



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2008-037

Imperial Parking Canada
Corporation

*Decision made
Friday, November 28, 2008*

*Decision and reasons issued
Monday, December 22, 2008*

IN THE MATTER OF a complaint filed under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

IMPERIAL PARKING CANADA CORPORATION

AGAINST

CANADA PLACE CORPORATION

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (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. Moreover, subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. Paragraph 7(1)(b) of the *Regulations* requires that the complaint be in respect of a designated contract, and paragraph 7(1)(c) requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*⁴ or the *Agreement on Government Procurement*⁵ applies.

3. In August 2007, Canada Place Corporation (CPC) issued a Request for Proposal (RFP) (Solicitation No. PMS 230807) to solicit bids for the management of the Canada Place parking facility located at 999 Canada Place, Vancouver, British Columbia. Imperial Parking Canada Corporation (Impark) alleged that its proposal was improperly rejected and that a sole-source contract was improperly awarded to a competitor that did not participate in the solicitation process.

4. Impark argued that CPC, a wholly owned subsidiary of the Vancouver Fraser Port Authority (VFPA), acted as an agent of the Department of Transport and the VFPA. In reaching this conclusion, it submitted that the Minister of Transport has ultimate control over the VFPA and that, consequentially, the Minister of Transport also has ultimate control over CPC. It submitted that procurements undertaken by the Minister of Transport, effectively by the Department of Transport, are covered under the *AIT*, as well as *NAFTA*. Impark further submitted that the VFPA is a recently established amalgamation of three port authorities, all of which are included for coverage under the *AIT*. Impark argued that, as the VFPA exercises effective control over CPC's activities, CPC's procurements are similarly covered by the *AIT*. Impark argued that, if procurements such as this one are not within the Tribunal's jurisdiction, the Department of Transport and the VFPA could avoid their obligations by conducting all procurements through subsidiaries.

5. Section 30.1 of the *CITT Act* defines a designated contract 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".

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. *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*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

6. Subsection 3 of the *Regulations* reads as follows:

3. (1) For the purposes of the definition “designated contract” in section 30.1 of the [*CITT 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 . . . is a designated contract.

(2) For the purposes of the definition “government institution” in section 30.1 of the [*CITT Act*], the following are designated as government institutions:

(a) the federal government entities set out in the Schedule of Canada in Annex 1001.1a-1 of NAFTA, under the heading “CANADA” in Annex 502.1A of the Agreement on Internal Trade or under the heading “CANADA” in Annex 1 of the Agreement on Government Procurement;

(b) the government enterprises set out in the Schedule of Canada in Annex 1001.1a-2 of NAFTA or under the heading “CANADA” in Annex 3 of the Agreement on Government Procurement;

...

7. In other words, before examining whether the evidence in the complaint contains a reasonable indication that the procurement was not conducted in accordance with the trade agreements, the Tribunal must first determine whether the procurement was in respect of a “designated contract”. The issue before the Tribunal, in this case, is whether the contract is to be awarded by a “government institution” and, therefore, whether the complaint relates to a “designated contract”.

8. The Tribunal notes that CPC, itself, is not listed as an entity or enterprise covered by any of the trade agreements. Impark argued however that CPC, by virtue of its status and structural relationships, was acting as an agent of both the Department of Transport and the VFPA.

9. The Order in Council establishing the VFPA also refers to its letters patent.⁶ The letters patent define the term “subsidiary” as follows:

“Subsidiary” means Canada Place Corporation or any other wholly owned subsidiary of the Authority incorporated from time to time in accordance with the Act and these Letters Patent.

10. This definition makes it clear that CPC is a wholly owned subsidiary of the VFPA. Furthermore, Article 7.2 of the letters patent outlines the activities of CPC as follows:

7.2 Activities of Canada Place Corporation. Canada Place Corporation is authorized to carry on the following activities:

(a) management, leasing or licensing the federal real property described under Canada Place Corporation in Schedule B for the following tenant uses: hotels, restaurants, bars, tour operations, travel or tour agencies and similar tourism-related uses, retail, office, entertainment activities, food services and display and trade shows;

(b) manufacturing and distributing steam and other utilities;

(c) management of assets and property, including the maintenance and repair of any building or structure located on the federal real property described in Schedule B or described as federal real property in any Supplementary Letters Patent;

(d) producing, coordinating, sponsoring and hosting of public or civic events; and

(e) promotion, marketing and undertaking of public relations in connection with Canada Place or the port.

6. *Certificate of amalgamation of port authorities*, P.C. 2007-1885, C. Gaz. 2007.I.3 (*Port Authorities Management Regulations*).

11. In Article 4.23 of the letters patent, the VFPA is tasked with taking “. . . all necessary measures to ensure that the directors of [CPC] are individuals appointed by the [VFPA] who have been approved by the Minister.” The activities of the VFPA are governed by the *Canada Marine Act*,⁷ subsection 28(11) of which stipulates the following:

- (11) The directors of a port authority shall take all necessary measures to ensure that its wholly-owned subsidiaries
- (a) have and exercise only the powers authorized in the letters patent of the port authority;
 - (b) carry on only the activities authorized in the letters patent; and
 - (c) do not exercise any power or carry on any activity in a manner contrary to the letters patent or this Act.

