Federal Court Cour fédérale

Date: 20150227

Docket: T-1097-13

Citation: 2015 FC 257

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 27, 2015

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

AIRBUS HELICOPTERS CANADA LIMITED

Applicant

and

THE ATTORNEY GENERAL OF CANADA
and
THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA
and
BELL HELICOPTER TEXTRON CANADA LTD.

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Airbus Helicopters Canada Limited [Airbus] is challenging the contract award process conducted on behalf of the Government of Canada by the Minister of Public Works and Government Services Canada [PWGSC], which concluded with the purchase of light-lift helicopters to replace the aging fleet used by the Canadian Coast Guard [CCG].

[2] The contract was eventually awarded to Bell Helicopter Textron Canada Ltd. [Bell] on May 9, 2014 (affidavit of Sandra Howell, September 19, 2014). In fact, Airbus chose not to bid in response to the request for proposals that was issued by PWGSC on April 3, 2013, following a consultation process with the industry. Airbus participated in the process leading up to the request for proposals. Only one bidder, Bell, responded to Solicitation No. F7013-120014/C, which closed on June 4, 2013.

[3] The contract is for the purchase of 15 helicopters, and could be worth up to $172 million, according to the press release that announced the awarding of the contract on May 12, 2014.

[4] An abridged chronology might be helpful in explaining the process followed in granting the contract:

March 2012: Federal budget

August 17, 2012: Letter to potential bidders in the industry inviting them to express an interest in the project

August 29, 2012:	First reaction from Airbus
September 4, 2012:	Meeting day with industry
September 6, 2012:	First day meeting one-on-one with Airbus
November 15, 2012:	Second day meeting one-on-one with Airbus
January 11, 2012:	Letter from Airbus clarifying, among other things, the Detailed Mission Requirements it wants to receive
February 6, 2013:	Third day meeting one-on-one with Airbus; Airbus announces it is withdrawing
February 13, 2013:	PWGSC reply
March 4, 2013:	Fourth day meeting one-on-one with Airbus
18 March 2013:	Another Airbus letter on Detailed Mission Requirements
April 3, 2013:	Opening of the tendering period: request for proposals
June 4, 2013:	Close of the tendering period
May 9, 2014:	Contract awarded

[5] This is therefore an application from Airbus for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, challenging the process that led to the request for proposals and ultimately the contract that was awarded in May 2014. Obviously, since Airbus

did not submit a bid, the request for proposals itself is not being challenged, but rather the refusal by PWGSC to reconsider and modify certain technical requirements contained in said request for proposals. According to Airbus, requests for modifications were refused despite its often repeated claims that the requirements were tailored specifically to suit Bell. We are therefore dealing with events prior to the request for proposals, not after it was issued.

II. The parties

[6] Both Airbus (Eurocopter at the time the procurement process was initiated) and Bell are well known in the aerospace industry. They both manufacture helicopters and they are competitors. There are other competitors in this market, but not many. There are only three serious competitors besides the two protagonists in this case. In fact, the top five players, along with a few others, all responded to a letter of interest, but only three pursued this interest, including, of course, Airbus and Bell. Ultimately, Bell was the only manufacturer to bid.

[7] Airbus and Bell are Canadian subsidiaries of companies headquartered outside Canada. As for the Government of Canada, PWGSC is given responsibility for procurement processes through its enabling legislation (*Department of Public Works and Government Services Act*, SC 1996, c 16), which states that "the Minister may, on behalf of the Government of Canada, enter into contracts for the performance of any matter or thing that falls within the ambit of the Minister's powers, duties or functions" (section 20). Furthermore, given that the helicopters were intended to renew the CCG's helicopter fleet, the Department of Fisheries and Oceans was involved in the procurement process (the CCG is an entity within that department and its responsible minister is the Minister of Fisheries and Oceans; *Oceans Act*, SC 1996, c 31,

section 41). Finally, the Department of Transport was also involved given that it is responsible for operating the CCG helicopter fleet (affidavit of R. Wight). As we will see, other departments also contributed to the process.

[8] A users group was therefore created once the Government of Canada had announced in its March 2012 budget that funds would be set aside for the purchase of helicopters. This group was composed of officials from different units within the CCG and the Department of Transport. However, PWGSC was ultimately responsible for managing the procurement process with the CCG, which was in charge of defining the technical requirements, since it was familiar with the various operational requirements. The first draft of the technical requirements was prepared by this group. The consultations were conducted based on this document, which was modified over the ensuing months. This document was the basis for the draft request for proposals that was completed after the second round of one-on-one meetings with interested companies. Said document is understood to have been prepared between late November 2012 and early January 2013. I will be returning to the governance structure of the procurement process.

[9] Since this is not a case in which the law predominates, it is necessary to review the facts with a certain degree of detail. To succeed, the applicant must meet the burden imposed on it. For their part, the respondents argue not only that the burden has not been met, but that their evidence is clear and refutes the applicant’s case.

III. The theory of the case and the applicant's evidence

[10] The theory of the case put forward by Airbus is ultimately quite simple. The applicant argues that the request for proposals that resulted from the consultations conducted by government representatives was tailored to enable Bell to win. Airbus contends that the technical requirements were designed based on the specifications for the aircraft provided by Bell (the Bell 429). Airbus goes as far as to maintain in its memorandum of fact and law that

> [TRANSLATION]
> . . . despite the appearance of an impartial, fair, open and transparent competitive call for proposals process, the Government of Canada had decided from the start to award the contract to Bell, and that the procurement process was conducted in a manner that ensured that the Bell 429 would be the only aircraft that would meet the project's technical specifications.
>
> [Para 3]

(See, to the same effect, the affidavit of Guillaume Leprince, Airbus Vice President of Sales and Marketing, paras 21 to 24. It was Mr. Leprince who presented the evidence on behalf of Airbus. The company also used the services of an expert.)

[11] This is not a trivial accusation. At the hearing, counsel for Airbus maintained that they were not arguing that there had been a conspiracy within the government. Nevertheless, the theory of the case maintains that from the very beginning of the process, the technical requirements substantially favoured the Bell 429. Requests by Airbus to reduce the technical requirements did not receive the desired response. Moreover, Airbus complains that on numerous occasions, it requested additional information about the profiles of the missions to be conducted by the CCG so that it could offer alternatives. Rather than satisfy the requirements imposed by

the process, Airbus sought to identify the customer's needs in order to address them outside of the constraints of the technical requirements. Clearly, Airbus wanted to avoid, and even challenge, the onerous technical requirements imposed by PWGSC by arguing that they could not be required based on the type of work to be performed by the new helicopters (Mr. Leprince's affidavit, paras. 39-41).

[12] There is no doubt in my mind that Airbus realized before the consultation process had even begun that it could not easily meet the original technical requirements, because it very early on asked not to determine if it could meet the requirements, but rather to receive the CCG mission profiles. By August 29, 2012, Airbus was already complaining. The following complaints can be found in its response to the letter of interest issued by the government on August 17, 2012:

> 1-4 Insert your key conclusions and recommendations. Two pages maximum – use the other sections to provide details
>
> Eurocopter welcomes GoC decision to move ahead with replacement of the current CCG fleet. As planned, holding an Industry Engagement Session as well as one on one sessions with potential bidders to finalize the requirements of the RFP is certainly a step in the right direction. Our comments and recommendations by analysing the contents of the LOI and the draft copy of the mission requirements include:
>
> - Mission Oriented RFP: GoC should focus on the specific mission requirements of the CCG and be careful on including specifications of a given platform as a reference for the RFP. This approach may limit the numbers of options that may be available to fulfill the mission requirements and also curtail the competition amongst the bidders. We are sure GoC wants the best for CCG missions and would be open to discussing in detail the operational details on the intended use of different class of helicopters. This way Bidders [*sic*] will not only be able to answer the requirements but also propose their respective solutions to the missions including value added product features that

> may not have been thought about for the CCG mission needs.
>
> [At page 6 of 16]

Further on, we read the following in the conclusion:

> 9-1 Indicate any other areas of concern that Canada may be interested/concerned with that would aid in providing a recommendation for improvement.
>
> Requirements should be more mission oriented than technically driven. We invite GoC to work with the industry to provide a solution fitting the operational requirements. GoC should be open to alternative solutions regardless of the type of aircraft (light, medium, polar) to ensure suitable solutions for the Canadian Coast Guard of Canada.
>
> Public works should carefully define requirements to allow several platforms to be compliant in order to have a fair competition for the benefit of Canada.
>
> [At page 16 of 16]

Airbus had already consulted the Preliminary Draft CCG Helicopter Requirements Document—Light and Medium Helicopters, Industry Day, September 2012, which listed a series of technical requirements and was provided to interested parties for purposes of the initial discussions between the government and industry, which took place on September 4, 2012.

[13] Moreover, as early as the industry day held on September 4, 2012, access was provided to seven CCG mission profiles describing CCG activities. A document entitled CCG Helicopter Mission Profile Document was made available. The applicant argues that the description there is very short. The preliminary technical requirements developed for consultation purposes in the Preliminary Draft CCG Helicopter Requirements Document—Light and Medium Helicopters,

Industry Day, September 2012, are considered by the applicant to be too onerous and specific. It wanted to offer alternatives based on mission profiles. Airbus continued in this vein up until the request for proposals was issued on April 3, 2013, and the same arguments are presented in the application for judicial review.

