

**ONTARIO SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**(Lederer, Williams, Leiper JJ)**

**BETWEEN:** )  
 )  
TRANSDEV CANADA INC. ) *Peter N. Mantas, Alexandra Logvin, Nabila*  
 ) *Abdul-Malik and Novera Khan, for the*  
Applicant ) Applicant  
 )  
– and – )  
 )  
THE REGIONAL MUNICIPALITY OF )  
YORK ) *Matthew Gottlieb, Philip Underwood,*  
 ) *Rahool Agarwal and Katelyn Johnstone, for*  
Respondent ) the Respondent  
 )  
 )  
 ) **HEARD by videoconference:** December 8,  
 ) 2022

Lederer J.

*Introduction*

[1] This application for judicial review concerns the award of a contract to operate a significant and important part of the public transit system in the Region of York. The contract was awarded to Miller Transit Ltd., the highest-ranking bidder. The Applicant, Transdev Canada Inc, the second ranked bidder, believes that Miller breached the terms of the solicitation of bids and should have been disqualified. By this application Transdev seeks a variety of remedies, among them an order quashing the decision awarding the contract (certiorari), an order restricting certain parties from taking part in the contract (prohibition), an order disqualifying Miller from the tendering process and awarding the contract to Transdev (mandamus) or in the alternative, an order requiring the Region of York to cancel and re-issue the applicable Request for Proposals (also mandamus).

*Background*

[2] The Region of York (“York Region”) is a regional municipality immediately north of the City of Toronto. York Region is made up of nine local municipalities. The *Municipal Act*<sup>1</sup> authorizes both lower and upper tier municipalities (that is both local and regional municipalities)

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<sup>1</sup> S.O. 2001, Chapter 25

to pass by-laws respecting “[t]ransportation systems other than highways”<sup>2</sup>. York Region provides public transit to its residents through York Region Transit. York Region contracts out the majority of its public transit bus services to private companies:

69 (2) A municipality that has the authority to establish, operate and maintain a type of passenger transportation system may,

...

(b) despite section 106 and any by-law under clause (a), *enter into an agreement granting a person the exclusive or non-exclusive right to establish, operate or maintain all or any part of a passenger transportation system of that type within all of the municipality or that area of the municipality designated in the agreement under such conditions as the municipality provides, including a condition that the municipality pay any deficit incurred by the person in establishing, operating or maintaining the system.*<sup>3</sup>

[Emphasis added]

[3] York Region Transit divides the region into “divisions”. York Region has separate transit operation and maintenance contracts for each of the divisions. Until September 2019 there were four such divisions.

[4] In September 2019, the council of York Region approved an update to its transit contracting strategy.<sup>4</sup> Among other things, the strategy update combined the four divisions into two divisions: the West-North Transit Division and the South-East Transit Division. Transit services to each of the two divisions is to be provided through separate and single operations and maintenance contracts.

[5] In June 2020, York Region issued a Request for Proposals regarding the operations and maintenance contract for the new West-North Division. Six companies submitted proposals. They included TOK Transit Limited, Miller Transit Limited and Transdev Canada Inc. They were evaluated through a competitive procurement process and assigned scores on technical and financial metrics. TOK Transit received the highest overall score and, in November 2020, was awarded the contract for the West-North Division.

[6] Public transit services within the new South-East Division are scheduled to start in mid to late 2023. In 2021, York Region implemented a competitive procurement process to solicit and assess proposals for the South-East Division operations and maintenance contract.

[7] On February 11, 2022, York Region issued a Request for Proposals. Over the following months, it hosted a virtual open house and on-site tour at its South-East Division garage, gave

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<sup>2</sup> *Ibid* at s. 11(3) para. 2

<sup>3</sup> *Ibid* at s. 69(2)(b)

<sup>4</sup> York Region Transit Contract Strategy Update, September 12, 2019 (Caselines A39) and September 26, 2019 (Caselines A49)

prospective proponents further information about York Region Transit operations and the work to be done under the new contract. York Region solicited questions and comments regarding the materials, a process which resulted in eleven addenda to the Request for Proposals. The Request for Proposals established requirements for the format and contents of the proposal submissions, structured the conduct of the procurement process, and explained how proposals would be evaluated.

[8] The Request for Proposals required each proponent to submit both a technical and a financial proposal. The proposals were evaluated through a five-step process based on a 100-point scale, with 70 points allocated to the technical proposal and 30 points for the financial proposal.<sup>5</sup> The “proponent qualifications” section required the proposals to address, among other things, the “[s]trength and relevance of demonstrated experience, qualifications and resources of the proponent and subcontractors, if any”.<sup>6</sup> Proponents whose technical proposal scored at least 60% were invited for an interview. Those who also scored at least 60% on the interview proceeded to the financial evaluation. There, the proponent with the lowest price received the maximum 30 points, with the scores for the other remaining proponents being pro-rated based on the difference between their price and the lowest one. At the end, the proponent with the highest score was the “Selected Proponent”.<sup>7</sup>

[9] To ensure that the procurement process was completed in a fair and transparent manner, York Region retained MNP LLP to act as “fairness monitor”. Its role involved the “observing and monitoring of the process utilized by York Region to ensure openness, fairness, consistency, and transparency of the communication, evaluation, and decision-making processes”.<sup>8</sup>

[10] The closing date for the submission of proposals was May 6, 2022. Six proponents including Miller and the Applicant (Transdev) delivered proposals. York Region procurement, transit, and finance officials reviewed the proposals using the criteria set out in the Request for Proposals. Five senior members of York Region’s Transit and Finance business units scored the proposals and then combined their assessments into a consensus score for each category.

