

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

**Date: 20110620**

**Dockets: A-264-10  
A-312-10  
A-321-10**

**Citation: 2011 FCA 207**

**CORAM: BLAIS C.J.  
SHARLOW J.A.  
MAINVILLE J.A.**

**Docket: A-264-10**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**ENTERASYS NETWORKS OF CANADA LTD.  
and CCSI TECHNOLOGY SOLUTIONS CORPORATION**

**Respondents**

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**Respondent**

Heard at Ottawa, Ontario, on June 15, 2011.

Judgment delivered at Ottawa, Ontario, on June 20, 2011.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

BLAIS C.J.  
MAINVILLE J.A.

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**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] The Attorney General of Canada (the “Crown”) filed three applications for judicial review seeking to quash three determinations of the Canadian International Trade Tribunal. The applications were consolidated because they raise common issues on similar facts. The determinations upheld in part a number of complaints made by the respondent Enterasys Networks of Canada Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4<sup>th</sup> Supp.) (the “Act”). The Crown’s principal argument in the consolidated application is that the Tribunal had no jurisdiction to determine the complaints because Enterasys did not submit a bid and the Tribunal found that no act of Public Works and Government Services Canada (“PWGSC”) in the procurement process precluded Enterasys from submitting a bid. For the reasons that follow, I agree with the Crown, and on that basis I would quash the Tribunal’s determinations.

**Procedural history**

[2] The Crown’s consolidated application challenges the following Tribunal determinations:

(1) Procurement Determination issued June 21, 2010 for reasons issued July 21, 2010 in relation to 44 complaints of Enterasys (file numbers PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128) (reported as *Enterasys Networks of Canada Ltd. v. Canada (Department of Public Works and Government Services)*, [2010] C.I.T.T. No. 104);

(2) Procurement Determination issued August 9, 2010 for reasons issued November 4, 2010 in relation to 22 complaints of Enterasys (file numbers PR-2009-132 to PR-2009-153) (reported as *Enterasys Networks of Canada Ltd. v. Canada (Department of Public Works and Government Services)*, [2010] C.I.T.T. No. 141); and

(3) Procurement Determination issued September 10, 2010 for reasons issued December 22, 2010 in relation to 3 complaints of Enterasys (file numbers PR-2010-004 to PR-2010-006) (reported as *Enterasys Networks of Canada Ltd. v. Canada (Department of Public Works and Government Services)*, [2010] C.I.T.T. No. 148).

[3] In the three proceedings before the Tribunal, the Crown opposed all 69 complaints. In the first two CITT proceedings, the position of the Crown was supported by an intervener, CCSI Technology Solutions Corporation, a successful bidder on some of the designated contracts. That intervener was named as a respondent in two of the Crown's three applications for judicial review, but it did not file notices of appearance. No one intervened in the third CITT proceeding.

Statutory authority of the CITT to determine a complaint

[4] The Tribunal has the statutory authority to determine a complaint under subsection 30.11(1) of the Act only if the complainant meets the definition of “bidder or prospective bidder on a designated contract” in section 30.1 of the Act (*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 S.C.R. 309, 2009 SCC 50).

Whether the Tribunal had the jurisdiction to determine the complaints

[5] The Enterasys complaints that are the subject of these applications relate to contracts issued to qualified bidders in a process governed by the Networking Equipment Support Services National Master Standing Offer (sometimes referred to as “NESS NMSO” or “NESS”), which is the means by which federal government departments may obtain computer networking equipment.

[6] When a government department wishes to procure equipment covered by the Networking Equipment Support Services National Master Standing Offer, it may engage a process which, in effect, is a request to PWGSC to procure the equipment under a standing offer. Subject to certain conditions, PWGSC may then issue a “request for volume discount” (sometimes referred to as “RVD”) inviting bids from pre-qualified suppliers. The bids are assessed, and the winning bidder is awarded a contract.

[7] It is undisputed that the contracts that are the subject of the Enterasys complaints are “designated contracts” as defined in section 30.1 of the Act, and that they are subject to the *North American Free Trade Agreement Between the Government of Canada, the Government of the*

*United Mexican States and the Government of the United States of America*, Can T.S. 1994, No. 2, Ann. 1001.1b-1 (“*NAFTA*”).