[14] In addition to quickly forming the opinion that the technical requirements could not easily be satisfied, the applicant decided that they favoured Bell, to the detriment of Airbus. This characterization is very general in nature, and Airbus only precisely identified a few technical requirements. The evidence presented through the affidavit of G. Leprince referred to the individual consultation session held on September 6, 2012. We read the following at paragraph 59:

> [TRANSLATION]
> 59. We then explained how the Preliminary Requirements for the light-lift helicopters were discriminatory to other potential suppliers, including Eurocopter Canada, AgustaWestland, MD Helicopters and Sikorsky. With regard to light-lift helicopters, we highlighted the following:
>
> (a) requirement 6.4 states that the aircraft must be certified to operate and fly at an exterior ambient air temperature between -40°C and +50°C, while the only aircraft certified to fly at -40°C is the Bell 429;
>
> (b) requirement 7.3.5.1.2 states that the aircraft must be equipped with a bleed air heater system or equivalent, with an appropriate de-icing capacity to operate in winter conditions at a temperature of -40°C, while the only aircraft that meets this requirement is the Bell 429; and
>
> (c) the combination of requirements 7.3.5.12.1 and 7.3.4.2.1 requires that the aircraft be equipped with skid landing gear and a four-axis digital automatic flight control system and flight director, while the only aircraft that meets these requirements is the Bell 429.

We do not find any greater precision coming directly from Airbus during the procurement process with regard to the allegation that the technical requirements were modeled after the technical specifications of the Bell 429. What is found through an examination of the evidence is that the alternatives proposed by Airbus over time in fact reduced the technical requirements. There is therefore a connection between the technical requirements considered by Airbus to be too stringent and the mission profiles: if the profiles were shown not to reflect reality, it might be possible to demand changes to the associated requirements.

[15] Thus, well after the request-for-proposals process had already begun, Airbus was still corresponding with PWGSC. This correspondence continued along the same lines, i.e., with Airbus claiming that the requirements were too stringent to allow it to participate in the request-for-proposals process. Some of these requirements had even been strengthened.

[16] On April 17, May 2, and May 17, 2013, Airbus wrote to PWGSC to continue to complain about the mission profiles, arguing that the technical requirements were too stringent for the mission profiles identified in these letters.

[17] The third individual consultation session, held on February 6, 2013, focused on the comments of a senior Airbus official, who announced that the applicant could no longer continue its participation in the process. What had become a mantra was repeated yet again:

> This confirms what Eurocopter [since become Airbus Helicopters Canada Limited] has been telling you for the last 6 months. The lack of real mission understanding, working only on technical parameters prevents us to understand the rationale behind the changes of requirements.

> It is in the Government of Canada [*sic*] best interest to present mission oriented requirements to the industry in order to obtain a best value proposal for the Coast Guards [*sic*]. We already addressed this issue several times in verbal and in written communications. This is the process followed by the Fixed Wing SAR project for which the industry consultation is constructively ongoing.
>
> [Exhibit P-30, affidavit of Mr. Leprince]

[18] PWGSC responded precisely to the specific elements raised in the February 6 letter in its letter of February 13, 2013. I note in particular its response to the Airbus comment to the effect that it had been serving the CCG with its helicopters for 25 years: "It is understood that Eurocopter has been serving the CCG for over 25 years and we believe that Eurocopter would have a great understanding of how the helicopter fleet is currently operating to achieve their mandate". The applicant continued to complain about having insufficient information with regard to mission profiles, or that the profiles did not justify the technical requirements that were being imposed.

[19] In fact, Airbus went further than to complain about the mission profiles provided. In letters sent by Airbus to PWGSC on January 11 and March 18, 2013, Airbus clarified the information it was seeking (Exhibits P-26 and P-33 in the affidavit of G. Leprince). I am reproducing the excerpt, which is identical in the two letters:

> The following are a few examples of Detail Mission Requirements as opposed to technical requirements that could be provided:
>
> - Number of bases to be equipped for each type
> - Number of vessels equipped for each type
> - Description of Night Mission
>   - Number of passengers
>   - Length
>   - Load

- Distance Flown from Shore to Ship for each mission
- Number of cargo / pax for each mission
- Percentage of usage for each mission of the helicopter type, per year
- Availability targets per type, per year
- Description of the loads
- How far do you need to go and with how many pax's

[Letter of January 11, 2013]

Regarding the mission requirements requested, our previous communications were asking for detailed Mission Requirements as opposed to technical requirements including but not limited to the following:

- Number of bases to be equipped for each type
- Number of vessels equipped for each type
- Description of Night Mission
  - Number of passengers
  - Length
  - Load
- Distance Flown from Shore to Ship for each mission
- Number of cargo / pax for each mission
- Percentage of usage for each mission of the helicopter type, per year
- Availability targets per type, per year
- Description of the loads
- How far do you need to go and with how many pax's

[Letter of March 18, 2013]

I am far from being persuaded that this is truly an issue of "mission requirements". It is no longer "mission requirements" at issue here but the use of the helicopter fleet: where, when and how the aircraft will be used, rather than responding to the question of what was involved in the missions. These requests can be seen to originate in the response provided by Airbus at the very first one-on-one meeting on September 6, 2012. The same list, in the same order, can be found there.

[20] What is not lacking is repeated requests from Airbus to be given mission profiles in order to offer alternatives. The evidence does not show what these alternatives could have been other than to claim that the requirements were too stringent based on the missions to be carried out. As has already been pointed out, for some important elements, the alternatives would ultimately be to decrease the desired performance.

[21] In fact, the technical requirements identified by Airbus before this Court always appear to suggest that its aircraft is less efficient, and not that the requirements are unprecedented. When it comes to a general allegation, the Court is referred to the working documents, in the form of tables, prepared by Airbus, which are intended to demonstrate that the technical requirements only favour Bell (in particular Exhibit P-46 in Mr. Leprince’s affidavit). The only real precision is actually found in Mr. Leprince’s affidavit, at paragraph 59, the content of which is reproduced at paragraph 13 of these reasons. The evidence will show, moreover, that requirements 6.4 and 7.3.5.1.2 were actually amended during the consultations.

[22] Following the fourth day of one-on-one meetings held on March 4, 2013, Airbus provided details of the technical requirements that would limit its ability to bid (letter of March 21, 2013, and affidavit of G. Leprince, at paras 96 to 104). The clear implication is that the aircraft that Airbus had available did not meet the requirements for payload and range. These are not simple details. The alternative proposed by Airbus was to reduce the range or payload. Airbus also complained about the required blade folding width for the helicopter. This time no alternative was offered other than to work with the CCG. In terms of the altitude limit for in-

ground effect hover, the alternative was to reduce the payload or the required altitude (from 7,000 to 6,000 feet). There was also an issue with regard to the flight director.

[23] The response received from PWGSC on April 4 was that the requested reductions to the payload or range represented decreases of 9% and 7% in the requirements, which would have a significant impact on operations. The same comment was made with regard to the altitude limit for in-ground effect hover. The response concerning the required blade folding for helicopter parking was particularly unequivocal:

> Your March 21, 2013 letter repeats Eurocopter's request in the Round 4 meeting of March 12, 2013 that CCG's maximum blade folding width requirement be 3.8 m to allow Eurocopter to bid the EC 135. Each and every one of Canada's requirement (*sic*) is based on the missions as described in the Mission Profile document provided to all bidders, and not on specific makes or models.
>
> As was specifically described in the March 12, 2013 meeting with Eurocopter, given CCG's shipboard hangar door width of 4.08 m, providing a maximum blade folding width of 3.8 m provides approximately 0.14 m of space between the helicopter and each side of the hangar door. A 0.14 m gap between the door and the helicopter is insufficient for at-sea operations.

[24] The applicant offered two additional elements in support of its position. Airbus presented a witness, Corey Taylor, who had examined the available documentation and concluded that the original request for proposals, on which comments from the industry were requested, unduly favoured Bell. The other element was in regard to a weight exemption obtained for the Bell 429 helicopter in 2011; Airbus contends that this is proof of the government's preference for Bell's product.

[25] As for the weight exemption, the evidence shows that in an e-mail dated June 17, 2010, a Transport Canada official reported to his supervisor that six months earlier, in December 2009, the CCG chief pilot, also an employee of Transport Canada, had asked the author of the e-mail about the possibility of granting a weight exemption at take-off for the class of helicopters to which the Bell 429 belonged. According to the e-mail, the chief pilot had indicated that this helicopter would be "a great aircraft for them." The e-mail indicated "I told him the bad news about the GW limit for Part 27 helicopters but we started throwing the idea around up here in Flight Test and thought why not?" (GW refers to gross weight). The e-mail concludes by describing the regulatory difficulties:

> From a technical standpoint the 429 is already or very nearly designed to 7500 lb. The big problem appears to be how to handle it from the regulatory standpoint. What we were thinking was a flight manual supplement for 7500 lb for Canadian-registered aircraft only (EMS operators would love another 500 lb of payload). How we deal with the 7000 lb max gross weight in 527.1 is another matter. Exemption, special condition, restricted type certificate…? Anyway, from our perspective in Flight Test, we support Bell's proposal. There have been some rumblings about Agusta requesting a similar increase in Max GW for the new A109 Grand New from EASA but I can't vouch for their authenticity. Just some food for thought.
>
> [Exhibit 1 to the affidavit of Michael Laughlin, Chief Pilot of the CCG, dated November 1, 2013]

When cross-examined by Airbus, Mr. Laughlin had a very unclear recollection of a conversation that would have taken place four years earlier.

