CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, April 10, 2003

File No. PR-2002-040

IN THE MATTER OF a complaint filed by IBM Canada Limited, PricewaterhouseCoopers LLP and the Centre for Trade Policy and Law at Carleton University, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Ellen Fry
Ellen Fry
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will be issued at a later date.

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Date of Determination:	April 10, 2003
Date of Reasons:	June 4, 2003
Tribunal Members:	Ellen Fry, Presiding Member Pierre Gosselin, Member Zdenek Kvarda, Member
Senior Investigation Officer:	Daniel Chamaillard
Counsel for the Tribunal:	Reagan Walker
Complainants:	IBM Canada Limited PricewaterhouseCoopers LLP Centre for Trade Policy and Law at Carleton University
Counsel for the Complainants:	Ronald D. Lunau Phuong Ngo
Government Institution:	Canadian International Development Agency

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Ottawa, Wednesday, June 4, 2003

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AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINT

IBM Canada Limited (IBM Canada), PwC Consulting (PwC), the consulting arm of PricewaterhouseCoopers LLP (PricewaterhouseCoopers), and the Centre for Trade Policy and Law (CTPL) at Carleton University, collectively the complainants, alleged that the Canadian International Development Agency (CIDA) erred in declaring non-compliant the joint proposal submitted by a consortium comprised of PwC and the CTPL. The complainants' position is that the proposal was never non-compliant and that CIDA failed to take into account all the relevant factors relating to the relationship between PwC and IBM Canada and that CIDA ought to have considered PwC and IBM Canada to be a single business enterprise for the purpose of submitting the proposal.

The complainants submitted that the pending change of ownership of PwC should not have disqualified the proposal. The pending change was fully and truthfully disclosed to CIDA in the proposal.

The complainants further submitted that the former PwC consulting business was now operating as a separate business unit within IBM Canada, with no material changes in professionals or capabilities from the business prior to the change of ownership, and that IBM Canada succeeded to the status of "bidder or prospective bidder" under the proposal when the acquisition of PwC was completed.

Finally, the complainants alleged that CIDA, having improperly disqualified the consortium's bid by failing to treat PwC and IBM Canada as a single business enterprise for purposes of the solicitation, has violated the trade agreements, specifically, Articles 1015(4)(c), 1015(4)(d) and 1008(1)(a) of the *North American Free Trade Agreement*,[1] Articles 501, 504(3)(g) and 506(6) of the *Agreement on Internal Trade*[2] and Articles VII(1), XIII(4)(b) and XIII(4)(c) of the *Agreement on Government Procurement*.[3]

The complainants requested that the Canadian International Trade Tribunal (the Tribunal) recommend that CIDA's decision, declaring the consortium's proposal non-compliant, be set aside and that their proposal be evaluated against the criteria set out in the Request for Proposal (RFP). If, as a result of the evaluation, the proposal is determined to be the winning bid, then CIDA should proceed with negotiations in

1. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [*AIT*].
3. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

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accordance with the terms of the RFP. The complainants further requested that the Tribunal award their costs for preparing and proceeding with the complaint and that an order be issued postponing the award of the contract.

PROCUREMENT PROCESS

On July 5, 2002, CIDA published an RFP, Solicitation No. SEL-02-A-031004-01, on MERX for the purpose of acquiring professional administrative and management support services. The closing date for the procurement was September 12, 2002.

The purpose of the procurement is to provide management services for the Economic Integration Program (EIP) of the Asia-Pacific Economic Cooperation Forum. The goal is to assist six countries[4] (recipient countries) in Southeast Asia to integrate more effectively into the world trading system. The EIP is part of Canada's Official Development Assistance, which is the subject of treaties with four of the recipient countries and which CIDA foresees will also be the subject of memoranda of understanding with the recipient countries.

On September 12, 2002, a technical proposal was submitted to CIDA by a consortium comprised of PwC and the CTPL, including the following notification to CIDA of a pending acquisition of PwC's business:

> Please note that, once the transaction has been completed, it is our intention that any subsequent negotiations with you will be conducted by IBM or any entity within IBM's group, and that any contract which may be agreed with you will be entered into by such entity.

