requirement that is not part of the tender documents, is likely to undermine the fairness and integrity of the bid process.

The Department of Transportation and Public Works of Nova Scotia ("the Department") called for tenders for the renovation of the Art Gallery of Nova Scotia. The tender documents included specifications with respect to certain building materials. In particular, the documents contained a requirement that a specific brand and model of window be used in the renovation.

Two bids were submitted: one by the Plaintiff, Force Construction Ltd. ("Force"), and one by Avondale Construction Limited. Both bids were submitted on time and accepted by the Department. As part of its bid, Force stipulated that it would use the windows specified and listed a specific supplier for these windows. Force's bid was the lowest of the two bids submitted

After the bids had closed, members of the Department raised concerns with respect to Force's ability to perform the contract. These concerns were based on interactions between some members of the Department with members of Force on a past project. The architect of the Art Gallery project was concerned that Force would not be able to obtain the windows specified. Ultimately, the architect recommended that Force's bid should be accepted, provided it was able to present written confirmation that it could supply the required windows. As a result, on Friday, December 12, 1997 the Department requested that Force provide written confirmation from its window supplier that the supplier would be able to supply the necessary windows. If Force did not provide the requested written confirmation by noon on Monday, December 15, its bid would be treated as incomplete. Force had oral confirmation from a supplier by around noon on Monday the 15th, and had left a voicemail with the Department contact to that effect. Force received the supplier's written confirmation after 4pm on December 15th and informed the project architect by telephone. The Department

was sent a copy of the supplier's paperwork early the following morning. The Department, however, awarded the contract to Avondale.

The Court found that Force had submitted a compliant bid and that the Department breached the standards of fairness by imposing an additional requirement on the company after the bids had closed that, if not met, would render the bid incomplete. When Force submitted its compliant bid Contract A arose between Force and the Department. The Court found that in requiring Force to provide written confirmation from a supplier the Department breached the terms of Contract A. Force was required to provide additional assurances that the other bidder was not required to provide and was subject to an arbitrary and unreasonable deadline by which to do so. The Court found that, "*It was not open to the Department to go outside the terms of the tender and impose additional informational requirements on the plaintiff, which, in addition to being previously undisclosed, were not applied equally to all of the bidders*." (para. 51). The Court further found that if it had not been for the additional, undisclosed terms imposed on Force, it would have been awarded the contract to renovate the Art Gallery.

In assessing the quantum of damages, the Court considered that Force had attempted to mitigate its damages by bidding, albeit unsuccessfully, on several other projects. As a result, the Court relied on the Plaintiff's expert evidence on its claim for loss of profit and awarded Force judgment in the amount of $222,859.00.

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Court confirms right of contractor to remedy deficiencies

C.S. Bachley Builders Ltd. v. Lajlo, [2008] O.J. No. 4444 stands for the proposition that, even if a party awarded a contract initially fails to do adequate work, the hiring party may not unilaterally repudiate the contract without providing the other party with the opportunity to rectify the deficiencies in the work.

This was a construction lien action for monies owed to the plaintiff, C.S. Bachly Builders Ltd. ("Bachly"), on a fire repair work and restoration project at the home of the defendant, Ms. Lajlo. Bachly was, after some negotiation with the insurance company, retained by Ms. Lajlo to do major repair and restoration work to her home. Bachly subcontracted approximately 95% of its work. For the duration of Bachly's work on the project, relations between it, the defendant and the insurance company were strained.

Sometime after Bachly began working on the project, Ms. Lajlo, became unhappy with the quality of the work. Ms. Lajlo made the decision to hire the National Fire Adjustment Company Inc. ("NFA") to oversee the repairs and to obtain a cash settlement from the insurance company. NFA was retained prior to Ms. Lajlo dismissing the services of Bachly.

At a site meeting attended by the defendant and representatives of NFA, the representative of Bachly acknowledged the problems with the work done to date and requested the opportunity to fix them. This opportunity was denied by one of the representatives of NFA. The insurance company paid-out the cash settlement, NFA took over the project, and Bachly

remained unpaid for the work it had completed. The plaintiff argued that it had acted in good faith and that, at the time when Ms. Lajlo repudiated the contract, Bachly was in the course of performing its contractual obligations.