[8] Pursuant to subsection 30.11(1) of the Act, a complaint concerning any aspect of the procurement process relating to a designated contract may be made by a “potential supplier”. The phrase “potential supplier” is defined in section 30.1 of the Act to mean, subject to any regulation made under paragraph 40(f.1), “a bidder or a prospective bidder on a designated contract” (no regulations have been made under paragraph 40(f.1)).

[9] Enterasys was a pre-qualified supplier under the Networking Equipment Support Services National Master Standing Offer, and had a legal right to bid on every request for volume discount that resulted in a designated contract that became the subject of one of its complaints. In fact, Enterasys did submit one bid, but its complaint in relation to the resulting designated contract was dismissed and need not be considered further. Enterasys did not submit a bid on any of the other requests for volume discount. By the time it submitted its complaints on the resulting designated contracts, it could not have submitted a bid because the permitted bidding period had expired.

[10] Clearly, Enterasys could not complain as a bidder on a designated contract on which it failed to bid, and it would appear to be arguable on a narrow interpretation of the phrase “prospective bidder” that Enterasys ceased to be a prospective bidder when the bidding period expired. However, according to counsel for the Crown, the Tribunal interprets the phrase “bidder or prospective bidder on a designated contract” to include a person who was eligible to bid for a designated contract but

was precluded from doing so by an aspect of the procurement process that is objectionable under the relevant trade agreement, which in this case is *NAFTA*.

[11] The Crown does not dispute the Tribunal's interpretation of the phrase "bidder or prospective bidder on a designated contract", and also accepts that an allegation by a complainant that it was precluded from submitting a bid because of an aspect of the procurement process that is objectionable under *NAFTA* may be a sufficient *prima facie* indication of the complainant's standing to permit the Tribunal to exercise its discretion to commence an inquiry.

[12] However, the Crown argues that if the Tribunal commences an inquiry on the basis of such an allegation, and the Tribunal finds after reviewing the evidence that the complainant was not in fact precluded from bidding by any objectionable aspect of the procurement process, the Tribunal must dismiss the complaint for want of jurisdiction.

[13] Given the Crown's position on these points, I will assume for the purposes of these applications, without deciding, that it was appropriate for the Tribunal, in determining whether to commence an inquiry into the complaints of Enterasys, to employ the interpretation of the phrase "bidder or prospective bidder on a designated contract" stated above. I will also assume that the Enterasys complaints provided the Tribunal with a sufficient basis to warrant a *prima facie* finding that it was a potential supplier because it was precluded from bidding by an objectionable aspect of the bidding process. It follows from these assumptions that the Tribunal was justified in



commencing the inquiry. The question is whether, given the factual findings of the Tribunal at the conclusion of the inquiry, the Tribunal had the jurisdiction to determine the complaints.

[14] I agree with the Crown that the Tribunal's reasons for each of the three determinations in issue contain clear findings of fact that disprove any allegation that Enterasys was precluded from bidding by any aspect of the procurement process that was objectionable under *NAFTA*. These findings of fact appear at paragraph 296 of the reasons for the June 21 determination, which reads in relevant part as follows:

The Tribunal notes that, despite its conclusion that PWGSC failed to comply with Article 1007(3) of *NAFTA* in certain instances, it found that Enterasys did not establish that additional information from PWGSC was required in order to permit bidders to submit responsive tenders. In the Tribunal's opinion, this means that PWGSC's actions did not have the effect of ensuring that no compliant equivalent bid could be submitted. In other words, the Tribunal considers that PWGSC's action did not preclude Enterasys from submitting a bid and, possibly, being awarded a contract.

(This statement appears in the part of the reasons dealing with remedy, but in my view nothing turns on that.)

[15] Substantially the same statements appear in paragraph 254 of the reasons for the August 9 determination, and paragraph 245 of the September 10 determination.

[16] The Crown argues that, based on the facts as found by the Tribunal after its inquiry, Enterasys did not meet the statutory definition of "potential supplier", and therefore the Tribunal

was obliged as a matter of law to dismiss the complaints for want of jurisdiction. In my view, the Crown's argument is correct in law.

