

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190102

Docket: A-220-17

Citation: 2019 FCA 1

**CORAM: WEBB J.A.
BOIVIN J.A.
WOODS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

VALCOM CONSULTING GROUP INC.

Respondent

Heard at Ottawa, Ontario, on January 23, 2018.

Judgment delivered at Ottawa, Ontario, on January 2, 2019.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**WEBB J.A.
BOIVIN J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] This is a judicial review application by the Attorney General of Canada in relation to a decision of the Canadian International Trade Tribunal (Tribunal) dated June 14, 2017: File No. PR-2016-056. The respondent, Valcom Consulting Group Inc. (Valcom), did not participate in the proceeding.

[2] The Tribunal's decision related to a complaint filed by Valcom pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (Act). Section 30.11 allows a potential supplier to file a complaint "concerning any aspect of the procurement process that relates to a designated contract."

[3] The Tribunal (*per* Member Penner) concluded that it had the authority to inquire into the complaint and that Valcom's complaint was valid. The Tribunal also made recommendations on appropriate remedies.

[4] In this judicial review, the Attorney General submits that the Tribunal erred in concluding that it had authority over this matter because the complaint did not relate to a procurement process as required by section 30.11 of the Act. The Attorney General also submits that the Tribunal erred with respect to remedies.

[5] For the reasons that follow, I would dismiss the application.

I. Background

[6] In 2016, Valcom submitted a bid pursuant a Department of National Defence (DND) request for proposals for the services of a senior technician. The contract was to be awarded for a duration of three years, with options to extend for a maximum of two years. DND received several bids and determined that Valcom's bid was the only one that was compliant with the bid conditions. As such, the contract was awarded to Valcom on December 14, 2016.

[7] Subsequently, DND received complaints from two other bidders that had submitted bids lower than Valcom's. DND then proceeded to reconsider these bids.

[8] On January 23, 2017, DND informed Valcom that various concerns had been raised regarding the solicitation process. Valcom was ordered to immediately stop work and its contract was terminated for convenience on 30 days' notice in accordance with the contract terms. DND stated that the termination was "in order to maintain the integrity of the competitive process" and advised that they intended to retender for the services (application record, p. 58, 179).

[9] On February 3, 2017, Valcom filed a complaint with the Tribunal with respect to the awarding of the contract and its subsequent termination for convenience. The Tribunal proceeded to conduct an inquiry into the complaint.

[10] On March 3, 2017, DND filed a motion under section 24 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499 in which they sought an order "that the Tribunal cease its inquiry" into the complaint on the basis that it was not in respect of the procurement process, and thus ought to be dismissed under subsection 10(b) of the *Canadian International Trade Tribunal Inquiry Regulations*, S.O.R./93-602 for lack of jurisdiction (application record, p. 166-168). The motion was dismissed on March 20, 2017, with reasons to follow.

[11] On March 10, 2017, DND commenced a new solicitation process for the services. Valcom participated in this process, but the new contract was awarded to someone else on May 2, 2017.

[12] On June 14, 2017, the Tribunal issued reasons for its decision on the motion and the merits. The Tribunal determined that it had the authority to consider the complaint under section 30.11 of the Act because the complaint concerned the procurement process. With respect to the merits, the Tribunal concluded that the complaint was valid because DND had breached several articles of the applicable trade agreements relating to the procurement process.

[13] The Tribunal also recommended remedies in order to make Valcom whole. This included awarding the contract to Valcom and cancelling the new solicitation process.

II. Issues

[14] There are two issues to be decided:

- (a) Did the Tribunal err in concluding that it had the authority to inquire into this matter?
- (b) Did the Tribunal err in recommending remedies that necessarily involve the cancellation of third party contracts that were issued pursuant to a separate solicitation process?

III. Analysis

A. *Did the Tribunal err in taking jurisdiction?*

[15] The first question is whether the Tribunal erred in concluding that it had the authority to inquire into the complaint. A preliminary question concerns the standard of review.

[16] The Attorney General submits that a correctness standard of review should apply because the issue involves a legal question of significant importance which the Tribunal is not better situated to answer than this Court. Although this is a recognized ground for correctness review, it is not applicable in this case.