The Court found that, although the poor workmanship constituted a breach of contract on Bachly's part, it was not a fundamental breach and did not amount to a repudiation of the contract. The Court found that Bachly was entitled to the opportunity to correct the unsatisfactory work. In not providing such an opportunity, Ms. Lajlo had failed to mitigate her damages. Furthermore, the Court found that at the time Ms. Lajlo terminated her contract with Bachly her true motivation for terminating the contract was not the defective workmanship, but rather to engage in the contract with NFA and receive a cash pay-out from the insurer. As a result, the Court awarded Bachly damages for wrongful termination of the contract.

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Privilege Clause Upheld Again

In *Aloia Bros. Concrete Contractors Ltd. v. Regional Municipality of Peel (2008)*, 92 O.R. (3d) 356, the Ontario Superior Court reiterated that a party that issues an invitation to tender may rely on a privilege clause in deciding not to award the tender to any bidder. Furthermore, the tenderee will not be found to have induced a company to submit a bid where it conducted the bidding process in fairness and good faith. In this case, the Regional Municipality of Peel ("the Municipality") issued an invitation to tender for road stabilization work at a total of 5 sites. Ultimately, the Municipality did not award the tender to any of the bidders. Aloia Bros. initiated a proceeding against the Municipality and claimed damages for breach of contract. In the alternative, Aloia Bros. claimed that the Municipality had failed to conduct the bidding process in good faith.

Before proceeding with the planned road stabilization work, the Municipality was required to obtain approval for the work from a variety of agencies and public authorities, including the Niagara Escarpment Commission ("the NEC"). The NEC granted approval, however two local residents, Tony and Maria Vander Park, objected to the NEC approval. The objection of the Vander Parks necessitated an appeal hearing. Based on information received from the NEC, the representatives of the Municipality believed that the Vander Parks would withdraw their appeal.

On June 22, 2005 all the prospective bidders attended a mandatory site meeting and had the opportunity to ask Municipality representatives about the details of the project. The bidders were informed that most of the necessary permits were in place and that the permit from the NEC was expected to be received in time for the work to begin according to schedule.

The timelines in this case are not insignificant. Some of the work that needed to be completed on the project was in-water work, and the window of time in which to complete that work only lasted from July 1st to September 15. This time-line was clearly established by the Municipality in the instructions to prospective bidders. The Municipality received NEC approval on April 14, 2005

and the Vander Parks filed their objection on April 28, 2005. The Municipality and its consultants met with the Vander Parks on May 20, 2005 and organized a public meeting with all the affected property owners on June 6, 2005. The Municipality hoped that it would be able to alleviate any concerns of local residents through these meetings. After the meeting of June 6, it was clear that only the Vander Parks objected to the project. It was sometime after the meeting of June 6 that NEC provided information to the project manager of engineering and construction for the Municipality that led him to believe the appeal would be withdrawn. The invitation to tender was issued on June 15, 2005. Tenders closed on June 29, 2005. The Vander Parks did not abandon their appeal and the appeal was heard on July 7, 2005. The decision in the appeal, which was ultimately unsuccessful, however, was not rendered until September 7, 2005. On July 12, 2005 the Municipality informed all of the bidders that the contract had been cancelled.

After the Municipality cancelled the contract, Aloia attempted to negotiate with the Municipality to perform the work on the site that did not require in-water work immediately and to undertake the in-water portions in 2006. The Municipality declined to negotiate and invoked the terms of the tender documents.

The tender documents clearly contained a privilege clause that stated, "The lowest or any bid will not necessarily be accepted." The documents also made it clear that approval from a variety of local agencies and authorities, including the NEC, was required before the project could commence. Furthermore, the documents stipulated that in the event the necessary approvals were not issued the Municipality reserved the right not to award the contract and cancel the call for bids; award the contract in whole or in part, subject to a right to cancel all or part of the contract if the approvals could not be obtained; or to delay consideration of the award of the contract.

