

[ENGLISH TRANSLATION FOR INFORMATION ONLY – NOT OFFICIAL VERSION]

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No 500-17-044243-080

S U P E R I O R C O U R T

FACIL, POUR L'APPROPRIATION
COLLECTIVE DE L'INFORMATIQUE LIBRE

Applicant

v.

CENTRE DES SERVICES PARTAGÉS DU
QUÉBEC – DIRECTION GÉNÉRALE DES
ACQUISITIONS

Respondent

and

MICROSOFT LICENSING GENERAL
PARTNERSHIP

and

MICROSOFT CANADA CIE

and

COMPUGEN INC.

and

ATTORNEY GENERAL OF QUEBEC

Interveners

MOTION TO INSTITUTE PROCEEDINGS
IN DECLARATORY JUDGMENT
(Art. 453 et ss. C.c.p.)

THE CLAIMANT EXPOSES RESPECTFULLY TO ONE OF THE HONOURABLE JUDGE OF
THE SUPERIOR COURT SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE
FOLLOWING:

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The claimant party – FACIL, pour l'appropriation collective de l'informatique libre

1. FACIL, pour l'appropriation collective de l'informatique libre (below « FACIL ») is a non-profit association domiciled at 7373, Lajeunesse Street, suite 100, in Montréal (Québec), legally constituted in accordance with the 3rd part of the *Companies Act*, as demonstrated on the CIDREQ electronic recorded entries, evidence **R-1**;
2. FACIL is a non-profit association which is dedicated to the promotion of Free Softwares. Its members have different expertises but share the same goal: the promotion of Free Softwares, Open Files formats as well as everything that is linked to Open Standards;
3. FACIL's mission is to promote directly or indirectly, the adoption, the usage and the democratization of Free Softwares and Open Standards in the Quebec population, its public institutions as well as its enterprises and organisms;
4. One of FACIL's goals is to raise awareness, to encourage and to persuade community-based organizations, public institutions of all the levels in the Government and in all activity sectors, the enterprises and the medias that including Free Softwares in their decisions and reflections can be proven beneficial;

Free Software

5. Free Software can be defined as a software constituted of programs of which authors and editors make available to users their source code without any restrictions nor additional costs. They give explicit rights to the users for them to study, adapt, modify, and distribute the software as a whole or in parts without having to ask for permission nor having to pay royalties.
6. Contrary to Free Software, Proprietary Software, most of which Microsoft products are, have many restrictions, among which we generally find: 1) Licences which prohibit distribution, study, edition, translation, adaptation, use without restrictions, 2) source code not available, etc.;
7. The absolute majority of the Web servers and Email servers uses Free Softwares. The Netscape navigator, pioneer of the Internet is now distributed as a Free Software named Firefox by the Mozilla Foundation;
8. A very large number of organisms and Public Administrations throughout the world have migrated their technological infrastructure towards solutions based on Free Softwares, showing significantly the adequacy between this type of solution and the Public Administrations needs. By way of example, 400 000 French civil servants have been using Free Softwares for two years. The Netherlands Government has decided this year to forbid the use of Proprietary Softwares within its Administration;

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9. Free Software and the lack of invitation to tender procedures has, on some occasions, been reported in Quebec's newspapers during the last year, as it appears from some articles published, evidence R-2 and R-3;

10. There are many studies showing the benefits of Free Softwares. One of them was published in 2006 for the European Union, it is entitled *Study on the: Economic impact of open source software on innovation and the competitiveness of the Information and Communication Technologies (ICT) sector in the EU*. Another one was published in 2007 for the Quebec region, it is a reference guide entitled *Les logiciels libres et ouverts et le gouvernement du Québec*, evidence **R-4**;

11. In the reference guide (**R-4**), which sets guidelines and « settles the essential legal framework for a healthy integration of Free Softwares in the Administration », the authors describe a way to acquire Free Open Softwares:

[112] Another way to acquire Free Softwares is by coming to an agreement with suppliers for services contracts. This solution should be preferred as soon as the expertise and the resources required are not available within the organisation. In Quebec, there is still an important difference between the two types of softwares and Free Softwares are often put at a disadvantage. The Proprietary Software commercial model, based on the selling of the Source code, is sold as a product. As far as Free Softwares are concerned, the suppliers give the source code for free, marketing instead their expertise and a wide range of subsidiary services. (translation)

