Federal Court of Appeal

Cour d'appel fédérale

Date: 20180118

Docket: A-329-16

Citation: 2018 FCA 18

[ENGLISH TRANSLATION]

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

THE ACCESS INFORMATION AGENCY INC.

Respondent

Hearing held at Ottawa, Ontario, on September 5, 2017.

Judgment delivered at Ottawa, Ontario on January 18, 2018.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. OVERVIEW

[1] This is an application for judicial review of a decision whereby the Canadian International Trade Tribunal (the Tribunal) ruled that the Tribunal had jurisdiction to investigate the procedure followed during a procurement regarding the provision of professional services, notwithstanding the subsequent cancellation of the procurement. The merits of the complaint

regarding the procurement were the subject of a second application for judicial review in docket A-323-16.

[2] The reasons for the Tribunal's decision (Reasons) are indexed under the following 0style of cause: *The Access Information Agency Inc. v. Department of Global Affairs*, File n° PR-2016-001.

[3] The decision in question was rendered following a complaint filed by the Access Information Agency Inc. (AIA) when Global Affairs Canada (GAC) advised it of its intention to award another bidder, LRO Staffing, a contract resulting from a procurement. In the light of the complaint, GAC decided to cancel the procurement. The Attorney General submits that due to the procurement's cancellation, the Tribunal no longer had jurisdiction to investigate because the inquiry no longer concerned a designated contract.

[4] For the reasons set out hereunder, I would dismiss the application for judicial review.

II. PROVISIONS OF THE *ACT*

[5] The following analysis lies within a legislative framework. The provisions relevant to the *Canadian International Trade Tribunal Act,* R.S.C. 1985, c. 47 (4th Supp.)(the Act) (the *Act)* are set out below.

[6] The Tribunal's mandate is assigned to it by section 16 of the *Act*:

16 The duties and functions of the Tribunal are to…	16 Le Tribunal a pour mission : …

(b.1) receive complaints, conduct inquiries and make determinations under sections 30.1 to 30.19;	b.1) de recevoir des plaintes, procéder à des enquêtes et prendre des décisions dans le cadre des articles 30.1 à 30.19;

[7] The definition of “designated contract” is found in section 30.1 of the *Act*:

Designated contract means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contract designated by the regulations.	Contrat spécifique — Contrat relatif à un marché de fournitures ou services qui a été accordé par une institution fédérale — ou pourrait l’être —, et qui soit est précisé par règlement soit fait partie d’une catégorie réglementaire.

[8] A designated contract is a contract that is subject to any of the free trade agreements concluded by Canada and listed in subsection 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 (the *Regulations*). The phrase “trade agreements” refers to all of these agreements.

[9] Any supplier or potential supplier that feels it has been prejudiced by the contract award procedure can file a complaint with the Tribunal:

30.11 (1) Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.	30.11 (1) Tout fournisseur potentiel peut, sous réserve des règlements, déposer une plainte auprès du Tribunal concernant la procédure des marchés publics suivie relativement à un contrat spécifique et lui demander d’enquêter sur cette plainte.

[10] The Tribunal may entertain a complaint only if certain requirements are met, in other words, if it states the following information:

(2) A complaint must	(2) Pour être conforme, la plainte doit

remplir les conditions suivantes :

(a) be in writing;

a) être formulée par écrit;

(b) identify the complainant, the designated contract concerned and the government institution that awarded or proposed to award the contract;

b) préciser le contrat spécifique visé, le nom du plaignant et celui de l'institution fédérale chargée de l'adjudication du contrat;

(c) contain a clear and detailed statement of the substantive and factual grounds of the complaint;

c) exposer de façon claire et détaillée ses motifs et les faits à l'appui;

[…]

[…]

[11] If the Tribunal rules that the statutory requirements are met, it may decide to conduct an inquiry. If it so decides, it must address only the subject-matter of the complaint:

30.13 (1) Subject to the regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2), it shall decide whether to conduct an inquiry into the complaint, which inquiry may include a hearing.

30.13 (1) Après avoir jugé la plainte conforme et sous réserve des règlements, le Tribunal détermine s'il y a lieu d'enquêter. L'enquête peut comporter une audience.

30.14 (1) In conducting an inquiry, the Tribunal shall limit its considerations to the subject-matter of the complaint.

30.14 (1) Dans son enquête, le Tribunal doit limiter son étude à l'objet de la plainte.