Aloia alleged that the Municipality acted unfairly and in bad faith by failing to advise prospective bidders about the Vander Park appeal, and that this failure to disclose important information induced the company to prepare a bid. In addition, Aloia alleged that the reassurances provided by the Municipality at the mandatory site meeting, suggesting that the project would proceed, amounted to a collateral warranty that the contract would be awarded. The Municipality relied on the privilege clause to justify its decision to cancel the bidding process.

With respect to the cancellation of the bidding process, the Court found that the Municipality was entitled to invoke the privilege clause in the tender documents. Furthermore, the Court held that the evidence did not support the allegation that the Municipality acted unfairly and in bad faith, but rather supported the contrary view. Bidders knew that permits and approvals were required to be in place before work could commence. The Court also found that, to the extent the bidders were left with the impression that there would be no impediment to obtaining the necessary permits at the site meeting, this impression was not created because the representatives of the Municipality wished to mislead the bidders. Rather, the Municipality's representatives had every reason to believe that the Vander Parks complaint would be resolved in their favour in time to proceed with the project. In the result, the Court held that the

Municipality had conducted itself appropriately throughout the bidding process, including in the cancellation of the contract, and Aloia Bros.' action against the Municipality was dismissed.

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Court Reviews Standing and Conflict Issues in Government Bid

In *Irving Shipbuilding Inc. v. Canada*, [2008] F.C.J. No. 1500. Irving Shipbuilding Inc. ("Irving") and Fleetway Inc. ("Fleetway") applied for judicial review of a Public Works contract awarded to CSMG in relation to in-service support for a group of Canadian submarines. This case raised a number of issues, including the appropriate jurisdiction of the application, and whether or not there existed a conflict of interest. Most importantly, this case provided clarity with respect to which parties have standing to bring an application for judicial review in a procurement context.

A call was made for bids in relation to in-service support for submarines and bids were submitted by CSMG and two other bidders. CSMG was a corporation formed by Devonport Management Ltd. and Weir Canada Inc. for the specific purpose of bidding on the Public Works submarine contract. Weir employees had been involved in the development of the Statement of Work that led to the Request for Proposals and at least one of those employees was a member of the CSMG bidding team. All the bids were rejected because they did not meet the mandatory requirements laid out in the request for proposals.

The call for bids was reissued by Public Works and, on this second occasion, CSMG and one other bidder met the requirements. CSMG was rated more favourably than the other bidder on the technical elements of the bid. As a result, Public Works negotiated and entered into a contract with CSMG.

Irving and Fleetway ("the Applicants") sought judicial review of Public Works' award of the contract to CSMG. The Applicants were not direct parties to the bidding process. Rather, they were subcontractors of an unsuccessful bidder. The applicants alleged that the CSMG bid should not have been considered because employees of a related company had been involved in both the statement of work that led to the initial request for proposals and the bid by CSMG. The Applicants asserted that this created an unfair conflict of interest. They also alleged that CSMG did not meet mandatory bid requirements with respect to the existence of shipyard facilities.

Generally, where there is a complaint with respect to the award of a federal government contract, that complaint will be heard by the Canadian International Trade Tribunal ("CITT"). Given the nature of the work at issue, (i.e. in-service support for Canadian submarines) the Department of Public Works invoked the national security exceptions available under the *Agreement on Internal Trade* ("*AIT*"). As a result, the Federal Court rather than the CITT was the appropriate forum for the complaint to proceed and an application for judicial review the appropriate mechanism. (See the article on the *AIT* and CITT in this issue.)

The Federal Court held that Irving and Fleetway did not have standing to make an

application for judicial review of the decision of Public Works. As the subcontractors of the unsuccessful bidder, the Court found that Irving and Fleetway were not directly affected by the Public Works decision. For a party to be directly affected it could not rely on intermediaries. In this case, the unsuccessful bidder was a necessary intermediary to establishing any link between the Applicants and the decision of Public Works. If Irving and Fleetway had formed a corporation with the failed bidder, or if that bidder had stipulated benefits for its contractors in its bid, the result would likely have been different. As these steps were not taken, however, Irving and Fleetway were not directly affected and did not have standing to bring the application for judicial review.

