



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2005-054

Luc Coulombe, operating as
Entreprise aérologique Rafale O Nord

v.

Department of the Environment

*Decision and reasons issued
Tuesday, May 23, 2006*

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IN THE MATTER OF a complaint filed by Luc Coulombe, operating as Entreprise aérologique Rafale O Nord, under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

**LUC COULOMBE, OPERATING AS ENTREPRISE
AÉROLOGIQUE RAFALE O NORD**

Complainant

AND

THE DEPARTMENT OF THE ENVIRONMENT

**Government
Institution**

DECISION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of the Environment give Luc Coulombe, operating as Entreprise aérologique Rafale O Nord, three weeks to respond to the original Request for Proposal concerning the procurement (Solicitation No. KM315-05-4339) for the provision of services to execute the upper air program at the Inukjuak Station and that the proposal that Luc Coulombe, operating as Entreprise aérologique Rafale O Nord, submits be evaluated for this Request for Proposal based on the same criteria as those used in evaluating the proposals previously submitted by the other bidders. In this case, the three-week period begins as of the date that Luc Coulombe, operating as Entreprise aérologique Rafale O Nord, receives this decision or, in the event that it has not received the Request for Proposal, as of the date the Request for Proposal is received.

Pursuant to subsection 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Luc Coulombe, operating as Entreprise aérologique Rafale O Nord, its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of the Environment. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

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Presiding Member

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STATEMENT OF REASONS

COMPLAINT

1. On February 20, 2006, Luc Coulombe, operating as Entreprise aérologique Rafale O Nord (Rafale O Nord), filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned the procurement (Solicitation No. KM315-05-4339) by the Department of the Environment (Environment Canada) for the provision of services to execute the upper air program at the Inukjuak Station.
2. Rafale O Nord alleged that Environment Canada had failed to provide suppliers with a reasonable period of time to submit proposals. As a remedy, it requested an extension of time to submit a complete and competitive proposal.
3. On February 24, 2006, the Tribunal informed the parties that the complaint had been accepted, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On the same date, the Tribunal also decided to issue a postponement of award order. Environment Canada filed the Government Institution Report (GIR) on March 20, 2006. On March 23, 2006, pursuant to paragraph 25.1(b) of the *Canadian International Trade Tribunal Rules*,³ the Tribunal asked the parties to answer a few questions. On March 30, 2006, Rafale O Nord filed its comments on the GIR. On April 3, 2006, Rafale O Nord and Environment Canada submitted their answers to the Tribunal's questions and, on April 7, 2006, both parties submitted their comments on those answers.
4. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and, pursuant to paragraph 25(c) of the *Rules*, disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

5. The Request for Proposal (RFP) was published on MERX⁴ on January 27, 2006, with a bid closing date of February 10, 2006, 2:00 p.m., Eastern Standard Time. The RFP was also published in the January 27 and February 3, 2006, editions of the *Nunatsiaq News*, a newspaper with its head office in Iqaluit, Nunavut, which is distributed to Inukjuak, Nunavik.
6. The RFP specified that Environment Canada was issuing a solicitation regarding the execution of its upper air program at the Inukjuak Station from April 1, 2006, to March 31, 2007, inclusive, with the possibility of four one-year extensions. Environment Canada stated that it had received proposals from two bidders.
7. On February 13, 2006, Rafale O Nord filed an objection with Environment Canada regarding the two-week time limit allotted for submitting proposals.
8. Rafale O Nord sent its proposal to Environment Canada on February 14, 2006, and, that same day, Environment Canada informed Rafale O Nord that its proposal could not be considered because the RFP

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499 [*Rules*].
4. Canada's electronic tendering service.

had been closed since February 10, 2006. On February 20, 2006, the Tribunal became aware of the complaint dated February 17, 2006, that had been faxed on February 18, 2006.

POSITIONS OF THE PARTIES

Rafale O Nord's Position

9. Rafale O Nord stated that the information regarding this RFP had not been distributed in a manner to allow it to submit a proposal within a reasonable time period. It submitted that the issuance of the RFP was not adapted to Inukjuak resources and did not allow interested bidders to take the necessary steps for submitting a proposal due to the short time period allotted.

