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# **Standing Committee on Government Operations and Estimates**

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**EVIDENCE**

**Thursday, May 29, 2008**

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**Chair**

**The Honourable Diane Marleau**

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## Standing Committee on Government Operations and Estimates

Thursday, May 29, 2008

•(0905)

[English]

**The Chair (Hon. Diane Marleau (Sudbury, Lib.)):** I'd like to welcome the members of what we like to call the CITT, which is really the Canadian International Trade Tribunal. I was speaking to the chair, Monsieur Scott, and I was telling him that I couldn't tell him how many times we have mentioned the name CITT, but that this is the first time they've actually come before us. I think it's a good thing. I think a lot of people don't understand who they really are and what exactly they do, although, a little bit like God, we know they do good things.

[Translation]

Welcome to our committee. Our usual procedure is to give witnesses 10 minutes to make their presentation. You will have an opportunity to tell us exactly what goes on at the tribunal and to introduce the people with you, if you would.

**Mr. André F. Scott (Chairman, Canadian International Trade Tribunal):** Thank you, Madam Chair.

I would like to thank you for inviting us to appear before the committee. This will give us an opportunity to explain who we are, what we do and to answer your questions. As I understand it, they will focus mainly on calls for tender.

Let me start by introducing myself. My name is André Scott and I am the Chairman of the Canadian International Trade Tribunal. Today, I am accompanied by Randy Heggart, the Director of Procurement Review at the tribunal, and Hélène Nadeau, the Secretary of the Tribunal, and Éric Wildhaber, a senior counsel from the tribunal's legal services.

I would like to start by giving you a brief overview of the tribunal's mandate. The tribunal hears complaints about federal government procurements. This line of business represents \$2.5 million of our annual budget of \$9.4 million. The tribunal also hears cases on dumped and subsidized imports, appeals from customs and excise tax rulings and requests for relief from textile tariffs.

Just to refresh your memory, I will start by reminding you of a few things. The independent review of procurement complaints, bid challenges, began in Canada in January 1, 1989, with the coming into force of the Canada-US Free Trade Agreement. At that time, it was handled by the Procurement Review Board. With the coming into force of the North American Free Trade Agreement (NAFTA) in 1994, the tribunal took over the mandate to review procurement complaints in Canada.

The tribunal is an administrative tribunal operating within Canada's trade remedies system. It is an independent quasi-judicial body that carries out its statutory responsibilities in an autonomous and impartial manner and reports annually to Parliament through the Minister of Finance. We are a separate department with a separate budget. We have our own independent legal services branch. Our counsel are employed directly by the tribunal and are not Department of Justice lawyers. We issue our own press releases and publish our own decisions.

Members and staff give presentations about the tribunal's work to the business and legal communities, industry associations, procurement professionals and international organizations. This is how we publicize our role and explain the rights that flow from the legislation we administer.

[English]

With respect to procurement complaints, we consider ourselves a court of easy access. There are currently no fees required to file a complaint. There is also no requirement to be represented by legal counsel. Although we do receive complaints from multinational firms represented by large law firms, we also receive complaints from individuals and small businesses that were vying for federal contracts covered by one of the trade agreements. Although there is a legislated ten-working-day time limit for filing a complaint, we have on our website, in both official languages, user-friendly information and a complaint form. I've asked the staff to put in your briefing binders a copy of that complaint form so that you can see that it is very simple. I believe it's no more than six pages, and that form can also be used as a guide for interested complainants.

I want to emphasize that the tribunal's work is supplier-initiated and complaint-driven. In other words, we are only authorized by legislation to respond to complaints filed by suppliers. Those complaints must relate to a contract or procurement that is covered by one of the three trade agreements, which are NAFTA, the federal-provincial agreement on internal trade, and the World Trade Organization Agreement on Government Procurement. The bid challenge portions of these agreements came into force on January 1, 1994, for NAFTA; on July 1, 1995, for the internal trade agreement; and on January 1, 1996, for the agreement on government procurement under the WTO.

The government mandated the tribunal as its reviewing body for bid challenges under these three agreements. A supplier may file a complaint concerning any aspect of the procurement process, which begins with the establishment of the requirement and goes up to and includes the contract award. After the contract award, we do not have any authority. It is out of our hands. Thus, suppliers who believe they have been unfairly treated during the solicitation or evaluation of bids or in the awarding of contracts on a designated procurement may lodge a formal complaint with the tribunal. More specifically, suppliers may challenge federal government procurement decisions that they believe have not been made in accordance with the requirements of any one of the three agreements—NAFTA, the internal trade agreement, and the agreement on government procurement.

There is an important distinction between our work and that of the new procurement ombudsman. Unlike the ombudsman, our work includes all procurements that fall under the coverage of the three trade agreements mentioned. We do not examine complaints about contract administration, and we do not conduct general practice reviews.

It should also be noted that a potential supplier is encouraged to first attempt to resolve the issue with the government institution responsible for the procurement. If this process is not successful or a supplier wishes to deal directly with the tribunal, that supplier may ask the tribunal to consider the case by filing a complaint. The legislated timeframe in which the tribunal must render its decision is normally 90 days from the time the complaint is filed. So it's not lengthy; it's three months. In some circumstances, it may be extended, but it can never go beyond 135 days.

I have provided to the committee a briefing document on the provisions and coverage of the three trade agreements. I will now provide a quick summary of the key objectives and provisions of these agreements.

Generally stated, the objective of procurement review in Canada is to ensure that procurements covered by the trade agreements are conducted in an open, fair, and transparent manner, and, whenever possible, in a way that maximizes competition. As a party to NAFTA and the agreement on government procurement, Canada has agreed to provide suppliers from the other countries that are parties to this agreement with an equal opportunity to compete with Canadian suppliers for contracts involving specific classes of goods and services. These include construction services bought by certain government departments, agencies, and enterprises such as crown corporations. The signatory countries have reciprocated by opening up their government procurement opportunities to Canadian businesses.

- (0910)

These agreements guarantee national treatment and non-discrimination for goods and services originating in Canada as well as for the suppliers of such goods and services. Some notable exceptions to the coverage of these agreements include communications services. They are excluded. Transportation relocation services are also excluded. Shipbuilding, repair, and goods and services related to military operations, such as armaments and vehicles, are all excluded from these three agreements. The agreements also allow exemptions

for reasons of national security and for small and minority businesses.