[11] After taking into account the scores at each stage of the assessment process, Miller received the highest total score (86.09 out of a possible 100 points). Transdev had the second highest score (81.45 point). Because the two scores were within five points of the other, York Region divided the contract price proposed by each of the two remaining proponents (for Miller \$517 million and for Transdev \$489 million) and divided that value by the number of “technical points” they had

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<sup>5</sup> Request for Proposals (Goods and Services) (RFP-421-21) Transit Operations and Maintenance Contract New South-East Transit Division, February 11, 2022) at s. 4.1 Evaluation Matrix (Caselines B-1-450)

<sup>6</sup> *Ibid* at Evaluation Matrix Chart (Proponent Qualifications & Experiences) at para. 1(Caselines B-1-450)

<sup>7</sup> *Ibid* at s. 4.2 Evaluation Process, Step 5 (Caselines B-1-452)

<sup>8</sup> MNP LLP Fairness Report at p. 4 Public Record of Proceedings RFP-421-21 p. 2737 (Caselines B-1-3139)

each received to calculate the value of the “dollars per technical point” for each of the two proposals.<sup>9</sup> On this calculation, Miller again received the highest score.<sup>10</sup>

[12] The Director of York Region’s Procurement Office then sent a preliminary report to its Director of Transit Operations recommending that the contract be awarded to Miller.<sup>11</sup> The fairness monitor delivered a report which found that the procurement process was followed as set out in the Request for Proposals and had been open, fair, consistent and transparent.<sup>12</sup> On the basis of those reports, York Region’s Commissioner of Public Works prepared her own report for review by the Committee of the Whole. The Commissioner recommended that Council approve the award of the contract to Miller.<sup>13</sup> The recommendation was considered by the Committee at its meeting of September 8, 2022. The Committee unanimously recommended that Council adopt the recommendation. At its meeting of September 29, 2022, the Council of York Region unanimously adopted the recommendation of the Committee of the Whole, subject to confirmation from the Regional Solicitor that there was no legal impediment to doing so. The Regional Solicitor having confirmed that there was no impediment, the contract was awarded to Miller.

*The Issue (the alleged breach)*

[13] On September 2, 2022 and “on numerous occasions between September 2 and 4, 2022” an employee of Miller (referred to by the parties as a “whistle blower”) approached and communicated with David Kelloway, Special Project Officer for Transdev to express concern with the procurement process.<sup>14</sup> On September 7, 2022, the day before the meeting of the Committee of the Whole and three weeks before the decision of the Council, the Chairman of York Region received an email, purportedly from a transit operator at Miller. The message expressed concern that the awarding of the contract to Miller would result in “TOK” and the United Food and Commercial Workers Canada being involved in the provision of transit services to the South-East Division.<sup>15</sup> “Two hours later, at 12:00 on September 8, 2022” York Region received a letter from Transdev and later that day a further letter from Counsel to the Amalgamated Transit Union, the

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<sup>9</sup> This process is identified at Request for Proposals (Goods and Services) (RFP-421-21) Transit Operations and Maintenance Contract New South-East Transit Division, February 11, 2022) at s. 4.2 Evaluation Process: Step 5 Identifying the Selected Proponent (Caselines B-1-452)

<sup>10</sup> Consensus Score Sheet (Record of Proceeding p. 2680) (Redacted)) referred to at *Factum of the Respondent* at para. 27 (fn. 22)

<sup>11</sup> Preliminary Procurement Report Public Record of Proceedings Regarding RFP-421-21 p. 2727 (Caselines B-1-3129)

<sup>12</sup> MNP LLP Fairness Report at p. 5 Public Record of Proceedings Regarding RFP-421-21 p. 2738 (Caselines B-1-3140)

<sup>13</sup> Committee of the Whole, Transportation Services, Report of the Commissioner of Public Works September 8, 2022 (Award of York Region Transit South -East Division Operations and Maintenance Contract) Application Record (Redacted), Affidavit of David Kelloway, sworn November 18, 2022 at para. 33 and Exhibit D (Caselines A-33 and A-60)

<sup>14</sup> Affidavit of David Kelloway, sworn November 18, 2022 at para. 32 (Caselines A32-A33). Counsel for York Region objected to the admissibility of part of this affidavit but not the parts that provide general background. This and the other references in these reasons fall within that parameter.

<sup>15</sup> Affidavit of Kyle Catney, sworn November 28, 2022, at para. 28 and Exhibit A (partially Redacted) (Caselines B-1-3191 and B-1-3196)

union representing Transdev employees. These letters both referenced unspecified issues with the procurement process.<sup>16</sup>

[14] In response to these complaints, York Region looked again at Miller's proposal and the surrounding facts. On doing so, it found there was no basis to conclude that the Request for Proposals process had been "compromised".<sup>17</sup> It was only after this review, that the Council of York Region awarded the contract to Miller on September 29, 2022.

[15] The concern raised reflects on the participation of "TOK"<sup>18</sup> in the bid and contract as approved by Council. Transdev submits that the inclusion of TOK in the bid made by Miller was contrary to the terms of the Request for Proposals and as a result did not comply with those terms. On that basis, Miller should have been disqualified and the contract awarded to Transdev as the second ranked bidder. York Region demurs. It submits that the bid provided by Miller complied in every way with the conditions set by the Request for Proposals. Whether the bid submitted complies with the Request for Proposals is the issue at the crux of this application for judicial review. Counsel for Transdev readily conceded that if the court finds that the submission made by Miller complied, this application cannot succeed.

### *The Concern*

[16] The foundation for the disagreement begins with the York Region Transit Contract Strategy. It proposed a substantial change to the approach to the provision of transit services. In summary, it was a consolidation of the prior system which was the result of a strategy brought forward in 2008. The consolidation was exemplified by the reduction from four to two divisions. It recognized that "since the implementation of the original [York Region Transit] Facility Strategy, bus fleet requirements have been reduced by 50% to approximately 744 buses by 2031".<sup>19</sup> In response, the strategy foresaw the withdrawal from premises leased from a private property owner that had been utilized in respect of the old Southeast Transit Division and the expansion of an Operations, Maintenance and Storage Facility, located in Richmond Hill, to service the "Viva and Southeast service".

[17] The strategy foresaw the need to extend the existing contracts but only long enough to undertake the procurement necessary to respond to the amended structure. In preparation for that process, it installed a new apportioning of the values to be incorporated into the coming process. The division of points between technical and financial consideration had been 50%. to each. It was through the strategy that this was revised to 70% for technical concerns and 30% for financial considerations.