[12] If it is the Tribunal's opinion that a complaint that meets the statutory requirements nevertheless is devoid of all interest or is made in bad faith, it may decide not to investigate:

30.13 (5) The Tribunal may decide not to conduct an inquiry into a complaint or decide to cease conducting an inquiry if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith, and where the Tribunal so decides, it shall notify, in writing,

30.13 (5) S'il estime que la plainte est dénuée de tout intérêt ou entachée de mauvaise foi, le Tribunal peut refuser de procéder à l'enquête ou y mettre fin, auquel cas il notifie sa décision, motifs à l'appui, au plaignant, à l'institution fédérale concernée et à toute autre partie qu'il juge intéressée.

the complainant, the relevant
government institution and any other
party that the Tribunal considers to be
an interested party of that decision
and the reasons therefor.

III. ANALYSIS

A. *The standard of review*

[13] To the extent that this case raises a question regarding the interpretation of the *Act*, the Supreme Court has ruled that a tribunal's interpretation of its home statute is presumed to be reasonable, save for certain exceptions: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraph 21 (*McLean*). One of these exceptions is a real issue as to a tribunal's jurisdiction.

[14] In this case, the Tribunal and the Attorney General agreed that the issue was determining whether the Tribunal could, under it enabling legislation, investigate an AIA complaint. This agreement as to the issue is not binding on this Court. We must decide whether this view is well founded.

[15] The issue of jurisdiction in this case is whether the Tribunal's jurisdiction depends on the existence, at any time during the examination of a complaint, of a designated contract or on the possibility of awarding such a contract.

[16] The Attorney General cited this Court's previous case law holding that the review of the Tribunal's decision regarding a question of jurisdiction be subject to the standard of correctness:

Northrop Grumman Overseas Services Corp. v. Canada (Attorney General), 2008 FCA 187, [2009] 1 F.C.R. 688 at paragraphs 27-28, conf. by *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 CSC 50, [2009] 3 S.C.R. 309 at paragraph 10 (*Northrop*). However, the Supreme Court cast doubt on soundness of *Northrop* in *Alberta (Information and Privacy Commissioner) v. Alberta*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 33, and more recently in *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, 412 D.L.R. (4th) 103 at paragraph 35 (*Guérin*).

[17] In *Guérin*, the Supreme Court noted that the reasoning in *Northrop* followed the case law prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and did not address a true question of jurisdiction: *Guérin* at paragraph 35. This comment is consistent with the case law that holds that courts should be slow to qualify an issue of interpretation as jurisdictional, and therefore subject it broader curial review when there is doubt as to its nature: *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417, at page 233).

[18] The issue of the Tribunal's jurisdiction in this case is very similar to the issue raised in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47, [2016] 2 S.C.R. 293 (*Capilano*). The issue was whether the City of Edmonton's Assessment Review Board had jurisdiction to increase a property assessment where the landlord's application for review alleged that the assessment of its shopping centre was too high. The Supreme Court ruled that the issue whether the Board had the power to increase an assessment was simply one of

interpretation of the Board's home statute and did not raise a true question of jurisdiction in the sense of *vires*:

> It is clear here that the Board may hear a complaint about a municipal assessment. The issue is simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints. No true question of jurisdiction arises.
>
> *Capilano* at paragraph 26.

[19] In this case, there can be no doubt that the Tribunal has the jurisdiction to inquire into the procedure followed with respect to a government contract subject to trade agreements. The question of whether the Tribunal loses jurisdiction when such a government contract is cancelled is simply one of interpreting the Act and, as in *Capilano*, does not raise a true question of jurisdiction.

[20] In the light of these cases, I am of the view that the Supreme Court has decided, if only implicitly, that *Northrop* is no longer good law. The fact that a question of interpretation of its home statute affects the conditions under which the Tribunal may exercise its statutory powers is not in itself a question of *vires*, to which the standard of correctness applies. The presumption of reasonableness set forth under *McLean* applies and has not been rebutted.

[21] Moreover, the issue whether a contract has been awarded is a mixed question of fact and law because legal doctrine it calls for the application of a legal doctrine to the facts of the case. In the case of a statutory appeal from the decision of an expert tribunal, "the standard of review must be determined on the basis of administrative law principles": *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, paragraph 38. The standard of review for

mixed questions of fact and law and questions of fact is that of reasonableness: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paragraph 40.

B. *A designated contract has been awarded*

[22] The Tribunal ruled that it had jurisdiction to pursue an investigation since a contract had been awarded to LRO Staffing. This conclusion was based on the email that GAC had sent the AIA on March 21, 2016 that [TRANSLATION] "[a] subsequent order was awarded to LRO Staffing for its successful proposal": Reasons at paragraph 31. The Attorney General, on the basis of Mr. Mucci's testimony that a contract is only awarded once the designated form is delivered to the successful bidder, was of the opposite view.