[26] The submissions include e-mails between Transport Canada officials, from which the applicant attempted to extract evidence of cronyism involving junior officials to prove that the Government of Canada had demonstrated favouritism toward Bell.

[27] The applicant also argued that both the American regulator (the Federal Aviation Administration [FAA]) and the European regulator (the European Aviation Safety Agency [EASA]) had refused the same exemption. However, 15 regulators in addition to Canada did accord it. Finally, the evidence shows that Airbus complained to a member of the party in power, who referred the matter to the Minister of Transport. The Minister did not ignore his colleague's letter; the weight exemption was granted after senior officials in the Department of Transport had been made aware of the allegations. In addition, the file before the Court reveals that the Department of Transport had been alerted and that it was not just junior officials who were involved.

[28] The file also shows that Department of Transport officials were aware of the Airbus viewpoint and had been in contact with the FAA and EASA. In an e-mail from the FAA to Transport Canada dated July 7, 2011, the FAA noted its reservations, although Bell had not as yet made a request to US authorities. On August 8, 2011, an e-mail from the EASA to Transport Canada noted that the legal systems were different and that a decision to grant a weight exemption could only be reached after an elaborate process. The e-mail indicated a preference for harmonization among the three agencies (affidavit of G. Leprince, Exhibit P-13).

[29] The file also shows that not only was Bell given weight exemptions by 15 other regulators, but that Airbus, which was clearly aware of the application for exemption since the evidence establishes that it was in communication with Transport Canada, did not request an exemption for itself. Nor did it challenge in court the exemption given to Bell by Canadian authorities, despite having informed Transport Canada of its opposition (affidavit of G. Leprince,

Exhibit P-13) and its opposition having been received by Transport Canada. The weight exemption was granted on December 28, 2011.

[30] This may explain why, at the hearing, Airbus focused more on the appearance of cronyism that it contended was suggested by some internal e-mails. We are not talking therefore of collusion, let alone fraud; Airbus does not go further than to suggest bias. But then, this bias would have occurred at the lower levels of the department. It therefore could not explain the departmental decision that was reached despite formal opposition from Airbus and the fact that the Minister himself had been made aware of the complaints. These complaints had even led to a letter from an assistant deputy minister of Transport Canada, on July 25, 2011, seeking to reassure Airbus executives that the application for a weight exemption would be handled in accordance with criteria established under the *Aeronautics Act*, RSC 1985, c A-2. This same letter stated that "[i]t should be noted that any other manufacturer of a comparable rotorcraft is eligible to apply for a similar exemption" (affidavit of G. Leprince, Exhibit P-13). As indicated above, Airbus did not take advantage of this invitation.

[31] The other evidence submitted by Airbus in support of its contentions is the affidavit of Corey Taylor, a helicopter pilot who undoubtedly has considerable experience in that field. He claimed to be familiar with the limits of most helicopters certified in Canada and to be knowledgeable about requests for proposals as he works for a company that provides helicopter transport services. As was mentioned during the hearing, Mr. Taylor does not have technical qualifications (his CV, which is Exhibit N in his affidavit, indicates that he completed high school and therefore has no particular aeronautics training), and his expertise, including that

relative to requests for proposals, is limited to the transportation of goods and people, and not the procurement of helicopters. According to his CV, he has spent his career as a pilot and manager (base manager, project manager, operations manager, exploration manager, and at the time of the affidavit, general manager of Great Slave Helicopters Ltd.)

[32] Mr. Taylor sought to testify with regard to the technical requirements in the request for proposals that could be tailored to fit one aircraft in particular. That is in fact the conclusion that he reached. To do this, he consulted flight manuals for different helicopter models, among other documents.

[33] At paragraph 24 of his affidavit, he states as follows:

> 24. The requirements, that leave only the Bell 429 in compliance, include:
>
> (a) 6.4 – Minimum operating air temperature (EC135 and AW109 disqualified);
>
> (b) 6.7 – Ditching standards (only the Bell 429 makes any claim to meeting ditching standards from what I have been able to determine);
>
> (c) 7.3.5.2.1 – 4 Axis Autopilot (EC135 eliminated);
>
> (d) 7.3.5.5.1 – Cargo compartment size (EC135 and AW 109 disqualified); and
>
> (e) 7.3.5.22.3 – Rear facing cargo doors (AW109 disqualified).

[34] The affiant adds the following at paragraph 131 of his affidavit:

> 131. As a result of the way that they have been drafted, the Technical Requirements have had the effect of excluding all

> aircraft other than the Bell 429 from the competition, as follows:
>
> (a) The AW109 is eliminated because of non-compliance with items 6.4, 7.2.1 and 7.2.3, although it gains 20 bonus points for 7.2.2;
>
> (b) The EC135 is eliminated because of non-compliance with items 7.1.2, 7.2.1 and 7.2.3, but gains 50 bonus points for item 6.4 and 60 bonus points for item 7.2.2;
>
> (c) The MD902 is eliminated because of non-compliance with the Canadian IFR certification and item 7.1.4.

We understand the affiant to be referring to manufacturers' helicopter models.

[35] The applicant seeks to draw two arguments from this evidence.

[36] First, the Minister of PWGSC acted unlawfully in that his action was arbitrary and unreasonable. It became clear during the hearing that when the applicant spoke in terms of "excess of jurisdiction", the reference was to the exercise of discretion inherent in the granting of contracts. Judicial review must be based on the standard of reasonableness in this case. This contrasts with the standard of correctness, which applies to true questions of jurisdiction, as set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], at paragraph 59 of the decision:

> [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is

> intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[37] It is clear to me that this is not at all what the applicant is contending. Its argument is rather that the favouritism demonstrated toward Bell is contrary to the law and government policies. A customized request for proposals cannot be reasonable. It cannot satisfy the law (section 40.1 of the *Financial Administration Act,* RSC 1985, c F-11) or the regulations (*Government Contracts Regulations,* SOR/87-402). Section 40.1 reads as follows:

Commitment	**Engagement**
40.1 The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.	40.1 Le gouvernement fédéral s'engage à prendre les mesures indiquées pour favoriser l'équité, l'ouverture et la transparence du processus d'appel d'offres en vue de la passation avec Sa Majesté de marchés de fournitures, de marchés de services ou de marchés de travaux.

A customized request for proposals would also violate policies aimed at promoting healthy competition (Contracting Policy) and meeting operational needs in a way that provides the best value (Procurement Review Policy). The refusal to reconsider the technical requirements would render the exercise of discretion unreasonable.

[38] The other argument proceeds from an alleged breach of procedural fairness. In this regard, the standard is less demanding for an applicant because it is not that of reasonableness, but of correctness. Here, the applicant challenges the decision to not change the technical requirements on the grounds that it was not impartial. According to the applicant, the criterion that should be applied is the appearance of bias: would this give rise to a reasonable apprehension of bias on the part of a well-informed person? Fairness, transparency and openness are required in the awarding of public contracts.

[39] Here, the applicant basically repeats the elements of its first argument in contending that the Minister failed in his duty to be impartial by favouring Bell and turning a deaf ear to the requests of Airbus, and in not responding to repeated requests to provide additional information on CCG mission profiles. The applicant pointed to the weight exemption that was granted for the Bell helicopter as demonstrating favouritism, as well as the technical requirements that Bell satisfied.

[40] Moreover, the applicant argued that the Minister violated the commitments that were made, and repeated, to act in the fairest and most impartial manner. As proof of this, it points to the engagement agreement that participants were required to enter into before the process began.

Indeed, the letter of interest (affidavit of G. Leprince, Exhibit P-2) states as follows:

[TRANSLATION] "One of the fundamental principles of the industry consultation is that it is conducted with the highest degree of fairness and equity among all parties. No person or organization shall receive, or be perceived to receive, any unusual or unfair advantage over the others."

[41] A second component of the breach of procedural fairness would be related to the legitimate expectations of Airbus. Again, there is a certain relationship with the first argument as to the reasonableness of the discretion exercised in awarding the contract. On this front, the applicant submits that it was entitled to expect that the request for proposals would be [TRANSLATION] "biddable", implying that the Minister should have taken into account the comments and proposals Airbus had provided between August 2012 and April 2013, and that the Minister would act with the utmost impartiality and as fairly as possible. Airbus argues that it was disappointed in these legitimate expectations.

[42] The applicant therefore asks that the contract that was awarded be cancelled due to a defective process, and that the Minister establish a new process leading to a new request for proposals.

IV. The defence

[43] The respondents vigorously attacked the allegations made in the application. The Attorney General, on behalf of the Minister of PWGSC, as well as the other organizations that participated in the procurement process for CCG helicopters, defended the process and sought to

demonstrate that the technical requirements criticized by Airbus were based on operational requirements and were fair and reasonable. Bell, which won the contract, fully supported the Crown and contended that the affidavit of Mr. Taylor was not that of an expert, or at the very least, carried little weight. Bell argued that if for some reason the Court agreed with Airbus, the appropriate remedy would not be to cancel a contract on which the applicant did not bid.

A. *The Crown*

[44] One of the respondents, the Crown, sought to demonstrate that the structure established for the procurement of helicopters ensured that the alleged bias was quite simply not possible; checks and balances were incorporated into the process to guard against the type of allegations being brought by Airbus in this case. The Crown met all of its commitments, and the process that was implemented was of the highest integrity.

[45] In addition, the Crown submitted evidence to show that the technical requirements were necessary for the wide variety of missions conducted by the CCG. Thus, the decisions being criticized by the applicant to not reconsider and modify certain technical requirements in the request for proposals were in fact reasonable and therefore unassailable.

