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Chair

Mr. Tom Lukiwski

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• (0845)

[English]

The Vice-Chair (Ms. Yasmin Ratansi (Don Valley East, Lib.)): Good morning. We have quorum, so we will start the meeting.

I want to let you know that bells will ring at 10:30 a.m. I understand the witnesses each have 10 minutes for opening statements; if they shorten it that would be good. That will give us one hour and 15 minutes. The clerk needs a few minutes to give us some updates. If we have unanimous consent and you don't mind staying for five minutes after 10:30, I'd appreciate it.

With that, welcome to the witnesses, Mr. James Cox, Mr. Sébastien Grammond, and Mr. Christopher McLeod.

Mr. Cox, the floor is yours.

Mr. James Cox (Fellow, Centre for Security, Intelligence and Defence Studies, Norman Paterson School of International Affairs, As an Individual): Thank you for your invitation to appear here this morning.

I'm here this morning to help you as much as I can. I have a general expertise in the area of policy and strategy in conflict and war. I have a specific expertise in the theory and practice of intelligence. I have had only a very small and old past experience in the area of acquisition. I had a career in the military, in the army, and I had a job or two in the mid-eighties involved in this area. I remember ordering spears and horses, so I don't know that anything I have in the way of experience is as relevant as you would hope today, although I do have a general understanding of the importance and the role of intelligence.

I understand that you have an interest in the Five Eyes arrangement, so I'm happy to provide as much information as I can on that.

I understand the importance of your questions. At this point I'm here to provide help and I'm keen on your questions.

Thank you.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you, Mr. Cox.

Mr. Grammond.

[Translation]

Prof. Sébastien Grammond (Professor, Civil Law Section, University of Ottawa, As an Individual): Thank you very much, Madam Chair.

I will speak in both languages.

I wish to speak to you today about a problem related to the national security exception, particularly the fact that the government seems to interpret this exception as excluding the jurisdiction of courts.

I'm not an expert in national security like Mr. Cox, nor in computer science. I am a lawyer, and that is why I'm addressing you.

Perhaps I could start with a personal example. I was a young lawyer in the 1990s, and I had to work on several bidding cases. Our office represented bidders who had been excluded from a process or were denied a contract.

At that time, the decisions of the courts made it very difficult to challenge decisions, such as those concerning contracts awarded by municipalities. I remember a case where the City of Montreal had awarded a contract to our competitor, despite the fact that there were irregularities in his bid, which had not been a problem. In another case, my client was accused of similar irregularities, and his bid was found to be invalid. I did not understand why the City did one thing in one case and something else in another.

A few years later, the Charbonneau Commission—as you may recall—allowed us to learn a lot about the integrity of the bidding process. The lesson I took away from this was that court oversight is essential to ensure that bidding processes work, that processes are followed, and that people make decisions based on criteria and not on arbitrary considerations or favouritism. As the saying goes, “when the cat's away, the mice do play”. Obviously, the cat is the courts.

• (0850)

[English]

I'd like to make an important point. I read the transcript of your last meeting—in February, I think—and the point was made that, well, the national security exception was invoked in a number of cases, but still, it was a competitive process. However, what I've learned shows you that, if you don't have an external control, you can never be sure that it's actually competitive. In the cases I talked about, yes, it was supposed to be competitive. There was a call for tenders and there were criteria, but the City of Montreal, in those cases, was doing what it wanted, essentially.

I want to go beyond that. Beyond protecting competitiveness, I think it's an issue about the rule of law. There's nothing in the act respecting the Canadian International Trade Tribunal, nor in the Agreement on Internal Trade, that ousts the jurisdiction of the tribunal when the national security exemption is invoked.

What the government is essentially asserting is a right to exempt itself from the law as it sees fit, without any statutory basis. That's called a dispensation power, and that was abolished by the Bill of Rights—not Diefenbaker's Bill of Rights, but the Bill of Rights that ended the Glorious Revolution in England in 1689. That's been with us for a long time, the principle that a government cannot exempt itself from the law. That is so, even when national security is at stake.

I don't want to minimize in any way the importance of national security, but the fact that national security is at stake does not mean that we oust the jurisdiction of courts and tribunals. What we do is design processes that reconcile the needs of national security and the need for judicial review, the requirements of the rule of law.

Let me give you a few examples. In the last Parliament there was Bill C-51. There was an important debate about this piece of legislation. Let me just give you an example from it. There were provisions with respect to the no-fly list. What you see is that the bill gave a statutory basis for the no-fly list, but it put into place a process for people to appeal or to contest before a court of justice their possible inclusion on the no-fly list. Even if there is a concern for national security, Parliament found a way to address it in a way that would preserve the individual's right to present his or her case before a court, and the needs of national security, especially with respect to confidentiality.

It's the same thing with respect to the famous security certificates. When you want to deport someone who's a threat to national security, there is a process for that person to challenge the designation in court, and there is a process for keeping information confidential when it relates to issues of national security, so it's possible to combine the two.

It's never done in a blanket way. It's never done in a way that prevents a court from looking at a particular case and asking itself if it is satisfied that there is really a national security concern. If there is one, it will address it; but if there are none, then it'll go public and deal with the case.

• (0855)

[*Translation*]

I think that gives us an idea of how the courts deal with these issues. The courts are sensitive to national security issues and have all the tools necessary to ensure the confidentiality of information that may pose a risk in this regard. In my view, nothing in the Agreement on Internal Trade that was mentioned earlier allows the government to say that the courts lose jurisdiction when it invokes a national security exception.

Thank you.

[*English*]

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

Mr. McLeod.

Mr. Christopher McLeod (Head, Commercial Litigation, Mann Lawyers LLP, As an Individual): Thank you.

Good morning, committee members, my name is Chris McLeod. I'm head of commercial litigation with Mann Lawyers in Ottawa. I have practised in the area of commercial litigation and public

procurement law for my entire career. I was the lead counsel in the MD Charlton Co. Ltd. case last year, which was the first time that the invocation of a national security exception has been found to be problematic by the Canadian International Trade Tribunal. I was honoured to receive your invitation here today, and I believe I can provide some context for the committee.

Based on my review of the transcripts of the last session, I thought I would start by providing a bit of an overview and intersection between public procurement and national security exceptions and how we get to some of the issues that we're seeing.

As you know, Canada has committed to various trade agreements, NAFTA, the Agreement on Internal Trade, and the WTO's Agreement on Government Procurement, among others. Included in all of these agreements are commitments with respect to promoting transparency, competition, fairness, and integrity when the Government of Canada is procuring goods and services.

The trade agreements are fairly specific about what these requirements are. There are different requirements and different wording in each agreement, but the general principles are there. There must be open process, such that Canada won't have technical specifications in their procurements that are biased in favour of one bidder or against another bidder. The timing of the procurement must allow bidders to provide a legitimate response to the solicitation. The bidders must know the evaluation criteria they need to meet and the bids must be evaluated against those criteria.

These and more are set out in the trade agreements, and they're the building blocks of this fair, transparent, and open procurement system.

Not all procurements will be subject to the trade agreements and these requirements. Certain goods and services are not subject to the agreements. In order to be subject to the trade agreements, the procurements have to meet certain thresholds that are set out in the agreements. Typically, a monetary threshold is broken down by type of good or service, and it's different depending on which trade agreement we're talking about. It's not uncommon to have one procurement in which multiple trade agreements and the obligations under those trade agreements are triggered.

By way of these trade agreements, Canada has also committed to providing a dispute body, a specialized body that has specialized expertise in dealing with alleged violations of these trade agreement obligations. That's the Canadian International Trade Tribunal, CITT.