[17] Recently, the Supreme Court of Canada provided guidance concerning this ground of correctness review, and stated that it should not be applied liberally. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, 36 Admin. L.R. (6th) 1, the Court stated:

[42] The Commission argues that the Tribunal's decisions raise a question of central importance in which it lacks expertise because other federal tribunals with the power to determine general questions of law have concurrent jurisdiction to interpret the scope of s. 5 of the *CHRA*. *Dunsmuir* recognized that the correctness standard of review can apply to questions of law that are both of central importance to the legal system as a whole *and* outside the decision maker's specialized area of expertise (paras. 55 and 60). Since *Dunsmuir*, this category of correctness review has been applied only twice by this Court — first in *Saguenay*, at paras. 49-51, and then in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 21-22 and 26. Indeed, this Court has repeatedly rejected a liberal application of this category (see, e.g., *Nor-Man Regional Health Authority Inc. v. Manitoba Association of*

Health Care Professionals, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 38; *Whatcott*, at para. 168; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at para. 44; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 34; *Alberta Teachers*, at para. 32; *Barreau du Québec v. Québec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18; *Canadian National Railway*, at paras. 60 and 62; *McLean*, at para. 28).

[43] Here, the Tribunal has extensive expertise in determining what is meant by a discriminatory practice. The ability of other federal tribunals to apply the *CHRA* does not rob the Tribunal of its expertise in its home statute. Regardless of whether the questions before the Tribunal rose to the requisite level of importance, they were clearly within the Tribunal's expertise. This category does not apply.

[18] In my view, the Tribunal's decision that it had the authority to consider the complaint does not warrant the application of the exceptional ground of correctness review, either from the point of view of significant importance or in respect of the Tribunal's suitability to answer the question.

[19] The Attorney General submits that the issue involves an important extricable question of law, that is, "whether a contract can be award[ed] in a non-definitive manner, allowing a Tribunal to retain jurisdiction after a procurement process has come to an end ..." (memorandum at para. 22).

[20] With respect, this misstates the issue. The question is not whether the Tribunal can retain jurisdiction after a procurement process has come to an end, but whether this particular complaint relates to the procurement process. This is a question of mixed fact and law and has a significant factual component. The issue does not give rise to a significant question of law, and it

is within the Tribunal's core area of expertise. The presumptive reasonableness standard should apply.

[21] As for the merits, the Attorney General submits that the complaint is beyond the reach of subsection 30.11(1) of the Act because the complaint does not relate to the procurement process. It submits that the procurement process ended when the contract was awarded to Valcom. The subsequent process by which the contract was terminated was, according to the Attorney General, a matter of contract administration over which the Tribunal has no jurisdiction.

[22] Subsection 30.11(1) of the Act provides:

Filing of complaint

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.

Dépôt des plaintes

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.

[23] In its reasons, the Tribunal reviewed the relevant trade agreements and found that they provide that the procurement process "begins after an entity has decided on its procurement requirement and continues through the contract award" (Reasons at para. 30, citing article 514(2)(a) of the *Agreement on International Trade* and article 1017(1)(a) of the *North American Free Trade Agreement*). The Tribunal accordingly agreed that matters of contract administration were beyond its jurisdiction (Reasons at para. 32).

[24] However, the Tribunal ultimately concluded that the complaint came within section 30.11 of the Act because Valcom's complaint concerned an aspect of the procurement process. In this regard, it determined that the procurement process continued in this case when DND reconsidered some of the bids after the contract with Valcom had been entered into (Reasons at para. 33). The Tribunal held:

35. Given that the complaint concerns aspects of the procurement process, the mere fact that the procurement process appears to have continued beyond the initial award of the contract does not deprive the Tribunal of jurisdiction. The information before the Tribunal relating to the "various concerns [that] have been raised with regards to [the request for proposals]" indicates that DND re-engaged the procurement process after awarding the contract to Valcom, and that these actions were integral to the procedures followed in respect of the designated contract. In fact, by DND's own admission, concerns about the procurement process caused it to retract Valcom's contract and retender the requirement. In such circumstances, the fact that the procurement process continued beyond the initial award of a contract cannot allow DND to eschew the disciplines of the trade agreements.

[Footnotes omitted.]

[25] The Attorney General submits that this decision is inconsistent with prior decisions of the Tribunal to the effect that it has no jurisdiction over contract administration. However, the Tribunal's decision is not inconsistent with these authorities. The Tribunal acknowledges that it has no jurisdiction over contract administration.

[26] The Attorney General refers in particular to the Tribunal's decision in *Reicore Technologies Inc. v. The Department of Public Works and Government Services*, File No. PR-2009-047. This submission misunderstands the conclusion in *Reicore* which essentially was based on its facts. In particular, the Tribunal in *Reicore* commented that the complaint did not

relate to an “evaluation process” and that the complaint did not indicate why the award would violate the procurement provisions of the relevant trade agreements (*Reicore* at para. 8). In contrast, the complaint by Valcom deals directly with the evaluation process and violation of trade agreements.

