

Ottawa, Thursday, May 10, 2001

File No.: PR-2000-075

IN THE MATTER OF a complaint filed by M.D. Charlton Co. Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47, as amended;

AND IN THE MATTER OF a motion by the Department of Public Works and Government Services for an order dismissing the complaint on the basis that the Canadian International Trade Tribunal does not have jurisdiction to conduct an inquiry into the procurement because the procurement is not covered by the *Agreement on Internal Trade* due to the national security considerations invoked by the Government.

ORDER

The Canadian International Trade Tribunal hereby dismisses the motion by the Department of Public Works and Government Services.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Order: May 10, 2001
Date of Reasons: June 15, 2001

Tribunal Member: Zdenek Kvarda, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Dominique Laporte

Complainant: M.D. Charlton Co. Ltd.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Ian McLeod
Susan D. Clarke
Christianne M. Laizner



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STATEMENT OF REASONS

COMPLAINT

On March 16, 2001, M.D. Charlton Co. Ltd. (M.D. Charlton) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Requisition No. M1500-012339) by the Department of Public Works and Government Services (the Department), on behalf of the Royal Canadian Mounted Police (RCMP), for the provision of various types of chemical munitions and equipment.

M.D. Charlton alleged that the procurement was fulfilled in a manner contrary to the provisions of the applicable trade agreements. M.D. Charlton requested, as a remedy, that the contract awarded to R. Nicholls Distributors Inc. LE (Nicholls) on March 9, 2001, be cancelled and re-issued according to standard bid procedures. Recognizing that this may have proven difficult in the circumstances, M.D. Charlton requested, in the alternative, compensation for the profits that it lost.

On March 20, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On April 17, 2001, the Department filed a notice of motion with the Tribunal in accordance with rule 24 of the *Canadian International Trade Tribunal Rules*,³ requesting that the Tribunal dismiss the complaint on the basis that the federal government had invoked Article 1804 of the *Agreement on Internal Trade*⁴ with respect to this matter and that the Tribunal, therefore, lacked jurisdiction in the matter. On May 1, 2001, M.D. Charlton submitted comments in response. On May 10, 2001, the Tribunal issued an order dismissing the Department's motion.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. S.O.R./93-602 [hereinafter Regulations].
3. S.O.R./91-499 [hereinafter Rules].
4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

PROCUREMENT PROCESS

On February 13, 2001, M.D. Charlton requested to be allowed to quote on the procurement. M.D. Charlton was never given the opportunity to quote. On February 15, 2001, the RCMP wrote the Department requesting that a number of solicitations be exempted for “public security reasons” [translation] from the notification requirements of the trade agreements. These solicitations were for a variety of goods and services to be procured by the RCMP in support of its role to ensure the security of heads of state at the Summit of the Americas, 2001, to be held in the City of Québec. The request reads, in part:

Many of these requests are not in the public interest, in whole or in part. The publication of some of these requests could even compromise public security.

In the case of all the requests for which publication is contrary to the public interest, we ask that you invoke public security reasons to exempt them from the publication requirements of MERX.

[Translation]

On February 21, 2001, the Assistant Deputy Minister, Supply Operations Services Branch (ADM, SOSB) of the Department, informed the RCMP, in writing, in part, as follows:

In support of your efforts to guarantee security during the third Summit of the Americas and to facilitate the procurement process for the requirements where the publication is contrary to the public interest, I agree that the exception for public security reasons should be invoked pursuant to Article 1804 of the *Agreement on Internal Trade*, Article 1018 of the *North American Free Trade Agreement* and Article XXIII of the *World Trade Organization Agreement on Government Procurement*.

[Translation]

On February 21, 2001, copy of the above-mentioned correspondence was sent by the ADM, SOSB, to the Department’s Regional Office for distribution to the appropriate personnel in the Quebec Region.

On March 5, 2001, the RCMP sent the subject requisition. A covering memorandum indicates that the matter is “VERY URGENT” [translation]. On March 6, 2001, the requisition was conveyed by the Department’s Regional Office to the Department’s office in Ottawa, along with a covering page. The covering page states, in part:

These solicitations are considered very urgent and of a delicate nature, given that this important event is forthcoming.

Mr. [name of departmental official] will contact you before the end of the afternoon to give you information and to discuss the details with regard to the publication exception in the interest of national security.

[Translation]

The Contract Plan/Advance Approval form with respect to this procurement, dated March 7, 2001, reads, in part, under the header “Remarks”:

The ammunitions are purchased on behalf of RCMP.

As the requirement is in the class of N1300, it is exempted from NAFTA and WTO-AGP. The National Security Exception is being invoked by the request of RCMP and with the approval of ADM, SOSB, PWGSC. Thus, this procurement is also exempted from AIT.

This procurement is urgent, and the requirement should be delivered by end of March, if it is possible.