12. In this reference guide (**R-4**), it is also interesting to notice that the authors concludes:

[194] Free Softwares are a feasible alternative to face the technological challenges of the Administration. However, Free Softwares are often put at a disadvantage compared to their equivalent Proprietary Softwares when a decision, with a technological impact, is to be taken. (**R-4**, page 70) (translation)

13. In Québec, on the Ministry of Government Services Web site, on a page entitled « Status and results in the Quebec Government », it is explicitly written « Many studies have brought the Quebec Government to consider Free Software as an alternative on the same level as commercial offers in our projects. », as it appears in the Web page, evidence **R-5**;

14. On the same Web site, it is mentioned that « Free Softwares are perfectly in line with an Open architectural strategy from which results the adoption of Open Standards and norms ensuring interoperability. », as it appears on the Web page, evidence **R-6**;

The procurement notices – 12.7 of the Regulation

15. Since the beginning of 2008, the Direction générale des acquisitions du Centre de services partagés du Québec (DGACQ) proceeds by means of procurement notices according to indent 7 of article 12 from section II of the *Regulation for supply contracts*,

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construction contracts and service contracts of Government departments and public bodies, for contracts awarding to Microsoft Licensing GP;

16. Since February 19th 2008, more than 7 procurement notices have been published, adding up to 10 711 986.05\$ in contracts for Microsoft softwares, without any invitation to tender:

Date	Reference No.	Product	Supplier	Amount
Feb. 19th 2008	197845	Software	Microsoft	1 744 384.05\$
Feb. 20th 2008	198120	Software	Microsoft	200 000.00\$
Mar. 27th 2008	206442	Software	Microsoft	964 929.00\$
Mar. 27th 2008	206461	Software	Microsoft	1 205 821.00\$
Apr. 24th 2008	213272	Software	Microsoft	333 579.00\$
Apr. 25th 2008	213542	Software	Microsoft	4 513 273.00\$
Jun. 17th 2008	226226	Software	Microsoft	1 750 000.00\$

as it appears in the procurement notices, evidence **R-7** to **R-13**;

17. This exceptional practice puts at a disadvantage Free Software without any justification and even goes against policies in effect;

Illegality of the procurement methods

18. We submit that the decision to put aside the invitation to tender process and to proceed with procurement notices is illegal and evidently unreasonable (*Dunsmuir v. New-Brunswick*, 2008 SCC 9) for the following reasons.

A. Procedures not in accordance with article 12.7° of the Regulation

19. Article 12.7° of the *Regulation for supply contracts, construction contracts and service contracts of government departments and public bodies* is an exception provision, the rule being to proceed with invitations to tender for all contracts for more than 25,000.00\$;

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Lack of valid motives

20. The only two reasons referred to in order to proceed with procurement notices can be summarized as follow:

- a. The Microsoft supplier is the only option since it possesses the author rights on the Softwares used; and/or
- b. To insure the continuity and the evolution through Softwares updates and additional licences purchases for products owned by this supplier;

21. We submit that it is well known that Microsoft new 2007 softwares, one of which is Vista, have only in common with the preceding softwares their function and the name of their manufacturer;

22. Furthermore, the fact that organisms use the same panel of softwares sold by a specific supplier does not justify the refusal to compare with other alternatives by means of an invitation to tender;

23. We submit that only the reality of the functional needs as far as the information treatment of the different organisms is concerned must be considered during the development of the specifications to which the suppliers must answer;

B. Transgression of the *Politique sur les marchés publics* and the guidelines « *Les logiciels libres et ouverts et le gouvernement du Québec* »

24. The decision to proceed without any invitation to tender is a transgression of the provisions of the *Politique sur les marchés publics*;

25. The *Politique* specifies in article 1 that « The procedures are designed to encourage products and services acquisition at the best global cost »;

26. The *Politique* specifies in article 4 that « the Administrations put in competition the largest possible amount of products and suppliers in order to benefit from products and services of quality, in the best conditions »;