10. Rafale O Nord stated that, to its knowledge, this RFP had been issued more than a month in advance compared to the previous RFP, issued in 2001 (2001 RFP). It maintained that the process for the 2001 RFP allowed bidders to submit proposals until March 14, 2001, with the possibility of attending a teleconference on March 1, 2001, along with the other bidders in order to discuss certain issues. Rafale O Nord also indicated that the information and time limits for the 2001 RFP had also been posted in government and public buildings in Inukjuak, providing broader dissemination of the information.

11. Rafale O Nord indicated it had heard by chance, on February 11, 2006, about the RFP being published in the regional newspaper *Nunatsiaq News*. It stated that Environment Canada was aware of its intention to submit a proposal and had assured it that it would send the 2006-2007 RFP by fax. Rafale O Nord also said that it had been dismayed to learn of the way in which the RFP was now being issued and the short time period allotted, because that restricted access for northern residents to this type of proposal.

12. Rafale O Nord stated that the *Nunatsiaq News* frequently reaches the village a few days late and that very few copies are available compared to the number of residents in the community. It stated that Inukjuak does not have a local newspaper. In fact, the *Nunatsiaq News* is not a local newspaper because its head office is in Iqaluit, Nunavut, a totally separate region from Nunavik, Quebec. This means that the newspaper is often delivered on Monday after it comes out on Friday and that only 75 free copies are available for Inukjuak, a village of 1,500 people. Rafale O Nord submitted that this short delay is significant when there is a two-week deadline for completing a proposal. Also according to Rafale O Nord, Internet access is difficult and does not do justice to the government's efforts of enabling more people to submit a proposal for these projects.

13. With respect to the fact that Environment Canada had received two proposals in the time period allotted, Rafale O Nord was surprised by this low number and argued that it believed that the head offices of those bidders were not located in remote or Aboriginal regions, unlike Rafale O Nord, which is at the heart of the community's economic and social development.

Environment Canada's Position

14. Environment Canada stated that it had received proposals from two other bidders, demonstrating that the time period allotted for submitting proposals was reasonable. In addition, in its view, the bid closing date clearly appeared in the duly published RFP.

15. As to faxing the RFP to Rafale O Nord, Environment Canada stated that that action would have been contrary to the rules of fairness in the *Agreement on Internal Trade*,⁵ since Rafale O Nord would have been favoured to the detriment of the other bidders.

16. Environment Canada stated that, in accordance with subsection 506(1) of the *AIT*, the information regarding the RFP was available, transparent, fair and compliant with government procurement policy. The RFP was published on MERX, an Internet site designed for publishing invitations to tender. Moreover, in the interests of greater transparency, the RFP was also published in the January 27 and February 3, 2006, editions of the *Nunatsiaq News*.

17. Environment Canada stated that it could not accept Rafale O Nord's proposal because said proposal was received four days after the bid closing date.

18. Environment Canada requested its costs incurred in proceeding with the complaint.

ANALYSIS

19. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*.

Tribunal's Jurisdiction

20. The Tribunal must first determine the boundaries of the jurisdiction that it intends to exercise in this case. This is necessary due to the confusion resulting from conflicting information in the RFP published on January 27, 2006.

21. The Tribunal's jurisdiction when considering a complaint filed by a potential supplier under subsection 30.11(1) of the *CITT Act* is limited solely to a complaint regarding a "designated contract", which is defined in section 30.1 as 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 contracts designated by the regulations". Subsection 3(1) of the *Regulations* describes the procurements covered as follows:

For the purposes of the definition of "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or Article I of the Agreement on Government Procurement, by a government institution, is a designated contract.

22. The RFP issued by Environment Canada specifies that it concerns "Environmental Services" belonging to service categories B109A, "Other Environmental Studies", and E199, "Other Environmental Services". It specifies the value of the contract as \$251,001 to \$500,000. The RFP also states that the *AIT* applies to the procurement in question, but does not specify any other agreements.