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<sup>16</sup> *Ibid* at paras. 29, 30, Exhibits B (referred to enclosure not included) and C (Caselines B-1-3191, B-1-3199 and B-1-3202).

<sup>17</sup> Affidavit of Kyle Catney, sworn November 28, 2022, at para 31 and (Redactions that appear thereafter) referred to at *Factum of the Respondent* at para. 34 (partially Redacted) (Caselines B-1-3192 and B-1-3237)

<sup>18</sup> As will become clear later in these reasons the reference to "TOK" is not only to Tok Transit. That is just one of a series of business names used by Tokmakjian Inc. a company incorporated under the Business Corporations Act of Ontario (Affidavit of Kyle Catney, sworn November 28, 2022 at Exhibit D (Profile Report, Ministry of Government and Consumer Services) (Caselines B-1-3204)

<sup>19</sup> York Region Transit Contract Strategy Update, at p. 3 September 12, 2019, (Caselines A41)

[18] The revised strategy went further into the prospective procurement process. It was to:

- enshrine a process that would result in [York Region Transit] services being delivered by two contractors....<sup>20</sup>
- restrict operations and maintenance contractors to hold one division at a time...<sup>21</sup>.

[19] As a result, the existing Viva and Southeast service [the new South-East Division] was planned to be delivered by a single contractor different from the contractor selected to provide services to the West-North Division.<sup>22</sup>

[20] This idea of each of the two Divisions being served by a single and separate Contractor was carried forward into the Request for Proposals which said:

In accordance with the Regional Council's direction that different operators operate York Region transit divisions, a Proponent is only eligible for the award of one of the Region's two transit divisions.<sup>23</sup>

[21] The Request for Proposals allowed for the possibility that there could be uncertainty with respect to some of its terms. It permitted questions and provided that any answers to those questions would be added as addenda to the Request for Proposals. York Region was required to notify all Proponents of the issuance of any addenda and the Proponents were required to confirm they had received each of them.<sup>24</sup>

[22] Transdev asked a question. The answer became Addendum 5<sup>25</sup>:

Question 1:

As long as the directive precluding any single proponent from operating more than one contract for York Region Transit is adhered to, can the Proponent propose its wholly-owned subsidiary as the Contractor? If so, does such subsidiary have to be specified at the time of submission of the Proposal?

Answer 1:

A wholly-owned subsidiary or related corporation of the Proponent would not be considered as distinct from the Proponent and proposing such related entities would not meet the purpose and intent of this directive.<sup>26</sup>

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<sup>20</sup> *Ibid* at p.2 (Caselines A40)

<sup>21</sup> *Ibid* at p. 1 (Caselines A39)

<sup>22</sup> *Ibid* at p. 5 (Caselines A43)

<sup>23</sup> Request for Proposals (Goods and Services) (RFP-421-21) Transit Operations and Maintenance Contract New South-East Transit Division, February 11, 2022) at s. 2.1 Procurement Process: Invitation (Caselines B-1-419)

<sup>24</sup> *Ibid* at s. 2.11 Addenda (Caselines B-1-426)

<sup>25</sup> Affidavit of David Kelloway, sworn on November 18, 2022 at para. 24 (Caselines A30)

<sup>26</sup> *Ibid* and at ADDENDUM #5 BID # RFP – 421 – 21, March 25, 2022 (Caselines A1922)

[23] Based on these directives Transdev concluded:

This precluded a corporation that had entered into some form of contractual partnership or joint venture, to participate in the bid.<sup>27</sup>

...

The Region's direction coupled with the terms of the RFP and the aforementioned Addendum made it clear that Transdev could not propose Tok [which, as already noted, had been awarded the contract for the West-North Division] *as a contractor in any capacity* in its bid to perform the entirety of the maintenance work for the new South-East Division.<sup>28</sup>

[Emphasis added]

[24] The Miller proposal, as accepted by York Region, disclosed that TOK Performance was to be a subcontractor for maintenance services. TOK Performance is a trade name used by Tokmakjian Inc. which also operates as TOK Transit, the holder of the West-North Division contract (see fn. 18 herein). As seen by Transdev this demonstrated that the proposal made by Miller did not comply with the terms of the Request for Proposals. TOK in this case, as TOK Performance, was involved in both Divisions. Transdev submits that the bid made in Miller's name should have been disqualified and removed from consideration.

#### *The Role of the Canada Free Trade Agreement*

[25] With the facts outlined, the legal parameters established, and the issue identified, in the normal course one would anticipate the identification of the appropriate standard of review and the application of the facts to what the law requires using that standard to guide the analysis. That is not the approach taken by Transdev.

[26] Counsel for Transdev began his submission by referring to the Canada Free Trade Agreement. It is an intergovernmental agreement entered into between the ten provinces, three territories and the government of Canada. It came into force on July 1, 2017. Its objective is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market.<sup>29</sup> Chapter 5 of the Agreement deals with government procurement and applies to municipalities.<sup>30</sup> Its purpose is to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers.

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<sup>27</sup> *Ibid* at para. 25 (Caselines A30-A31)

<sup>28</sup> *Ibid* at para. 27 (Caselines A31)

<sup>29</sup> Web page: Home-Canada Free Trade Agreement and *Canadian Free trade Implementation Act* S.C. 2017, c. 33, s. 219 (Preamble)

<sup>30</sup> Canada Free Trade Agreement, s. 103:

Each Party is responsible for compliance with this Agreement by:

...

[27] Transdev submits that this “treaty”, internal to Canada, readjusts the principles involved in assessing the efficacy of government procurement. In furtherance of outlining what it sees as the overriding obligations placed on York Region by the Canadian Free Trade Agreement, Transdev refers to the requirement that procurement by government agencies be

- transparent (Articles 500, 502(1), 506, 509(7), 510, 516(1));
- fair (Articles 500, 503(5), 507(3), 510, 512(3), 515(1), (4));
- consistent (Articles 507(3), 512(2), 515(4), (5), 516(1)) and
- not arbitrary (Articles 503(1), (5), 518(9)).<sup>31</sup>

[28] The goal is to establish a system that is transparent, fair, consistent and understood to be such by those who take part, referred to by counsel for Transdev as the “procurement community”. Counsel submitted that a determination of whether the goal was met depends on how the procurement process, in any given case, is perceived by that community.