According to the complaint, IBM Canada acquired the business of PwC from PricewaterhouseCoopers by way of a local purchase agreement dated September 21, 2002. The transaction closed on October 1, 2002.

On October 9, 2002, PricewaterhouseCoopers wrote to CIDA, advising that some of the rated personnel resources set out in the proposal had not been transferred to IBM and that the others had been retained by PricewaterhouseCoopers from IBM on a sub-contract basis for this contract.[5]

On October 25, 2002, PricewaterhouseCoopers again wrote to CIDA, confirming that it was authorized to negotiate and enter into a contract with CIDA, should PricewaterhouseCoopers be selected to enter into negotiations with CIDA.[6]

On November 12, 2002, CIDA informed PricewaterhouseCoopers that the joint proposal submitted by PwC and the CTPL had been found non-compliant with the mandatory criteria and was, therefore, rejected. The reason given by CIDA is as follows:

> The stipulation, in the proposal, that any contract which may be agreed with CIDA will be entered into by IBM or by any entity within IBM's group is unacceptable. It is a mandatory provision of the Request for Proposal that, if a contract is awarded, each member of a consortium must be a signatory to the contract and shall be jointly and severally liable and responsible for the fulfilment and execution of the contract. Neither IBM nor any other entity within IBM's group is a member of the proposing entity.

4. Vietnam, Cambodia, Laos, Thailand, Indonesia and the Philippines.
5. Government Institution Report, confidential version, Tab 4.
6. *Ibid.* Tab 5.

> The correspondence dated October 25, 2002, received from PricewaterhouseCoopers LLP after the proposal closing date is an amendment to your proposal. CIDA cannot accept amendments to proposals after the proposal closing date.

A complaint was filed with the Tribunal on November 26, 2002, and a postponement of award order was issued on December 10, 2002.

On January 13, 2003, CIDA filed a Government Institution Report (GIR) with the Tribunal.

On February 3, 2003, the complainants filed their comments with the Tribunal in respect of the GIR.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

JURISDICTIONAL ISSUE

CIDA's Position on Jurisdiction

CIDA claimed that the Tribunal does not have jurisdiction to inquire into the complaint because the term "procurement", as defined in the relevant trade agreements, excludes contracts for government assistance and that, therefore, the procurement in question was not a "designated contract" within the meaning of subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[7] or sections 3 and 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[8] CIDA submitted that the proposed contract was one of official development assistance, that is, government assistance to developing countries, which is financed from funds appropriated for official development assistance and not from CIDA's operating budget. Since the proposed contract relates to government assistance, paragraph 2 of the General Notes for Canada appended to the *AGP*, Article 1001(5)(a) of *NAFTA* and the definition of "procurement" in Article 518 of the *AIT* do not apply. CIDA also argued that the procurement was excluded from the *AGP*, by paragraph 7 of the General Notes for Canada, which provides as follows: "This Agreement shall not apply to contracts under an international agreement and intended for the joint implementation or exploitation of a project."[9]

Moreover, CIDA submitted that Article 1001(1)(a) of *NAFTA* stipulates that *NAFTA* only applies to measures adopted or maintained that relate to procurement by a federal government entity set out in Annex 1001.1a-1 and that, in that annex, CIDA is listed as follows: "Canadian International Development Agency (on its own account)". CIDA argued that the insertion of the words "on its own account" was intended for greater certainty, to make it clear that only procurement of goods and services for CIDA's own use or direct benefit would be covered. CIDA further argued that the AGP similarly provides for the same treatment.

CIDA stated that the purpose of the services referred to in the RFP was to assist the governments of the recipient countries to strengthen themselves in order to comply with World Trade Organization (WTO) obligations and accession requirements and increase their ability to take advantage of WTO rights.