As a party to the agreement on internal trade, the federal government has agreed to provide all Canadian suppliers with equal access to procurement opportunities involving most goods and services, including construction services, in government departments and agencies and crown corporations listed in the agreement on internal trade, which you have in your briefing material.

The agreement on internal trade prohibits the federal government from discriminating against goods or services of a particular province or region and the suppliers of such goods or services in any province or region. The agreement on internal trade imposes constraints on procurement procedures, which are aimed at promoting equal access to procurement for all Canadian suppliers.

Although most federal government procurements with a value of over \$25,000 for goods and \$100,000 for services, including construction, are covered by the agreement on internal trade, notable exceptions are advertising and public relations services, health services, and social services.

The agreement on internal trade contains exceptions for national security, for measures with respect to aboriginal people, and for measures that are part of a general framework of regional economic development. So there are those exceptions.

The agreement on internal trade also allows preferences for Canadian goods and suppliers and for Canadian value added, as long as these are consistent with Canada's obligations. So the provisions are there for these exceptions, but within limits.

[*Translation*]

I would now like to talk briefly about how the procurement review process is carried out at the tribunal. When the tribunal receives a complaint, it reviews the submission against certain criteria. If the tribunal decides to conduct an inquiry, the government institution is sent a formal notification and a copy of the complaint itself. An official notice of the complaint is also published in MERX, Canada's official electronic tendering service, and in the *Canada Gazette*.

If the contract in question has not been awarded, the tribunal may order the government institution to postpone awarding it pending the disposition of the complaint.

After receipt of its copy of the complaint, the government institution responsible for the procurement files a response within 25 days. So, to summarize, there are five days from the day on which the complaint is received to determine whether there is a *prima facie* basis for it. The party then has 10 days in which to file a complaint, and the government institution has 25 days to respond to it. So the timelines are quite short.

The complainant and any interveners are sent a copy of the response and then have the opportunity to submit comments within seven working days. And I stress seven "working" days. Deadlines of less than 10 days are working days. Any comments are forwarded to the government institution and other parties to the inquiry.

Once this phase of the inquiry is completed, the tribunal reviews the information on the record so far and decides if a public hearing is necessary or if the case can be decided on the basis of the information on the record. Generally, cases are decided without a public hearing.

The tribunal then determines whether the complaint is valid. If the complaint is found to be valid, the tribunal may make recommendations to the government institution such as re-tendering, re-evaluating or providing compensation. The government institution is notified of the tribunal's decision, as are all other parties and interested persons.

Recommendations made by the tribunal in its determination are, by statute, to be implemented to the greatest extent possible.

The tribunal will ordinarily award reasonable costs to the complainant or the government institution depending on which one succeeded in the case. Costs awarded are generally between \$1,000 and \$4,100.

I would like to take this opportunity to point out that access to the tribunal is not expensive, unlike traditional courts, where the losing side generally has to pay much higher costs.

In the last five years, the tribunal has received 351 procurement complaints. Consider that during the same time period there were more than \$100,000 contracts for goods and services above \$25,000, worth in excess of \$80 billion, issued by the federal government. For comparison, in 2004, there were over 400,000 transactions at values less than \$25,000, for a total value of \$1.3 billion; whereas there were 20,854 transactions above a value of \$25,000, worth a total of \$17.7 billion. That gives you some idea of the number of the small transactions compared to the number of large transactions.

Although these complaints represent only a small percentage of the procurements performed by the federal government for which a complaint could be lodged (less than 1%), their small numbers belie a significant impact on the integrity of government procurement through the disciplinary and instructional effects of complaints found valid.

Of the 351 complaints received by the tribunal, 318, or more than 90%, were filed by Canadian suppliers. This is quite conclusive. Most of those were related to procurements covered by the Agreement on Internal Trade. That is why I sometimes say that the name of the tribunal maybe somewhat misleading. Canadians are filing complaints under the Agreement on Internal Trade. As you can see, the procurement review mechanism at the tribunal has primarily become a vehicle for Canadian business to address its concerns with the way some procurements have been conducted.

With 19 years of procurement review experience in Canada behind us, it is important to emphasize some key lessons.

Truly competitive procurement processes require open bidding, clear procedures and transparent criteria for selection. Such a process enhances the integrity of the procurement system in Canada, invigorates the delivery of government services and translates into savings for the taxpayers, because it is a competitive process.

One of the intended purposes of the Federal Accountability Act is to ensure that the bidding process for government contracts remains fair, open, and transparent.

● (0915)

Along the same lines, the Canada-United States Free Trade Agreement and its successor, NAFTA, required that Canada adopt and maintain bid challenge procedures for procurement in order to promote fair, open and impartial procurement procedures. The formal process of procurement review at the tribunal allows Canada to meet these obligations as well as similar ones under the Agreement on Internal Trade and the Agreement on Government Procurement .

Before opening the floor for questions, it is important to set out the areas within which I am able to answer questions. I am speaking today in my capacity as the chairman of the tribunal. Our mandate is to ensure that federal government procurements respect the obligations set out in all domestic and international trade agreements. I am thus able to answer questions on the provisions of the trade agreements and on the tribunal's procurement review process.

As an adjudicator, I am not, however, at liberty to speak to individual cases whether real or hypothetical. Unfortunately, I must respect this requirement. I am sure you will understand.

Moreover, I must stress that the tribunal administers these provisions of the trade agreements but has no policy responsibility with respect to the trade agreements. That is not our responsibility. We implement the agreements we are given. I am thus unable to speak to government policy on NAFTA or international trade agreements. That is outside my jurisdiction.

I will now be pleased to answer any questions you may have.

● (0920)

**The Chair:** Thank you very much.

Mr. Silva.

[*English*]

**Mr. Mario Silva (Davenport, Lib.):** Thank you, Madam Chair.

I want to get some clarification. You receive about 318 complaints a year from suppliers.

**Mr. André F. Scott:** Correct.

**Mr. Mario Silva:** It says here that 90% of them were filed by Canadian suppliers. I don't understand the resolution. How many of them are actually resolved, and are they resolved positively or negatively?