[29] The Affidavit of Camille Boulier, the Vice-President Strategy, Business Development and Communications of Transdev was referred to.<sup>32</sup> She describes how, at an industry conference, she was approached by a competitor who apparently referred to the “‘vast joke’ that was the outcome of the RFP” and expressed “outrage that no questions had been raised as to Miller’s ability to come out on top...”. As stated in the affidavit, this individual recounted how a representative of TOK “bragged at the conference that TOK was doing work for the entire region”.<sup>33</sup> Camille Boulier goes on to say:

This irked me and Mr. Patterson [the competitor] and other participants at the conference. It was unfair. It was shocking to all of us that this would have been allowed to occur.<sup>34</sup>

[30] As submitted on behalf of Transdev this evaluation from parties outside the process (members of the “procurement community”) is evidence of the failure of the procurement process to comply with the Canada Free Trade Agreement and reason enough to set aside the award of the contract to Miller. The procurement community does not see the process as fair, transparent and consistent. Under the heading “Breaches of the CFTA” the following is submitted through the Factum filed on behalf of Transdev:

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(b) its regional, local, district, and other forms of municipal government...

<sup>31</sup> *Factum of the Applicant* at para. 62

<sup>32</sup> The reliance on this Affidavit was objected to by counsel for York Region as being inadmissible. It was agreed by counsel that the matter would proceed, the objection considered and the issue of the treatment of this affidavit left to the Court to determine. Apart from everything else the statements to which I refer are hearsay. I do not rely on them for the truth of what is said but to demonstrate the approach of Transdev to its reliance on the Canada Free Trade Agreement.

<sup>33</sup> Affidavit of Camille Boulier, sworn on November 18, 2022 at para. 33 (Caselines A90)

<sup>34</sup> *Ibid*



The decision to:

- (i) disregard the one-contractor-per-division requirement under the terms of the RFP and the Decision in favor of Miller and Tok;
- (ii) not disqualify Miller and Tok for contravening such requirement;
- (iii) recommend that the contract be awarded to them, despite the contravention; and
- (iv) award that contract to them anyway, despite this pending application,

does not comply with the Region's obligations with respect to the conduct of procurements under [the] CFTA.<sup>35</sup>

[31] What is striking about this conclusion is that it makes no reference to and undertakes no analysis of the actual content of the submission made by Miller to York Region, how that content responds to the Request for Proposals or to any limitations or constraints that are part of the Canada Free Trade Agreement. The Request for Proposals noted:

### **Trade Agreements**

Proponents should note that procurements coming within the scope of the Canada-Europe Union Comprehensive Economic and Trade Agreement, the Canada Free Trade Agreement and/or the Trade and Cooperation Agreement between Québec and Ontario are subject to such agreements, although *the rights and obligations the parties shall be governed by the specific terms of this RFP*.<sup>36</sup>

[Emphasis added]

[32] What this direction confirms is the need to reach beyond an evaluation that considers the Canada Free Trade Agreement separate from the requirements of the Request for Proposals and the actions taken in respect to what it directs. The difference in the considerations required is captured in the quotation:

The world must construe according to its wits, this court must construe according to the law.<sup>37</sup>

[33] In this case those outside the specific procurement process [the world] will understand this situation as they will, the Court, however, must look at what happened and determine the legal implications. It does not matter whether the man who spoke to Camille Boulier believes the process to have been unfair or for that matter whether she or her colleague, David Kelloway, feel the same.

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<sup>35</sup> *Factum of the Applicant* at para. 62

<sup>36</sup> Request for Proposals (Goods and Services) (RFP-421-21) Transit Operations and Maintenance Contract New South-East Transit Division, February 11, 2022) at s. 2.30 Trade Agreements (Caselines B-1-431)

<sup>37</sup> Robert Bolt, *"A Man For All Seasons"*. A play based on the life of Sir Thomas More, July 1, 1960.

In this case, the issue is whether, as a matter of law, the bid complied with the Request for Proposals.

*Standard of Review*

[34] Transdev submitted that the obligations imposed by the Canada Free Trade Agreement and implemented by a federal statute<sup>38</sup> put in place requirements that had to be adhered to. This lifted the applicable standard of review beyond reasonableness to correctness. This is contrary to the available jurisprudence and to a full understanding of this case. The issue is touched on in *Canada (Minister of Citizenship and Immigration) v. Vavilov*:<sup>39</sup>

We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada’s international obligations, and the legislature is “presumed to comply with the values and principles of customary and conventional international law”.<sup>40</sup>

[35] This would seem to take the question of the applicable law in the direction suggested by counsel for *Transdev* but the paragraph goes on:

Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a *reasonable exercise* of administrative power.<sup>41</sup>

[Emphasis added]

[36] This points to reasonableness as the proper standard of review. This is confirmed in *Thales DIS Canada Inc. v. Ontario*.<sup>42</sup> The case concerned the procurement of the blank cards used as, among other things, drivers’ licences and health cards in Ontario. Obviously, for these forms of identification security is a key consideration. The Request for Bids required that the cards be produced in Canada. Thales DIS wished to manufacture them at a plant in Poland and considered the requirement to be discriminatory and, on that basis, contrary to the Canadian-European Union Comprehensive Economic Trade Agreement (commonly “CETA”), a trade agreement similar to the Canada Free trade Agreement<sup>43</sup>, albeit as between Canada and the European Union. The provincial government considered the complaint. It was dismissed in a decision made by the Minister of Transportation. An application for judicial review was brought and considered by the

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<sup>38</sup> *Canada Free Trade Implementation Act* S.C. 2017, c. 33, 2.219

<sup>39</sup>2019 SCC 65 (CanLII), [2019] 4 SCR 653, 312 ACWS (3d) 460, 441 DLR (4th) 1

<sup>40</sup> *Ibid* at para. 114 referring to *R. v. Hape*, [2007 SCC 26](#), [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, [2015 SCC 59](#), [2015] 3 S.C.R. 754, at para. 40.