If you're bidding on a government contract that is subject to one or more of the trade agreements, and the procurement you're bidding on meets the thresholds under the trade agreements so that they're triggered, and you feel that Canada has violated one or more of its obligations under the agreements, you can complain to the CITT and ask for relief. You can allege that there's an unfair process or unfair conduct and ask that it be addressed.

The CITT has a number of tools to deal with issues. They can recommend that the solicitation be cancelled and resolicited. They can award bid prep costs. They can award loss of profit if they're convinced that the complaining bidder would have otherwise won the bid.

The CITT's procedure is also designed specifically for procurement. Very much unlike a court, the CITT's process happens very quickly. You're talking about days as opposed to months and years. You're inside of 90 to 145 days as opposed to what could be a two-year to three-year process.

From a practical perspective the CITT plays a very important role. Typically, these goods need to be procured at the time they're being purchased, and if the procuring of those goods is tied up in the courts for years, it can set the government back. It's the same for bidders. My clients certainly want these issues resolved quickly as well, and the CITT offers a venue that does that very quickly, using its specialized expertise.

National security exceptions come into play because the trade agreements all recognize that there are instances where there are legitimate national security concerns at play for the Government of Canada, where procuring goods and adhering to these obligations under the treaty agreements just doesn't make sense from a practical perspective.

● (0900)

To give you an example, if you're purchasing military hardware, you may want to do it in secret. You may not want other countries to know what you're purchasing, or the technology that's included. Rather than reaching out to the market in general to procure these goods, you may want to limit it to a couple of trusted suppliers. There are some suppliers that are known for historically providing goods to Canada and our allies.

What's happened over the years is that when Canada has invoked a national security exception—as when my friend said here, deemed itself to have a national security concern that warrants moving away from the obligations under the trade agreements—Canada has done so in a comprehensive way. Canada has taken a position that when a national security concern arises with respect to one of the trade agreement obligations, that it dispenses with all of the commitments under the trade agreements, including dispensing with a bidder's ability to seek recourse to the CITT. That's the jurisdiction issue that's come up.

Canada's position has been and continues to be that where there's an NSE, a national security exception, the procurement is taken right outside of the trade agreements and therefore outside of the purview of the CITT. The CITT no longer has jurisdiction to hear the complaint. For a long time, the CITT agreed with Canada on this. Many bidders tried to challenge it and the CITT would consistently say, look, if a national security interest is triggered, all we can do is look to see whether the national security exception has been properly created—triggered basically. Technically, all they would look at is whether the person with the right authority signed off on it. As soon as you had that, that was it; it was outside of their hands, and off you went.

It came up in the testimony in February. There is other recourse with the courts, but for a lot of reasons it doesn't make sense practically. And frankly, the courts are moving away from administrative remedies for what they consider to be commercial undertakings by the federal government.

Over the years, this has created an environment that was frankly ripe for abuse. That was recognized by the courts and by the tribunal. I'm not suggesting that it was abused in every case, or even in most of the cases, but it would certainly allow the government to ignore its commitments, even if the commitments were not impacted by the national security concerns.

If we go back to the military hardware example, if the Government of Canada has an interest in keeping the procurement secret and maybe limiting the pool of bidders to trusted bidders, what's been happening over the years is that Canada also has taken a position that it can treat—within that small pool of bidders and that small pool of bids—those bidders unfairly, and the bidders have no recourse under the trade agreements or to the CITT.

What we argued in the MD Charlton case, and what the tribunal found for the first time, is that while there are instances where national security concerns would warrant excluding one of the obligations of the trade agreements, it should only be done to the extent necessary in the circumstances. If you can address a national security concern by running the solicitation in secret or limiting the number of bidders, within that pool of bidders, you should be treating them fairly, so that everyone has an equal opportunity to compete for work. It ensures competition and a fairness in the process.

Since that decision, and since your February 23, 2017 sitting, the CITT has followed up on the MD Charlton decision with the Hewlett-Packard decision. If you've had a chance to read that, it sets out in very detailed terms that the tribunal has gone to great lengths, and has done a great job of setting up the entire background, with respect to the issues of national security exceptions in their jurisdiction.

● (0905)

They have taken a new position on it, basically, a position that is consistent with the MD Charlton—

The Vice-Chair (Ms. Yasmin Ratansi): Mr. McLeod, I'll have to thank you now. When the questions are asked, you might be able to expound on it.

We'll go to the first seven-minute round with Mr. Peterson.

Mr. Kyle Peterson (Newmarket—Aurora, Lib.): Thank you, gentlemen, for being with us this morning.

I'm going to start with a general question to Mr. Cox. I understand you have some expertise with the Five Eyes. With regard to IT, how does our process, our procedure, specifically this blanket exception, compare to our Five Eyes allies?

Mr. James Cox: I carried out some research over a few days on the policies and other regulations of Australia, New Zealand, the U.K., and the U.S. I found, in general, that our wording on the NSE is reflected in the countries of the Five Eyes in various ways. It's fairly straightforward in Australia because it's a small organization, the same as here in Canada. On the other hand, it's complicated in the American policies and regulations because they have a whack of it.

In terms of the spirit of what we see in ours, it's reflected in the others, so there is a common approach.

Mr. Kyle Peterson: Thank you for that.

Professor Grammond, public procurement is fraught, as well. I'm a commercial litigator myself. I've practised a little bit in the procurement field—not in the national security exception, for sure. Even without the national security issues, those types of procurements and contracts often result in litigation. Unhappy bidders don't think they were treated fairly. Their recourse is to the courts or, in some cases, the tribunal.

Do you see the national security exception as being just another layer of that sort of risk to bidders, or do you actually see widespread abuse of that provision in trying to undercut the commercial interest in getting the supplier that perhaps the government wants?

Prof. Sébastien Grammond: I have not conducted a thorough investigation that could provide a basis for a conclusion that there has been abuse. What I can say is that, from a principled point of view, the more exceptions you have, the closer you are to the old situation where there was no control at all on decisions of public authorities as to the procurement process. I think there is potential for abuse, certainly, if the position is that there is no review at all once the national security exception is invoked.

I cannot say for sure that there has been abuse. In fact, that's the role of the court or tribunal to decide, but if the court or tribunal has no jurisdiction, then how can we know whether there has been abuse or not?

• (0910)

Mr. Kyle Peterson: What would you see as ways to improve the use of this?

Prof. Sébastien Grammond: I think the recent decision of the Canadian International Trade Tribunal is a positive development in the sense that it says the government has to prove exactly why it thinks that there is a risk to national security if, for example, we allow judicial review of a particular procurement decision.

Then the tribunal would have to ask, "Is there a problem? What's the problem, and how can we solve it?" It could be solved, for example, by saying, "This and this information will be held as confidential", or "This particular part of the hearing will be held in camera".

There are many tools to ensure that information is kept confidential. I don't think there's any major problem with the operation of such tools. We have examples with hearings of the Federal Court on security certificates. They have crafted a procedure to ensure that information that is really related to national security is kept really confidential and, in some cases, is not even disclosed to the lawyer for the person who is the object of a certificate.

Mr. Kyle Peterson: Okay, thank you.

Mr. McLeod, I want to direct some questions at you.

Do you see—I don't want to call it abuse necessarily—a misuse of the exception when it shouldn't apply and it being used to perhaps achieve commercial or other ends that aren't really the purpose of the exception?

Mr. Christopher McLeod: Well, we certainly saw it in the MD Charlton case before the tribunal. The tribunal agreed that there were issues with the solicitation. But just on a broader level, I do. This idea of the blanket NSEs and running multiple solicitations under the

NSEs and Canada's historical position and Canada's position in the HP decision as well that no justification is necessary is, to me, contrary to the trade agreements. The NSE language in the trade agreements has qualifiers showing that Canada considers it necessary. To me, you have to give some effect to that language. There has to be some ability to test whether or not Canada actually felt it was necessary or whether Canada was using an NSE as a convenient way to avoid going through its other obligations in order to justify sole-sourcing, for example. I think the tribunal is going in that direction certainly.