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7. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
8. S.O.R./93-602 [*Regulations*].
9. In this connection, CIDA referred to four such international agreements: the *General Agreement on Development Cooperation Between the Government of Canada and the Government of the Socialist Republic of Vietnam*; the *Agreement on Development Co-operation Between the Government of Canada and the Government of the Kingdom of Thailand*; the *General Agreement on Development Co-operation Between the Government of Canada and the Government of Indonesia 1991*; and the *General Agreement on Development Co-operation Between the Government of Canada and the Government of the Republic of the Philippines.*

Finally, CIDA argued that the reference to the rules of the Tribunal in "CIDA 102—General Conditions (RFP)" (CIDA 102) was merely intended as a clause of general application that could not impose the application of the *CITT Act* in situations where there was no procurement in accordance with the trade agreements.

Complainants' Position on Jurisdiction

The complainants submitted that there is no merit in CIDA's argument that the Tribunal lacks jurisdiction over the complaint. They argued that CIDA had already acknowledged, in the RFP, that the procurement was subject to the *Rules*, as provided in CIDA 102, which is incorporated by reference in section 1.1 of the RFP. Having made the Tribunal's review a condition of the RFP, CIDA cannot now argue that the procurement is not subject to the Tribunal's jurisdiction.

The complainants submitted that CIDA's argument that "the acquisition of goods and services for developing countries and countries in transition, which is government assistance, is not covered" is based on a mischaracterization of what is being procured under the RFP and a misapplication of the "government assistance" exclusion. What is involved in the procurement is the hiring by CIDA of a Canadian-based consultant to provide services to CIDA, as directed by CIDA. The complainants also submitted that, although the trade agreements do not provide for a definition of "government assistance", they do provide an indication of what government assistance includes by listing various examples, such as grants, loans, equity infusions, guarantees and fiscal incentives, all of which relate to the direct provision of financial aid. The selection and hiring of a consultant to provide services to CIDA is not "government assistance" in the sense intended by the various trade agreements.

The complainants also relied on the Tribunal's decision in File No. PR-97-040.[10] In that case, the RFP described the purpose of the services in similar terms to those of the present procurement: "The purpose of this request for proposals is to select a Consultant to enter into negotiations with CIDA for a contractual agreement for the provision of services as Canadian Executing Agency." In *Société de coopération*, the basis of the complaint was that the complainants' bid had been improperly disqualified by CIDA. There appears to have been no suggestion by CIDA in that case that the Tribunal lacked jurisdiction to inquire into the procurement, and the Tribunal did in fact proceed to determine the validity of the complaint.

Tribunal's Decision on Jurisdiction

The Tribunal has jurisdiction to inquire into complaints concerning any transaction that is, among other things, a "procurement" as defined in a prescribed trade agreement, subject to any exceptions provided for in the trade agreement. CIDA argues that the object of the RFP is to provide "government assistance" to developing countries, that such a procurement falls within an exception in the trade agreements and that, therefore, the Tribunal has no jurisdiction to determine the validity of the complaint.

All three trade agreements provide exceptions for government assistance.

Article 1001(5) of *NAFTA* provides, in part, that "[p]rocurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy", but does not include "non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments".

10. *Re Complaint Filed by Société de coopération pour le développement international* (9 April 1998) (CITT) [*Société de coopération*].

Paragraph 2 of the General Notes for Canada in the *AGP* provides, in part, that "[p]rocurement in terms of Canadian coverage is defined as contractual transactions to acquire property or services for the direct benefit or use of the government", but does not include "any form of government assistance, including but not limited to, cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services, given to individuals, firms, private institutions, and sub-central governments."

Article 518 of the *AIT* provides that "procurement means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction" but does not include "any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives" or "government provision of goods and services to persons or other government organizations".

The evidence indicates that the **direct** purpose of this solicitation is to obtain consulting services for CIDA. Through this solicitation, CIDA will select a consultant with whom to negotiate a contract for the personnel resources necessary to organize technical assistance to the recipient countries. CIDA could have chosen to make use of its own employees to perform these services rather than to enter into a contract with a consultant who would provide them.