[23] It was not disputed that the government contract was subject to one of the trade agreements listed or described in section 3 of the Regulations. This being the case, a contract awarded pursuant to such a government contract is a "designated contract," which should be conclusive as to the issue of the Tribunal's jurisdiction, unless the cancellation of the request for availability (RFA) has the extinctive effect that the Attorney General attributes to it.

[24] In this case, the Tribunal, which is the fact finder, asked whether a contract had actually been awarded and answered in the affirmative. The evidence before the Tribunal included Mr. Mucci's testimony and the communications between GAC and AIA. These communications included the email in which GAC advised AIA that a contract had been awarded to another supplier. It was for the Tribunal to weigh the evidence and draw conclusions that it deemed credible. In exercising this power, the Tribunal found that a contract had been awarded.

[25] That conclusion necessarily implies an interpretation of the words “contract . . . that has been awarded” in the definition of “designated contract” in section 30.1 of the Act. The Tribunal is not bound by the meaning given to that expression in the documents prepared by the government institution and may give it a meaning consistent with the wording of the Act in its entire context, which serves the fulfillment of the object of the Act: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 36 O.R. (3rd) 418 at paragraph 21.

[26] In this case, the Tribunal interpreted the words “contract . . . that has been awarded . . .” on the basis of the communication of the contract award, not on the basis of contractual formalities. The Tribunal’s point of view is not unreasonable. The definition of “designated contract” plays a limiting role in the Act because it limits access to the complaint and investigation process to disputes arising from government contracts subject to trade agreements. The Tribunal has chosen to define one of the components of this limiting element in relation to communicating the contract award to one or more bidders, a public gesture, rather than in relation to contractual formalities which are, in fact, non-public.

[27] This is entirely consistent with the Tribunal’s view that its interpretation contributes to its ability “to ensure that the government contract award process is fair, competitive, efficient and inclusive”: Reasons at paragraph 34. The exercise of this jurisdiction over the supply contract award process does not violate the Tribunal’s discretion under subsection 30.13(5) of the Act, not to conduct an inquiry where the complaint is trivial, frivolous or vexatious: Reasons at paragraphs 33-37. In sum, the Tribunal’s finding that a contract was awarded in this case is not unreasonable and therefore does not call for our intervention.

C. *The cancellation of the contract did not deprive the Tribunal of its jurisdiction*

[28] The Attorney General argues that even if a contract was awarded, the subsequent cancellation of the government contract deprived the Tribunal of its jurisdiction. The Attorney General bases his argument on case decided by this Court, *Novell Canada Ltd. v. Canada (Minister of Public Works and Government Services)*, [2000] FCJ No. 950 (QL) (*Novell*).

[29] In *Novell*, a supplier (Novell) contested the government's awarding of a contract without having conducted a competitive process. The government institution alleged that it did not have to conduct a competition because the contract was not covered by trade agreements. Novell was of the opposite view and further alleged that awarding the contract in this way was part of a contract splitting strategy. The Tribunal found in favour of Novell on the grounds that the contract was indeed subject to one or more trade agreements. However, the Tribunal did not rule on the issue of contract splitting. Despite its success before the Tribunal, Novell filed an application for judicial review before this Court, alleging that the Tribunal should rule on the issue of contract splitting.

[30] The supply at issue was designed to prevent the possibility of a computer system failure in the federal institution during the transition from 1999 to 2000, the famous Y2K problem, which, at the end of the day, turned out to be a non-event. After January 1, 2000 had come and gone without incident, the federal institution no longer needed the supply and, in the light of Novell's complaint, divested itself of everything it had acquired under the contract at issue.

[31] Given these facts, this Court dismissed the application for judicial review, stating:

> There is now no designated contract at issue. . . . While subsection 30.11(1) is broad enough to confer on the Tribunal jurisdiction to consider any aspect of a procurement process that relates to a designated contract, there must be a designated contract in order to trigger the broader inquiry. As there is now no designated contract at issue, the Tribunal is without jurisdiction to enter into any procurement process inquiry. In other words, there is no jurisdiction in the Tribunal under subsection 30.11(1) to conduct an at-large inquiry into the procurement processes of the government.

[32] The Tribunal considered *Novell*. It pointed out that it had previously noted that that case should be understood in the light of its particular facts, including the fact that after the Tribunal had ruled in favour of the complainant, the government institution had indicated that it no longer needed the services at issue and had discarded the software it had previously acquired. The Tribunal was of the opinion that this explained the result in *Novell*: Reasons at paragraph 41.