Mr. Kyle Peterson: Okay. To my mind, the default should be an open and transparent process. I think everyone on the panel is in agreement because, among other things, that makes the most competitive process, which would result in the best supplier getting the contract. Generally speaking, I think that's the perspective taken. The exception must be an exception, and it shouldn't be used regularly or it's no longer an exception.

Two parties can be hurt by misuse of the exception. With competitive bidders, one bidder can be prejudiced against another. But also I think it's a way to perhaps circumvent trade obligations that Canada, as a country, may have or other countries that use these exceptions—

The Vice-Chair (Ms. Yasmin Ratansi): Mr. Peterson, you've gone over your time. He'll have to answer on your next turn.

Mr. Clarke, go ahead for seven minutes.

• (0915)

[*Translation*]

Mr. Alupa Clarke (Beauport—Limoilou, CPC): Thank you, Madam Chair.

Gentlemen, thank you very much for being here this morning.

Mr. Grammond, you said that courts of justice cannot control the use of a national security exception, but I understand that some can, like the commercial courts.

What I understand is that you want Canadian courts themselves to be able to control the use of this exception. Is that the case?

Prof. Sébastien Grammond: Perhaps I didn't express myself properly. In my opinion, the jurisdiction that is otherwise conferred on courts and tribunals cannot generally be removed. The Canadian International Trade Tribunal has been given jurisdiction over certain categories of bids, and that seems to me to be the focus of our discussion today. There may be litigation in common courts, such as the Federal Court or the provincial courts, but in practice, for the reasons Mr. McLeod has expressed, these disputes are before the Canadian International Trade Tribunal.

In my view, we shouldn't conclude, as the government does, that the jurisdiction of the court is discarded as soon as an official signs a certificate that there is a national security exception. I don't think that's desirable. When a court's jurisdiction is called into question, it should be able to exercise some control in this respect. In most cases, it will be the Canadian International Trade Tribunal, but it could be another court if, for example, a disappointed bidder decides to bring the bid before the Federal Court.

Mr. Alupa Clarke: What happens if a Canadian interested in procurement decides to challenge the use of a national security exception in a particular situation? Would the challenge come before a Canadian court?

Prof. Sébastien Grammond: A general rule of civil procedure provides that a personal interest is required in order to bring legal action. There are certain exceptions, but generally speaking, in a bidding process, an individual has no personal interest that would allow that person to sue.

Mr. Alupa Clarke: That is what makes you say that, in reality, the government assumes that this process is not subject to the rule of law.

Prof. Sébastien Grammond: That's right, yes.

Mr. Alupa Clarke: In essence, no individual could protest. In fact, no one could challenge the use of the exception in the courts, right?

Prof. Sébastien Grammond: No, the affected people, that is, the affected companies, can do so.

Mr. Alupa Clarke: Do you think it's problematic that companies can do so, but not all Canadians? I'm trying to get a better understanding of this.

Prof. Sébastien Grammond: That isn't what I said.

I said that the fact that the government wants to prevent companies from exercising this legitimate right before the competent courts is problematic because it is a right generally recognized in our legal system. When personal rights are adversely affected, it is possible to go to court to pursue the breach. It's very important. It is the rule of law and is one of the things that makes what we live in a democracy.

Mr. Alupa Clarke: I fully agree with you.

I simply want to understand better. So companies can address the trade dispute tribunal.

Prof. Sébastien Grammond: The Canadian International Trade Tribunal, yes.

Mr. Alupa Clarke: Thank you.

However, others can't.

Prof. Sébastien Grammond: Meaning, there are two things.

First of all, the tribunal has a statutory jurisdiction, including contracts under the Agreement on Internal Trade, NAFTA and other agreements. It is quite complex. My colleague here would be in a better position to describe it. That's one thing. The tribunal must be competent at the outset, according to the legislation.

There is a problem when the government goes beyond that and says that the tribunal isn't competent because the government itself has invoked the national security exception.

• (0920)

Mr. Alupa Clarke: Right.

When can the government say this?

Prof. Sébastien Grammond: Any time, apparently.

Mr. Alupa Clarke: Even before a dispute occurs?

Prof. Sébastien Grammond: Even before there is a dispute.

Mr. Alupa Clarke: Can it determine which companies it thinks will not have the right to contest?

Prof. Sébastien Grammond: I understand that an exception has been invoked generally for bid categories. Therefore, any call for tenders that falls within this category, according to the government, would not be subject to review by the tribunal.

Mr. Alupa Clarke: The other two witnesses and you mentioned that, still, in some cases the exception is used legitimately and in good faith.

Prof. Sébastien Grammond: Certainly, there will be cases where

Mr. Alupa Clarke: Do you think that it would be appropriate in these cases to establish an internal mechanism, perhaps a parliamentary mechanism? Perhaps this committee, which is in charge of government operations, could be given confidential information on the use of the exception, and then decide collegially whether it is appropriate.

What do you think of the idea of parliamentary mechanisms?

Prof. Sébastien Grammond: In terms of a solution or way of dealing with this issue, I think the Canadian International Trade Tribunal Act does not at all cover the national security exception.

If a mechanism is needed to address the issue, the act may need to be amended and set out that the government may, under certain conditions, invoke a national security exception by providing certain information on the scope of the exception invoked and its justifications. Then, the tribunal would decide whether or not the exception was justified. When you get right down to it, the process isn't very different.

Mr. Alupa Clarke: You mean that—

[English]

The Vice-Chair (Ms. Yasmin Ratansi): Mr. Clarke, your time is up. Thank you.

Mr. Alupa Clarke: Thank you, Madam.

[Translation]

I'll come back to it.

[English]

A voice: The clock was fast.

Mr. Alupa Clarke: There might be a reason for that.

The Vice-Chair (Ms. Yasmin Ratansi): Mr. Weir, you have seven minutes, please.

My clock doesn't go fast.

Mr. Erin Weir (Regina—Lewvan, NDP): Thank you.

One aspect of the national security exception is that there's no definition of the term "national security." I wonder if that's a problem and if other countries have a definition of national security that we might look to.

Prof. Sébastien Grammond: If I may, there is no definition. It is a concept that we find in other trade agreements, and my understanding is that there have been some arbitral decisions internationally about this concept. For example, in Argentina, in the early 2000s, there was a very severe economic crisis and some tribunals accepted that this could be a national security concern. So, it's not military; it's not terrorism or anything like that. It could be economic. We don't really know. In fact, it could help if we had a definition in legislation of what it means, what exactly we have in mind when we speak about national security.

Mr. James Cox: I would argue against having a definition in print. There is a lot of literature around in Canada now on the general idea of security. There is a policy in place but it's about to change. It is interpreted in a broad way. It talks of hurricanes and floods at one end, all the way to a military attack on the country at the other end. Agreed, there is a lot of space in there for interpretation. It depends on the issue of the day, I think, but in terms of interpreting it, it's squarely in the hands of the government.

Prof. Sébastien Grammond: If I may add, I agree with what has just been said. In fact, from my perspective, what's more important is to have a neutral review process when this is invoked, not perhaps trying to limit, in advance, the category of situations that might come under the exception.

Mr. Erin Weir: Is there anything further on this, Mr. McLeod?

Mr. Christopher McLeod: I think it will be interesting to see where the CITT goes with these types of cases. We only have two where they've accepted jurisdiction or taken on a matter and looked at an NSE. They're walking a fine line right now with respect to what their role is in the definition of national security and whether or not their role is to look and determine whether there's a legitimate national security interest at play or whether their role is to simply look at whether there's a nexus between some belief by the government that there's a national security interest at play and the limits to the national security exception.