<sup>41</sup> *Ibid* referring to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, at paras. 69-71.

<sup>42</sup>2022 ONSC 3166 (CanLII) leave granted by the Court of Appeal, November 9, 2022

<sup>43</sup> The case notes that the Request for Bids stated that both CETA and Canada Free Trade Agreement apply to it (at para. 146(c)), that the complaint included the latter but that the court found there was no discrimination contrary to it and that the court was not required to consider whether the Request for Bids violated its terms (at par. 134).

Divisional Court. While Thales DIS, the applicant, submitted that the applicable standard of review was correctness, the court found it was reasonableness. With respect to the role of trade agreements the majority of the court observed that:

...while Ontario's obligations under international trade agreements are important, the interpretation and application of the domestic production requirement in this case cannot be considered a question of law of central importance to the legal system as a whole. The fact that international obligations are engaged is not, in and of itself, sufficient to warrant a correctness standard of review.<sup>44</sup>

[37] The decision went on to refer to the quotation from *Vavilov* repeated above (see: fns. 40 and 41) to establish that the role of international treaties is to help inform whether an exercise of administrative power was reasonable.<sup>45</sup> There is no reason why a domestic agreement, entered into by the provinces and territories of Canada, should be treated differently.

[38] With respect to government procurement, in the absence of the applicability of any trade agreement the conclusion is the same. *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*<sup>46</sup> dealt with the procurement process in respect of the widening of Highway 417 near the town of Arnprior. The government had issued a Procurement Directive. The stated purpose of the Directive was to “ensure that goods and services . . . are acquired through a process that is fair, open, transparent, geographically neutral and accessible to qualified vendors”.<sup>47</sup> The Directive prescribed that vendors would be disqualified if they did not comply with any mandatory requirement. The Directive provided for a Steel Policy of preferential pricing for domestic steel as part of the mandatory requirements.<sup>48</sup> To support domestic steel vendors, procurement evaluation processes with an estimated total contract value of \$100,000 were required to include a price preference of 10% for Canadian steel products identified in vendor proposals.<sup>49</sup> A portion of the applicable contract required the use of rolled steel, a product not produced in Canada. The successful bid stipulated that all the steel to be used in the contract would be sourced in Canada. Bot Construction understood, given that rolled steel had been specified albeit for a small portion of the contract, that this was not possible and not in conformity with a requirement of the tender.

[39] The issue found its way to the Divisional Court as a request for judicial review. The Court considered the standard of review. The parties agreed that as applied to the finding and interpretation of facts the standard was reasonableness.<sup>50</sup> Bot, as the applicant, took the position that, with respect to the interpretation of the legal constraints within which the Ministry operated, specifically the compliance with the Directive, the standard of review should be correctness.<sup>51</sup> The

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<sup>44</sup>*Thales DIS Canada Inc. v. Ontario, supra* (fn. 42) at para. 82

<sup>45</sup> The concurring judgment agreed with this analysis (para. 165)

<sup>46</sup> 2009 CanLII 92110 (ON SCDC), 99 OR (3d) 104

<sup>47</sup> *Ibid* at para. 14

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid* at para. 47

<sup>50</sup> *Ibid* at para. 37

<sup>51</sup> *Ibid* at para. 38

Divisional Court did not agree that the standard of correctness applied to determining whether the Ministry had acted within its statutory limits.

[40] The applicable standard of review was reasonableness.

[41] The requirement of rolled steel beams was not to be characterized as a mere formality.<sup>52</sup> It was a part of the specifications and therefore, a mandatory requirement. The court found that the Decision that the bid was compliant with that mandatory requirement was not reasonable. The application was granted. The decision awarding the contract was quashed.<sup>53</sup>

[42] There was an appeal.<sup>54</sup> It adds to the case being considered.

[43] The Court of Appeal reviewed the extent of the deference owed to the Decision that had been made. It quoted the decision of the Divisional Court as to the expertise of those involved in making the decision:

However, the ministry personnel who select bids are highly experienced in the road construction specifications and in the public tender process. They support the Minister in fulfilling the broad mandate for road construction under the [Public Transportation and Highway Improvement Act](#). They operate a public tendering system expending millions, if not billions, of dollars. They pre-qualify vendors. They are charged with complying with the Directive for all tendering for Ontario's road construction and maintenance. They will have considerable expertise in the application of the administrative Directive and the application of the Steel Policy. The Ministry determination of the bid process or of bid compliance is inextricably intertwined with the facts.<sup>55</sup>

[44] It reviewed the results of the investigation that had been undertaken by the Ministry after the complaint was made. Where rolled steel was specified, the successful bidder had proposed to use “Canadian welded steel” which would meet the standards for structural strength and performance set by the Ministry of Transportation.<sup>56</sup> The use of this product would better accord with the policy directed to the preference given to Canadian steel. Even if the use of Canadian steel required a change in the project specifications, this change would be a minor one and would be readily approved. The Court of Appeal noted that if the successful bid had declared imported steel for use on the bridge beams, it would not have affected the order of bids.<sup>57</sup> These findings took the determination that had been made by the Ministry outside “the realm of unreasonableness” and into the “range of possible, acceptable outcomes”.<sup>58</sup> It allowed the appeal and dismissed the judicial review.

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<sup>52</sup> *Ibid* at para. 88

<sup>53</sup> *Ibid* at para. 78

<sup>54</sup> *Bot Construction Limited v. Ontario (Transportation)*, 2009 ONCA 879 (CanLII), 85 CLR (3d) 25

<sup>55</sup> *Ibid* at para. 17 quoting *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*, *supra* (fn. 41) (Divisional Court) at para. 39

<sup>56</sup> *Ibid* at para. 14

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid* at para. 16

[45] This provides guidance as the measure of the deference to be accorded where administrative decisions as opposed to quasi-judicial determinations are being made. No less adherence should be paid to the expertise of the officials who evaluated the proposals and made the recommendation that informed the decision of the council of York Region.