**Mr. André F. Scott:** I will be more precise. The 318 complaints were over five years.

**Mr. Mario Silva:** Okay. So annually you received, on average—

**Mr. André F. Scott:** This year we are forecasting 95 complaints. It was 95 last year. A few years prior to that it was around 60.

**Mr. Mario Silva:** Okay. How many of them are resolved favourably?

**Mr. André F. Scott:** How do you qualify “resolved favourably”?

**Mr. Mario Silva:** Well, tell me how they were resolved.

**Mr. André F. Scott:** A number of these were withdrawn. Some were not accepted. When they were not accepted, in 15% of the cases it was because they were not within the *délaï prévu*. Some were found to be not valid and some were found to be valid.

If I take the year 2007-08, out of 95 complaints filed with the tribunal, 5 were withdrawn, 58 were not accepted, 15 were found to be not valid, and 11 were found to be valid.

**Mr. Mario Silva:** Because there is the procurement ombudsman now, and you were saying you have some relationship, do they actually go to you first, and if they find they're not getting a resolution they then go to the ombudsman?

**Mr. André F. Scott:** We have a different threshold. We only deal with \$25,000 and up, whereas the ombudsman is below \$25,000. We're complementary; we don't overlap for complaints.

**Mr. Mario Silva:** So for complaints over \$25,000, there is no ombudsman. You're it. You're the quasi-judicial authority.

**Mr. André F. Scott:** We're the authority.

**Mr. Mario Silva:** The authority.

You also mentioned the fact that your mandate is broader, because it includes NAFTA and other free trade agreements. But there is a separate tribunal as well for that. So which get resolved by you and which get resolved by the international tribunals?

• (0925)

**Mr. André F. Scott:** I'm sorry, can you be a bit more precise? I fail to understand the question.

**Mr. Mario Silva:** We'll, I'm trying to understand you as well and what your mandate is, so don't ask me to clarify things.

**Voices:** Oh, oh!

**Mr. Mario Silva:** I'm trying to get some clarification myself.

You mentioned in your discussion that you also handle issues from disputes within NAFTA. Is that the case?

**Mr. André F. Scott:** Yes, absolutely. If we're talking about government procurement, somebody can file a complaint with the tribunal under one of the three agreements. Canadian suppliers can also say, pursuant to Canadian obligations under NAFTA, that these obligations were not respected, and therefore file a complaint with the tribunal. Anyone can. You don't need to be a foreign supplier to file a complaint under NAFTA; a Canadian supplier can do so.

Maybe, Eric, you want to comment.

**Mr. Eric Wildhaber (Counsel, Legal Services, Canadian International Trade Tribunal):** Yes. I think I understand the distinction that has to be made.

You hear of trade disputes between Canada and other countries. Those happen on a state-to-state level at the World Trade Organization. For example, Canada will be brought to the World Trade Organization for consultations on a matter, and if those consultations are not fruitful, there will be a case that will go through—on softwood lumber, for example. Those are not within the mandate of the tribunal.

Given that the tribunal is really a domestic court, what can happen as well, in terms of dumping and subsidization, is that the domestic

Canadian industry will allege there is an increase in unfairly traded imports coming in, and the tribunal will create a forum whereby the domestic industry will square off against the importers, for example.

**Mr. André F. Scott:** But since we're talking about procurement...

**Mr. Eric Wildhaber:** In terms of procurement, there's also the ability at the World Trade Organization for there to be certain discussions on procurement issues. But this is really within Canada.

**Mr. Mario Silva:** I think my colleague Mark Holland wants to have two more seconds.

**The Chair:** You might want to wait till the next turn, because there's very little time left.

**Mr. Mario Silva:** He'll be very short.

**Mr. Mark Holland (Ajax—Pickering, Lib.):** I just have one question, Madam Chair.

**The Chair:** Very short.

**Mr. Mark Holland:** I'm just wondering if you can tell me if, in those 300-and-some-odd cases you've had over a five-year period of time, there are certain types of issues you're dealing with repetitively. Are there certain areas that are more problematic, or certain complaints coming from certain departments more prevalently than others?

**Mr. André F. Scott:** Complaints very often deal with suppliers who have been excluded based on criteria the complainant doesn't agree with: contradictory terms in the call for tenders; ambiguous language; specifications that were over-restrictive or biased towards a certain or specific product; insufficient time to bid, or failure to grant a time extension when one was justified; a bidder being permitted to effectively modify their proposal after the deadline for receipt of proposals had passed; improper clarification processes; unsuccessful bidders not being provided adequate debriefings; and improper application of limited tendering, or sole-sourcing—though this is less frequent now.

**Mr. Mark Holland:** Madam Chair, this is it.

Was there a particular department—

**The Chair:** Mr. Holland!

**Mr. Mark Holland:** —with a preponderance of complaints, or was it limited?

**The Chair:** Mr. Holland, you'll have to ask that the next time around, okay?

Thank you.

Madame Bourgeois.

[Translation]

**Ms. Diane Bourgeois (Terrebonne—Blainville, BQ):** Thank you, Madam Chair.

Good morning, ladies and gentlemen.

I would like to congratulate you on your almost perfect French, Mr. Scott. I cannot judge your English, but I can say that your French is excellent.

**Mr. André F. Scott:** Thank you.

**Ms. Diane Bourgeois:** Your appearance here is very important, because you work in three distinct areas. Two of these areas can be looked at together: The Agreement on Internal Trade, at the federal and provincial levels, and the Agreement on Government Procurement. I think it is important to look them together. As I proceed with my questions, you will see what I am getting at.

There are no fees to file a complaint. You mean that there are no fees charged by you.

• (0930)

**Mr. André F. Scott:** That is correct.

**Ms. Diane Bourgeois:** But a person who comes forward with a complaint might need the services of a lawyer or someone from the outside.

**Mr. André F. Scott:** I included in your briefing book a copy of the complaint form to show you how easy it is. A complainant may decide to hire counsel, but in a number of the cases we deal with, there is no legal counsel involved. Often the amount of money spent to respond to the call for tenders may cause people to spend more to retain legal counsel. However, given the way we work, complaints can be filed without recourse to a lawyer.

**Ms. Diane Bourgeois:** The reason I asked the question is that I tabled Bill C-411 this year. It has to do with antidumping measures that would allow the International Trade Tribunal to exercise a little more power. The fact is that on several occasions the current government has swept aside your international trade decisions.