[46] As to the allegations that the process that was followed violated procedural fairness, particularly because it interfered with the applicant's legitimate expectations, the Crown strongly defends what it considers to be a model process. The process that was selected and used was fair: it sought to involve industry well before the request for proposals was issued on April 3, 2013. But it could not cause the Minister to refuse to exercise the discretion required of him by law.

Draft technical requirements were provided to everyone, and meetings were organized with those who had chosen to participate in the process following a 19-page letter sent out in August 2012 to identify interested parties. Numerous changes were made to the technical requirements to promote competition and not accidentally eliminate potential bidders. These changes demonstrate the value and validity of the rigorous process that was put in place and followed. The government was looking for the best helicopter and did not wish to eliminate competition, which promotes the best quality at the best price. On the contrary. But the product had to meet the operational requirements.

[47] The Attorney General argues that in no way did the Minister of PWGSC have a closed mind regarding changes to the technical requirements. The applicant would not be any more successful if the test to be applied were the reasonable apprehension of bias since the evidence does not show any such bias, in appearance or reality. The government promised a process and followed it. This is what was done.

[48] The applicant's contentions are not supported by any evidence, much less solid evidence. In fact, given the high number of participants on the government side, the governance structure and the presence of external parties to ensure a fair process, it would have taken serious fraud on the part of all involved for there to be favouritism toward Bell. No such evidence was tendered. The applicant was careful not to cross that line.

[49] The governance structure put in place shortly after the March 2012 budget remained in place at least until the request for proposals was issued on April 3, 2013. The closing date for tenders was June 4, 2013.

[50] At the heart of the governance was PWGSC, which is legally responsible for managing the procurement process. While two other organizations in particular had an interest in the matter, the Minister of PWGSC was the minister responsible. Thus, the CCG had to determine its operational requirements, which led to the technical requirements of the aircraft to be procured. The Department of Transport provides the pilots and is responsible for maintaining the helicopters. These organizations therefore participated in the various committees established to ensure healthy governance, but it was PWGSC that was primarily responsible for ensuring that the process complied with the standards and the law.

[51] Organization of the process leading to a request for proposals in April 2013 began with the creation of a core team of experts from the three departments. These project managers, members of the CCG and a helicopter pilot (affidavit of R. Wight, para 33), directly supported PWGSC. The core team was assisted by a users group that was established in June 2012 and had more than 20 participants (affidavit of R. Wight, para 32 and Exhibit 1). The result of multiple meetings held by these groups was the Preliminary Draft CCG Helicopter Requirements Document—Light and Medium Helicopters, Industry Day, September 2012, which was intended for use at the initial meeting with helicopter manufacturers that followed a letter of interest issued by PWGSC. As seen above, the letter was dated August 17, 2012.

[52] This broad-based group was headed by a project steering committee mandated to review and approve the technical requirements. In the event that there was disagreement over the requirements, the issue would be resolved by a committee composed of director generals, based on the recommendations of the Project Steering Committee. Finally, the most difficult and contentious issues were referred to a committee of assistant deputy ministers (ADMs), the ADM Integrated Committee, whose membership was expanded beyond the three key departments to include the Department of Industry, the Treasury Board Secretariat and the Privy Council Office, the last two being central agencies (affidavits of M. McNeil and R. Wight). There is evidence that the ADM Integrated Committee insisted on the anonymity of the sources of requests for changes to certain technical requirements.

[53] Finally, PWGSC hired a consultant to serve as a "fairness monitor", while the CCG mandated an employee from the Ontario Ministry of Natural Resources, pursuant to a memorandum of understanding (MOU), to provide "an independent review of CCG's technical requirements for its Helicopter Project, and provide feedback to CCG regarding the requirements". The certification to be produced under the MOU was that the requirements were the following:

- Reasonable for the stated CCG missions and for commercial utility helicopters
- Achievable by manufacturers of commercial utility helicopters
- Unbiased toward any particular manufacturer(s)

[Affidavit of R. Crowell, Exhibit 2]

The agreement between the two ministries was in place between October 1, 2012, and March 31, 2013. The services of Mr. Crowell, the independent expert, were provided free of charge by the

Ontario Ministry of Natural Resources, except for expenses incurred in the exercise of his mandate. In other words, Mr. Crowell did not receive any remuneration from the CCG.

[54] The Attorney General added that there was no obligation to consult prior to issuing a request for proposals. However, the choice to consult, with the support of a fairness monitor and an external consultant who not only is himself a pilot, but also has specific knowledge about the use to be made of such helicopters, along with a very elaborate governance structure from working level to ADMs, could only serve to guarantee the fairness and impartiality of the consultation. A very tight net was woven to avoid accusations of collusion.

[55] None of the Transport Canada officials involved in the exercise leading to the weight exemption for the Bell helicopter (there do not appear to have been other departments or organizations involved) participated in the procurement process in question. Only the chief pilot, who according to the June 17, 2010, e-mail, contacted an official of the Department of Transport in December 2009, would have been a resource person involved with the core group. He was, at most, one of the experts involved in the core group and the users group. No one has suggested that he had any decision-making power or control.

[56] The governance system that was established was both structured and rigorous. A remarkable quantity of minutes documenting the work was submitted as evidence.

[57] This governance structure was put in place for a reason. It oversaw the consultations that the Minister had chosen to hold with industry. Moreover, it was because of these consultations

that the respondent had an opportunity to be heard. It must be understood, however, that the Minister did not abandon his discretion. The August 17, 2012, letter of interest stated so bluntly in the "Terms and Conditions" section, as follows: "If Canada does release a RFP, the terms and conditions of the RFP shall be at the sole discretion of Canada" (affidavit of M. McNeil, Exhibit 6).

[58] The consultation process was intended "to give industry information about the procurement for the Helicopter Project and to obtain from industry the latest information on helicopters, including their capabilities, limitations and available systems and equipment" (affidavit of M. McNeil, para 28). Nowhere do we find that the government was abandoning its management authority. It was going to procure helicopters for purposes that it intended to determine. It had also decided to procure helicopters that already existed, as opposed to having helicopters built based on specifications to be determined.

[59] Following the issuance of the letter of interest, an Industry Day was held on September 4, 2012. The purpose was to provide the information required for individual consultations. The first round of individual consultations took place between September 4 and 6 and involved meetings with 10 interested parties. The meeting with Airbus was held on September 6, and was intended, as were the other consulting sessions, to open a dialogue.

[60] A second round of individual consultations was held between November 15 and 19. A meeting with Airbus took place on November 15 and was attended by officials from the CCG, Transport Canada, PWGSC and Industry Canada.

[61] The period from November 19 to December 12, 2012, was spent reviewing the questions and comments raised during the consultations in order to prepare a draft request for proposals, on which additional individual consultations would be held.

[62] Evidence was submitted demonstrating that significant changes, requested by Airbus, were made and were reflected in the draft request for proposals. The affidavit of M. McNeil, project manager at PWGSC, indicates the following:

- while initially the aircraft offered for sale had to already be certified, it was agreed that certification of a new aircraft could be acceptable up to six months after the bid closing date. As can be seen in the letter that Airbus sent to PWGSC on December 20, 2012, Airbus was insisting that consideration be given to a helicopter that was not yet certified. On reading the letter, it seems clear to me that Airbus was seeking an additional 12-month period after the contract had been awarded. I note that the documentary evidence shows that Airbus also complained that the contract-granting process was proceeding too quickly (letter from Airbus to PWGSC, January 11, 2013);
- the autopilot that was originally requested was amended to satisfy a request from Airbus;
- the capacity to fold the helicopter blades so the helicopters could be parked on CCG vessels was adjusted at the request of Airbus. It appears that in the end, the adjustments were not satisfactory to Airbus because for reasons of security, which were never challenged, there must be a minimum amount of space on either side of the parked helicopter. The Airbus suggestion to allow the blades to be removed

> from the helicopter so it could be parked was rejected for technical and operational reasons. So, one of the problem requirements for Airbus seems to have been that the helicopter blades it could provide to satisfy the CCG could not fold enough to allow the helicopters to be parked in hangars onboard CCG vessels. The waters on which the CCG operates are not always calm, and it was determined that it was necessary to have a place to park the helicopters onboard vessels. While the hangar doors on the vessels are 4.08 metres wide, the blades on the Airbus choppers only close to 3.8 metres, leaving clearance of no more than 14 centimetres on either side to move a piece of equipment weighing several tons into this restricted space. In its letter of March 21, 2013, Airbus offered to work with Transport Canada and the CCG "on solutions that would give them additional comfort with this proposed width." The response from PWGSC on April 4, 2013, which also dealt with other Airbus complaints, quickly disposed of the question, as demonstrated in the passage reproduced at paragraph 22 of these reasons (affidavit of M. McNeil, paras 58 to 62).

[63] The numerous changes that were made in response to recommendations, comments and requests were compiled and presented as evidence before this Court (affidavit of R. Wight, paras 77 to 82 and Exhibits 4 to 7).

[64] Three manufacturers continued with the individual meetings in 2013. At the meeting on February 6, 2013, Airbus made the usual speech (see para 16 of these reasons). The applicant

declined the offer to discuss the technical requirements. A final individual meeting was held on March 4, 2013.