However, the evidence also indicates that the **indirect** purpose of this solicitation is to provide government assistance to the recipient countries. The consultant will be responsible for overall project planning, management and financial administration, procurement, contracting and the provision of personnel for the delivery of the government assistance.[11] The Tribunal notes that the benefit to the recipient countries will not occur until the personnel engaged by the consultant begin to deliver the government assistance, in the form of trade-related technical assistance, focussed training and support for establishing and maintaining thematic networks.[12] Furthermore, given that the contract resulting from this solicitation will be between CIDA and the consultant, it will not create any obligation by CIDA to the recipient countries to deliver the government assistance. Any such obligation would need to be created by a separate instrument, such as a treaty or a memorandum of understanding with the government in question.

The Tribunal needs to consider whether the exemptions for government assistance referred to in the above provisions of the trade agreements should be applied narrowly to encompass only procurement where the direct purpose of the procurement is government assistance, or whether the exemptions should be applied more liberally to also encompass situations where government assistance is the indirect purpose.

In interpreting the trade agreements, particularly the *AGP*,[13] the Tribunal is mindful of Article 31(1) of the *Vienna Convention on the Law of Treaties*,[14] which states that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

11. RFP at 31.
12. *Ibid*. at 32.
13. Article 3.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to the *Marakesh Agreement Establishing the World Trade Organization*, stipulates that WTO agreements are to be interpreted in accordance with customary rules of interpretation of public international law, which has been interpreted by the WTO Appellate Body to be the *Vienna Convention on the Law of Treaties*. See *United States—Standards for Reformulated and Conventional Gasoline* (20 May 1996), WT/DS2/AB/R at 17.
14. (1969) 1155 U.N.T.S. 331, in force 1980.

The Tribunal is also mindful that it has been held in a number of cases involving the law of international trade that, in the interpretation of agreements, "exceptions provisions should normally be construed narrowly rather than broadly."[15]

In File No. PR-2001-026,[16] the Tribunal addressed the issue of whether the "shipbuilding" exemption from the trade agreements should be construed narrowly or liberally. The Tribunal made the following comments, which are consistent with the international trade cases noted above:

> Generally speaking, the purpose of the procurement provisions of NAFTA and the AGP is to promote trade liberalization by ensuring that tendering procedures are applied in a non-discriminatory and transparent manner. In order to address this purpose as broadly as possible, the Tribunal considers that the categories of procurements excluded from coverage by NAFTA and the AGP should normally be construed narrowly.[17]

The Tribunal considers that these comments apply not only to *NAFTA* and the *AGP* but also to the *AIT* and should govern the interpretation of the exemption at issue in the current complaint. Accordingly, the Tribunal considers that the exemptions for government assistance do not apply in this case because they should be interpreted narrowly and confined to situations where government assistance is the **direct** purpose of the solicitation.

As noted above, CIDA also argued that Annex 1001.1a-1 of *NAFTA* and Appendix 1 to the *AGP* exempt CIDA from the application of those trade agreements, since these provisions indicate that the respective trade agreements apply only to the "Canadian International Development Agency (**on its own account**)" [emphasis added]. CIDA submits that procurement for CIDA's own use or direct benefit would be funded from its operating budget and not Canada's Official Development Assistance budget, which is the source of funds for the present procurement.

To address this issue, the Tribunal needs to consider the nature of CIDA's role in the solicitation. The RFP describes the nature of this role. As stated above, the Tribunal considers that CIDA is the direct beneficiary of the solicitation. The RFP also indicates that CIDA is the party that controls the procurement process, that CIDA is the party that will negotiate and enter into the contract with the successful bidder, that the consultant will be accountable to CIDA under the contract and that CIDA will have financial control over the contract. Thus, the RFP indicates that CIDA is acting on its own behalf in the solicitation and does not support the premise that CIDA is acting as agent, trustee or go-between for the recipient countries or any other party. The Tribunal considers that, by its nature, the RFP is more persuasive in this regard than CIDA's submission concerning its internal administrative decision regarding its source of funding. Accordingly, the Tribunal considers that CIDA is acting on its own account in this solicitation and, hence, is a federal government entity covered by *NAFTA* and the *AGP*.

CIDA also argued that this solicitation falls under the exemption in paragraph 7 of the General Notes for Canada in the *AGP*, which stipulates that that the *AGP* does not apply to "contracts under an international agreement and intended for the joint implementation or exploitation of a project."