**Mr. André F. Scott:** We are not talking about bids. I just want to be sure I understand.

**Ms. Diane Bourgeois:** I just want to draw a parallel. Company representatives appearing before the tribunal are nervous and do not know how things will work. A number of them have had to pay some rather substantial fees. You say you pay between \$1,000 and \$4,000 in compensation...

**Mr. André F. Scott:** It is not compensation. As with other courts, the losing party has to pay the costs of the other party. The maximum we have awarded was \$4,100.

**Ms. Diane Bourgeois:** Based on your experience, would you say that this is enough for someone from a small business who hired a lawyer?

**Mr. André F. Scott:** In the case of people who do not hire legal counsel, it depends on how much time they spend on their complaint. We are talking here about filling in a form, as you saw. The individual states the reasons for the complaint based on non-compliance with the criteria. The complaint is then referred to the tribunal. As I said in my remarks, very few hearings are public. Most cases are dealt with on paper. Is that adequate? You are asking me to make a value judgment, and that is rather difficult for me to do.

**Ms. Diane Bourgeois:** The fact remains that if an invitation to tender is badly worded, for example, people who have dealt with you may feel that their rights have been violated. In such cases, if people hire the services of a lawyer, the cost can be \$10,000 or \$12,000.

**Mr. André F. Scott:** We should be careful here: if a bid process was improper and if the complainant wins, in addition to having his or her costs paid, there may be compensation for the loss of profit. So we must distinguish between the costs and the ultimate penalty.

**Ms. Diane Bourgeois:** Do you have that power?

**Mr. André F. Scott:** Absolutely.

• (0935)

**Ms. Diane Bourgeois:** I thought you seemed to say in your text that you had the power to make recommendations. It was not clear.

**Mr. André F. Scott:** That is the terminology used in the act.

**Ms. Diane Bourgeois:** But in practice, what does that imply?

**Mr. André F. Scott:** In practice, our recommendations are always implemented by Public Works and Government Services Canada. If the department were to decide not to implement a recommendation, it would have to justify its position. Appeals to the Federal Court of Appeal are possible in such cases as well.

**Ms. Diane Bourgeois:** To your knowledge, has that happened often?

**Mr. Eric Wildhaber:** In fact, it has never happened. The act provides that the Crown must implement the recommendations as far as possible. These are the tribunal's decisions.

**Mr. André F. Scott:** I think—and you will correct me if I'm wrong, Eric—that if the department were to decide not to do so, it would have to write to us to give its reasons or publish them.

**Mr. Eric Wildhaber:** Under the regulations, the federal institution, within 20 days of the tribunal's decision—let us call it that—must inform the tribunal and the parties to what extent it intends to implement the tribunal's recommendation. After 90 days, it must say to what extent it has implemented the recommendation.

**Mr. André F. Scott:** It reports.

**Mr. Eric Wildhaber:** It does.

**Ms. Diane Bourgeois:** You see why I asked...

**The Chair:** May I ask you to come back to that later? I will explain why.

**Ms. Diane Bourgeois:** Yes, of course.

**The Chair:** Mr. Julian has to leave.

[English]

Mr. Kramp was nice enough to give him his spot, so he could go. I thought that was very nice of him.

So I'm asking Madam to come back. I want to make sure Mr. Julian gets his question, so he can go and do what he has to do.

[Translation]

**Ms. Diane Bourgeois:** Fine.

[English]

**The Chair:** Mr. Julian.

[Translation]

**Mr. Peter Julian (Burnaby—New Westminster, NDP):** Thank you very much, Madam Chair.

[English]

Thank you again, Mr. Kramp, for switching. I have to present a private member's bill in the House.

I actually have three questions. I'll just put them out there and give you the chance to respond.

First, I just wanted to clarify something in terms of the involvement of the CITT in domestic procurement issues. For example, let's take a large IT contract that domestic—Canadian—companies are competing for. To what extent would the CITT be involved? Is it only if there are complaints from one of those companies, and only if there are perceived violations of the agreement on internal trade?

That's the first question.

Second, regarding your reference to the agreement on internal trade's allowing preferences for Canadian goods and suppliers and Canadian value added, could you go into a little more detail about what preferences are allowed on Canadian goods and suppliers and Canadian value added?

Third, you have contacts with international tribunals, such as those that exist in the United States. I'd like to know to what extent you see the Buy American Act having an impact on procurement policies with your colleagues within the trade tribunals in the United States. You'll have to decide whether or not you feel comfortable answering that question.

**Mr. André F. Scott:** With respect to your first question on the internal trade agreement, it is not solely on the internal trade agreement that a complainant, a Canadian supplier, can come before the tribunal. He can come under NAFTA, and he can also come under the WTO agreement on government procurement. The three avenues are open to him for a Canadian procurement, for a call for tenders by a Canadian department.

NAFTA and the WTO have similar criteria. NAFTA inspired the WTO agreement on government procurement. The criteria are practically the same, and the exemptions are also close. The Canadian agreement on internal procurement is slightly different.

But to answer your question specifically, a supplier could come under the three.

**Mr. Peter Julian:** But in a case where only two domestic suppliers are participating—

**Mr. André F. Scott:** Under the agreement, we have to apply the NAFTA standard to all government procurements. That is Canada's obligation.

**Mr. Eric Wildhaber:** Indeed, in some instances the NAFTA and the agreement on government procurement afford disciplines that have a little bit more bite than the AIT, the agreement on internal trade. So when a domestic supplier comes to us, even if it's a purely Canadian case, I know this may sound odd, but the tribunal will afford the same benefit that is contained in the AGP and NAFTA to Canadian domestic suppliers. So we're affording to Canadian

suppliers as much as we'd afford to a foreign company that would come in.

● (0940)

**Mr. Peter Julian:** But only upon complaint.

**Mr. Eric Wildhaber:** Indeed, everything is complaint driven.

**Mr. André F. Scott:** On your second question, in terms of exceptions for regional development or other exceptions under the Canadian agreement, I believe it would be section 500 of the agreement.