[65] According to the respondent, at no time during the individual sessions did Airbus present one of its helicopters; rather, it simply claimed to have several helicopters that could be considered in response to the requirements. The Crown contends that the applicant's focus was on attempting to redefine the mission profiles that had led to the operational requirements. At paragraph 78 of his affidavit, M. McNeil says the following:

> 78. On many occasions, Eurocopter requested more detailed information on the mission profiles which were used by the CCG to create the technical requirements in the RFP. Based on communications with Eurocopter representatives during the consultative process, it appeared that Eurocopter wanted more details on the mission profiles so that they might redefine how the CCG conducted its operations. The intent of providing mission profiles to suppliers was not to give them an opportunity to dictate to the CCG how to conduct its operations, but to provide them with some context for understanding the basis for the technical requirements.

[66] The request for proposals was completed and made public on April 3, 2013. Mr. Crowell, the official from the Ontario Ministry of Natural Resources, confirmed on March 12, 2013, that he had been able to certify "that all the requirements referenced in the Final Light Helicopter Baseline Requirements document dated February 28, 2013, are deemed Reasonable, for the stated missions and for commercial utility helicopters; Achievable by manufacturers of commercial utility helicopters and Unbiased toward and (sic) particular helicopter manufacturer(s)" (Exhibit 12 in the affidavit of R. Crowell).

[67] The Attorney General concludes by recognizing that Airbus did not bid before the deadline. He comments that the impossibility of parking the helicopters in the hangars onboard CCG vessels was basically a *sine qua non*: [TRANSLATION] "the helicopters are too wide" (memorandum of fact and law, para 25).

[68] The arguments of the Attorney General therefore rest on the applicant's failure to demonstrate that the technical requirements are unreasonable due to arbitrariness. These requirements are based on operational requirements identified by a range of experts in the field, and monitored by a consultant who is not even paid by the CCG, further guaranteeing his independence.

[69] Several of the technical requirements identified by the applicant were in fact amended (requirements 6.1(a), 7.3.5.2.1 and 7.2.13). In the final analysis, the purchaser of goods is entitled to determine requirements. The Attorney General supports his argument with *Almon Equipment Limited v Canada (Attorney General)*, 2012 FCA 318, in which we read the words of Mr. Justice Evans:

> [11] We would only add that we agree with the CITT that the fact that one bidder is better able than another to meet the specifications of an RFP does not in itself necessarily mean that the requirements of the RFP are biased in favour of that bidder. We also agree that the purchaser of goods or services has the right to determine the requirements needed for bidders to meet its legitimate operational requirements, subject to the limits imposed by the applicable trade agreements to ensure fair competition in public procurement.

[70] The Attorney General adds that the evidence of affiants Wight and Laughlin, on the contrary, demonstrate legitimacy. The comments and observations of industry were carefully accepted, collected, and considered before being decided on. They are in the file.

[71] Procedural fairness was respected. The respondent does not deny that procedural fairness must prevail even for requests for proposals; however, the requirements are not as rigorous as for other processes.

[72] The Minister of PWGSC was under no obligation to consult, and had complete discretion to determine the technical requirements for the product being acquired. The Minister did have to respect the process he had created and announced. The doctrine of legitimate expectation does not guarantee a given result; it is procedural in nature.

[73] In this case, the duty of impartiality was fulfilled. According to the Attorney General, the Court should apply the closed mind test. Given the considerable ministerial discretion, it is this more stringent test that should apply. Furthermore, if the test for a reasonable apprehension of bias is applied, the Minister still would have satisfied it. Here again, the Attorney General cites a series of factors, ranging from the governance structure, through the monitoring of the process and the changes made to the technical requirements following the consultations the government chose to hold, right up to the evidence that the technical requirements were based on the operational requirements of the CCG.

[74] As for the mission profiles that Airbus wanted, the Attorney General notes that several were provided for purposes of contextualizing the procurement exercise. What Airbus was trying to do was interfere in the conduct of missions and the use the CCG would make of these helicopters.

B. *Bell*

[75] Bell, the other respondent, adopts the viewpoint that Airbus is a disappointed competitor: no particular decision is being challenged. Airbus is complaining rather that some of the modifications to the technical requirements were not accepted, which was in fact the prerogative of the buyer, acting based on the operational requirements that it knew well.

[76] Bell argues that one of the two affiants presented by the applicant, Mr. Taylor, should not be characterized as an expert; in any case, little weight should be accorded his testimony. Bell submits that this witness is not independent because it was established on cross-examination that not only is he paid, he is paid by the hour; he has a stake in the outcome of this matter, which damages the quality of his evidence. He is a helicopter pilot in the private sector who has never been involved in a helicopter procurement process (he has participated in service procurement processes, but these are very different and much less complex).

[77] In addition, doubt is cast on numerous statements that were contradicted by the respondents' witnesses. With regard in particular to a technical table pertaining to HOGE (hovers-out of ground effect), the applicant did indeed concede its error. Bell adds that Mr. Taylor was wrong to assert that the Bell 429 can only use a certain type of fuel at low

temperatures and cannot take off from certain helipads. If Mr. Taylor's testimony is not set aside completely, at the very least it should not be given much weight.

[78] Respondent Bell also notes that Exhibit P-46 from affiant G. Leprince of Airbus is far from convincing. Not only were nine technical requirements misinterpreted by incorrectly ascribing to them colours they didn't deserve, but several boxes were not ascribed any colour at all. Bell recommends that no weight be given to such evidence, which is ultimately nothing more than patchwork.

[79] Bell argues that Airbus is not owed any duty of fairness in a procurement process and that section 40.1 of the *Financial Administration Act*, cited by Airbus, does not create such a statutory duty (*Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116, 314 DLR (4th) 340).

[80] In any event, the process was impartial, whether the test used is the one of closed mind or the reasonable apprehension of bias. Suspicion is never enough. The proof was lacking; the allegations were high-sounding, but the evidence was non-existent.

[81] Although Bell recognizes the existence of the doctrine of legitimate expectations, the latter merely requires that the administration respect the promises made in terms of procedure; it never applies to the substantive outcome. Airbus is arguing that it should have been entitled to changes in the technical requirements. The process that was followed corresponded in all respects to the promises made before it was begun.

[82] Finally, both Bell and the Attorney General are asking the Court to refuse to grant the requested remedy, i.e., cancellation of the contract, in the event that Airbus should be successful.

V. Analysis

[83] In my opinion, the weight of the evidence in this matter amply favours the respondents. The applicant, Airbus, has not satisfied the Court that procedural fairness was violated or that the refusal to reconsider and modify certain technical requirements in the request for proposals constituted an unreasonable exercise of the authority conferred on the Minister of PWGSC.

A. *The legal framework*

[84] It is worth remembering from the outset that the law confers discretion on the Minister in performing his duties. Section 7 of the *Department of Public Works and Government Services Act,* SC 1996, c 16, establishes the functions for which the Minister is responsible. Section 20 deals specifically with contracts on behalf of the Government of Canada. The scope of the discretion is found in section 21, which reads as follows:

Terms and conditions	**Modalités**
21. (1) The Minister may fix terms and conditions of contracts, and instructions and terms and conditions with respect to other documents relating to contracts and their formation.	21. (1) Le ministre peut fixer les modalités des marchés et les directives et modalités des documents qui se rapportent aux marchés ou à leur passation.
Designation	**Désignation par numéro**
(2) The terms and conditions and instructions may be	(2) Les modalités et directives peuvent être désignées par un

identified by number or other designation and may be incorporated in a contract or other document by reference to their number or other designation.	numéro ou d'une autre façon et être incorporées dans les marchés et documents en y étant signalées par ce numéro ou selon l'autre façon.
Publication	**Règlements**
(3) The Minister may, by regulation, prescribe the electronic or other means by which a term, condition or instruction, including its identification number or other designation, shall be published.	(3) Le ministre peut, par règlement, prévoir la manière de publier, notamment par voie électronique, les modalités et directives relatives aux marchés ou à leur passation, y compris leur désignation par un numéro ou d'une autre façon.

[85] This is why the Minister is a key part of the process to procure helicopters on behalf of the CCG, and why he holds the balance of power. He is accountable to his administration:

Exercise of powers, etc.	**Fonctions**
7. (1) In exercising the powers or performing the duties or functions assigned to the Minister under this or any other Act of Parliament, the Minister shall	7. (1) Dans le cadre des pouvoirs et fonctions que lui confère la présente loi ou toute autre loi, le ministre :
[…]	[…]
(*b*) acquire materiel and services in accordance with any applicable regulations relating to government contracts;	b) acquiert du matériel et des services, en conformité avec les règlements pertinents sur les marchés de l'État;
(*c*) plan and organize the provision of materiel and related services to departments including the preparation of	c) planifie et organise la fourniture aux ministères de matériel et de services connexes tels l'établissement

specifications and standards, the cataloguing of materiel, the determination of aggregate requirements for materiel, the assuring of quality of materiel, and the maintenance, distribution, storage and disposal of materiel and other activities associated with the management of materiel; and	de normes générales et particulières, le catalogage, la détermination des caractéristiques globales du matériel et le contrôle de sa qualité, ainsi que la gestion de celui-ci et les activités qui en découlent, notamment son entretien, sa distribution, son entreposage et sa destination;
…	[…]

It flows from that, it seems to me, that if there were collusion or bias in favour of one or other of the companies invited to participate in the bidding process, it would have occurred among the most senior people responsible. This alleged bias would have to benefit the CCG or the Department of Transport, but in a way that is unknown to us. Yet it was PWGSC which managed the process, which had to be fair. It was that department's responsibility. Section 40.1 of the *Financial Administration Act,* although declaratory, is nevertheless a strong affirmation on the part of Parliament that the federal government must take "appropriate measures to promote fairness, openness and transparency in the bidding process for contracts". As we have just seen, this task falls first and foremost to the Minister of PWGSC. The evidence shows that it was PWGSC that managed the process and was the main contact for the applicant.