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [AIT].

23. According to the detailed description of the services specified in the RFP, Environment Canada was issuing a solicitation for proposals to “execute its upper air program at the Inukjuak Station”. The RFP also states that the “contractor will mainly be responsible for performing two upper air observations per day”. Finally, the RFP states that “the upper air observers are required to carry out a series of climatological programs”. This description suggests that the services fall under weather observation.

24. If the services specified in the RFP are “environmental services” as Environment Canada indicated, then two out of the three relevant agreements at subsection 3(1) of the *Regulations* apply because environmental services are covered by the *AIT* and the *North American Free Trade Agreement*.⁶ These two agreements cover all services except those that it does not cover specifically. However, if the services in question are, as suggested by the description in the RFP, related to weather observation, then only the *AIT* applies because these services are specifically excluded from *NAFTA* under item R102 of Section B, entitled “Excluded Coverage”, of Annex 1001.1b-2. In the latter case, the Tribunal cannot consider the complaint with respect to the *NAFTA* provisions, in view of the wording of subsection 3(1) of the *Regulations* quoted above. This question is not simply academic because the nature of the applicable rights and obligations can vary depending on the provisions of the relevant agreements.⁷

25. In its answers to the Tribunal’s questions on March 23, 2006, Environment Canada responded that it was of the view that the procurement was excluded from *NAFTA* under Annex 1001.1b-2, specifically item R102, which mentions weather observation. It also stated that weather observation services are not covered by the *Agreement on Government Procurement*.⁸ Rafale O Nord submitted that the three agreements apply in this case.

26. After closely examining the issue, the Tribunal finds that, although the RFP describes the services as environmental services, they are instead services that, according to the description in the RFP, correspond to the weather reporting/observation services specified in item R102 of Section B, entitled “Excluded Coverage”, of Annex 1001.1b-2 of *NAFTA* and that, consequently, only the *AIT* applies in this case. Environment Canada also took this view in its GIR.

27. The French term “*météorologie*” (meteorology) is defined as the scientific study of atmospheric phenomena,⁹ e.g. pressure, currents, temperature and the presence of water in the atmosphere. Anything meteorological has to do with meteorology, e.g. weather observations, weather maps, reports on the radio.

28. Accordingly, the Tribunal finds that it does not have jurisdiction to consider the complaint under the provisions of *NAFTA*, contrary to what the service category originally chosen by Environment Canada may suggest. As such, the Tribunal will consider the complaint solely under the applicable provisions of the *AIT*.

Reasonable Period of Time

29. The Tribunal’s role in considering this complaint is to determine whether the government institution responsible for the procurement covered by the complaint, Environment Canada, complied with the obligations of the Government of Canada under the *AIT*, specifically those set out in Chapter Five.

6. *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*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

7. For example, under *NAFTA*, the deadline for the receipt of tenders cannot be less than 40 days, except for the situations set out in subsections 1012(2) and (3).

8. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

9. *Le Petit Robert de la langue française*, 2006.

30. In accordance with the *AIT*, the Government of Canada agrees to provide Canadian suppliers with equal access to federal government procurement to obtain contracts involving goods and services required by the government departments and agencies and Crown corporations listed in the *AIT*.

31. The allegations in the complaint and the facts to which it refers clearly raise the issue of whether Environment Canada's procedure complies with its obligation to give bidders a reasonable period of time for submitting proposals.

32. Article 506(5) of the *AIT* provides the following: "Each Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement."

33. This article of the *AIT* is perfectly clear. It sets out the department's obligation to provide, in its RFP, a reasonable time for bidders to submit their proposals. However, the article states that a reasonable time period takes into account the time needed to disseminate the information and the complexity of the procurement.

34. Given that nothing in the evidence on the record suggests that this procurement is particularly complex, the Tribunal is of the view that the only issue in this case is whether the period of time provided for in the RFP was reasonable, taking into account the time needed to disseminate the information.