**Mr. Randy Heggart (Director of Procurement Review, Canadian International Trade Tribunal):** It's article 504.

**Mr. André F. Scott:** It's article 504, which will list the preferences that are allowed. The general standard is set in section 400, I believe, and then the exceptions are called for under section 500 of the agreement. I can maybe give you some examples. I referred in my text to programs for aboriginal businesses. We also have regional development exceptions. Then I recall there's also one for special programs like ACOA. That is under section 508, regional and economic development exceptions.

**Mr. Peter Julian:** But they're not specified, so it's up to the tribunal essentially to adjudicate or to define how that could be operative.

**Mr. André F. Scott:** Where that exception would have been used in the tender... It's up to the tribunal, if a complaint was filed, to see if that exception was properly applied and that they didn't go beyond the scope of what was contemplated in the agreement.

**Mr. Peter Julian:** Okay, but because it is not specified in the agreement, is it fair to say that it is jurisprudence that you establish? In other words, you're providing greater definition than actually exists within the agreement.

**Mr. André F. Scott:** Our reasons in our decisions, as they come down, interpret specific provisions of the agreement. But each case is specific, as you know.

**Mr. Randy Heggart:** We have not had any specific cases on regional economic development.

**Mr. Peter Julian:** That's interesting.

**The Chair:** Thank you.

Mr. Kramp.

**Mr. Daryl Kramp (Prince Edward—Hastings, CPC):** Thank you, Madam Chair.

Thank you very kindly. I think your appearance here today will also be helpful in just making the general public aware of some of the scope and responsibilities you do have. In most cases, a lot of your activities fall outside the general population's interest. So I think this is a good opportunity.

I have four questions, and I'll just take them one at time. Some of them, of course, are.... There's no such thing as a minor question, but on page 5 of your opening statement, the third paragraph down, you stated, "The agreements also allow exemptions for reasons of national security and for small and minority businesses." Could you give me a definition of what you really mean there by small and minority businesses?



**Mr. André F. Scott:** There is no definition per se. It is just written that way in the agreement. If we get a complaint, I guess we will be called upon to give an interpretation.

**Mr. Daryl Kramp:** Okay, so that's a bit of a fluid...

**Mr. André F. Scott:** And we haven't had any.

**Mr. Daryl Kramp:** I didn't know if it was clearly defined or if that was just a bit of a catch-all opportunity. That's fine; you gave me a response on that.

Building on Mr. Holland's point, and I think it was a valid point, you gave a number of the reasons why there would be cause for either judgment or justification either for allowance or denial of particular issues. Of those, have you found any real common denominators? Are there any patterns or trends that clearly could be identified? As an example, we as legislators could say there's a definitive problem in one particular area; we're having an issue that's coming back again and again and again, and it could be due to regulatory requests, demands, desires, etc. Have you found any consistency there, or are you sort of hit-and-miss depending on how things are going?

● (0945)

**Mr. André F. Scott:** At the expense of repeating myself a bit, in preparing for this appearance we did a lot of homework. I don't have specific statistics, but what comes up generally more frequently are specifications that are overly restrictive or biased towards a specific supplier. That is one.

**Mr. Daryl Kramp:** Have you found any of those reasons to be...? Has there been a human element in it—paternalism, relationships, undue influences—or has it just simply been each sort of on their—

**Mr. André F. Scott:** I can't cross that line, I'm sorry.

**Mr. Randy Kamp:** That's okay; I'm just prying a little.

**Mr. André F. Scott:** A second one would be insufficient time to bid or failure to grant a time extension when one of the potential suppliers required one. Another bidder was permitted to, effectively, modify his bid after it was filed. Those are the types of things we see that we take exception to.

**Mr. Daryl Kramp:** Okay. If we as legislators could be helpful, or even in the marketing of programs or judicial directions and so on, if we are given some form of direction that would be advance notice to potential people who would be involved.... It would just help them not walk into a situation where other people have been caught before.

**Mr. André F. Scott:** You see, as a tribunal, we're constrained by the fact that we are a tribunal and therefore our reasons are our explanations, but we can't go beyond that. The ombudsman has the power to go beyond that, which is not our case.

**Mr. Daryl Kramp:** Okay, thank you.

Going to the third question, you just mentioned the procurement ombudsman. How do you see the establishment of this position of ombudsman? Do you see it as being totally helpful or potentially having some overlap or duplication? Do you see it as an arm's-length or symbiotic relationship? What do you see with this?

**Mr. André F. Scott:** I think it is complementary because of the thresholds. He can deal with smaller complaints where we did not have any jurisdiction. It's complementary in that sense.

Beyond that, I think the question addresses policy issues, which I can't get into.

**Mr. Daryl Kramp:** My fourth and last question might get towards policy, and if you're not able to answer this, I understand. Once you have made a recommendation.... In particular, I'm not talking about the private sector here, because obviously they will have a different set of responsibilities. We, as legislators, want to ensure that the activities we have before.... If you pass judgment—this is following up on Madame Bourgeois' position a little bit—and you've made recommendations to a department and/or a crown corporation and/or an agency, have you found that your decisions have had a good level of acceptance? I'm not asking for a judgmental response here. Has there been any resistance or appeal process based on your decisions?

**Mr. André F. Scott:** In terms of appeals, very few have been appealed. If I recall, we have some statistics on that, and it was around six cases in the past five years. Very few are appealed.

In terms of implementation, that I know of, all our decisions have been implemented.

**Mr. Daryl Kramp:** That's actually reassuring. That basically tells us that you're doing your job.

Thank you.

Those are all the questions I have right now, Madam Chair.

**The Chair:** Thank you.

Mr. Holland, did you want to continue?

**Mr. Mark Holland:** No, that's fine.

[Translation]

**The Chair:** We will now come back to you, Ms. Bourgeois.

**Ms. Diane Bourgeois:** Since my colleague has a brief question, I will give her the floor, and then come back with my questions.

**The Chair:** Ms. Faillie.

**Ms. Meili Faillie (Vaudreuil-Soulanges, BQ):** Thank you for appearing before us today.

My questions have to do with the way in which the tribunal works. When an individual files a complaint... I can see that the form is quite easy to complete, and that people have to do that within 10 days of the awarding or the signing of the contract.

● (0950)

**Mr. André F. Scott:** People must do it within 10 days of the contract being awarded, or as soon as something happens in the bid process that would cause them to file a complaint. The complaints can be made even before the contract is awarded or closed.