[86] But the exercise of discretion can never be arbitrary. As we have just seen, the Minister must respect the *Government Contracts Regulations,* which require the following:

5. Before any contract is entered into, the contracting authority shall solicit bids therefore in the manner	5. Avant la conclusion d'un marché, l'autorité contractante doit lancer un appel d'offres de la façon prévue à l'article 7.

prescribed by section 7.

Nowhere is there mention of an obligation to consult beforehand. That is an obligation that PWGSC chose to place on itself. It then had to follow the rules it had established for itself and announced to the participants.

B. *Access to remedy on judicial review*

[87] In this case, Airbus did not respond to the request for proposals. It chose not to continue in the process that began with the August 17, 2012, letter of interest and concluded with the April 3, 2013, request for proposals, which it considered to be fatally flawed. It therefore could not seek a remedy in contract law (*Irving Shipbuilding Inc v Canada (Attorney General*), 2009 FCA 116, [2010] 2 FCR 488 [*Irving Shipbuilding Inc.*]). The question is therefore whether judicial review is available to the applicant.

[88] The Attorney General concedes that the action undertaken by the applicant is viable. The other respondent, Bell, merely states that it is an issue for the Court to resolve. Obviously, jurisdiction cannot be given by consent. However, I am of the opinion that judicial review is a possibility under the circumstances because the Minister chose to hold a consultation process before launching the request for proposals. This choice prevents him from acting arbitrarily, which in turn, requires that judicial review of the exercise of discretion be available.

[89] Although pronounced in a completely different context, the words of Mr. Justice Montigny in *Canadian World Wide Film Festival v Telefilm Canada*, 2005 FC 1730, support my opinion:

> [27] The respondent submitted that the applicant was not directly affected by the decisions of September 7 and December 17, 2004 as it refrained from participating in the bidding process. Therefore, it could not file an application for judicial review since it did not meet the requirements of subsection 18.1(1) of the *Federal Courts Act*.
>
> [28] The applicant replied that it had the required standing inasmuch as it risked having to face competition making use of the grant which the WFF would then no longer have. The reason why it did not participate in the bidding process was that it felt that the dice were loaded and that the sole purpose of the process started by Telefilm was to exclude it from the organization and presentation of a film festival in Montréal.
>
> [29] In view of the increasingly broad interpretation given to the notion of standing by the courts in the past few years, and the ongoing involvement by the WFF in the international film world in Montréal since 1977, as well as of the impact which the disputed Telefilm decisions could not fail to have on the activities, participation and even existence of the WFF, I have no difficulty in ruling that the applicant has sufficient legal standing to apply for judicial review of the bidding process and of the selection of a competing organization by Telefilm at the conclusion of that process. Although Prothonotary Morneau did not give reasons for his decision to deny the motion to strike made by the respondent, this Court has no reason to think that he erred in his interpretation of the facts or in applying the principles developed by the courts in this area.

The ball had already been set in motion in *Gestion complexe Cousineau v Canada (Minister of Public Works)*, [1995] 2 FC 694 [*Gestion complexe Cousineau*], where Mr. Justice Décary, writing for the Federal Court of Appeal, stated as follows:

> [10] With respect, that would be to take an outmoded view of supervision of the operations of government. The "legality" of acts done by the government, which is the very subject of judicial

> review, does not depend solely on whether such acts comply with the stated requirements of legislation and regulations. For example, when the Minister makes a call for tenders he is establishing a procedural framework which brings into play the principle of reasonable or legitimate expectation recognized by this Court in *Bendahmane v. Canada (Minister of Employment and Immigration)* [1989] 3 F.C. 16 (C.A.). See also *Pulp, Paper and Woodworkers of Canada, Local 8 v. Canada (Minister of Agriculture)* (1994), 174 N.R. 37 (F.C.A.). The unsuccessful bidder thus has the right to ask the Court, by an application for judicial review, to compel the Minister to observe commitments made by him as to the procedure he intended to follow, regardless of whether the Minister acted on his own initiative or in compliance with regulations.

Paragraphs 17 and 18 of that decision are also important:

> [17] I cannot conceal the hesitation I would have had in categorically stating that in no circumstances could the Federal Court by way of judicial review determine the legality of a tender proceeding, as essentially that is what is meant when it is argued that the Court does not have jurisdiction. It is one thing to say that a remedy is more or less appropriate depending on the circumstances; it is another to say that a remedy is systematically prohibited in all circumstances. It seems to me that the respondents have confused these two ideas. It may be that in reality they will more often than not be right in that the courts will seek in vain for the illegality which alone could justify intervention. The fact remains that under the language conferring jurisdiction on the Court, Parliament authorized challenges to such decisions and the fact that in practice they will seldom be successfully challenged does not mean that the Court lacks jurisdiction over them.
>
> [18] In the case at bar we need only assume that the appellant was able to prove the allegations of collusion between the Crown and the *mis en cause* which were originally its principal ground of challenge (and which it withdrew during the course of its action). Would the Court not then have had jurisdiction in hearing an application for judicial review to quash the disputed actions on the ground of fraud mentioned in paragraph 18.1(4)(*e*) [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Court Act*? Additionally, what is the position of a third party who in view of the collusion refrained from making a bid and which because it did not do so was not a "contracting party" within the meaning of *Ron Engineering*? Could it be compelled to take its chance in a

> delictual action against the Crown? And what should be said of the fraudulent act which would be beyond the scope of any judicial review, including in this Court an application for a declaratory judgment, and could never be quashed?

[90] It is clear, however, that when a party chooses to request a judicial review of a request for proposals, it must live with the constraints of the chosen remedy. But the remedy does exist, as we read in *Irving Shipbuilding Inc*, cited above, at paragraph 21:

> [21] The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1, a public law proceeding to challenge the exercise of public power. However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.

Clearly, there is more case law dealing with situations where bids were actually submitted. The decision in *Cougar Aviation Ltd v Canada (Minister of Public Works and Government Services),* 2000 CanLII 16572, 264 NR 49 [*Cougar*], dealt with the evaluation of submissions. Nevertheless, it appears to me that the consideration set out at paragraph 37 is just as relevant in our case, where the Minister chose to consult within a very precise framework:

> [37] Second, the application of the more stringent test advances the objectives of the Agreement, in view of the importance of the transparency and fairness of the process, and the avoidance of "pork-barrelling" in the award of procurement contracts. If potential bidders lack confidence in the integrity of the way in which government contracts are awarded, they may be discouraged from submitting a bid, to the detriment of the public interest in

> obtaining the best value for money, and in ensuring that the competition is truly open to all.

In my opinion, what is important is that a process leading to a request for proposals was established. In this case, there was this public element in the awarding of the contract, even in the preliminary stage. The Minister cannot act arbitrarily. But this will be a very high bar for an applicant to try to jump. The Minister must ensure procedural fairness, however limited it may be, and must use his discretion reasonably. These are the parameters to which the applicant must submit.

[91] In this case, it is not easy to identify the decision that would be subject to judicial review. The applicant refers to a refusal to reconsider and modify the technical requirements. The respondents appear to be satisfied with that characterization. Fine. No one doubts that fairness, transparency, equal opportunity and competition should be part of the contract awarding process. The same goes for the preliminary process leading to the eventual request for proposals itself. But there is no less a burden on the applicant, and that is to demonstrate that the refusal to consider the changes was unreasonable. In that same vein, it must also demonstrate that the refusal to make the changes was unreasonable.

[92] In these matters, Supreme Court of Canada case law has determined what is involved in the standard of reasonableness. Deference is required. The now famous paragraph 47 of *Dunsmuir*, cited above, deserves to be reproduced in full:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific,

> particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Thus, the standard of reasonableness is rooted in the concept of deference, which "therefore implies that courts will give due consideration to the determinations of decision makers" (*Dunsmuir*, at para 49). If the decision is justified and transparent and results from an intelligible decision-making process, it will be reasonable; if the decisions are among the possible and acceptable outcomes, the decision will be reasonable. The reviewing Court does not replace the decision maker. The onus is on the applicant to satisfy the Court. The Supreme Court stated as follows at paragraph 49:

> In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

C. *Is the decision reasonable?*

[93] Here, the evidence presented in support of the application does not meet the burden. With respect, I could not find in the evidence how the process followed could have been faked or arbitrary. In my opinion, the alleged favouritism was never demonstrated.

[94] The Crown presented very strong evidence of a transparent and intelligible process run by the Minister of PWGSC, who had no interest in the matter other than to conduct a request-for-proposals process that satisfied the commitment set out in section 40.1 of the *Financial Administration Act*. The governance structure, the participation of a number of people and experts, the involvement of several departments and the use of an independent expert (who was not even paid by the CCG) all argue in favour of a framework that provided for reasonable decisions in terms of administrative law. Indeed, the evidence shows that nearly 25 recommendations, some favourable to Airbus, were accepted and resulted in amendments to the technical requirements. We are far from the applicant's allegation that the Minister refused to reconsider the technical requirements. This is quite simply not the case. The Minister refused to make some of the changes that were requested. That is not the same thing.