12. The determination of the existence of an agency relationship is a matter of fact, and the question that must be answered is whether or not one entity’s actions are being undertaken on behalf of another entity. In this instance, the relevant facts are the letters patent of the VFPA, which indicate that CPC is a subsidiary of the VFPA and mandated to carry on specified activities through directors appointed by the VFPA, and the *Canada Marine Act*, which makes the VFPA responsible for ensuring that CPC acts only within its mandate. Also, as CPC’s obligations flow from the letters patent of the VFPA, it can be concluded that those obligations further the fulfillment of the VFPA’s mandate. As a result, the Tribunal is satisfied that, by necessary implication of the terms of the relevant Order in Council and legislation, CPC acts for the VFPA and is thus, for all its purposes, an agent of the VFPA.

13. As can be seen above, the *Regulations* only reference the federal government entities set out under the heading “CANADA” in Annex 502.1A of the *AIT* as being designated government institutions. Similarly, the *Regulations* only reference the federal government entities listed in the Schedule of Canada in Annex 1001.1a-1 of *NAFTA* as being designated government institutions. The VFPA itself is not listed within either of those annexes, the obvious consequence of which is that the VFPA, in and of itself, is not a covered entity as contemplated by the *Regulations*. However, the Department of Transport is listed in those annexes and, as a result, it becomes essential to consider whether an agency relationship might exist between the VFPA and the Minister of Transport.

14. Section 7 of the *Canada Marine Act* provides as follows:

7. (1) Subject to subsection (3), a port authority is an agent of Her Majesty in right of Canada only for the purposes of engaging in the port activities referred to in paragraph 28(2)(a).
- (2) A wholly-owned subsidiary of a port authority is not an agent of Her Majesty in right of Canada unless, subject to subsection (3),
- (a) it was an agent of Her Majesty in right of Canada on June 10, 1996; and
 - (b) it is an agent of Her Majesty in right of Canada under an enactment other than this Act.
- (3) A port authority or a wholly-owned subsidiary of a port authority may not borrow money as an agent of Her Majesty in right of Canada.

7. S.C. 1998, c. 10.

Further, subsections 28(2) and (3) provide as follows:

- (2) The power of a port authority to operate a port is limited to the power to engage in
 - (a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and
 - (b) other activities that are deemed in the letters patent to be necessary to support port operations.
- (3) The activities that a port authority may engage in under paragraph (2)(b) may be carried on by the port authority directly or through a wholly-owned subsidiary of the port authority. The port authority and the subsidiary are not agents of Her Majesty in right of Canada for the purpose of engaging in those activities.

15. It is thus clear from the above provisions that the VFPA is an agent of the Minister of Transport in relation to those activities outlined in paragraph 28(2)(a) of the *Canada Marine Act* and not an agent of the Minister of Transport in relation to those activities typically undertaken by its wholly owned subsidiary, CPC, outlined in paragraph 28(2)(b). Further, the *Canada Marine Act* effectively makes clear that no agency relationship exists between the Minister of Transport and organizations such as CPC, unless an indication to that effect exists in another piece of legislation.

16. The procurement in question is in relation to the management of the parking facilities at Canada Place in Vancouver. The Tribunal is of the opinion that this service cannot reasonably be considered to be “port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods” as envisaged under paragraph 28(2)(a) of the *Canada Marine Act* and would more logically fall under the category of “other activities” under subsection 28(3). As such, it is clear that the VFPA is in effect utilizing CPC for the procurement in question for its own benefit and that there is no agency relationship between the VFPA and the Minister of Transport in relation to the procurement in question. Thus, the Tribunal finds that the procurement in question was not undertaken by a designated government institution listed in Annex 502.1A of the *AIT* or the Schedule of Canada in Annex 1001.1a-1 of *NAFTA*.

17. In relation to the *AIT*, the Tribunal wishes to note that, although the three port authorities that were amalgamated to constitute the VFPA (the Fraser River Port Authority, the North Fraser Port Authority and the Vancouver Port Authority) are listed in Annex 502.3 of the *AIT*, and that article 11 of the letters patent of the VFPA makes clear that the VFPA shall comply with the *AIT*, the Tribunal does not have jurisdiction with respect to procurements conducted by those entities, as Annex 502.3 is not contemplated by section 30.1 of the *CITT Act* or the *Regulations*.

18. In addition, Section B of Annex 502.3 of the *AIT* states the following:

B. Relationship to the Agreement on Internal Trade

1. Chapter Five (Procurement) and the provisions of other Chapters of the Agreement on Internal Trade apply only as specified in this Annex.
2. The following Articles of the Agreement on Internal Trade, or portions thereof, apply to this Annex: Article 505 (Valuation of Procurement); Article 509 (Language); Article 512 (Contact Point); Article 518 (Definitions); Article 1600 (a), (b), and (d) (Committee on Internal Trade); Article 1603.4 (Secretariat); Article 1802 (Aboriginal Peoples); Article 1803 (Culture); Article 1805 (Taxation); and Article 1811 (Accession and Withdrawal).

19. Article 514 of the *AIT*, which contains the authority with regard to the Tribunal's dispute resolution jurisdiction, is not mentioned in Section B of Annex 502.3.

20. Thus, the Tribunal finds that the VFPA and its predecessor organizations are not designated as "government institutions" by the *Regulations* and, therefore, concludes that their procurements cannot be considered "designated contracts" as defined by the *CITT Act*.

21. Finally, while not requisite with regard to the question of agency, the tender documents themselves make no reference to either the VFPA or the Department of Transport nor do the tender documents indicate that CPC is conducting the procurement other than on its own accord.

22. Therefore, the Tribunal finds that the complaint does not relate to a contract proposed to be awarded by a government institution and, thus, does not relate to a designated contract.

23. Given the above, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

24. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member