[17] That is a sufficient reason for allowing the Crown's applications for judicial review, quashing the Tribunal's determinations, and returning this matter to the Tribunal with a direction that the complaints of Enterasys be dismissed.

#### Other issues

[18] The Crown made written and oral submissions on the substantive issues determined by the Tribunal in upholding many of Enterasys' complaints. In my view, the most important of those substantive issues relates to the issue of when it is permissible for a procurement to specify the item to be procured by brand name. Although it is not necessary to consider this issue for the purpose of disposing of these applications, I propose to do so because of one particularly striking aspect of the Tribunal's reasons.

[19] The designated contracts that were the subject of the Enterasys complaints were awarded on the basis of procurements that specified the desired equipment by brand name or equivalent. Enterasys alleged in its complaints that there was a sufficiently precise or intelligible way of describing the procurement requirements other than by brand name, and therefore PWGSC was not entitled to specify its requirements by brand name. PWGSC argued the contrary. The Tribunal upheld the complaint on this issue.

[20] The Tribunal's determination as to whether PWGSC was entitled to specify equipment by brand name required consideration of the interpretation and the application of *NAFTA* Article 1007(3), which reads as follows:

1007. (3) Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.

1007. (3) Chacune des Parties fera en sorte que les spécifications techniques prescrites par ses entités n'exigent ni ne mentionnent de marques de fabrique ou de commerce, de brevets, de modèles ou de types particuliers, ni d'origines, de producteurs ou de fournisseurs déterminés, à moins qu'il n'existe pas d'autre moyen suffisamment précis ou intelligible de décrire les conditions du marché, et à condition que des termes tels que "ou l'équivalent" figurent dans la documentation relative à l'appel d'offres.

[21] The Tribunal's interpretation and application of *NAFTA* Article 1007(3) must be reviewed on the standard of reasonableness (*Canada (Attorney General) v. McNally Construction Inc.*, [2002] 4 FC. 633, 2002 FCA 184).

[22] As I understand the reasons of the majority and the dissenting member, the essential difference between them related to the legal relevance of a substantial body of cogent and uncontradicted evidence explaining the practical reasons for specifying brand names when procuring products covered by the Networking Equipment Support Services National Master Standing Offer for installation within an existing computer network.

[23] The conclusion of the majority to disregard that evidence appears in paragraph 126 of the reasons for the June 21 determination (my emphasis), which reads in relevant part as follows:

In summary, the Tribunal is of the view that PWGSC has not established that the conditions necessary for using brand names as required by Article 1007(3) of *NAFTA* have been met in the circumstances of the RVDs that specify products by brand name that are at issue. Practical/operational and/or general systemic considerations, such as the ones taken into account by PWGSC, do not fall within the scope of the language set out in Article 1007(3), which provides for the use of brand names. Accordingly, the Tribunal concludes that PWGSC's conduct regarding these RVDs was inconsistent with Article 1007(3).

[24] The majority took the same approach in the other two determinations, although the underlined passage is not repeated.

[25] In my respectful view, discounting or ignoring the evidence and justification offered by PWGSC rendered the conclusion of the majority on the interpretation and application of *NAFTA* 1007(3) wrong in principle and therefore unreasonable. Specifically, I agree with the Crown that the majority misdirected itself on the object and purpose of the permitted exception. I do not accept the proposition implicit in the decision of the majority that *NAFTA* Article 1007(3) necessarily requires the federal government to take unacceptable operational risks. It follows that the Tribunal, in determining whether a particular procurement may use a brand name specification, cannot disregard or discount as irrelevant evidence submitted by PWGSC in support of its position that the use of brand names in relation to a particular procurement was necessary to avoid an unacceptable operational risk.