These are two very different things. In one instance they'd be diving into the details to find out whether there's a legitimate threat. In the other, they're simply looking to see if there's a justification in linking them, leaving that discretion to the government to decide for itself what national security is. Is there a link to that subjective belief by the government that there's a national security interest at play and a link to the scope of the national security exception that's invoked?

● (0925)

Mr. Erin Weir: The Canada-European Union free trade agreement will apply to subnational procurement for the first time. I wonder, given this expansive definition of national security, whether provincial or municipal governments would be able to invoke the national security exception.

Mr. Christopher McLeod: They would. It's been a while since I've looked at the CETA language, but I don't recall seeing anything

that would limit municipalities or provinces from employing a national security exception when required. It makes sense. There can be purchases by provinces and municipalities that can have legitimate national security concerns triggered.

Mr. James Cox: It's a very interesting question. I would approach it from the angle of our talking about issues of security that impact the country as a whole. The spirit of what we have seen and the interpretation of national security, I think, is that it has an impact on the country as a whole. At the same time, all the provinces have the right and the mechanism to request help of the federal government in times of need.

In my mind, the question is, how far up the road is it required that we are going to have anything in print or again allow interpretation of the situation at the time? It's only my humble experience. I just haven't seen the kind of issue where I could see a province heading out on its own on an issue of importance that is not having impact on the country as a whole.

Mr. Erin Weir: Okay.

We've talked a lot about procurement within Canada, and bidders looking to have access to tenders. I'm wondering if you could speak at all to the experience of Canadian companies trying to bid on public procurement in other countries and being faced with their national security provisions.

The Vice-Chair (Ms. Yasmin Ratansi): You have 30 seconds to answer, whoever takes it.

Prof. Sébastien Grammond: My answer is that I don't know.

Mr. James Cox: I don't know.

Mr. Christopher McLeod: I have never represented a client in that situation, so I have nothing to add on that point.

Mr. Erin Weir: Okay. No problem.

It sounds like we're out of time.

The Vice-Chair (Ms. Yasmin Ratansi): No, you have 30 seconds to ask a question, and then they can think about responding...

Oh, now you don't.

Mr. Erin Weir: I just tried to do that.

Voices: Oh, oh!

The Vice-Chair (Ms. Yasmin Ratansi): You could have asked a quick one, if you'd wanted.

[Translation]

Mr. Ayoub, you have seven minutes.

Mr. Ramez Ayoub (Thérèse-De Blainville, Lib.): Thank you, Madam Chair.

Gentlemen, thank you for being here today.

I would say that it's basically a matter of trust in the processes. We spoke about defining and trying to frame what seem to be problematic calls for tender. It's important to have a definition. Mr. Cox wants some flexibility in the definition, and I agree with him. We can't categorize everything. However, the verification and integrity assurance processes could be improved.

I come from the municipal world, and I don't think there are national security issues at that level. Of course, there may be emergencies involving national security, such as the floods that are occurring right now. These are emergencies, but they are unplanned, while a call for tenders is. So when you put out a call for tenders, you may have certain companies in mind.

Could you tell me what solutions or methods could be used to prevent cases from reaching the courts? Cases that go to court take time and money. In addition, there are countless delays, so bidders become discouraged. They may not bid anymore, leaving room for bidders who might not have been chosen otherwise. Then we end up not having any quality bidders.

I know this question has been asked, but I'd like you to expand on how we could improve the situation.

Mr. McLeod, I see you would like to respond.

• (0930)

[English]

Mr. Christopher McLeod: I think we're moving in the right direction with the recent change in position by the CITT. Now we'll have a body that's willing to provide some level of scrutiny to national security exceptions and hold the government more accountable in the scope of the national security exception.

That leads back to your trust issue. If there is no scrutiny at the end of the day, if the rules go out the window, if it's the wild west, then it's easy to go down a bad path in the procurement world. We've seen it many times before. Where there is scrutiny, where there is someone watching over the process, and where the bidders impacted by any impropriety have an ability to go to an independent body and say, "Something went wrong here, take a look at this", that's what drives trust through the process, in my opinion.

Mr. Ramez Ayoub: Who would you foresee having that oversight? In terms of the people who would be outside the scope, outside of the regular basis, who are you thinking of?

Mr. Christopher McLeod: Well, the CITT; I mean, procurement is its field of expertise. In a normal procurement challenge, that's where it goes. There are other remedies that you can take to the Federal Court, to the superior court, but they have the expertise. They also have a very good process with respect to confidentiality. The CITT also handles our trade disputes, dumping and subsidy cases where highly confidential data from around the world comes in. They have a robust and confidential undertaking, and a confidential process. I think they are well positioned to do it.

We'll see whether or not the CITT wants to, or will, go so far as to step in to see whether there's a legitimate national security interest at play. That may be a different question. If they stay on the perimeter and just say that they'll look to see whether you've described an interest that seems to make sense with the NSE, then I could see some opportunity with this, yes.

Mr. Ramez Ayoub: Thank you.

I want to give Mr. Grammond—

[Translation]

Prof. Sébastien Grammond: Yes, if I may.

I would like to defend the courts.

Mr. Ramez Ayoub: Ha, ha! My remarks were sort of directed at you.

Prof. Sébastien Grammond: I appreciate your concerns, which our clients at the time shared as well. They were telling us that if they sued for damages, they would have to wait four years for a settlement. They preferred obtaining the contract rather than being compensated four years later. However, I note that the Canadian International Trade Tribunal has been specifically designed to resolve bid disputes quickly, and it appears that the system is working.

Mr. Ramez Ayoub: I would say it's our last resort.

Prof. Sébastien Grammond: Certainly.

Mr. Ramez Ayoub: It is always said that an out-of-court settlement is better than one arising from a ruling. If it's a process that works, so much the better.

Prof. Sébastien Grammond: Yes.

Mr. Ramez Ayoub: Are there ways of avoiding the use of a ruling?

Prof. Sébastien Grammond: I think there are internal processes within the public service. Of course, internal controls are required, and the Auditor General must be able to conduct inquiries into the bidding processes in order to have an overall perspective. He must be able to determine whether the rules have been followed, for instance.

• (0935)

Mr. Ramez Ayoub: I was wondering who determines that it's a national security exception. Doesn't this decision lead to protection and a process that ultimately eliminates certain procedures?

Prof. Sébastien Grammond: That's right.

What I understand from the testimony in February and the tribunal's decision that was referenced is that, rather than proceeding on a case-by-case basis, the government decided to categorically invoke the national security exception, meaning all bids related to the government's computer systems. The government also categorically invokes the effects, in that, according to the government, it eliminates—

Mr. Ramez Ayoub: What's your opinion on the decision?

Prof. Sébastien Grammond: In my view, this is not supported by the legislation nor by the Agreement on Internal Trade. The exception must always be linked to a specific case, there must be a justification.

Mr. Ramez Ayoub: Do you think the category is not enough?

Prof. Sébastien Grammond: Only to the extent that it could be demonstrated that, in all cases of the category, there is a real concern. There may be categories like that. Perhaps it can be said that in all computerized bidding cases, information related to the architecture of the system will be kept confidential, for example. Yes, I think it's possible to say that. However, it went much further. It was said—

[English]

The Vice-Chair (Ms. Yasmin Ratansi): Thank you very much.

We go now to the five-minute round.

Mr. McCauley.

Mr. Kelly McCauley (Edmonton West, CPC): Mr. Clarke is going to ask a quick question.

[Translation]

Mr. Alupa Clarke: I have a quick question. When you say that the Canadian International Trade Tribunal should be the one to determine whether the use is appropriate, do you mean before there is a challenge?

Prof. Sébastien Grammond: No.