This procurement will be sole-sourced. [NICHOLLS is identified in the Plan as the proposed contractor]. However, an ACAN [Advance Contract Award Notice] will not be posted as per ADM's approval.

A contract for this procurement was awarded to Nicholls on March 9, 2001. According to the facts presented in support of the motion, a notice of contract award for Requisition No. M1500-012339 was placed on Canada's Electronic Tendering Service (MERX) on March 13, 2001, through inadvertence. The existence of this notice was brought to the attention of a departmental official on March 22, 2001, when the Tribunal advised the Department of the complaint. The notice was immediately withdrawn. The notice reads, in part:

Contract Award Procedure (Procurement Strategy): National Security Considerations.

MOTION

The Department submitted that this procurement is not subject to either the *North American Free Trade Agreement*⁵ or the *Agreement on Government Procurement*⁶ pursuant to Article 1001.1 of NAFTA and Article I of the AGP. The Department submitted that the types of ammunition that are the subject of this procurement are not listed in Section B of Annex 1001.1b-1 of NAFTA or Canada's Annex 1 to the AGP and, consequently, are excluded therefrom.

The Department further submitted that the federal government determined that this procurement was necessary to protect its national security interest and, pursuant to its international obligations, to maintain international peace and security. The Department added that the national security exception under Article 1804 of the AIT was properly invoked and, as a consequence, this procurement was removed from the coverage of the procurement obligations of the AIT and the bid challenge process under the CIIT Act.

The Department, referring extensively to the Tribunal's determinations in PR-98-005, PR-98-006 and PR-98-009,⁷ submitted that these determinations are applicable to the circumstances of the procurement at issue. In this respect, the Department submitted that the facts of this case clearly establish that the provisions of Article 1804 of the AIT were invoked by the ADM, SOSB, and subsequently applied by appropriate departmental staff acting within their delegated responsibilities and within the mandate of the ADM's invocation.

In its comments on the motion, M.D. Charlton submitted that it believes that the Department does not want to address the complaint and simply wants to use this motion to hide from any issue.

M.D. Charlton submitted that, insofar as it is concerned, there exists no security issue. Furthermore, it asserted that, even when delivery is urgent, it is possible for the Department to obtain prices from two or more suppliers via phone, which will not hinder any delivery schedule.

M.D. Charlton submitted that national security is not the issue. Rather, the issue is that preferential treatment appears to have been given to a Quebec distributor and this, M.D. Charlton submitted, has infringed on its rights as a lawful supplier to Canadian government agencies. M.D. Charlton added that, in this particular instance, there is no question that the Department had knowledge of M.D. Charlton's ability

5. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].

7. *Re Complaint Filed by Lotus Development Canada* (14 August 1998) [hereinafter *Lotus*].

to supply the required goods. Yet, special treatment was given to a competitor that resides in Quebec. The fact that both M.D. Charlton and Nicholls were aware of the same confidential information concerning the Summit of the Americas, 2001, discounts any consideration for one of these potential suppliers being eliminated due to any clause concerning national security.

DECISION ON THE MOTION

The Tribunal determines that the ammunitions being purchased are goods not covered by either NAFTA or the AGP. However, the ammunitions are covered by the AIT.

Relying on the principle set out in *Lotus*, the Tribunal determines that, in this instance, the federal government has properly invoked the provisions of Article 1804 of the AIT concerning national security for this procurement.

In *Lotus*, the Tribunal stated: “The Tribunal, as the bid challenge authority under the trade agreements, must be satisfied that a national security exception has actually been invoked and that it has been invoked by a Party, for purposes of NAFTA and the AGP, and the Federal Government, for purposes of the AIT. If these conditions have not been satisfied, then the Tribunal would not be fulfilling its responsibility, under the trade agreements, of ensuring that government procurement subject to the agreements is carried out in a manner consistent with the provisions of those agreements. Furthermore, the Tribunal must also consider whether a national security exception has been fully invoked. In certain circumstances, the action taken or information not disclosed by the government may be such that the exception has been invoked in respect of only certain aspects of a particular procurement. In these circumstances, the Tribunal may retain jurisdiction in respect of that part of the procurement not subject to the exception. In the Tribunal’s view, given their exceptional nature, these matters should only be determined on a case-by-case basis.” (Emphasis added)

However, relying on the very terms of the RCMP’s request of February 15, 2001, and of the Department’s answer of February 21, 2001, the Tribunal determines that the invocation as requested by the RCMP and as granted by the Department’s official representative is a partial invocation only aiming at exempting certain procurements, including the one at issue, from the publication requirements in Article 506(2) of the AIT. Therefore, in the Tribunal’s opinion, this procurement has not been exempted from the other procedural requirements of the AIT, and the Tribunal’s jurisdiction in this matter stands to that extent. Because the complaint made by M.D. Charlton does not relate to the publication requirements of Article 506(2) of the AIT, the Tribunal’s jurisdiction in this matter stands.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member