In the Tribunal's view, the evidence does not indicate that the procurement is intended for the **joint** implementation or exploitation of the EIP by CIDA and the recipient countries. Rather, it is intended that the consultant would undertake the work as a single "Canadian Executing Agency" under CIDA's direction.[18] Although it is contemplated that the consultant would work in consultation with the recipient countries in

15. *United States—Procurement of a Sonar Mapping System* (23 April 1992), GPR.DS1/R at para. 4.21; *United States—Restrictions on Imports of Cotton and Manmade Fibre Underwear* (8 November 1996), WT/DS24/R at para. 7.21.
16. *Re Complaint Filed by McNally Construction Inc.* (6 December 2001) (CITT).
17. *Ibid.* at 7.
18. RFP at 25.

certain respects (e.g. through their participation in a project steering committee), the Tribunal does not consider that this type of participation is sufficient to constitute "joint implementation or exploitation". The Tribunal also notes that, while arguably the procurement might constitute a "[contract] under an international agreement" for the four recipient countries with which there is a treaty, this argument could not apply to the other two recipient countries, given that the evidence does not indicate that there is any treaty or memorandum of understanding with those two countries. Accordingly, the Tribunal does not consider that this solicitation falls under the exemption in paragraph 7 of the General Notes for Canada in the *AGP*.

As noted above, the complainants submitted that CIDA is estopped from arguing that the Tribunal lacks jurisdiction because the RFP incorporated, by reference, the clause in CIDA 102 that states that "[t]his selection process is subject to the rules of the Canadian International Trade Tribunal (CITT)." The Tribunal does not agree. It is the legislation governing the Tribunal, and not the agreement of the government entity, that determines whether the Tribunal has jurisdiction.

However, the Tribunal does need to consider the effect of this clause. CIDA submitted that the clause is one of general application for all RFPs, whether for procurement for CIDA's own use or procurement relating to government assistance. The Tribunal does not consider this explanation to be helpful. CIDA cannot ignore the text of its own document in cases where it does not wish to apply it. In other words, it cannot argue that the clause only applies to procurements for its own use, and not to those for government assistance, when the document makes no such distinction. In the Tribunal's view, this clause is evidence that when it issued the RFP, CIDA considered the solicitation to fall within the Tribunal's jurisdiction, i.e. not to be a solicitation for government assistance.

For the foregoing reasons, the Tribunal does not consider that this solicitation is exempted from coverage under *NAFTA*, the *AGP* or the *AIT*. Accordingly, the Tribunal finds that it has jurisdiction to inquire into this complaint.

STANDING

CIDA submitted that PwC does not have standing to file a complaint, because it is not itself a legal entity. It is described in the proposal as the management consulting services business of the worldwide PricewaterhouseCoopers organization. CIDA further submitted that IBM Canada cannot be a potential supplier and, accordingly, also does not have standing. The complainants submitted that PwC has standing and that IBM Canada also has standing because it succeeded to the status of "bidder" under PwC's proposal.

The *CITT Act* grants standing to file complaints to "potential supplier[s]". "Potential supplier" is defined as "a bidder or prospective bidder on a designated contract." The term "designated contract" is defined in the *Regulations* as "any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade or in Article I of the Agreement on Government Procurement, by a government institution". As stated above, PwC was a bidder on a contract concerning the procurement of services as described in the relevant articles of the trade agreements and, hence, a "potential supplier". Since, at the time of bidding, PwC was not itself a legal entity, but rather part of PricewaterhouseCoopers, the rights and obligations that it acquired as bidder were the rights and obligations of PricewaterhouseCoopers. CIDA's evidence did not indicate that PwC was anything other than a division of PricewaterhouseCoopers with apparent authority to join in the complaint, as submitted by the complainants.