Mr. Alupa Clarke: So we need a mechanism that comes before a challenge. Don't you think it should be parliamentary?

Prof. Sébastien Grammond: Yes, maybe so.

I believe that before there is a challenge, there must be internal processes within the public service to ensure that the exception is not invoked excessively. Since the public service is under the control of Parliament, you may have a role to play in this regard.

I don't think it's easy for a committee like yours to review on a case-by-case basis all the public tenders that the government submits in a year. Your role would probably be to ensure that the government is putting in place procedures so that the national security exception is invoked for more specific contract categories, and also to clarify what aspects of the applicable rules should be excluded from the Agreement on Internal Trade, for example. You might say that this or that rule won't apply, and not just say there will be no more control or rules. That is the meaning of the general exemption currently being invoked.

Mr. Alupa Clarke: I understand, thank you.

I'll give Mr. McCauley the floor.

[English]

Mr. Kelly McCauley: Thanks.

Mr. Grammond, you were actually answering some of the questions I was going to ask. You mentioned setting up strong external controls on NSEs and a neutral review process. I wonder if you could expand a bit on how you might see that set up.

The reason I ask is that, at a previous meeting on NSEs, we heard one of our assistant deputy ministers who signed off on NSEs basically saying she automatically approved everything, including photocopy paper and paper clips, which obviously are hardly national security issues. I'm wondering if you or any of the three of you could give us a bit of feedback in the very short time we have on how you might see the strong external controls that you mention.

Prof. Sébastien Grammond: First, you have to maintain the power of the tribunal to assess whether the exception has been invoked rightly or wrongly.

• (0940)

Mr. Kelly McCauley: How do you set that up?

Prof. Sébastien Grammond: Before that, if you have that rule in place, it will force the public service to say to itself, "When we want to invoke the national security exception, we need to have a specific rationale, and we need to identify which effects it will have in particular. Does it mean we will keep this kind of information confidential? Does it mean we will suspend a particular rule dealing with fairness to bidders?", and so on. We don't just invoke the exception and that's it.

Possibly this committee could ask the government what policies it has put in place to ensure that the national security exception is justified when it is invoked. This would discipline the public service to invoke the exception only when it is actually mandated.

Mr. Kelly McCauley: Mr. McLeod, do you have any comments on that?

Mr. Christopher McLeod: I think it can be done through the CITT, if you're looking for external controls.

Mr. Kelly McCauley: I mean external controls so it doesn't have to get to the CITT, and so we don't end up with an ADM just automatically signing off—like we've seen in Shared Services—a blanket NSE on everything. How do we set up internally so that it becomes an exception rather than a rule?

Mr. Christopher McLeod: I guess one way to do that is to make it clear to the CITT that it has the authority. As a statutory body, the CITT can be adjusted; we can make it clear that it has the authority. A separate process can even be set up within the CITT to look at whether the national security exception is legitimate.

Going that route, if the CITT clearly has the ability to look at whether or not the NSE was legitimately invoked, then I feel the marketplace will take care of the rest. Just because the national security exception is invoked doesn't mean you're going to have an unfair process. You're going to have a fair process. If bidders have the opportunity to challenge it, people are going to be a lot more careful when they do it.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

We now go to Mr. Drouin for five minutes.

Mr. Francis Drouin (Glengarry—Prescott—Russell, Lib.): Thanks to the witnesses for being here. I'm going to go on to some of what my colleagues touched on. When we talk about the NSE, we've heard complaints that it was overused, and we've seen with the CITT that there were some comments made.

Mr. Grammond, you've touched on the policy. I'd like to ask all of you three if you know, from your experience in other jurisdictions—let's say in the United States, where we know that they use the national security exception—whether there is a policy to justify the NSE in the United States or other jurisdictions?

Mr. James Cox: I am generally aware it's the same as in Canada. I'm in the other half of the camp. I have confidence in the people and the government, who are working all these issues and have decided that a particular one is an issue of security. There are all kinds of processes in the government, and particularly in the American one. It's a maze of steps, hurdles, and hoops they have to go through. There are a bunch of processes and explanations, as well as internal scrutiny.

In terms of Australia and the U.K., which have governments akin to ours, there is very active involvement of Parliament and committees of Parliament. Even in Canada, we have a number of committees in Parliament that, in my view, are capable of addressing a question as it's coming up. It depends on the committee and the specific issue at hand, but you all have the capability to do that.

On top of that, we have any kind of an external review, which our panellists have spoken about. The tools are in place, and I have always been a fan of using the tools and regulations that you have, and not attempting to add to them.

[Translation]

Mr. Francis Drouin: Mr. Grammond, do you have anything to add?

Prof. Sébastien Grammond: Once again, I want to emphasize that there has to be some external control. That's my opinion. Internal controls are desirable to prevent external control from becoming necessary, but the threat of external control is extremely important for disciplining the public service. In fact, if this possibility is always present, people discipline themselves. That's what I have sort of seen. There was no control over tenders in Quebec during the 1990s.

• (0945)

Mr. Francis Drouin: External control can also come from another internal agency. The Department of National Defence, for example, has to work with Public Services and Procurement Canada.

Prof. Sébastien Grammond: In my opinion, no.

Mr. Francis Drouin: We're talking about a third party. A company that does business with National Defence may consider the procurement criteria to be too specific to a particular company and may notify Public Services and Procurement Canada. We routinely hear about cases like that. They have been in the media on a number of occasions. The relations between National Defence and Public Services and Procurement Canada are not necessarily the best. Some people from National Defence tell us they particularly hate Public Services and Procurement Canada.

In the case of Shared Services Canada, for example, procurement is done internally. Companies therefore have no choice but to contact Shared Services Canada. However, we feel that they do not trust Shared Services Canada when it comes to certain procurement files. We have seen this in the media.

Prof. Sébastien Grammond: From the perspective of the public or of companies, a department is not a third party to another department. I don't agree with that. I think we need an independent body. That's usually the courts. It is possible for other types of truly independent bodies to play that role. I think there are all sorts of options. At any rate, I am of the opinion that internal control in the government, although essential, is not sufficient.

Mr. Francis Drouin: Absolutely. I completely agree with you.

However, I think if we end up going to court, it's already too late. The courts are a last resort, in my opinion. As you mentioned, it is important that this service exists, but we also need to ensure that internal controls are applied.

[English]

The Vice-Chair (Ms. Yasmin Ratansi): Sorry, Mr. Drouin, you can ask again in the next round.

Mr. Clarke, you have five minutes.

[Translation]

Mr. Alupa Clarke: Thank you, Madam Chair.

In cases where recourse to the national security exception is sought, Public Services and Procurement Canada states that: it is the responsibility of the director general of procurement, in collaboration with the client, to prepare a letter to the assistant deputy minister of procurement, Public Services and Procurement Canada, for approval of the use of the exception. The letter must be signed by the deputy commissioner in charge and must specify the nature of the acquisition and the reasons for the request.

It seems to me that a first step would be to allow a group or committee of parliamentarians to have access to the letter to determine whether the exception actually makes sense in major cases such as biological warfare, terrorist acts, industrial espionage crimes, and so on.

Politically, we should also ensure that some of the reasons given by a government for making an acquisition without a call for tenders are actually legitimate.

Don't you think it would be appropriate for this committee to have access to the letter signed by the assistant deputy minister?

Prof. Sébastien Grammond: I would have to study the process more. Generally speaking, I think it is good that public service processes are under the control of Parliament. That includes a committee like yours. Clearly, this possibility raises concerns about confidentiality. We keep coming back to that.

Mr. Alupa Clarke: As far as we are concerned, things are confidential.