27. The *Politique* specifies in article 5 that « the acquisition practices allow the suppliers to easily access the information market opportunities, to know clearly the evaluation criteria of their offers and to obtain appropriate information on the results of such an evaluation »;

28. The *Politique* specifies in article 6 that « the Administrations ensures that their markets contribute to the economic development of Quebec and its regions and encourage the use of the Quebec technologies »;

29. By proceeding without invitations to tender, the DGACQ does not encourage the best cost, nor the competition between suppliers, avoids to share its information concerning its precise operational needs and does not promote the use of Quebec technologies;

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30. The decision to proceed with procurement notices by which only one supplier is identified is a transgression to the guidelines (**R-4**) which specify:

[96] Before proceeding to all technological acquisition, the concerned project's characteristics and the imperatives to consider must be detailed. This definition of the operational needs as well as their implementation framework must be done in the most inclusive way possible in order to avoid excluding prematurely potential solutions. A software, Free or Proprietary, should only be chosen if it answers adequately the formulated needs. The particularities concerning the evaluation of the services offers based on Free and Open Softwares are discussed further. (translation)

[97] Moreover, the technological solution's capacity to meet the identified needs must be connected to its cost. It is not just the amount associated to the software licence, it is the total cost for possession according to the specifications above. Given the commercial model underneath, most of Free and Open Softwares are clearly in favour. With the same functionalities, they offer a favourable alternative.
(we underline) (translation)

31. This procedure is a transgression of the guidelines (**R-4**) which also specify:

[117] In order to encourage the competition as well as a fair treatment for the potential suppliers, the Administration has to establish contracts in the most neutral and objective way. For that purpose, the use of an invitation to tender process, public or on invitation, can be required. Any invitation to tender should be written in a way to allow participation of all the suppliers capable of answering to the identified operational needs. The copyright management on the software should not be taken into account at this stage. Thereby, references to specific operating systems, to a development model or a specific licence should be avoided. Evidently, the environment and the architecture in place will influence the choice of a solution. Nonetheless, some Proprietary Softwares Editors offer adapted versions for a Free environment, and vice-versa. (translation)

[118] The necessity to rely on neutral invitations to tender does not mean to renounce to evaluate the factors that can encourage the use of Free and Open Softwares. The interoperability, the importance of being independent from its supplier as well as the necessity to allow the Administration to keep on developing within are as many factors that can be taken into account. The openness of the invitation to tender process asks for these factors to be explicitly specified to all of the suppliers. This way, the suppliers can adapt and write their offer accordingly. (translation)
(we underline)

32. This practice within the Administration of the province which consists in ignoring the invitation to tender process in favour of the procurement notices is widely spread, and favours without any serious justification one supplier, Microsoft;

33. For all this reasons, we submit that the decision of the Régie to proceed with procurement notices in favour of invitations to tender is illegal and clearly unreasonable;

35. This motion is founded in fact and in law;

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FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT this motion;

DECLARE that the Direction générale des acquisitions du Centre de services partagés du Québec (DGACQ) cannot take advantage of the exception in article 12.7° of the *Regulation for supply contracts, construction contracts and service contracts of Government departments and public bodies*;

DECLARE that it could not procure, without any invitation to tender, the different contracts to Microsoft Licensing General Partnership and Microsoft Canada Cie;

DECLARE that the Direction générale des acquisitions du Centre de services partagés du Québec (DGACQ) must, according to the *Regulation for supply contracts, construction contracts and service contracts of Government departments and public bodies*, and the directives enacted in the reference guide. *Les logiciels libres et ouverts et le gouvernement du Québec*, proceed with invitations to tender for the granting of contracts for the acquisition of softwares;

DECLARE that the Direction générale des acquisitions du Centre de services partagés du Québec (DGACQ) must, according to the *Politique sur les marchés publics*, and the guidelines included in the reference guide *Les logiciels libres et ouverts et le gouvernement du Québec*, consider objectively the use of protocols and computing standards copyright free, by encouraging Free Software markets by means of invitations to tender.

GRANT any other necessary or useful remedy for the ends of justice.

With costs.

Laval, July 15, 2008

(S) Marc-Aurèle Racicot

Me Marc-Aurèle Racicot
Counsel for the Applicant