The Tribunal also finds that IBM Canada , through its purchase of the PwC business, does have standing to file and pursue the complaint. The complainants submitted that, on the basis of the master stock and asset purchase agreement and local purchase agreement, portions of which were filed with the Tribunal as confidential exhibits, upon completion of the sale of PwC to IBM Canada, IBM Canada assumed PricewaterhouseCoopers' consulting business rights and obligations and succeeded to the status of "bidder" under PwC's proposal. The Tribunal agrees that an assumption of such rights and obligations would give IBM Canada an interest in the solicitation sufficient to file a complaint under section 30.11 of the *CITT Act*.

Although the *CITT Act* deals extensively with contractual matters in the procurement context, nowhere in the *CITT Act* is it stipulated that rights under the *CITT Act* arising from such matters cannot be assigned. This is consistent with the Tribunal's earlier decision in File No. PR-95-011.[19] The Tribunal notes that this analysis concerning the assignment of rights for the purposes of standing does not, however, hold for the assignment of obligations for purposes of the bid evaluation, which is dealt with below.

VALIDITY OF THE COMPLAINT

Complainants' Position on the Validity of the Complaint

The complainants submitted that the consortium's proposal was never non-compliant and that CIDA erred in disqualifying the proposal by failing to take into account all relevant factors relating to the relationship between IBM Canada and PwC. In effect, they argued that IBM Canada should be seen as having stepped into the shoes and succeeded to all the rights and obligations of PwC and that CIDA ought to have treated PwC and IBM Canada as one enterprise for the purpose of the evaluation. The complainants further submitted that, at the time of bid submission, there was a signed master stock and purchase agreement between PricewaterhouseCoopers and International Business Machines Corporation in place, as a result of which IBM Canada had an interest in any commitments undertaken by PwC prior to the closing of the procurement.

The complainants relied on the Tribunal's decision in *AmeriData*, wherein it was held that the complainant in that case had standing to file a complaint with the Tribunal regarding a proposal that had been filed by another company, Control Data Systems Canada, Ltd. In that case, the complainant had not been a party to the actual proposal, nor had its signature appeared on it. Despite the fact that the complainant had not joined in the proposal, the Tribunal rejected PWGSC's challenge to the complainants' status to bring a complaint, on the grounds that the complainant had inherited Control Data Systems Canada, Ltd.'s status as a "potential" supplier under the bid.

AmeriData, according to the complainants, demonstrates that a successor company may, as a result of legitimate business transactions, step into the shoes of the actual bidder under a proposal that was submitted before the sale of business occurred.

The complainants also alleged that, in fairness, before a disqualification occurs, bidders should be made aware of concerns on the part of the procuring entity and given a chance to clarify their proposals, within the rules of the procurement process.

The RFP, according to the complainants, required PwC to advise CIDA of the pending sale and its effect on any subsequent negotiations. Section 3.1 of the RFP states that, "It is thus essential to define, from the outset, who the contracting party will be." The complainants submitted that PwC, in the circumstances of this case, where the time frame of the sale transaction coincided with the RFP time frame, had an ongoing obligation of disclosure with respect to matters affecting the proposal.

They further submitted that PwC properly indicated, at page 9 of the proposal, that "it is our intention that any subsequent negotiations with you will be conducted by IBM or any entity within IBM's group, and that any contract which may be agreed with you will be entered into by such entity. Changes in PwC Consulting's ownership will not result in any changes to the structure, design, management, resources or client relationship proposed for the EIP." They argued that the mere statement of intention in the proposal ought not to have been significant enough, under the circumstances, to result in the proposal being non-compliant, as the sale might still have fallen through at the last minute due to something unforeseen.

19. *Re Complaint Filed by AmeriData Canada Ltd.* (9 February 1996) (CITT) at 4 [*AmeriData*].

In addition, the complainants submitted that CIDA's decision in this case is contradictory to the manner in which CIDA dealt with PwC and IBM Canada in another similar RFP.

The complainants also submitted that the RFP provided a framework for negotiations, but did not circumscribe their content and that the framework contemplated that the final contract could differ in material respects from both the contents of the proposal and the RFP itself.