**Ms. Meili Faillie:** I have worked in Public Works and in a number of departments, on issues involving contracts that are subject to NAFTA.

The process does include an evaluation stage for bidders. Individuals who go through all the steps may not have realized that their rights were violated. The process proceeds, and they trust in the system. It is transparent, and there are meetings held. When the bidder is chosen, one of the parties competing may say that they do not understand the decision. In that case, they may file a complaint with the tribunal.

**Mr. André F. Scott:** Often, the individual will go back to the department running the bidding process to get an explanation. That is called a debriefing, and departments very often grant that.

**Ms. Meili Faille:** I see.

**Mr. André F. Scott:** Normally, at these debriefings, the department explains the procedure that was used and answers certain questions. One does not exclude the other.

**Ms. Meili Faille:** You know as well as I do that bidders are not given some documents. These documents are quite important in choosing the winning bid. As a result, people have to go through access to information to get them. If the value of the contract is quite high—\$200 million or \$250 million, for example—there may be a good deal of documentation, and it may be very costly. In addition, it may take time to get them.

Is there a point in the process where people can ask for an extension in the deadlines in order to provide documents? There's a reference to "attachments" on the form. That is where the application usually becomes thicker.

**Mr. André F. Scott:** Your question contains a number of sub-questions. Individuals may file a complaint as soon as they have a reason for doing so. They may also file new complaints later on or change their original complaint if they discover new reasons for doing so. The 10-day time limit begins as soon as there is an initial reason for filing a complaint.

However, once the first complaint is filed and has been rejected, people can come back if they discover...

**Ms. Meili Faille:** At what point does the 10-day period begin? Let us assume that I am a bidder, that the selection process, the boards that review the applications, happened six months ago, and that when I heard the decision, I realized that I had grounds for complaint at that stage.

**Mr. André F. Scott:** From the moment we learn there is ground for a complaint, the 10-day time limit begins. That's why I always make the distinction. There may be grounds for a complaint before the bidding process has been closed and the assessment done. You might want more information on the content of the material on which the bidding process is based or on the interpretation of certain provisions. If you are not given an answer or if you are given an answer which might cause your bid to become distorted, you might have grounds for making a complaint. You would then have 10 days to go before the tribunal even though the bidding process is not closed yet.

**Ms. Meili Faille:** Fine.

After the 10 days, you can apply to the Federal Court.

**Mr. André F. Scott:** No. We are the first level. If you are not within the deadline, there is unfortunately no other recourse for you.

**Ms. Meili Faille:** I could not make a complaint to the tribunal anymore, but I could take legal action against the department in Federal Court.

**Mr. André F. Scott:** In my opinion, that would depend on the grounds. There is no review. At the Federal Court...

**Ms. Meili Faille:** The interested parties are often very few when there is a call for tenders. The work to be carried out is so specific that only a few service providers can qualify. Even if they do not

qualify, it is possible that three months later, people get together and learn that the bidding process was flawed.

If that happens, what kind of recourse is available?

• (0955)

**Mr. André F. Scott:** If three months later a bidder realizes there is grounds to file a complaint, he has 10 days to do so at that point.

**Ms. Meili Faille:** Thank you.

I just wanted to know when the 10-day time limit begins.

**Ms. Diane Bourgeois:** May I continue, Madam Chair?

**The Chair:** No, but you can come back during the next round.

**Ms. Diane Bourgeois:** All right.

Mr. Albrecht.

[English]

**Mr. Harold Albrecht (Kitchener—Conestoga, CPC):** Thank you, Madam Chair.

I want to thank our witnesses for being here today.

After having heard the procurement ombudsman on Tuesday and you today, I'm certainly finally up about 2% in my understanding of the procurement process. It's much clearer. Thank you. I was at zero before.

I just wanted to ask a couple of questions related to your statement. First, on page 2 you mention the fact that there are no fees and that there is no requirement for legal counsel.

I needed to step out for a few minutes earlier, so you may have answered this question. I just want to verify that even a very small business that has a complaint could access your services without undue cost, other than the time it would take to fill out the forms and that sort of thing.

**Mr. André F. Scott:** Exactly. That's why I qualified the tribunal as being user-friendly, because there is no filing fee and there is no requirement to have counsel.

**Mr. Harold Albrecht:** That's the same as for the procurement ombudsman.

On page 4 you talk about the fact that you do not examine complaints about contract administration, nor do you conduct general practice reviews.

It was my understanding, on Tuesday, when the procurement ombudsman was here, that he actually has, or his office has, the authority to go into contracts that are over \$25,000 to deal with that part of the complaint. Is that accurate?

**Mr. André F. Scott:** That is correct.

**Mr. Harold Albrecht:** So in a way, that really does underline the fact that you're complementary.

**Mr. André F. Scott:** That's why I made the statement that we are complementary, and that's why I wanted to underline where we have limits and where he doesn't.

**Mr. Harold Albrecht:** You mentioned that one of the highest criteria for a complaint was overly restrictive specifications. If a complaint was raised on that basis and the complaint came to you and it was on a very technical matter, how would you, amongst your tribunal, have the expertise to decide whether those specifications were in fact overly restrictive or whether it was actually pretty necessary for the unique characteristic of that particular procurement? I'm just wondering how that works out. Do you access outside expert help or consultants?

**Mr. André F. Scott:** We can. We are allowed to do so, and we have budgets to do so.

**Mr. Harold Albrecht:** In terms of the safety issue, my concern is that the tribunal might say the specs are overly restrictive, and ten years later it is found that the specs were there for a reason because of structural integrity or something.

**Mr. André F. Scott:** But you must understand that the department, in its response to the complaint, has to address the issues raised by the complainant and therefore must justify that overly restrictive aspect.

**Mr. Harold Albrecht:** Okay.

**Mr. Randy Heggart:** The complainant must also demonstrate the opposite.

**Mr. Harold Albrecht:** But in most cases, you come to an agreement that the specs need to be altered minimally or they're valid the way they are. I know you can't go—

**Mr. André F. Scott:** I can't comment on that, sorry.

**Mr. Harold Albrecht:** You did mention that there were up to six appeals in the last five years. I don't care if the number is four or six. My question is, to whom do they appeal?