Prof. Sébastien Grammond: I think the concern is similar to the one we have about the control and oversight of intelligence agencies. Special measures are taken to ensure that some control is applied. As you are probably aware, discussions have taken place on this issue. Special measures will have to be taken to have a smaller group of MPs. In the case of CSIS, I think it is a sort of a wise persons' committee or a commissioner.

Mr. Alupa Clarke: Who makes up this wise persons' committee?

Prof. Sébastien Grammond: I think it is made up of former parliamentarians and former judges, in some cases. So they are people with very high security clearance. They can have access to the information and know exactly why the exception was—

• (0950)

Mr. Alupa Clarke: If memory serves, private individuals were on this committee a few years ago.

Prof. Sébastien Grammond: I said there were some controversies. You have a good memory.

Mr. Alupa Clarke: I just remembered that.

Prof. Sébastien Grammond: Those are the sorts of things. Could a committee of MPs do that? No doubt, but you see the kinds of concerns that this raises.

Mr. Alupa Clarke: That would increase the confidence that Mr. Ayoub talked about, which is fundamental.

Prof. Sébastien Grammond: Yes, confidence is important, and it stems from the fact that independent controls are in place.

Mr. Alupa Clarke: Without going so far as to check whether the national security exception used in a particular case is actually legitimate, we, as parliamentarians, are currently having trouble accessing information, such as the acquisition of the 18 Super Hornet fighter jets. The Liberal government claims there is a capability gap.

I personally have made a request a number of times. The government contracts legislation requires the Minister of Public Services and Procurement to request that the Department of National Defence send a letter confirming that the exception invoked to avoid a call for tenders is legitimate. I am not talking about the national security exception in this case.

Prof. Sébastien Grammond: You are talking about sole-sourcing.

Mr. Alupa Clarke: That's right.

This letter must have been received by the Department of Public Services and Procurement. It has been a month and a half or two months since I have asked to see the letter, so that I have evidence that there is a capability gap. However, the national security exception is not even discussed. Even at a lower level, we have absolutely no access to this kind of tangible evidence of untendered procurement. So there is clearly a problem there, even before we look at the national security issue.

Ms. Yasmin Ratansi: Thank you, Mr. Clarke.

Mr. Alupa Clarke: Thank you.

Ms. Yasmin Ratansi: You won't have an answer because you have used up all your time.

[English]

Mr. Drouin, you have five minutes.

[Translation]

Mr. Francis Drouin: Thank you, Madam Chair.

[English]

Mr. McLeod, just to get back to my question, I understand the importance of CITT. We need it. You've convinced me that it should have some sort of oversight over whether an NSE is justified, and not a simple sign-off.

Speaking of the simple sign-off, you mentioned your experience in your opening remarks. How do they justify that NSE? Is it an ADM or a DG who has the sign-off authority?

Mr. Christopher McLeod: I think it depends on the department, but yes. The NSE letters that I've seen show a reason, and there's an approval.

Mr. Francis Drouin: But it's a simple letter; it's not....

Mr. Christopher McLeod: It's nothing more than that.

I'm just going to get back to your last point and also to Mr. Clarke's point about having parliamentarians overseeing this process. I think the risk there is in the timing.

The one thing that CITT does really well is move fast. There's a 10-day limitation period for bringing a complaint with the CITT, 10 working days. It can be extended to about 20 working days. That's lightning speed for a process. This is not a court process. It's not getting into the courts. This is an administrative body, and the CITT rules set out an extremely fast and efficient process.

Mr. Francis Drouin: Yes, I don't think I would want to be involved in a quasi-judicial battle between a company and the state. I don't see my role as that, but opinions may differ.

Just on your thoughts about the importance of the procurement process, we've seen that most departments will rely on PSPC now, or public works, to perform their procurement for departments. SSC is a bit different. It manages its own procurement. I'm somewhat worried that by doing that, the reporting, the structure of the organization, doesn't provide the confidence to companies to go to that other organization and say that SSC or whatever department is doing something funny, and ask that it look into it. What's your opinion on that, having dealt with clients before?

• (0955)

Mr. Christopher McLeod: I think you have a legitimate concern there.

Oftentimes, you see the back-and-forth between PSPC and the department where PSPC is running the procurement process and the department is providing the technical specifications. In some cases that I've been involved in, you can see where there is discourse and disagreement between PSPC and government departments on whether or not those technical specifications are appropriate, whether they're appropriate in the procurement context, whether they are too specific, and whether they effectively eliminate all but one bidder and effectively sole-source. You can see these discussions going on in some cases.

I think you've raised a valid concern.

Mr. Francis Drouin: This committee is studying that right now, and this is probably one of our last meetings, unless we want to go on. If we were to make a recommendation, would it be that we allow the CITT to specifically get involved in NSE justifications?

What would you see if we were to make recommendations? I'm asking all three members.

Mr. Christopher McLeod: Honestly, my recommendation at this point I think would be to wait and see what the CITT does. We've only had two decisions where they've accepted jurisdiction and looked at this. They have two paths here that they're going to go down, and it's going to happen as bidders bring cases.

Either they're either going to say that they're going to look at this very lightly, and that as long as there's a reason, they won't look at whether it's a legitimate reason or not. They'll say that as long as you've provided a reason, they'll accept that as true, and based on that reason, then, yes, limiting the fairness requirements is appropriate. In that case, I think I would suggest that something else happen: that either there's more oversight internally or the CITT's mandate is expanded so it's clear that they have a chance to look at the actual concern.

Or the CITT may go down the other road, which means diving into the depths and taking a look at the rationale as to whether or not there's a legitimate national security interest at play in invoking the national security exception.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you very much.

We'll go now to the three-minute round and Mr. Weir.

Mr. Erin Weir: To stay on this idea of the CITT being able to review the invocation of national security exceptions, I think an alternative view would be that those decisions should be reviewable by the regular court system. I believe that the federal government is actually appealing the Hewlett-Packard decision on that basis, so I would invite witnesses to comment on that perspective.

Mr. Christopher McLeod: This goes back to an earlier question. I'll be very brief.

In a procurement dispute, there are a number of routes you can take. One is to the CITT. One is to the Federal Court, with an application for just a review, an administrative process where you're asking the court to determine whether a decision was made with the proper authority. The other is to go off to the regular courts in seeking damages.

In the context of the application for judicial review, that's where I can see the ability to challenge the invocation of a national security exception if you're impacted by it. The Federal Court will look at whether or not the decision was made with the proper authority. I don't think you're going to get them to look at whether or not there's a legitimate national security interest at play.

Mr. James Cox: I am hesitant about the judgment of what is or is not a security issue, which is the responsibility of the executive to interpret, having a number of bodies anywhere, and even a committee of Parliament, engaging in a critique of it.

On the other hand, apart from that, all that we've heard this morning in terms of oversight and scrutiny I think is fine. I'm just not excited about the possibility of a discussion of the interpretation of what the executive has decided.

Prof. Sébastien Grammond: If I may add to that, when courts or tribunals review decisions that are made by the executive and that have a policy component, they typically show deference, in the sense that they do exercise some form of control but they recognize that the executive has a margin of discretion.

They typically ask themselves if the executive decision was reasonable. They don't ask themselves what decision they would have made had they been in the Prime Minister's shoes or the ADM's shoes. Rather, they look at reasonableness. It's the same thing for security certificates, for example. This is a standard of a review that has proven practicable and that does not intrude too much on the

kind of discretion that is necessary when matters of national security are at stake.

• (1000)

Mr. Erin Weir: But should it be the courts or the—

The Vice-Chair (Ms. Yasmin Ratansi): Thank you, Mr. Weir. Your time is up.

We're going into one more round. We have half an hour, and I want the committee's indulgence. Could we go with five at five minutes, so that you will get your five, you will get your five, and you will get your five? That way we will have five minutes for committee business. Is it agreeable that instead of seven minutes we're going to go to five minutes?