The Court, in case it had erred in determining that the Applicants did not have standing, went on to consider the allegations of conflict of interest and failure to meet mandatory bid requirements. The Court found that, although there was reason to be concerned about conflict in the first round of bidding, there was no reasonable apprehension of conflict with respect to the second bid, "*in the sense of CSMG being able to use Weir's insider knowledge to its advantage*." (para. 40). Any advantage CSMG would have had in the first bidding process was ultimately irrelevant because its bid failed. Presumably, the Court felt that, at the time of the second bid, no advantage to CSMG remained. Finally, the Court found that there was no evidence to suggest that CSMG had failed to meet the mandatory bid requirements with respect to shipyard facilities. In short, the Court found that the Applicants did not have the standing to bring an application for judicial review, but even if they had, the Applicants had failed to demonstrate either conflict of interest or a failure on the part of CSMG to meet the bid requirements.

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Court confirms extension of contract not unfair -- but decision depended on specific legislation

In *R. v. Crown Paving*, [2009] N.J. No. 26, Crown Paving sought to appeal a decision dismissing its cause of action against the provincial government's Department of Transportation. The appeal was unsuccessful and the case confirmed that, in some circumstances, it may be permissible to extend an existing contract and cancel the call for bids. This may be true even if the contract extension is granted to an entity taking part in the bidding process.

The Department of Transportation ("the Department") issued a call for tenders in relation to the maintenance of a portion of highway in Labrador. The tender documents contained a privilege clause stating the Department was not required to accept the lowest or any tender. All of the bids submitted were significantly higher than the government had anticipated. As a result, the Department entered into an agreement to extend the existing contract held by Glenn Corporation ("Glenn") and then cancelled the call for tenders. Another short term contract extension was subsequently granted to Glenn.

Glenn had been one of the companies that bid on the project. Crown Paving had been identified by the Department as the preferred bidder. Crown Paving was

notified of its preferred bidder status by the Department, but was informed that because the bids were significantly higher than expected they would require Treasury Board approval. Crown Paving brought an action seeking damages for breach of contract, but the trial court dismissed the action.

At issue on appeal was whether the short term contracts to Glenn were contract extensions permissible under the *Public Tender Act* or whether they were renewed or new contracts. Additionally, the Court had to consider whether, even if the contracts were permissible under the *Public Tender Act*, the Department had breached its duty of fairness to Crown Paving.

The Court found that the short duration of the contracts supported the conclusion that they were extensions rather than renewals or new contracts. Further, the Court found that these were valid under s. 5 of the province's *Public Tender Act*, which governed the circumstances of permissible government extension of contracts. The Court noted however, "*Where there is more than one extension, or a lengthy extension, of the original contract, the courts will be vigilant to ensure that such extensions do not, in fact, amount to a renewal of the contract. Multiple or lengthy extensions may not be used to circumvent the objectives of the Public Tender Act*." (para. 16) The Court clarified that, subject to the other party's agreement of course, the government might exercise its discretion to extend a contract under s. 5 of the *Act* whether or not the contract itself contained a clause delineating this right.

While the Court supported the trial judge's conclusion that the contract extensions granted to Glenn were permissible under the *Act*, the Court of Appeal was also required to consider whether or not the Department had acted fairly and in good faith. In determining whether the Department had acted fairly and in good faith, the Court held that it was necessary to refer to the existence of the privilege clause: "*Where a privilege clause is contained in the call for tenders, the duty of fairness must be assessed within the context of that clause. That is, the obligation to treat bidders fairly cannot be used to render the privilege clause ineffective.*" (para. 48) The Court commented that the duty of fairness requires the procuring party to protect the integrity of the bid process, including protection from the exercise of bid shopping. The Court found that in extending Glenn's contract, the Department was not engaging in bid shopping, but rather using the extension as "*a bridging measure to permit the Department time to assess alternatives for dealing with work that could not be postponed*." (para. 48) This bridging measure did not undermine the integrity of the bid process, and the Court found that in some cases extension of an existing contract represents a viable and necessary option. The Court also found that Crown Paving had not been unfairly induced into bidding on the project, nor had the Department unduly delayed informing Crown that the bid had been cancelled. In the result, Crown Paving's appeal was dismissed.

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