**Mr. André F. Scott:** The Federal Court of Appeal.

**Mr. Harold Albrecht:** So they'd go to the Federal Court, and then the costly part would kick in.

**Mr. André F. Scott:** Yes.

**Mr. Harold Albrecht:** In your report, you say a number of the cases are simply dismissed. How do you get back to a complainant and say, "Sorry, but your...?"

**Mr. André F. Scott:** They're dismissed with reasons.

**Mr. Harold Albrecht:** It's with reasons.

Those are my questions, Madam Chair. Thank you very much.

**The Chair:** Thank you very much.

Mr. Kramp, do you want something else? No?

Mr. Warkentin, do you have any questions?

**Mr. Chris Warkentin (Peace River, CPC):** Maybe I'll just follow up, because I don't have that many questions.

Once you've made a determination, there's not much you can provide in terms of public disclosure.

**Mr. André F. Scott:** We publish all our decisions. They're on our website, and they're also published on MERX.

**Mr. Chris Warkentin:** So the reasons would be given full disclosure?

**Mr. André F. Scott:** Absolutely.

**Mr. Chris Warkentin:** That probably resolves some of the issues.

Actually, I was talking with our chair earlier. When she was minister, she had situations in which she wasn't allowed to talk about the process. Of course, the company could disclose what it wanted, but then the public relations issues would come up.

It's nice to know that once it's all said and done, you can bring some clarity and assure the public that full reasoning was behind the determination at the end of you making your decision.

● (1000)

**Mr. André F. Scott:** Absolutely. The reasons are there. Our decisions are public and they're published.

**Mr. Chris Warkentin:** That's pretty much the only time when full disclosure.... So often when they're making decisions based on procurement, governments can't disclose the terms of the contract or the reasoning behind certain things.

**Mr. André F. Scott:** Our files are also public, and when we have hearings, they're public too.

**Mr. Chris Warkentin:** So once they come to you, they have to be prepared to fully disclose, not only to you but also to the public.

**Mr. André F. Scott:** Absolutely. The only exception would be in a hearing in which there is confidential commercial information. That portion would be in camera.

**Mr. Chris Warkentin:** What would be included in the commercial consideration? If somebody came with a product they claimed was able to do a certain thing, and if the purchaser found the product did not in fact do what they said it would, the company could say, of course, that it was a commercial liability if it was disclosed that it couldn't do what it was supposed to do. Of course, that would probably be the determining decision as to....

**Mr. André F. Scott:** I'd love to answer, but I'm constrained here in terms of.... As I stated initially, I cannot answer hypothetical questions.

**Mr. Chris Warkentin:** Right, so what types of things would be included in the listing of things that wouldn't be disclosed in terms of commercial considerations?

**Mr. André F. Scott:** We publish general guidelines on what we consider confidential, and they're on our website. When somebody files a complaint....

Hélène, maybe you can answer that question best.

**Ms. Hélène Nadeau (Secretary, Secretariat, Canadian International Trade Tribunal):** We always maintain two sets of files: a public file and a confidential file. We have generally accepted guidelines with respect to what is confidential, like business-sensitive information. For instance, we'll put a financial proposal in a confidential file, because obviously the supplier doesn't want his financial proposal to be on the public file. The complaint itself is public.

**Mr. Chris Warkentin:** So the company itself can determine what they want to keep confidential.

**Mr. André F. Scott:** Their margins, obviously...

**Mr. Chris Warkentin:** No, I'm thinking more technically in terms of the product itself and in terms of specifications of the product.

**Ms. Hélène Nadeau:** If they would like to put something as confidential and the other side does not necessarily agree, we'll have—

**Mr. André F. Scott:** A tribunal decision on this issue.

**Mr. Chris Warkentin:** Thank you very much.

**The Chair:** They do have the power to decide, right?

Madame Bourgeois.

[*Translation*]

**Ms. Diane Bourgeois:** Madam Chair, I will probably be the last one to intervene. I only have four questions.

I want this to be very clear. On page 8 of the English version of your presentation, you say: "Recommendations made by the Tribunal in its determination are, by statute, to be implemented to the greatest extent possible."

A little earlier, I asked you a question about international trade, and the same applies for domestic trade. I want to make this comparison because I think it is important. As far as international trade is concerned, your decisions are applied to the greatest extent possible. To the extent possible, this implies that the Minister of International Trade can completely ignore your decision. There have been precedents.

In this case, is it the same thing? For example, if the Minister of Public Works and Government Services does not like what you say, can he completely ignore it?

**Mr. André F. Scott:** That's never happened.

**Ms. Diane Bourgeois:** That's never happened in the case of a department.

**Mr. André F. Scott:** Absolutely.

**Ms. Diane Bourgeois:** Very well then. I just wanted to compare the two.

**Mr. André F. Scott:** You are right, it is an important distinction.

**Ms. Diane Bourgeois:** It's very important.

In the third paragraph on page 6 of your presentation, you say "The agreement on international trade also allows preferences for Canadian goods and suppliers and for Canadian value-added [...]".

What happens when a complaint is filed based on the fact that the procurement process was vaguely worded or simply because the Canadian subsidiary of an American company gets the contract?

● (1005)

**Mr. André F. Scott:** Under the agreement, Canadian-produced goods can be privileged if the level falls below a certain threshold. If memory serves me well, it is 10%.

[*English*]

Under the accord, Randy, we can privilege Canadian-produced goods. Isn't the level 10%?

[*Translation*]

The threshold is 10%.

**Ms. Diane Bourgeois:** I want to make sure I understood. I own a company which manufactures hot water pumps. The Department of

Public Works and Government Services Canada decides to open a bidding process because it has to replace its furnaces or the hot water pump which supplies hot water to our beautiful buildings, which incidentally do not have any water as we speak. So a typically Canadian company and an American subsidiary each put in a bid. Both companies submit similar specifications and estimates, but the Canadian subsidiary of the American company wins the contract. The Canadian business owner claims there has been prejudice. What happens? It is a good question, is it not?

**Mr. André F. Scott:** I am not saying it is a good or bad question, but it is relevant. Unfortunately, I am restricted in what I can say. You are presenting me with a hypothetical situation and I cannot answer because, as a potential arbitrator, I would have prejudged the situation if I had to preside over a similar case one day. Do you understand?