*The Request for Proposals and the Miller Proposal*

[46] The Request for Proposals defines the terms it used, among them:

**plan taker** means any entity that has registered for this RFP being RFP-421-22<sup>59</sup>

**Proponent** means an entity that submits a Proposal in response to this RFP and, as the context may suggest, refers to a potential Proponent<sup>60</sup>

**Selected Proponent(s)** means a Proponent(s) whose Proposal has been selected by the Region for further consideration<sup>61</sup>

**Contractor** means the entity to whom the contract is awarded as a result of this RFP<sup>62</sup>

[47] What this list demonstrates is the succession of identifiers applied to suppliers who were interested in bidding for the contract as they proceeded through the procurement process. As explained by York Region, Miller was the party that successfully proceeded through the process beginning as a plan taker and, in the end, becoming the Contractor. TOK and the various business names it uses was never any of these things. As understood by York Region it was a “subcontractor,” defined by the Request for Proposals, for its purposes, as:

**Subcontractor** means a person, firm or corporation who will have a direct contract with the Contractor to perform a part or parts of the Services<sup>63</sup>

[48] As put by York Region, Tokmakjian Inc., under the name TOK Transit, is the Contractor for the new West-North Division of York Region Transit and Miller is the Contractor for the new South-East Division. Tokmakjian Inc., this time operating as TOK Performance, is also a Subcontractor to Miller in its performance of the contract for that Division. This understanding is consistent with the direction found in the body of the Request for Proposals and Addendum 5. The direction is quoted above but for ease of reference I repeat it here:

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<sup>59</sup> Request for Proposals (Goods and Services) (RFP-421-21) Transit Operations and Maintenance Contract New South-East Transit Division, February 11, 2022) at SECTION 1-DEFINITIONS (Caselines B-1-416)

<sup>60</sup> *Ibid*

<sup>61</sup> *Ibid* (Caselines B-1-417) The “further considerations” refer to the right of York Region to enter into negotiations with the Selected Proponent (Request for Proposals (Goods and Services) (RFP-421-21) Transit Operations and Maintenance Contract New South-East Transit Division, February 11, 2022) at s. 4.3 Negotiations with Selected Proponent(s) (Caselines B-1-453)

<sup>62</sup> *Ibid* (Caselines B-1-415)

<sup>63</sup> *Ibid* (Caselines B-1-417)

In accordance with Regional Council’s direction that different operators operate York Region transit divisions, a Proponent is only eligible for the award of one the Region’s two transit divisions.

[49] The directive is in the second clause. A supplier is limited to being awarded only one of the two contracts; it cannot be the “Contractor” for both. The introductory clause does nothing other than identify the policy the directive responds to. “Operators” is not a term that is defined. The responsibility of the “operators” is to operate the transit divisions, the whole of them, not parts. Understood in this way operators do what “eligible Proponents” seek to do. They operate a division. If the word “operators” includes more than just Proponents then, consistent with the definitions that guide the Request for Proposals, the term includes subcontractors who by definition are not proponents and not on track to be a Contractor. Either way, this does not support the proposition put by Transdev that the proposal made by Miller, by including TOK is not compliant with the Request for Proposals.

[50] The same is true for Addendum 5 (see: para. [22] above). The introduction to the question presumes the understanding that it is a “proponent” that is prohibited from “operating” more than one of the “contracts”. The question deals with the limits of the restriction. Does it extend to and include a “wholly-owned subsidiary”? The answer: It does. This means that a wholly-owned subsidiary of a Contractor of one Division cannot be a Proponent for the other. This does nothing to limit a Proponent, or its subsidiary, from being a subcontractor in the second Division.

[51] As submitted by York Region, the set of relationships which includes TOK as a subcontractor is compliant with the Request for Proposals and does not imperil its decision to award the Contract for the South-East Region to Miller. To repeat what has already been said, it does not matter what the procurement community, in the person of Camille Boulier, people she spoke to at a conference, or her colleague David Kelloway may think or feel is fair. What matters is whether this understanding and the decision it supports are reasonable or, following from the Court of Appeal in *Bot Construction*, fall within the range of possible, acceptable outcomes.<sup>64</sup> If they do, then the proposal made by Miller complied with the Request for Proposals.

[52] I point out that this understanding of the structure of the process and the distinction between those who proceed through the process as plan takers, Proponents, Selected Proponents and finally Contractors as being separate from sub-contractors is the model adopted by Transdev in its proposal. Consistent with the understanding of York Region, Transdev, in its Proposal provided “a current list of sub-contractors” one of which was SN Diesel, a business name formerly used by Tokmakjian Inc.<sup>65</sup> York Region refers to the two names, SN Diesel and TOK Performance, as

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<sup>64</sup> *Vavilov* continues to see this inquiry as part of a reasonableness review:

Reasonableness, according to *Dunsmuir*, “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”, as well as “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (*Vavilov, supra* (fn. 34) at para. 86)

<sup>65</sup> The name expired on April 17, 2022: (Affidavit of Kyle Catney, sworn November 28, 2022 at Exhibit D (Profile Report, Ministry of Government and Consumer Services) (Caselines B-1-3210)

identifying the same business.<sup>66</sup> Among the contemplated sub-contracted services was “repairs to the internals of the drive train (engines, transmissions, differentials)”. This was the work to be subcontracted to what is now identified by York Region as TOK Performance. The reason it was included as a subcontractor is because it operates “one of the only” facilities in the Greater Toronto Area capable of performing diesel powertrain repairs<sup>67</sup>

[53] This being so, it cannot be that Transdev holds to the idea that the Request for Proposals does not recognize the possibility of the Contractor for one division being a subcontractor in the other. If it does, its own proposal is not compliant and, given the submissions it has made, it would have to be disqualified.