[95] The evidence before this Court is clear. A rigorous process was put in place, with close monitoring of the recommendations and requests made and the reasons for their acceptance or rejection. Everything seems to have been documented. One might think that the giver of work was seeking to guard against possible attacks. A process was therefore created that had abundant checks and balances. A process designed to counter potential attacks cannot be all things: it is not impossible that despite the process, there were flaws. But again, they must be demonstrated. Insinuations are not sufficient.

[96] Robert Wight, who is a mechanical engineer and an MBA, is the director general at the CCG responsible for several procurement projects exceeding $4 billion. He testified about the process established in this case, with overlapping committees to oversee the exercise (Project

Steering Committee, Director General Governance Committee, ADM Integrated Steering Committee).

[97] His testimony, which was given by affidavit and on which he was cross-examined, is particularly relevant with regard to the development of the technical requirements criticized by the applicant.

[98] The least that can be said is that this element of the procurement process is particularly well documented. Of particular interest are the tables, each more than 45 pages in length, which became Exhibits 6 and 7 in Mr. Wight's affidavit.

[99] These tables list all the mandatory requirements. Exhibit 6 shows the evolution of each requirement, starting with the initial requirements, through the draft request for proposals and on to the final request for proposals. All of the changes are explained. Exhibit 7 provides the reader with the justification for the technical requirement as it related to the operational requirement.

[100] It would seem to me impossible to conclude arbitrariness on reading these tables. At the very least, the applicant's evidence did not demonstrate this, let alone convincingly. Moreover, there is transparency. The changes are recorded, and they are many, and they are justified based on operational requirements. The evidence is abundant and it was not disputed. One can even find in Exhibit 5 to Mr. Wight's affidavit a copy of the requests for proposed changes, running to more than 200 pages.

[101] As if the tables were not sufficient, Mr. Wight explains in his affidavit the rationale for denying some of the changes requested by Airbus. In my opinion, this evidence is overwhelming. In fact, it was not disputed, and the cross-examination of Mr. Wight did nothing to weaken or undermine the tables.

[102] That the applicant was disappointed that some of its recommendations were not adopted is all very well. But that certainly does not make the decisions unreasonable. In fact, I was not convinced that the technical requirements were not based on CCG operational requirements. Quite the opposite. The applicant's evidence was sorely lacking on this front. This evidence comes down to allegations of bias that never reached the point of demonstrating that the operational requirements were exaggerated. From the outset, Airbus saw that the technical requirements were high and chose instead to address the mission profiles. If these did not match the operational requirements, then the claim could be made that the technical requirements exceeded actual requirements. Unfortunately for the applicant, this was not proved, and it is not possible to draw inferences of this nature from unsupported allegations.

[103] There was little in the way of evidence from the applicant's witness, Mr. Taylor. As an experienced helicopter pilot who has always worked in the private sector, his expertise was limited in that he had no experience with requests for proposals for the procurement of helicopters. Without rejecting his testimony outright, it counted for little in the face of the solid evidence presented by the Crown. As John Sopinka wrote in 1981 in his *The Trial of an Action* (John Sopinka, *The Trial of an Action*, (Toronto: Butterworths, 1981)):

> It is usually vain to suppose that the expert will be wholly discredited. The object is to flaw him so that your expert is preferred.
>
> [Page 80]

[104] As noted above, Mr. Taylor's expertise is limited and the applicant admitted that he had misunderstood the technical table regarding HOGE. I also recall the questions relating to the use of certain fuels at very low temperatures, where the testimony seemed far from persuasive. This affected the relative weight.

[105] The applicant did not really focus on specific aspects of the technical requirements. When it did so early in the process, adjustments were made that favoured Airbus, at least in part. When, at the very end of the process, the focus was on the vital points of payload, range of the aircraft—in terms of both distance traveled and desired altitude—or blade folding, the changes sought by Airbus were considerable and would have significantly diminished the technical requirements. Airbus was promoting less versatility and inferior performance.

[106] Airbus sought instead to focus the debate on two key points: that the government showed favouritism, beginning with its decision to grant a weight exemption for the Bell helicopter; and that it refused to provide the mission profiles, which would have allowed for suggesting alternatives rather than challenging the technical requirements.

[107] In terms of the weight exemption, the applicant sees this as evidence of favouritism by the government. It seems to me that there is here an element of verbal inflation. Even if there were an admission that the CCG chief pilot had indicated in December 2009 that the Bell 429

would be a good candidate for the CCG, which he claims not to remember, he cannot speak for the Government of Canada. The weight exemption was not granted by the chief pilot.

[108] The Attorney General argued that if Airbus wanted to challenge the weight exemption, it should have done so at the time it was granted. I concluded that there is nothing improper in raising the context that led to the exemption because it is part of the overall story. Airbus is not challenging the exemption on technical merits, but rather as evidence of favouritism. But again, that must be proven.

[109] The evidence shows that the complaints on this matter did reach the Minister of Transport. There is evidence that 15 other regulators accorded the exemption to this aircraft, that Airbus could have taken advantage of it (it is difficult to see how Airbus could have been refused if it was permitted by the specifications of other crafts) and that the decision was made at the highest level. The allegations of cronyism at the lower levels were not proved, and even if they had been, the collusion would have to have been very extensive in order to lead to the conclusion that the Government of Canada had unduly favoured Bell. The circumstantial evidence, consisting more of allusions than facts, does not allow such an inference. And that is not what Airbus has alleged. Its allegation of cronyism is baseless and leads nowhere. This certainly does not show collusion or even favouritism.

[110] As for the mission profiles, Airbus requested more information about them very early in the process, despite the fact that seven mission profiles had been provided to the participants in the process. It is far from clear what constituted possible alternatives, other than altering the

requirements by reducing them in terms of helicopter performance. For some requirements, the proposed alternative was to reduce the payload by nearly 9%, or have maximum flight times lowered by 8.3%. For blades that could not be folded back to park the helicopter, the first alternative was to remove them; in March 2013, there was nothing more than an offer to work with the CCG to find a solution. Here again, there was a lack of precision in the applicant's evidence.

[111] There is more however. It became apparent early in 2013 that the mantra about the mission profiles went beyond the profiles. In its letters of January 11 and March 18, 2013, Airbus was no longer seeking mission profiles. I reproduced identical passages from the two letters at paragraph 19 of these reasons. When the questions turn to the number of bases, the number of vessels, the length of night missions, the distance from ship to shore for each mission, the percentage of usage of each type of helicopter for each mission per year and the description and quantity of loads for each mission, one can conclude that we have moved away from mission profiles in an effort to find alternatives. This looks much more like interference in the conduct of CCG operations. What could possibly explain the relevance of the number of bases or vessels? I cannot see how a refusal to submit to this type of questioning could in any way be considered unreasonable. It was not so much the mission profile being requested, but the profile of use for the helicopters. Not only did the Minister not have an obligation to provide mission profiles, but he actually had done so in order to provide context. He certainly did not have an obligation to provide the use of the helicopters and their frequency of use under different circumstances. That seems to me to be a different matter altogether.

[112] The evidence also suggests that Airbus did not have a latest-generation helicopter. While the original requirements indicated that bids would only be accepted on helicopters that were already certified, at the request of Airbus, that requirement was changed so that certification had to be obtained within six months of the bid closing date. The Crown presented evidence to the effect that the applicant has never disclosed which helicopter would have been the subject of a bid. In January 2013, Airbus complained that the consultation process was going too fast. I think that a reasonable inference can be drawn that as early as August 2012, the applicant knew that its helicopters would be incapable of meeting the technical requirements, but that another helicopter could be more competitive. This would explain the request to allow a helicopter to be certified after bid closing and the insistence that the bidding process was moving too quickly.

[113] In any case, if the applicant could argue that the type of use was exaggerated, this might have led to reduced technical requirements that would have made it more competitive. However, the technical requirements were neither unfair, nor unreasonable, nor arbitrary according to the evidence before the Court. Airbus has never demonstrated that the technical requirements exceeded the identified operational requirements. This is consistent with the findings of the independent expert, whose conclusions were not seriously questioned, that these requirements are “reasonable, achievable and fair.” The applicant did not demonstrate that the Minister was unreasonable in refusing to reconsider and modify the technical requirements. Rather, the file points to a systematic review of technical needs, and this is backed by abundant documentation submitted as evidence. Nor was it proven that the request for proposals was tailored so as to favour Bell, since the process followed and its elaborate governance produced reasonable, achievable and fair requirements, according to an independent expert.

D. *Procedural fairness: impartiality*

[114] The other component of the judicial review is the contention that there was a breach of procedural fairness. The standard of review in this area is that of the correct decision (see, among others, *Dunsmuir*, above, Mr. Justice Binnie at para 129). No deference is normally owed.

[115] Brown and Evans, in their *Judicial Review of Administrative Action in Canada* (Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto, ON: Carswell, 2013) (loose-leafs updated 2014-3), ch. 7, 1610) present the question as follows:

> Apart from a legislated standard, courts have generally assumed that questions of administrative procedural propriety are peculiarly within their province, at least when they are determining whether an administrative agency's procedure was unfair, and accordingly they rarely apply a deferential standard of review. Others have reached the same conclusion on the basis that since both the existence of and the content of the duty of fairness raise questions of law, the standard of review of correctness.
>
> There would appear to be two bases for the court's present non-deferential approach. First, as indicated, courts have traditionally regarded themselves as having an expertise in matters of procedure, and in particular, in the conduct of fair hearings in connection with adjudicative decision-making. Second, when the legislature endows an administrative tribunal with a dispute resolution function, and in effect takes it out of the judicial system, the courts can provide some protection to individuals against abuses of power and arbitrary decision-making, by requiring the tribunal to follow a fair procedure.