CIDA'S Position on the Validity of the Complaint

CIDA submitted that the complainants had miscast the issue by defining it as whether or not the proposal was non-compliant due to the pending change in ownership of PwC. In CIDA's opinion, the real issue is whether the following statement in the proposal disqualifies the consortium's bid:

> Please note that, once the transaction has been completed, it is our intention that any subsequent negotiations with you will be conducted by IBM or any entity within IBM's group, and that any contract which may be agreed with you will be entered into by such entity.

In the context of the above statement, CIDA argued that "IBM" is understood to be "International Business Machines Corporation", not "IBM Canada Ltd.". According to CIDA, the statement clearly indicates that subsequent negotiations and any resulting contract are intended by the consortium to be conducted between CIDA and International Business Machines Corporation or any entity within the latter's group of related companies. On the closing date of the RFP, no such entity was named.

According to CIDA, a completely new entity could be formed for the purpose of completing the transaction; one with no corporate history. CIDA could not know if the entity met the mandatory requirements, such as the Canadian eligibility conditions. Having IBM Canada or any other member of the International Business Machines Corporation group of companies sign the contract is a substantial deviation from the requirements of the RFP. Such a change is not trivial or minor, since IBM Canada or another member of the International Business Machines Corporation group would not have been subject to the evaluation process.

Even if one could construe the above statement as referring to IBM Canada, according to CIDA:

> IBM Canada Ltd. is not itself a Consultant; it is not a party to the Proposal; it is not part of any consortium related to this RFP; it has not executed the mandatory Form I; it has not agreed to be bound jointly and severally in accordance with the terms of the RFP; it has not provided any of the detailed corporate information requested; it has not provided minutes of any Board meetings or other documentation designating the individual(s) authorized to sign the contract; it has not been identified as a subcontractor. It is, accordingly, inaccurate to state, as the Complainants do in paragraph 31 of the Complaint, that the "… signature of IBM on the resulting contract would have complied fully with the terms of the RFP…."[20]

CIDA argued that the above quoted statement in the proposal, which requires it to deal with IBM Canada or any entity within International Business Machines Corporation's group, is not consistent with the requirements and process set down in the RFP. Such a statement is tantamount to imposing a condition on CIDA that PwC will not sign the contract if the transaction identified in the master stock and asset purchase agreement is successful. CIDA submitted that, since there is no unequivocal obligation on PwC to sign the contract, accepting this condition would impair the integrity of the competitive process and be unfair and inequitable to the other bidders that responded to the RFP.

20. GIR at 52.

In short, by failing to name the corporate entity that would be responsible for subsequent negotiations and any subsequent contract, PwC failed to meet the mandatory requirements.

Tribunal's Decision on the Validity of the Complaint

Section 30.14 of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

This dispute centres on the effect of two key paragraphs contained in the consortium's proposal. The paragraphs read as follows:

> As you may be aware, on July 30, 2002, IBM and PricewaterhouseCoopers announced that IBM would acquire PricewaterhouseCoopers' global business consulting and technology services unit, PwC Consulting. The transaction has been approved by IBM's board of directors and PricewaterhouseCoopers' leadership board and is subject among other things, to regulatory approvals and the approval of local PwC firms through the votes of their partners. It is expected to be concluded by October 1, 2002. Further information is contained in IBM and PwC's press release on the transaction which may be found at www.pwcconsulting.com. Please note that, once the transaction has been completed, it is our intention that any subsequent negotiations with you will be conducted by IBM or any entity within IBM's group, and that any contract which may be agreed with you will be entered into by such entity.
>
> Changes in PwC Consulting's ownership will not result in any changes to the structure, design, management, resources or client relationship proposed for the EIP.

The last sentence in the first paragraph of the above statement, particularly the phrase "it is our intention", is somewhat ambiguous. This sentence could be interpreted as contemplating either a unilateral assignment of PwC's negotiating rights and obligations to "IBM or any entity within IBM's group" or an assignment that would be subject to CIDA's consent.[21]

The Tribunal considers that, in these circumstances, any requirement for CIDA's consent to an assignment would be an important stipulation and that, hence, such a requirement, if it existed, would normally be mentioned expressly in the bid. However, there is no express mention of such a requirement for consent. Furthermore, the Tribunal does not consider that the context of these paragraphs of the proposal implies a requirement for consent.