[27] In my view, the Tribunal reasonably concluded that the issue in the complaint relates to a procurement process over which it has the authority to inquire into pursuant to section 30.11 of the Act. The Tribunal’s reasons, as well as its conclusion, are reasonable.

B. *Did the Tribunal err in the recommended remedies?*

[28] The Tribunal also considered appropriate remedies and recommended that Valcom effectively be put in the same position as if its contract had not been terminated. It was recommended that the contract be awarded to Valcom and that the new solicitation process be terminated.

[29] The Attorney General submits that these recommendations necessarily affect the contract that was awarded after DND retendered the solicitation. According to the Attorney General, the Tribunal does not have the authority to recommend such a remedy under the Act. The remedies can only affect the designated contract that was awarded to Valcom, it is suggested. Otherwise, the remedies would affect innocent parties.

[30] I do not agree with this submission. First, the focus of the Tribunal's inquiry is on the procurement process. This is clear from the wording of subsection 30.11(1) of the Act which provides that a complaint may be filed "concerning any aspect of the procurement process that relates to a designated contract". This suggests that remedies should address the harm that arises from a defective procurement process, which is what the Tribunal's recommendations do.

[31] Second, the Act explicitly provides for a very wide range of remedies. Subsection 30.15(2) of the Act provides:

Remedies

30.15(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

Mesures correctives

30.15(2) Sous réserve des règlements, le Tribunal peut, lorsqu'il donne gain de cause au plaignant, recommander que soient prises des mesures correctives, notamment les suivantes :

- a) un nouvel appel d'offres;
- b) la réévaluation des soumissions présentées;
- c) la résiliation du contrat spécifique;
- d) l'attribution du contrat spécifique au plaignant;
- e) le versement d'une indemnité, dont il précise le montant, au plaignant.

[32] Parliament did not intend for the remedies to be limited as suggested by the Attorney General. This is clear from the word “including” in subsection 30.15(2) above. Also the explicit remedies that are provided in clauses (a) to (e) are very broad and could affect third parties.

[33] The Attorney General submits that “Parliament intended to create an adjudicative process that would be directed at a given procurement and not the entire existing inventory of contracts that the Government of Canada has concluded” (memorandum at para. 50). I agree but here it is reasonable to consider the first contract and the new contract as part of a “given procurement.” By DND’s own admission, the second Request for Proposals took place due to deficiencies in the first, but both were essentially for the same service. I do not read the Tribunal’s decision as opening the door to remedies that affect entirely unrelated procurement contracts entered into by the government.

[34] The Attorney General finally contends that, because Valcom did not file a complaint with respect to its unsuccessful bid in the second Request for Proposals, “the decision was accepted by all” (memorandum at para. 45). This argument is misplaced. When DND retendered the Request for Proposals on March 10, 2017, Valcom had already filed its complaint on February 3, 2017. Moreover, Valcom had “requested that the Tribunal recommend that its contract be reinstated” (Reasons at para. 98). Although Valcom could have separately challenged the second Request for Proposals, its failure to do so does not mean that it accepted the result but rather that the second Request for Proposals never should have been tendered at all.

[35] Ultimately, on the reasonableness standard of review, the remedies recommended by the Tribunal were within the range of reasonable outcomes available to it in the circumstances.

[36] In any event, this submission is flawed procedurally because the issue was raised for the first time on this judicial review. DND did not address remedies at all in its submissions to the Tribunal, and it did not provide the Tribunal with evidence that a new contract had been awarded on May 2, 2017. It is not appropriate for the Attorney General to raise this issue for the first time on judicial review (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 21-26).

IV. Conclusion

[37] For the reasons above, I would dismiss this application for judicial review. Since the respondent did not participate in the proceedings, I would not order any costs.

“Judith M. Woods”

J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
Richard Boivin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-220-17

**AN APPLICATION FOR JUDICIAL REVIEW FROM THE DECISION OF THE
CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED JUNE 14, 2017, FILE NO.
PR-2016-056**

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. VALCOM
CONSULTING GROUP INC.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 23, 2018

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: WEBB J.A.
BOIVIN J.A.

DATED: JANUARY 2, 2019

APPEARANCES:

Alexander Gay
Helene Robertson

FOR THE APPLICANT

SOLICITORS OF RECORD:

Nathalie G. Drouin
Deputy Attorney General of Canada

FOR THE APPLICANT