35. Article 506(5) of the *AIT* must be interpreted and applied bearing in mind the purpose of the agreement, which is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in a context of transparency and efficiency.¹⁰

36. Within this framework, there is no doubt, in the Tribunal's view, that the specific context surrounding the procurement is key in determining the time needed for disseminating the information, within the meaning of Article 506(5) of the *AIT*.

37. The Tribunal notes that this procurement concerns the provision of upper air services in Canada's Far North. On its own, that circumstance would mean nothing in particular. However, it takes on a completely different meaning when considered from the perspective of potential suppliers that may be located in that region or any other remote Canadian region. Access to information on the RFP is of particular importance to all potential suppliers, regardless of their location in Canada.

38. It has been established by the evidence and is unchallenged by the parties that the period of time allotted for submitting proposals was 14 days from the date of publication on MERX.¹¹ The same applies to the RFP being published in the January 27 and February 3, 2006, editions of the *Nunatsiaq News*.

39. The Tribunal agrees that publishing an RFP on MERX with a 14-day time period for submitting proposals, particularly when it is also published in a local newspaper may, under normal circumstances, be reasonable for meeting the requirements of Article 506(5) of the *AIT*. However, it is apparent that the particular circumstances of this procurement are not entirely normal.

10. Article 501 of the *AIT* reads as follows: "Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

11. The RFP was published on January 27, 2006, and its closing date was February 10, 2006.

40. In fact, according to the evidence submitted by Rafale O Nord, Environment Canada's previous practice when publishing the RFP took into account the particular circumstances involved in disseminating the information on an RFP for the provision of the services in question in Inukjuak.¹² In addition, it was alleged and unchallenged that Environment Canada knew of Rafale O Nord's interest in the procurement and that an Environment Canada representative had supposedly even indicated in 2005 that the upcoming RFP would be faxed to it.¹³ In the Tribunal's view, these facts demonstrate implied acknowledgement on the part of Environment Canada that, in this case, certain adjustments were required for disseminating the information to take into account the particular circumstances.

41. Environment Canada apparently attempted to meet the specific requirements in this case by publishing the RFP in two separate editions of the *Nunatsiaq News*, with the obvious goal of reaching potential suppliers in the regions included within the newspaper's circulation.

42. Unfortunately, the steps that Environment Canada took, including publishing the RFP in the newspaper, proved insufficient for ensuring that the information was disseminated in a manner that would allow suppliers to submit proposals within the time specified in the RFP.

43. First, according to the evidence on the record, access to the Internet, and therefore to RFPs published on MERX, is difficult and is not consistently available in Inukjuak, which is a significant problem for a potential supplier in that community. This is particularly significant in view of the 14-day time period allotted for responding to the RFP. All it takes is lack of access to the Internet for a few days for that time period to be considerably reduced. Second, the evidence clearly indicates that the distribution schedule of the *Nunatsiaq News* and the limited number of copies distributed in the community of Inukjuak means that this dissemination method could not ensure access to the information needed by potential bidders to prepare their proposals on time, in light of the 14 days allotted.¹⁴ It is clear in the Tribunal's view that, in the particular circumstances of this case, the time period was not reasonable because it did not take into account the difficulties frequently associated with disseminating information in remote regions.

44. Environment Canada argued that the fact that two bidders successfully submitted their proposals within the 14 days specified in the RFP demonstrates that the time allotted was reasonable.¹⁵ It also alleged that it could not have faxed a copy of the RFP to Rafale O Nord without contravening the *AIT* and the requirement for a fair, open and transparent procurement process.¹⁶

45. Regarding the two proposals submitted, it is important to mention that both bidders were from areas close to major urban centres and therefore did not experience the information dissemination difficulties referred to above. Thus, the Tribunal finds that the submission of these two proposals in no way demonstrates that the time period allotted was reasonable and that it took into account the information dissemination difficulties specific to the circumstances that Rafale O Nord faced.

46. With respect to Environment Canada's allegations regarding the requirements for a fair, open and transparent process and the fact that Environment Canada could not have faxed the RFP to Rafale O Nord, the Tribunal agrees. That being said, the Tribunal is of the view that these requirements must not be

12. Complaint at 6.

13. *Ibid.*

14. Rafale O Nord states that the newspaper is often distributed on Monday after it comes out on Friday and that only 75 free copies go to Inukjuak, a village of 1,500 people. See Rafale O Nord's comments on the GIR, Annex 1.