[33] This attempt by the Tribunal to limit *Novell* to its particular facts would be persuasive if this Court had decided that the application for judicial review should be dismissed because the issue was moot, which was certainly the case. Thus, the decision to dismiss the application for judicial review would simply be an exercise of discretionary power not to proceed with an application for judicial review, which in fact, could not have any practical implications for the parties. But this Court decided the case on a question of jurisdiction, which is entirely different. We must abide by this Court's decision and not substitute for it the one it could have made. It follows that, if *Novell* was correctly decided, the Tribunal lost jurisdiction over AIA's complaint when the government contract was cancelled. The question is then whether Novell was correctly decided.

[34] The consistency of the doctrine of a court of appeal requires that each panel respect and apply in good faith the *ratio decidendi* of any decision rendered by another panel of the Court. The need for finality and certainty in law demands no less. That being said, since a court is a human institution, the possibility of error cannot be ruled out and, given the limited number of applications for leave granted by the Supreme Court, not to mention the costs of such an approach, these errors may not be corrected. That is why the law gives courts of appeal the option to intervene when a decision rendered by a panel is clearly erroneous.

[35] This Court provided guidance on this possibility to intervene in *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (*Miller*). One panel of this Court cannot depart from a decision of another panel unless ". . . the previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed": *Miller* at paragraph 10.

[36] I am of the opinion that, evidently, *Novell* was wrongly decided by this Court because it overlooked the Act in several regards. The Court's concern in *Novell* seemed to have been that in the absence of a specific contract, the Tribunal my read into subsection 30.11(1) a power to conduct an at-large inquiry into the procurement processes of the government. That concern is not in any way addressed in the provisions of the Act.

[37] The wording of the Act does not require that there be a specific contract in uninterrupted existence while a complaint is active. The Act simply requires that a complaint address the processes followed with respect to the award of a contract subject to trade agreements. The

Tribunal rejected the argument based on the “extinguishing effect” of the cancellation of a procurement because a cancellation does not necessarily relate to the procedural flaws highlighted in the complaint and does not allow the Tribunal to fulfil its role of preserving trust in the integrity of procurement procedures: Reasons at paragraph 35.

[38] The concern that, in the absence of a specific contract, the Tribunal is allowed “to conduct an at-large inquiry into the procurement processes of the government” overlooks several other provisions of the Act.

[39] Subsection 30.11(1) authorizes the filing of a complaint with respect to a specific contract, but no inquiry is authorized unless the complaint meets the statutory requirements. Subsection 30.11(2) of the Act sets out the conditions a complaint must meet, including: “identify the complainant, the designated contract concerned and the government institution that awarded or proposed to award the contract” and “contain a clear and detailed statement of the substantive and factual grounds of the complaint.” All this ensures that any inquiry is limited to the circumstances surrounding a specific designated contract. Moreover, since subsection 30.14(1) provides that, in conducting an inquiry, the Tribunal shall limit its considerations to the subject-matter of the complaint, the Tribunal must therefore stand by the process followed with respect to the contract designated in the complaint.

[40] The effect of all these provisions is that the Tribunal may not conduct an inquiry into the process followed by a federal institution unless a potential supplier files a complaint designating a specific contract that was awarded or could be awarded. The supplier must also specify the

reasons for the complaint. Once the Tribunal is convinced that the complaint meets the statutory requirements, it may determine whether an inquiry is warranted, but the inquiry must be limited to the subject-matter of the complaint. In sum, these provisions do not allow the Tribunal to conduct an at-large inquiry into the procurement processes of the government, contrary to the Court's concern.

[41] It is also telling that, as the Tribunal noted, subsection 30.13(5) allows the Tribunal to decide not to conduct an inquiry into a complaint or to cease conducting an inquiry if it is of the opinion that the complaint is trivial. This provision gives the Tribunal the latitude to decide not to conduct an inquiry when its inquiry could have no practical effect and raises no questions as to the integrity or efficiency of procurements. This provision would have a very limited scope if the Tribunal could conduct an inquiry only when it was still possible to award a contract at any time.

[42] In the light of these provisions, I conclude that this Court did not consider all the provisions of the Act pertaining to the operation of the Tribunal and, therefore, made a manifestly wrong decision. *Novell* is no longer good law. Consequently, the Tribunal did not lose its jurisdiction when GAC cancelled the procurement.

IV. CONCLUSION

[43] I conclude that the Tribunal's decision on its jurisdiction is not unreasonable.

[44] The application for judicial review should therefore be dismissed, with costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Marc Nadon J.A."

"I agree.
Johanne Gauthier J.A."

Certified true translation,
François Brunet, Revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-329-16

Appeal of a decision of the Canadian International Trade Tribunal dated August 19, 2016, under docket PR-2016-001

STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. THE ACCESS INFORMATION AGENCY INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 5, 2017
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	JANUARY 18, 2018

APPEARANCES:

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