[54] Even so Transdev submitted that York Region acquiesced to the view that the Contractor in one division cannot be a Subcontractor in the other division. In its *Factum* it makes the assertion that as a result of being awarded the West-North Contract, TOK “...became ineligible to participate as a service provider in any subsequent procurements for the operation and maintenance of the [South-East] Division.” This statement is absolute. Not only can TOK not be the Contractor for the South-East Division, it also cannot be a “service provider”, which would presumably include being a subcontractor. Counsel says this “is not disputed by the Region but was specifically acknowledged in a report of the Commissioner of Public Works dated September 8, 2022”<sup>68</sup> where it was said:

As the current service provider for the West -North Transit Division, [TOK] *was not eligible to submit a proposal*, based on the transit operations and maintenance contract strategy which *precludes a service provider from having more than one operation and maintenance contract.*<sup>69</sup>

[55] What this confirms is that TOK, as the Contractor for the West-North Division (referred to as “*the* service provider”) cannot submit a proposal that it be awarded the South-East Division contract. The use of the pronoun “the” signifies there is only one “service provider” for the West-North Division. It follows that there can only be one “service provider” for the South-East Division and it cannot be TOK or any of its business names. There is nothing in this that prohibits TOK from being a subcontractor. If there was, I note again, that the proposal of Transdev would be non-compliant.

[56] When counsel was asked about this discrepancy, he indicated it was a matter of degree. There is nothing in the words of the Request for Proposals or the Report of the Commissioner of Works that supports a distinction based on the size of contribution to be made by the subcontractor.

[57] It is his submission that the proposal made by Miller is a “sham”, that Miller is a “straw man” and that TOK, in some form is the true proponent. As a matter of contractual arrangement this is not so. As counsel for York Region pointed out, Miller is the only party who will enter into a contract with York Region with respect to services being provided to the South-East Region. It

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<sup>66</sup> Affidavit of Kyle Catney, sworn November 28, 2022 at para. 35 Redacted

<sup>67</sup> Excerpts from the Transdev Proposal at p. 36 CONFIDENTIAL SUBJECT TO THE SEALING ORDER p. 2169)

<sup>68</sup> *Factum of the Applicant* at para. 18

<sup>69</sup> *Ibid* (Emphasis added in the *Factum of the Applicant*)

will bear the responsibility to carry out the obligations of the Contractor. It will have contracts with subcontractors, including TOK, just as Transdev would have had if it was the Contractor.<sup>70</sup> Transdev went so far as to suggest that Miller would be unable to complete the contract. The implication of the submission is that there is some obligation on York Region to look behind the bid to ensure the ability to comply with the terms of the Contract. The Supreme Court of Canada has observed:

We do not think there is an implied duty requiring an owner to investigate to see if bidders will really do what they promised in their tender. We agree with Russell J.A.'s observation on behalf of the Court of Appeal, that:

To impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties. [para. 36]<sup>71</sup>

[58] Transdev suggests that the value of the services TOK will provide as a part of the total costs is an indicator that it is the main beneficiary of the contract and Miller the “straw man”. Counsel for York Region pointed to a chart which outlines the hourly rate breakdown that could be used to administer the contract.<sup>72</sup> The cost of all the items that refer to “Maintenance” (the general subject of the subcontract) taken as a percentage of the whole is a small percentage of the total. This is not the demonstration of a dominance of TOK such that it would reduce Miller to being a “straw man” and render the position of Miller, as the Contractor, a “sham”. Counsel for Transdev pointed out that to get a true understanding of the comparative value of the various contributions one would have to know the projected hours for each of those services. Counsel for York Region noted that the chart is what the Request of Proposal required.<sup>73</sup>

### *Was the Process Unfair*

[59] Quite apart from what the documents say and whether there is anything to suggest the decision as made by the council of York Region was unreasonable, or fell outside the range of possible, acceptable outcomes, it is said on behalf of Transdev that the process was unfair. It was

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<sup>70</sup> The overarching responsibility of Miller is reviewed in its Proposal which has been redacted but made available to the Court. “TOK Performance (S&N Diesel)” is cited as the Maintenance Sub-Contractor “Engine Transmission and general repairs, Cummins and Voith Certified-Mid-life” and “TOK Smartech the subcontractor for “Fire suppression systems”. Miller indicates it will be fully responsible for managing TOK and ensuring all contractual requirements are adhered to. There are many other “current and proposed” Miller Division Maintenance Sub-contractors (a chart present in the proposal lists 15). Maintenance Tasks will be the responsibility of TOK Performance in liaison with, and with ultimate oversight by Miller. Miller will be ultimately responsible for all required maintenance under this RFP and will ensure that TOK Performance will meet all requirements.

<sup>71</sup> *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 (CanLII), [2007] 1 SCR 116, 29 MPLR (4th) 1, [2007] 3 WWR 1, 275 DLR (4th) 577 at para. 50

<sup>72</sup> Excerpt from Miller Post-Financial Submission (Record of Proceedings, Tab C.I.6), Hearing Compendium-Respondent York Region (Redacted) at T. 5, p.40

<sup>73</sup> The Chart is in the form shown as Table 4-Year 1 Hourly Rate Breakdown found in the Request for Proposals at page 37 of 50 (Caselines A223). There are Charts that refer to “Estimated Billable Hours” but they appear to represent totals. There is no breakdown by activity or subcontract (see Request for Proposals at pp. 44-46 of the Public Record of Proceedings Regarding RFP-421-21 (Caselines B-1-446 – B-1-448))



submitted that the council was uninformed as to the participation of TOK in the Miller proposal and that this was contrary to the intent of its policy supposedly directed to ensuring that the Contractor of one division was not to be a service provider in the other. The implication was that the staff may have failed to advise council appropriately.

[60] Counsel for Transdev, in her submissions, noted there was no document or reference that reflected any discussion pointing to or raising concern about the participation of TOK in the proposal made by Miller. In effect, counsel asks that the Court look behind the decision and in the absence of specific comment find that the matter was not raised and that as a result the decision taken should not be relied on as representative of a proper consideration by council. It is not for the court to look behind the decision that was taken in a search for something improper or open to question.