**Ms. Diane Bourgeois:** I can tell you that this happened several years ago, but that the case was not brought to the International Trade Tribunal. The fact remains that, despite what you said about favouring Canadian companies...

**Mr. André F. Scott:** What I am saying, Ms. Bourgeois, is that under the Agreement on Internal Trade, it is possible to favour Canadian-produced goods on the condition that the level falls below 10%. That is all I can tell you.

**Ms. Diane Bourgeois:** All right.

I have a final question. Were you consulted with regard to the mandate of the ombudsman?

**Mr. André F. Scott:** I am new to the tribunal, so I cannot tell you whether there were consultations. In fact, I have only been with the tribunal for three months.

**Ms. Diane Bourgeois:** Your two services are really interrelated, or at least there are many common areas.

**Mr. André F. Scott:** They complement each other in some ways.

**Ms. Diane Bourgeois:** That is right. So you don't know whether you were consulted.

**Mr. André F. Scott:** When the decision was taken, we did have discussions with the acting ombudsman on the fact that the two services would complement each other, and we also made sure that people understood the different mandates of each service to ensure that when they file a complaint, they would know where to go.

For example, if you went on the ombudsman's website, you would see that it refers to the tribunal and explains the mandates of each organization.

Ms. Nadeau, if you receive questions, I believe you do the same thing.

**Ms. Hélène Nadeau:** Yes, that is what we do.

**Ms. Diane Bourgeois:** We have to make sure that there is no ground...

**Mr. André F. Scott:** We have to make sure that there is no confusion and that we clearly inform any potential complainant so that they do not lose their rights.

**Ms. Diane Bourgeois:** Absolutely.

**Mr. André F. Scott:** Indeed, I know that these types of exchanges take place.

**Ms. Diane Bourgeois:** Excellent, thank you very much.

Thank you, Madam Chair.

[English]

**The Chair:** Are there any other questions?

[Translation]

Thank you very much.

I hope this was useful.

[English]

I hope people understand a little bit more your role. In a sense, you're quite restricted. You know exactly what you have to do and what you can do. I would hope that the ombudsman can come in, and where there are holes, fill them. We'll keep looking at this, because we're very interested. We'd like to do an even more in-depth study of the procurement process.

Thank you very much.

**Mr. André F. Scott:** Madam Chairman, thank you. Thank you, members.

It was a very good experience. If you have other questions, we're always available to answer them.

*Merci beaucoup.*

**The Chair:** Thank you.

Next Tuesday we will be working on the report, which has been circulated.

• (1010)

**Ms. Diane Bourgeois:** Is it about passports?

**The Chair:** Yes. You have that.

Next Thursday, the members might be interested to know, we are going to have National Defence here, along with Public Works. You can imagine that it should be a good meeting.

Go ahead, Madame Bourgeois.

[Translation]

**Ms. Diane Bourgeois:** Madam Chair, I thought that we were going to hear from other witnesses with regard to Passport Canada.

**The Chair:** Possibly. Do you have anyone in particular in mind?

**Ms. Diane Bourgeois:** We only spent one or two hours on this issue.

**The Chair:** We have been talking about this for a while.

**Ms. Diane Bourgeois:** Do you think we have covered the issue?

**The Chair:** Read the report and tell us whether you think the matter deserves further study.

**Ms. Diane Bourgeois:** I have read it and, indeed, I find we are still missing some information.

**The Chair:** Please make your suggestions, if you have any.

**Ms. Diane Bourgeois:** I don't like the extra \$25. That money could go to Passport Canada.

**The Chair:** Yes, but it is a policy of the government to charge an additional \$25 to help consulates throughout the world. We could

invite a representative from the Department of Foreign Affairs to give us an explanation. But as you saw, when Passport Canada officials were before the committee, they did not even mention the \$25. In fact, they did not even want to talk about it. They said that the price of a passport was \$62 and that, as far as they were concerned...

**Ms. Diane Bourgeois:** Yes, but everybody pays \$87.

**The Chair:** You are right, and Ms. Fraser mentioned this in her last report. It is the equivalent of a tax Canadians must pay when getting a passport, but Passport Canada has nothing to do with it. It simply collects the money.

But it is up to you if you want to call someone...

**Ms. Diane Bourgeois:** It really bothers me and I would like us to take some time to give the issue the attention it deserves.

What the draft report reveals is first that Passport Canada does not have any money. It is undergoing a reorganization which will take some time to be completed. But in the meantime, the staff in certain MPs' offices have to make up for the situation, and they are not compensated for doing so. Where will we get the money to pay for that? We are talking about an additional \$25. Many Canadians do not need consular services. So who is getting the \$25?

**The Chair:** It goes to the Department of Foreign Affairs or to the consulates.

**Ms. Diane Bourgeois:** Could the Department of Foreign Affairs not give the \$25, which is collected every time a Canadian gets a passport, to the offices of the members of Parliament who are swamped, as a way for compensating for the extra work?

**The Chair:** That is certainly one recommendation we can make.

**Ms. Diane Bourgeois:** It is cheap labour for Passport Canada.

I don't think that we have received answers to all of our questions.

[English]

**The Chair:** Yes, we know that.

[Translation]

You are right. At one point, I even thought about sending a bill to the Department of Foreign Affairs, so what can you do?

**Ms. Diane Bourgeois:** There you have it.

**The Chair:** If you have any other suggestions or recommendations, we can discuss them next Tuesday. Also, if you wish to invite witnesses to the committee, please let us know. We could call them for next Tuesday's meeting.

**Ms. Diane Bourgeois:** We will do some research to see how we can compensate the people involved.

**The Chair:** We can always make recommendations in our report.

**Ms. Diane Bourgeois:** Mr. Kramp has not said much, but when he will have to process 10,000 passports, he will surely speak up.

[English]

**Mr. Harold Albrecht:** I don't think \$25 should be considered a tax. It's insurance. If you travel and need consular services when you're over there, you'll want to have it.

**The Chair:** That's fine. All I'm saying is it's there and it's part of  
the fee for passports. Passport Canada doesn't really deal with that at  
all, other than collecting it.

[*Translation*]

We will see each other again next Tuesday. Have a good weekend  
and thank you for being here.

The meeting is adjourned.

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