With that, Madam Shanahan.

Mrs. Brenda Shanahan (Châteauguay—Lacolle, Lib.): Thank you very much, Madam Chair.

Really, I must thank the witnesses this morning, because you are bringing a degree of subtlety to an area in which too often, especially after events of 9/11, and terrorism on our continent, it's been very easy to invoke fear and to invoke issues of national security to effectively take away individuals' rights, let alone to get into projects of questionable cost and effectiveness.

The reason we've called you here is to learn more about the use of the national security exception in other countries and how we can improve that application here, particularly in regard to IT services, to Shared Services.

For you, Mr. Cox, how does Canada compare to our Five Eyes allies in the use of exemptions with IT infrastructure, which admittedly is a whole new territory? We're not talking about weapons and so on, but it can be just as effective a weapon.

Mr. James Cox: From the papers I read over the weekend, my general impression is that Canada is the calmest of the Five Eyes in using this. All of the others have a more acute interpretation of security—the Americans and the British, and even the Australians. I don't have any specifics in terms of tables or quantities or times of use, yet this is the impression I get from the reading I've done. So in comparison with our Five Eyes allies, I don't think we are at all overenthusiastic in the use of the NSE. I don't think we are using it as much as the others are.

Mrs. Brenda Shanahan: Specifically to IT, to Shared Services, are we in line with the others? Have they done the same thing with their IT?

Mr. James Cox: I can't speak to the details of the other government departments in the rest of the countries, but I'll give you a specific example that isn't well known that impacts in this area, which may sort of eliminate the competition. It happens fairly often in the area of cryptological equipment, and the people who are the most advanced in that in the world are the Americans. In terms of the Five Eyes, you will occasionally have the Americans saying here's a piece of equipment that all of us have to have, and it's a question of getting it or not, and therefore staying in the Five Eyes or not. There are occasional examples of that over time where the Americans have said, here's a neat piece of equipment, and that automatically invokes an NSE, and Canada says okay.

Mrs. Brenda Shanahan: And it's sole-sourcing, really.

•(1005)

Mr. James Cox: And it's probably American.

But that's at the very extreme end of classified stuff. That is really high stuff, and it would be extremely hard to have a discussion on that in any way.

Mrs. Brenda Shanahan: The problem there is this balance between what is a key piece of security equipment—with cost, of course, and that's where the competitive aspect comes in. We see in our briefing notes that a couple of the other countries have a debrief after a contract has been awarded. Is this something, Mr. McLeod, that industry would be interested in, or is it just placating people who haven't won the contract?

Mr. Christopher McLeod: There is an ability to debrief after a competitive process typically, but whether that's placating or whether that's providing actual information is something to be decided on a case-by-case basis. Certainly if you're looking at value, absolutely. A competitive process is going to provide typically a better value to the government, to the taxpayers. At the same time there are legitimate national security interests that might come into play.

Just stepping back from this a little bit, if you're saying that a supercomputer for weather forecasting and other uses invokes national security interests, I can see how that might be. If you're talking about office paper and paper clips, I struggle to see that. Perhaps there's a reason but I would suggest there likely isn't.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

Mr. McCauley, for five minutes.

Mr. Kelly McCauley: Thanks very much. It's been very informative and I appreciate your input. I just want to get back to what I was chatting earlier about. How do we set up processes to stop government, whether it's this government, the next government or the government after that, from using NSE as a blanket excuse just to do what they want and just call it NSE. And it's bigger than just the photocopied paper that CSIS is doing it on; there's military procurement, the sole sourcing of the Super Hornet is a controversial issue. How do we get systems set up so there's NSE and we're shut down from oversight on spending, procurement and other issues?

Mr. James Cox: Could I speak to that?

Mr. Kelly McCauley: I'm sorry, I understand what you're saying about giving powers more to the CITT, but I'm thinking, again, of setting up processes in advance so that it's not used and then we wait a year or two, or months etc., to get in front of CITT, but so that we stop it as a matter of policy. Again, I'm talking about governments down the road as well.

Mr. Christopher McLeod: Obviously it's within your ability to create an internal oversight process whether that's by committee or by some other method.

Mr. Kelly McCauley: Do you have suggestions?

Mr. Christopher McLeod: My suggestion is not to do it unless you can ensure that it's done officially because if it becomes another layer of process that is going to further restrict the government's ability to purchase goods in a timely fashion and bidders' ability to sell their goods to the government in a timely fashion, then I think it would be problematic in itself.

Mr. Kelly McCauley: Maybe I'm a bit of an optimist or pragmatist, but I would think that would be a simple sign-off, no photocopy papers, not an NSE. We could clear these things off, but how do we set processes—

Mr. Christopher McLeod: If you're asking for suggestions for internal checks and balances, that's not my area of expertise.

Mr. Kelly McCauley: Mr. Grammond, any thoughts, or Mr. Cox?

Prof. Sébastien Grammond: Perhaps I could say again—

Mr. Kelly McCauley: I keep cutting off Mr. Cox.

Prof. Sébastien Grammond: I could say that there could be audits of the invocation of national security exceptions. I don't know to whom this mandate could be given, perhaps the Auditor General, and that would not delay the process for the award of contracts, so it would come after the fact. It would be an internal process within government and it would not be the courts, but then the Auditor General, for example, or some sort of committee....

•(1010)

Mr. Kelly McCauley: Mr. Cox.

Mr. James Cox: I have the general opinion that in government there are enough processes and—

Mr. Kelly McCauley: Everything is about process, not outcomes.

Mr. James Cox: —I've always held the view that there's a lot of capability in the committees of Parliament. I would say any of the committees has the power to call the minister and ask him the question, have him explain himself.

Mr. Kelly McCauley: Perhaps this would be a good forum seeing as that we are...procurements under this—

Mr. James Cox: Absolutely.

Mr. Kelly McCauley: Very good.

Mr. McLeod, just quickly, I have a question on the CITT. You've mentioned that there's Charlton and there was a second one that came up recently.

Mr. Christopher McLeod: Hewlett-Packard.

Mr. Kelly McCauley: How much is the CITT used for NSE issues?

Mr. Christopher McLeod: It's twice that I know of.

Mr. Kelly McCauley: That's just been it? Okay.

Mr. Christopher McLeod: There have been attempts to take issue with solicitations that are being run with a national security exception invoked. In all but these two instances the tribunal has declined to hear the matter, basically, because it determined that the technical, the NSE, was signed off by a person with the appropriate authority and at that point it was outside of its jurisdiction.

Mr. Kelly McCauley: So, they are not signing off on the validity of the issue; it's just more that they followed the rules properly.

Mr. Christopher McLeod: Correct. The MD Charlton decision was the first time they said that, no, the NSE has gone too far, and they've done that again with the Hewlett-Packard decision. The committee should definitely take a look at this decision, if you haven't already, and I suspect you probably have. The tribunal sets out a very....

Mr. Kelly McCauley: So, just very quickly, what do we have to change, then, with the NSE to expand it so CITT believes it has the mandate to look at this, because this sounds as if we've narrowed its ability too much in just saying, "Well, they followed the rules."

Mr. Christopher McLeod: So, the CITT is interpreting its own jurisdiction, for lack of a better term, in deciding whether or not and how deeply it can look at—

Mr. Kelly McCauley: So, expand their jurisdiction?

Mr. Christopher McLeod: I mean, again, this is all new because it's all very recent within the last year. The CITT may decide that it has the ability to dive deeper, or it may not. If it doesn't and if it's only going to look at whether there is legitimate reason shown in the actual national security exception—whether that's actually legitimate is a separate question—then perhaps that would be the way to do it.

Mr. Kelly McCauley: Okay. I'm out of time. Thanks very much, gentlemen.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

We go now to Mr. Weir for five minutes.