[116] But this does not resolve the issue. The case law is clear that the quality of procedural fairness should vary with the context, the circumstances. Thus, in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Court developed a framework of analysis for determining the applicable standard. The various elements were helpfully summarized in

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village), 2004 CSC 48, [2004] 2 SCR 650, at paragraph 5:

> 5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

Generally speaking, if one were to place the guarantees of procedural fairness along a spectrum, they would be significantly more elaborate where fundamental human rights are being adjudicated, with the other end of the spectrum being occupied by cases in which commercial interests are at play. Here, the discretion conferred on the Minister is considerable. There is no dispute on that front. The consultation that was held was by choice, with no legal obligation. There is no doubt that the Minister must act impartially and in good faith. But this was not an adjudication or a process that can be likened to the quasi-judicial function. In any case, I believe the process followed by PWGSC is irreproachable in terms of procedural fairness. There is no need to elaborate further on the analysis framework, given that in my opinion, PWGSC met its duty of impartiality and procedural fairness in that all participants in the process were treated equally.

[117] This argument overlaps in large measure the first. The applicant argued that the Minister failed in his duty of impartiality, which without a doubt falls under minimal procedural fairness.

Based on the abovementioned decision in *Cougar*, the applicant argues that the applicable test was that of reasonable apprehension of bias. *Cougar* states as follows:

> [35] It is not necessary to decide here whether the duty of fairness, as it applies to Appeal Boards, includes a reasonable apprehension of bias. However, in my opinion it is entirely compatible with the legal framework regulating the award of this procurement contract to require that those evaluating the bids must avoid conduct that gives rise to a reasonable apprehension that they were biased in favour of one bidder.
>
> [36] I base this view on two grounds. First, the award of a contract governed by the Agreement is not essentially a policy-based decision to which it might be appropriate to apply the less stringent test of the appearance of a closed mind. The decision-making process for the award of procurement contracts involves the weighing of competing bids by reference to relatively objective criteria, as well as to a more subjective assessment of the suitability of the bidders as potential service providers, especially when, as here, they will be in an ongoing relationship with officials from the DFO during the performance of the contract.
>
> [37] Second, the application of the more stringent test advances the objectives of the Agreement, in view of the importance of the transparency and fairness of the process, and the avoidance of "pork-barrelling" in the award of procurement contracts. If potential bidders lack confidence in the integrity of the way in which government contracts are awarded, they may be discouraged from submitting a bid, to the detriment of the public interest in obtaining the best value for money, and in ensuring that the competition is truly open to all.

We see that the Federal Court of Appeal does not formally rule on the issue, but seems to tend in that direction. However, the Attorney General argues that the test should in fact be the appearance of a closed mind, relying in this on another decision of the Federal Court of Appeal, in *Pelletier v Canada (Attorney General)*, 2008 FCA 1 [*Pelletier*].

[118] Neither of these decisions is entirely consistent with our business: *Cougar* dealt with bias in the evaluation of bids, which is different from the process, not required by law, leading up to the request for proposals. *Pelletier* considered the dismissal of a person appointed by the Governor-in-Council at pleasure. Our case involves a non-obligatory process prior to a request for proposals.

[119] Given the conclusion reached by the Court, it is not necessary to select a higher test, such as the close-minded person, because in my opinion there could be no reasonable apprehension of bias on the part of an informed observer looking at the matter realistically and practically (the test as presented in *Med-Emerg International Inc v Canada (Public Works and Government Services)*, 2006 FCA 147, at para 31, repeating the now famous test articulated in *Committee for Justice and Liberty v The National Energy Board*, [1978] 1 SCR 369).

[120] Essentially, the applicant repeats its argument with regard to the reasonableness of the refusal to modify the technical requirements, and now contends that there was a lack of impartiality. The applicant argues the following:

- the technical requirements were modeled on the specifications of the Bell helicopter;
- the applicant's interventions exposing the discrimination it had suffered remained unanswered;
- the Minister wanted to prevent Airbus from offering alternatives by not providing enough information about the mission profiles;
- certain technical requirements were modified to favour Bell;

- the government already favoured Bell given that it accorded a weight exemption that was refused by the relevant US and European authorities.

[121] As I have attempted to show, these complaints do not hold water and in any event, the weight of the respondents' evidence is much greater. The governance structure, the large number of officials at different levels who were part of the consultation process, the presence of a fairness monitor to ensure that the participants were treated equally and that the same information was available to everyone, the fact that numerous changes were made, including several in favour of Airbus, and the firm opinion of an independent expert that the technical requirements were reasonable, achievable and fair, all favour the respondents. I add that I am satisfied with the evidence presented to the effect that the technical requirements are intended to address the CCG's operational requirements. As mentioned earlier, the episode of the weight exemption, which did not involve any of the people involved in the helicopter procurement process, with the exception of the CCG chief pilot, and the issue of mission profiles, do not advance the cause of the applicant. We cannot see a breach of impartiality in refusing to accept interference, even when disguised, in CCG operations. The consultation process did not go that far. The informed observer examining the facts realistically and practically would clearly recognize the quality of the process put in place, which eliminates the reasonable perception of bias.

E. *Procedural fairness: legitimate expectations*

[122] Finally, the applicant alleged a breach of its legitimate expectations. I agree for the purposes of this case that the doctrine of legitimate expectations operates (*Gestion complexe*

Cousineau, cited above, paragraph 10). But this doctrine is of a procedural nature; the applicant was entitled to expect that the procedure initiated by the Minister to consult, even if it was not required, would be followed. In *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 [*Mavi*], the doctrine of legitimate expectations is described as follows:

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.

However, as the Court observes in *Mavi*, this doctrine has its limits. In *Genex Communications Inc v Canada (Attorney General)*, 2005 FCA 283, Mr. Justice Létourneau provided a concise explanation of those limits:

> [191] It is well known that the doctrine of reasonable expectations is procedural and does not create any fundamental rights: it is simply an extension of the principles of natural justice and the rules of procedural equity: see *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at paragraph 74; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249. "The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. <u>But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result</u>." [Emphasis added]. See *Moreau-Bérubé, supra*, at paragraph 78. The expectation must not conflict with the public authority's statutory mandate and substantive relief is not available under this doctrine: see *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, at paragraphs 29, 32 and 38.

[123] Again just recently, the Federal Court of Appeal pointed out that only clear, unambiguous and unqualified representations may give rise to the doctrine (see *Drabinsky v Canada (Advisory Council of the Order)*, 2015 FCA 5, at para 8). The Minister promised a fair and impartial process. This is where the reasonable expectation ended, and it was fulfilled.

[124] When we take a closer look, this last argument of the applicant is just another variation on the previous theme of bias. Thus, it complains that the request for proposals was not [TRANSLATION] "biddable" because the flexibility requested was not granted; the Minister's conduct did not meet the high level of fairness and impartiality promised; and the applicant's comments and proposals were not truly taken into consideration.

[125] To some degree, the applicant is departing from the procedural nature of the doctrine. It seeks to judge the process based on the outcome. But the outcome is of little consequence given that none of the factors associated with bias were accepted by this Court. Application of the doctrine did not give rise to the remedy sought because the Minister followed the promised procedure closely. This is what the applicant was entitled to. What the applicant is complaining about is not obtaining all the requested changes. The applicant appears to believe that because not all the changes were accepted, the process must have been flawed. However, in terms of procedure, the Minister delivered on his promises; the applicant was not entitled to a particular outcome. It had a right to be consulted. Moreover, there is no proof of the alleged bias, therefore it was not established that the changes were rejected for arbitrary or unjust reasons.

[126] I would conclude by citing paragraph 59 of the Federal Court of Appeal decision in *Cougar*, cited above:

> [59] In my opinion, even when considered cumulatively, the grounds advanced by the applicant for impugning the impartiality and fairness of the tendering process do not establish a breach of the duty of fairness. Decisions made in the course of the decision-making process that are perceived by a participant to be adverse to its interests will normally not suffice to prove a reasonable apprehension of bias in the decision-maker. Nor does the duty of fairness require a decision-maker to adopt the best possible process for arriving at the "right" decision.

VI. Conclusion

[127] The respondents had argued that if the Court decided to grant the application for judicial review, the contract should not be cancelled as a result of a tendering process deemed unlawful. They relied in particular on *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6 [*MiningWatch*], contending that the public interest and prejudice to the respondents would justify the Court using its discretion in the area of judicial review to decline the requested remedy.

[128] Clearly, the Court does not have to rule on this given the outcome of the application for judicial review. I would not have been inclined on the face of it to deny the requested remedy given that the rule of law takes precedence and the respondents obviously chose to proceed despite the risk posed by the application for judicial review. Nevertheless, it is neither necessary nor worthwhile to continue seeking the balance of convenience in this case, where the nature of the remedy is very different from that in *MiningWatch,* in which the question of law was the central interest of *MiningWatch*, a non-profit corporation.

[129] For the reasons above, the application for judicial review must be dismissed.

[130] It was agreed that the question of costs would be dispensed with after the decision was rendered. If the parties are unable to agree on the basis on which costs should be awarded, the Court Registry will schedule a hearing, in person or by telephone, at the convenience of the parties.

JUDGMENT

THE COURT'S ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs. Representations on costs will follow.

"Yvan Roy"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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