[26] The approach taken by the dissenting member on this issue was reasonable. She considered the evidence in issue to be legally relevant and sufficient to justify the decision of PWGSC to use brand name specifications in all but two of the designated contracts in issue. She explained her conclusion at paragraphs 145 to 152 of the reasons for the June 21 determination (which is substantially repeated in the other two determinations). The following excerpts from those paragraphs highlight the parts of her analysis that disclose her understanding of *NAFTA* Article 1007(3) and its application (footnotes omitted, my emphasis):

**146** [...] In my view, in the circumstances of the present case, Article 1007(3) of *NAFTA* authorizes PWGSC to identify products by brand name when using an RVD, to the extent that it can provide to the Tribunal a reasonable explanation to the effect that generic specifications are not sufficiently precise to allow it to ensure that the requested product will properly integrate into the existing network. In such a case, my opinion is that PWGSC presented a reasonable explanation that there is no other sufficiently precise or intelligible way to identify the products, since the use of generic specifications would risk compromising the Government's networks and prevent it from purchasing the products effectively required.

**147** PWGSC submitted in the GIR and confirmed during the hearing that, when switches are to be installed and integrated into existing networks, whose integrity and reliability are essential to the host department or agency, failure of the switches to properly integrate into those networks could compromise those networks.[...]

[...]

**151** It is my view that, in the circumstances of this case, as reviewed above, the risk and the consequences of not procuring the right product when a switch is to be used in an existing system/infrastructure constitute a sufficient and reasonable justification for PWGSC to require a "brand name or equivalent".

**152** Therefore, in my view, PWGSC presented the necessary justifications to specify products by "brand name or equivalent" for each of the 43 RVDs at issue, with the exception of RVD 651 and RVD 650, in terms required by Article 1007(3) of *NAFTA*. [...]

[27] If I had concluded that the Tribunal had the statutory authority to determine the Enterasys complaints, I would have concluded that its determinations in relation to the interpretation and application of *NAFTA* Article 1007(3) are unreasonable and can not justify upholding the Enterasys complaints, with the two exceptions noted by the dissenting member.

Costs of the applications for judicial review

[28] The Crown included a request for costs in each of the three notices of application for judicial review. The same request was repeated in the Crown's memorandum of fact and law in the consolidated application. Counsel for the Crown made no oral submissions on costs, and he was not obliged to do so as the request for costs was on the record. In my view, there is no reason in this case to depart from the normal rule in this Court that costs follow the event, if sought.

[29] Enterasys filed a notice of appearance but did not file a record or a memorandum of fact and law opposing the Crown's applications, or its request for costs. Enterasys did not and was not obliged to explain why it did not defend the Tribunal determinations. However, counsel for Enterasys attended the hearing of the applications to inform the Court that Enterasys wished to make oral submissions on costs only. In the absence of any written submissions from Enterasys in advance of the hearing, the Court exercised its discretion not to permit Enterasys to make oral submissions on costs.

[30] Despite the lack of oral submissions, I have considered whether the amount of costs awarded to the Crown in this consolidated application should be reduced or limited in some way

because Enterasys did not oppose the consolidated application. I have concluded that no such reduction or limitation is warranted. The fact that Enterasys did not oppose the consolidated application did not relieve the Crown of the normal burden of an applicant to produce a record, prepare a memorandum of fact and law, and appear at the hearing to make submissions to persuade the Court that the determinations of the Tribunal were based on an error warranting the intervention of this Court.

[31] Enterasys initiated the complaint proceedings. Having succeeded before the Tribunal, Enterasys bore the risk that the Tribunal's determinations of its complaints might be successfully challenged in this Court, and that the Crown might be awarded costs in this Court. That risk did not disappear when Enterasys decided not to defend the Tribunal's determinations.

### Conclusion

[32] I would allow the Crown's applications for judicial review with costs, quash the determinations of the Tribunal, and refer the complaints of Enterasys back to the Tribunal with a direction that they be dismissed for want of jurisdiction.

“K. Sharlow”

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J.A.

“I agree  
Pierre Blais C.J.”

“I agree  
Robert M. Mainville J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-264-10

**STYLE OF CAUSE:** Attorney General of Canada v.  
Enterasys Networks of Canada Ltd.  
et al

**PLACE OF HEARING:** Ottawa

**DATE OF HEARING:** June 15, 2011

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**CONCURRED IN BY:** BLAIS C.J.  
MAINVILLE J.A.

**DATED:** June 20, 2011

**APPEARANCES:**

David M. Attwatter FOR THE APPLICANT

Claude-Alain Burdet FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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