Mr. Erin Weir: Thank you.

Mr. Grammond, you mentioned the Auditor General, and the news is out this morning that the Auditor General is questioning Defence Construction Canada for a lack of fraud prevention in its procurement. I appreciate this isn't the issue any of you were invited here to testify about, but on the other hand, you are experts on procurement and defence, so I wondered if you had any thoughts on this situation.

Mr. James Cox: I haven't, sir, no.

Mr. Erin Weir: Okay, no problem; I thought it was worth providing the opportunity.

Something I did want to raise regarding the national security exception is whether it's possible that the procurement requirements in trade agreements are just too onerous to begin with.

Mr. Christopher McLeod: I don't believe that's the case. I mean, if you're talking about amending the requirements in all the trade agreements....The various trade agreements that we have signed off on have very similar language and requirements within them. It's not a matter of adjusting one; you'd have to adjust probably all of them. It's a trade agreement, so there's a party on the other side that's agreeing to the same or similar provisions, so it would be a tremendous undertaking, I would imagine.

Mr. Erin Weir: I guess one example of the national security exception being invoked was the purchase of winter jackets for Syrian refugees, and that seemed like a legitimate case where the government needed to procure something quickly, but it wasn't really about national security.

I guess what I'm getting at is whether there needs to be more flexibility in the trade agreements or some other mechanism for

governments to do quick procurements without pretending it's national security.

•(1015)

Mr. Christopher McLeod: I agree with you on the timing issue. I read the transcripts and I disagree that the national security exception should be used when it's a timing issue. I mean if there's a national security interest in the timing issue, fine, but some of the examples that were provided were events that were happening where the process could have been planned out in advance and timing didn't seem like a legitimate basis, other than if you accept that by invoking the national security exception they wanted to take away bidder recourse so that it would speed up the process and not allow bidders to challenge.

Prof. Sébastien Grammond: I don't know much about the example you mention, but it seems to me as you describe it that this is a case where there should be a rule—I don't know; there must be one—allowing for purchases in case of emergency, which is a totally distinct concern from national security. If national security was invoked, it's probably because the government started to see it as an easy way out, and it shouldn't.

Mr. Christopher McLeod: This is the same issue that comes up with sole sourcing, NSE in sole sourcing.

Let's say I'm wanting to purchase some goods inside the government and I want to sole-source that, there's a fairly robust process I would have to go through in order to get approval to sole-source. What I can do in the alternative is invoke a national security exception, then I can write my specifications so specifically that only one bidder can actually win. I would have effectively created an end run around the sole-sourcing approval process.

That's exactly what we alleged in the MD Charlton case, and I'll leave it at that.

Mr. Erin Weir: I think our committee is concerned that the national security exceptions are being overused, particularly by Shared Services. On the other hand, there might be a need for some other type of mechanism for procurements that need to be done quickly or for some reason don't fit into the framework that's been set up by trade agreements.

I'm curious about what those alternative mechanisms might be. I think this would be of particular interest to provincial and municipal governments, if they are doing procurement that now will be subject to trade agreements but have probably less ability to say that national security is their concern.

Mr. James Cox: Unless there's the possibility that the provinces and the cities are going to interpret the issue of security as local—emergency in the city, emergency in the province—and not national.

Prof. Sébastien Grammond: Like public utilities, electricity, transit, or subway systems. There must be some security interest in there.

Mr. Erin Weir: I guess that's the question—

The Vice-Chair (Ms. Yasmin Ratansi): Mr. Weir, your time is up.

Before I go to Mr. Ayoub, we have been watching the House and the debate started a little late, so maybe, if you have questions afterwards, we will have some time.

Mr. Ayoub, for five minutes.

[*Translation*]

Mr. Ramez Ayoub: Thank you, Madam Chair.

We can always take five minutes to ask questions.

A little earlier, suggestions were made. The one I wrote down is: “keep politics and bidding decisions separate”. We—Mr. Clarke in particular—want to have information, which is perfectly legitimate, but, at the same time, we want to be able to trust the process.

What I'm most interested in is a robust process so that the public, including the members of Parliament, can trust it. I don't think a committee like ours can look at specific bidding issues. There are all kinds of calls for tender, and we would spend the year studying them.

I want you to help me understand the process. Where is the problem? Where do we have to put the finger in order to change and improve certain aspects of the process and to restore confidence so that we can then ask more specific questions when there are doubts? We can ask more specific questions when doubts arise, and we should do so.

Mr. Grammond, what do you have to say about that?

• (1020)

Prof. Sébastien Grammond: I would say that the internal process will inevitably do most of the work.

The issue of trust is crucial, you are absolutely right. In order for the public and the bidding companies to trust the process, I think the public must have the assurance that there is no political interference and that the process does not give undue discretion to the public service employees involved in the process.

You talked about putting the finger on the problem. I would say that the problem is when public service employees are granted too much power. According to the evidence you have heard, I think that's where we are at in terms of the national security exception. It is enough for an assistant deputy minister to sign a letter for the process to take an entirely different direction. There is no internal or external control over that decision. Therein lies the problem, I think.

So the idea is to find a way of having internal control over it and maintaining the external control that the Canadian International Trade Tribunal has put in place in its latest decisions, or to find an alternative. The Auditor General might have a role to play. However, I think the solution would be a combination of those various—

Mr. Ramez Ayoub: We want to avoid all sorts of allegations, criticisms and suspicions. You follow the news, I'm sure. In today's world, a few social media posts are enough to eventually cause suspicion and loss of confidence. In my view, the process is important, because, once you trust the process, which has various levels of security and barriers to making a reasoned, logical and, of course, well-defined decision, the trust should be maintained.

That's why I think there's work to be done in terms of the process to avoid political interference as much as possible. However, sometimes, there are emergencies, national security cases, exceptional circumstances where there's a place for politics. Politics should be allowed in those cases, but it remains to be defined. Just now, we were talking about a restricted group of people with top security clearance, so that would probably be allowed. I think you are really suggesting that the process be examined, and I'm all for that.

How much time do I have left, Ms. Ratansi?

[*English*]

The Vice-Chair (Ms. Yasmin Ratansi): You have 30 seconds.

[*Translation*]

Mr. Ramez Ayoub: Thank you, gentlemen.

I think that covers everything. We have some work to do

[*English*]

The Vice-Chair (Ms. Yasmin Ratansi): We still have time. The bells will not ring for another 10 minutes. If anybody has any burning questions, I'm willing to entertain them.

Go ahead, Mr. Weir.

Mr. Erin Weir: To follow up on something I was asking about earlier, I'm wondering if you could address the relative merits of having the CITT, rather than the Canadian courts, reviewing the use of the national security exception.

Mr. Christopher McLeod: The courts take a much longer time to get to a result. If there is a challenge to the invocation of a national security exception and the government is trying to procure goods, and if they decide to hold off until that issue is resolved, they'll be holding off a lot longer with the courts than with the CITT. Timing is a big issue. The other issue is expertise. Frankly, the confidentiality regime with CITT is arguably easier to access, so it's easier to keep the process confidential. They do it every day with the majority of cases that come before them.

[*Translation*]

Prof. Sébastien Grammond: I agree. I would just add that it is essential that the courts retain their ability to rule on cases that are not covered by the Canadian International Trade Tribunal, because there are some cases like that. The tribunal does not have universal jurisdiction. There may be cases where court intervention will be required and, at that point, they will decide whether or not the exception has been properly invoked.

• (1025)

[*English*]

The Vice-Chair (Ms. Yasmin Ratansi): Are there any more questions?

Thank you very much. I thank the witnesses for being here and giving their time.

I'll suspend the meeting for a few minutes, so we can excuse the witnesses and then we'll go in camera.

[*Proceedings continue in camera*]

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