[61] In *Thunder Bay Seaway Non-Profit Apartments v. Thunder Bay (City)*<sup>74</sup> the municipality sought to sell land it owned. There was a municipal policy that said that in such circumstances attention should be given to non-profit housing. The Thunder Bay Seaway Group received a preliminary allocation from the Ontario Ministry of Housing to develop non-profit housing units. The staff of the municipality issued a report that the property be sold to the proponent of the non-profit project. The Committee of the Whole passed a resolution recommending the sale to council. That night an alternate purchaser asked that the matter be deferred so that he could make submissions. On a subsequent vote the matter was deferred. Thereafter, it became apparent that the intention was to make the building available to recovering alcoholics and drug abusers. There was a public outcry. The issue returned to Committee of the Whole and the proposal was “lost”. It went to council. There was a 6:6 vote meaning that the proposed sale was defeated. An application for mandamus was heard and dismissed. Among other things the Court observed:

It is not for a court to analyze the reasons and motives why a municipal council did not pass a by-law; the by-law may have failed to be enacted for the best or the worst of reasons. It is not the court's duty to look at “what might have been” in the legislative forum; our duty is to look at the “legislated product”.<sup>75</sup>

[62] In this case the “legislated product” was taken through an appropriate process and there is no reason to presume that Council was uninformed about the role of TOK in the recommended proposal. For one thing, after the Committee of the Whole had determined to recommend the Miller proposal, the concern with the presence of TOK was raised by an employee of Miller (the “whistle blower”), Transdev and two unions. As a result, a further examination of the proposal was undertaken. It is difficult to believe that this would occur without members of council being aware. The Committee of the Whole is made up of the members of Council, albeit in a different role. The review concluded that the proposal complied with what the Request for Proposals required. I note that in his affidavit, Kyle Catney, the Director of Transit Operations in the Public Works Department of York Region deposed:

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<sup>74</sup>1991 CanLII 7100 (ON SC), 7 MPLR (2d) 276, 5 OR (3d) 667

<sup>75</sup> *Ibid* under the heading “Compellability of the City to pass a by-law”

Before Council made any decision on whether to award the Contract, staff advised Council that:

- (a) Tok Performance (aka Tokmakjian) was a subcontractor under Miller's proposal and would be providing maintenance services to Miller in connection with the Contract.<sup>76</sup>

...

[63] There is no explanation as to the source of this information, whether Kyle Catney was present at the time, whether this was referred to in something he read or whether he was told about it by someone else. I point out that, as has already been noted, the proposal makes clear the involvement of TOK. This would have been apparent to any member of Council who reviewed or read it.

[64] In any case, there was the report prepared by the Commissioner of Public Works. It does not refer to TOK in the context of either the Miller or the Transdev proposal. It makes no reference to any other subcontractor. It does contain a comprehensive review of the process and the analysis that had been undertaken. The report was signed on August 25, 2022, by the Commissioner of Works and the Chief Administrative Officer whose role was to approve the report for submission.<sup>77</sup> The report was considered by the Committee of the Whole on September 8, 2022. The Committee recommended to Council that it approve the awarding of the Contract, that the Region enter into an agreement with Miller for a term of seven years and that Council authorize the Commissioner of Public Works to execute the agreement.<sup>78</sup> The matter came before council at its meeting of September 29, 2022. The council went into Private Session, among other things, to receive a "Verbal Update" on the "Award of York Region Transit South-East Operations and maintenance Contract- Litigation".<sup>79</sup> There is no record of what was said. This would have been an opportunity to review the role of TOK particularly given the complaint that had been received and reviewed. In its public session, council adopted what had been recommended by Committee of the Whole. There is nothing in this that would confirm what to my mind is speculation, without substance, that the council was not advised as to the role of TOK in the proposal and the complaint that had been made.

[65] The decision taken was reasonable, the process undertaken was fair, and the submission made by Miller compliant with the Request for Proposals.

### *Conclusion*

[66] For the reasons reviewed, the application is dismissed.

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<sup>76</sup> Affidavit of Kyle Catney, sworn November 28, 2022 at para. 39 (Redacted)

<sup>77</sup> *Supra* (fn. 12)

<sup>78</sup> Minutes Committee of the Whole, September 8, 2022, Public Record of Proceedings Regarding RFP-421-21 p. 2754 (Caselines B-1-3156)]

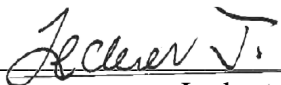
<sup>79</sup> Minutes: The Council of the Regional Municipality of York, September 29, 2022, Public Record of Proceedings Regarding RFP-421-21 p. 2762 (Caselines B-1-3164)

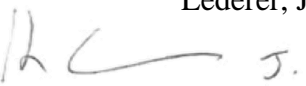
*Costs*


[67] The parties are to see if they can resolve the issue of costs. If they cannot, they are to provide submissions in writing no longer than four pages double spaced, exclusive of any Bill of Costs or caselaw being relied on. The submissions are to be uploaded on to Caselines, on behalf of York Region within one week of the issuance of these reasons and on behalf of Transdev within 5 days thereafter.

*Sealing Order*

[68] The Sealing order is continued for two months following the issuance of these reasons subject to further Order by the Court. Should the parties seek to have the Order continued with respect to any of the documents that have been sealed, the parties are to advise the Court, in writing as to any agreement they have made or outline any area of disagreement. The court is to be so advised within six weeks of the issuance of these reasons. The court will advise counsel as to the need, if any, for further submissions and the forum in which they are to be made.

I agree  \_\_\_\_\_  
Lederer, J.

I agree  \_\_\_\_\_  
Williams, J.

I agree  \_\_\_\_\_  
Leiper, J.

**Released:** January 11, 2023

**CITATION:** Transdev Canada Inc. v. The Regional Municipality of York, 2023 ONSC 135  
**DIVISIONAL COURT FILE NO.:** DC-22-1335-00JR  
**DATE:** 20230111

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**Lederer, Williams, Leiper JJ**

**BETWEEN:**

TRANSDEV CANADA INC.

Applicant

– and –

THE REGIONAL MUNICIPALITY OF YORK

Respondent

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**REASONS FOR JUDGMENT**

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Lederer, J.

**Released:** January 11, 2023