

Federal Court of Appeal



Cour d'appel fédérale

Date: 20171120

Docket: A-128-17

Citation: 2017 FCA 227

**CORAM: NOËL C.J.
TRUDEL J.A.
WEBB J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

HEWLETT-PACKARD (CANADA) CO.

Respondent

and

**CANADIAN INTERNATIONAL TRADE
TRIBUNAL**

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 20, 2017.

REASONS FOR ORDER BY:

WEBB J.A.

CONCURRED IN BY:

**NOËL C.J.
TRUDEL J.A.**

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REASONS FOR ORDER

WEBB J.A.

[1] The Canadian International Trade Tribunal (CITT) has brought a motion for an order striking the application of the Attorney General of Canada (AG) for judicial review of a decision

of the CITT. The CITT dismissed the Shared Services Canada's (SSC) preliminary motion to dismiss the complaint filed by Hewlett-Packard (Canada) Co. (HP) before the hearing was held.

[2] HP had filed a complaint with the CITT on November 11, 2016. On December 15, 2016 SSC brought a motion before the CITT alleging that the CITT lacked the jurisdiction to hear HP's complaint. The CITT issued an order dismissing this motion on January 10, 2017. The reasons for dismissing this motion were included with the reasons issued by the CITT on March 20, 2017 following its determination of HP's complaint. SSC was successful in relation to the merits of HP's complaint. HP did not seek judicial review of the final determination but the AG is seeking judicial review of the preliminary decision of the CITT on whether the CITT had the jurisdiction to hear the complaint.

[3] In this motion, the CITT raised a number of grounds. In particular it raised the ground that the application for judicial review should be dismissed because it is moot.

[4] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at 353, 92 NR 110, Justice Sopinka, writing on behalf of the Supreme Court of Canada the two step analysis in relation to the doctrine of mootness:

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ...

[5] In paragraph 10 of the AG's memorandum filed in relation to this motion, it is stated that "Canada acknowledges that this application is moot". Therefore the only issue is whether this Court should exercise its discretion to hear this application.

[6] This decision is a discretionary decision. The Supreme Court of Canada has provided some guidelines in *Borowski*, at pages 358 – 359, to assist a court in determining whether the discretion to hear the case should be exercised. In particular the Supreme Court noted that:

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail.

[7] In this case, HP is not participating in the judicial review application. This only leaves the AG and the CITT, as an intervener. It is the CITT's own decision that is the subject of the judicial review application. The CITT would be defending its own decision. In my view, this factor does not weigh in favour of exercising the discretion to hear the matter.

[8] The Supreme Court also referred to the concern for judicial resources as a factor to be considered at pages 360 - 361. In relation to this aspect, an important consideration will be the frequency in which the issue under review arises. In the AG's memorandum, it is stated that:

21. The issue in this case is evasive of review. If the Court declines to hear this application, Canada must await (a) the issuance of a procurement subject to the Omnibus NSE, (b) a complaint from a potential bidder about that procurement, and (c) for the CITT to uphold the complaint (upon dismissing a motion from SSC on jurisdictional grounds). The Omnibus NSE was invoked in 2012 and not once since the invocation has a case arisen

that satisfies these three criteria. Contrary to the CITT's assertion that it regularly receives procurement challenges regarding SSC procurements, not a single complaint has been filed relating to a procurement subject to the Omnibus NSE since the CITT released its decision in this case. It is thus entirely speculative as to when this issue will be ripe for the Court's review, which justifies exercising this Court's discretion to hear it now.

[9] The CITT, in paragraph 30 of its reply submissions, disputes these assertions and submits that there are more opportunities for the AG to raise this issue.

[10] If, as submitted by the AG, this is rare and may not arise again, this does not weigh in favour of exercising the discretion to hear this case. If, as submitted by the CITT, there may be several other opportunities to raise this issue, in my view, this would also not weigh in favour of exercising the discretion to hear this application. If there are other occasions to raise this issue, there should be a case where there is an opposing party, other than the CITT, to advance the arguments that would be opposed to the arguments that would be advanced by the AG on the merits of the judicial review application.

[11] As a result, I would not exercise the discretion to have this matter heard. I would allow the motion of the CITT and dismiss this application for judicial review.

“Wyman W. Webb”

J.A.

“I agree
Marc Noël C.J.”

“I agree
Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-128-17

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. HEWLETT-
PACKARD (CANADA) CO. AND
CANADIAN INTERNATIONAL
TRADE TRIBUNAL

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: WEBB J.A.

CONCURRED IN BY: NOËL C.J.
TRUDEL J.A.

DATED: NOVEMBER 20, 2017

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Canadian International Trade Tribunal

FOR THE INTERVENER