15. GIR, para. 21.

16. GIR, paras. 28, 29.

interpreted and applied so as to require the application of a method or process that is the same in all respects resulting in an outcome that is the exact opposite of what is desired.

47. In fact, nothing in Article 506(1) or Article 518 of the *AIT*, to which Environment Canada referred in its response, requires that a single method for disseminating information be used in all circumstances. What matters, when these requirements are examined within the context of Environment Canada's argument, is that the method of dissemination chosen to address the specific circumstances surrounding the RFP is such that access to the information is fair, open and transparent for all suppliers. These requirements can be met even if, to achieve this objective, it becomes necessary to use a specific method of dissemination to address the circumstances applicable to a limited number of potential suppliers. Posting the RFP in public places is one useful way of disseminating information in remote regions. It should be noted that this very method had been used for the 2001 RFP regarding upper air services at Inukjuak. This seems particularly relevant since Environment Canada was aware of the interest in the RFP of the potential suppliers in that region.

48. Pursuant to Article 506(5) of the *AIT*, suppliers must be provided with a reasonable period of time to submit their proposals, taking into account the time needed to disseminate the information. None of the arguments presented by Environment Canada persuaded the Tribunal that Environment Canada could not have given potential suppliers more time to respond to the RFP, in light of the particular circumstances of suppliers located in remote regions.

49. In light of the foregoing, the Tribunal is of the view that the period of time specified in the RFP was not reasonable to allow potential suppliers to submit proposals, taking into account the time needed to disseminate the information in Canada's Far North, specifically Inukjuak, particularly since Environment Canada knew that a potential supplier was located there. Therefore, the Tribunal finds that Environment Canada contravened Article 506(5) of the *AIT*. As such, it finds that Rafale O Nord's complaint is valid.

Remedy

50. In formulating its recommendations, the Tribunal must, pursuant to subsection 30.15(3) of the *CITT Act*, consider all the factors coming into play in the procurement covered in the RFP, particularly the following:

- the seriousness of the deficiency found in the procurement process;
- the degree to which the complainant and all other interested parties were prejudiced;
- the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- the issue of whether the parties acted in good faith; and
- the extent to which the contract was performed.

51. In determining the appropriate remedy, the Tribunal considered all the factors coming into play in the procurement covered in the RFP. The overriding factor in the Tribunal's consideration is the fact that the contract has not yet been awarded and that Rafale O Nord made no requests other than being given a reasonable time to submit a proposal.

52. Therefore, as a remedy, the Tribunal recommends that Environment Canada give Rafale O Nord three weeks to respond to the original RFP concerning the procurement for the provision of services to execute the upper air program at the Inukjuak Station and that the proposal that Rafale O Nord submits be

evaluated for this RFP based on the same criteria as those used in evaluating the proposals previously submitted by the other bidders. In this case, the three-week period begins as of the date that Rafale O Nord receives this decision or, in the event that it has not received the RFP, as of the date the RFP is received.

53. The Tribunal awards Rafale O Nord its reasonable costs incurred in preparing and proceeding with the complaint. It took into account its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*). The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the procurement itself was low, in that the procurement involved the execution of routine services. The complexity of the complaint was low, in that the basic facts were simple. Finally, the complexity of the proceedings was low, as there were no motions or interveners, the 90-day time frame had been observed and a public hearing was not required. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

54. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

55. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that Environment Canada give Rafale O Nord three weeks to respond to the original RFP concerning the procurement for the provision of services to execute the upper air program at the Inukjuak Station and that the proposal that Rafale O Nord submits be evaluated for this RFP based on the same criteria as those used in evaluating the proposals previously submitted by the other bidders. In this case, the three-week period begins as of the date that Rafale O Nord receives this decision or, in the event that it has not received the RFP, as of the date the RFP is received.

56. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Rafale O Nord its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Environment Canada. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member