Accordingly, the Tribunal finds that the bid should be interpreted as proposing a unilateral assignment on PwC's part. In other words, CIDA is being asked to accept a bid where either (1) the potential contractor might continue to be PricewaterhouseCoopers, the owner of PwC, an entity whose information CIDA has had the opportunity to evaluate for compliance with the requirements of the RFP, or (2) alternatively, whether CIDA consents or not, the potential contractor might be some other entity whose information CIDA has not had an opportunity to evaluate. In the context of the key paragraphs of the proposal quoted above, it is clear that the reference to "IBM" is to International Business Machines Corporation, and not IBM Canada. Thus, "the entity within IBM's group" that is the potential contractor might be International Business Machines Corporation, IBM Canada or any other member of the international family of International Business Machines Corporation companies.

21. It would appear to the Tribunal that PricewaterhouseCoopers is the legal entity that would hold PwC's rights and obligations.

The central issue of this complaint is whether, in light of the above key paragraphs in the bid, the consortium's proposal complies with the mandatory requirements of the RFP.

Article 2 of the RFP provides that each member of the consortium must fulfil every mandatory condition and certify that this is the case. Article 2 reads in part:

> **2 MANDATORY REQUIREMENTS**
>
> This section contains the mandatory requirements, with which the Consultant, including EACH member of the consortium, joint venture or other type of association (where the proposal is submitted by a consortium, joint venture or other type of association) must comply. Therefore, **Form I** – Mandatory Certifications – must be signed and attached to the technical proposal certifying that the Consultant, including EACH member of the consortium, joint venture or other type of association, complies with all the mandatory requirements. In the event of a discrepancy between the wording of this section and the other sections of the Request for Proposal (RFP) and/or *CIDA 102* – General Conditions (RFP), this section of the RFP shall prevail.
>
> **The Consultant, including EACH member of the consortium, joint venture or other type of association, must comply with the Conditions of Eligibility in CIDA 102 – General Conditions (RFP). Among other things, the Consultant, including EACH member of the consortium, joint venture or other type of association, must comply with the Canadian Eligibility Requirements.**
>
> **Failure to comply with all the requirements set out below will result in rejection of your proposal.**

Similarly, Article 3.1 of the RFP provides, in part, as follows:

> **3.1 Designation of the Consultant**
>
> Note that, where the proposal is submitted by a consortium, joint venture or other type of association, EACH member of the consortium, joint venture or other type of association must sign a copy of **Form I** concerning the mandatory certifications in accordance with the Signature Procedures set out in the RFP and EACH member must be capable of signing the contract. Therefore, EACH member must comply with the requirements in the Mandatory Requirements Section of the RFP.

The mandatory requirements include the following:

> **I Conditions of Eligibility in CIDA 102 – General conditions (RFP)**
>
> Among other things, the Consultant must comply with the following Canadian Eligibility Requirements:
>
> . . .
>
> (ii) if the Consultant is a profit generation organization – it must have its head office in Canada and it must be a least 51% beneficially owned and controlled by Canadian citizens or Canadian landed immigrants.
>
> Where the proposal is submitted by a consortium, joint venture or other type of association, EACH member must comply with either requirement (i), (ii) or (iii) above.
>
> **II Financial Viability**
>
> The Consultant, including EACH member of the consortium, joint venture or association, must be financially solvent and financially capable to undertake the proposed contract work and to perform such work and to undertake the necessary expenditures without anticipated financial difficulties, and must be able to demonstrate so prior to contract award.

III Non-participation in Project Planning and Implementation

Where this RFP relates to the implementation of the first or only phase of a project, the Consultant, including EACH member of the consortium . . . must not have been involved, individually, jointly or severally, in the planning . . . of this project, nor have been assisted in the preparation of the proposal by any party who has been involved in the planning of this project.

IV Validity of Facts

The Consultant, including EACH member of the consortium . . . must certify that each statement made with regard to the proposal is accurate and factual, and that it is aware that the Minister reserves the right to verify any information provided in this regard, and that untrue statements may result in the proposal being declared non-compliant, or in any action which the Minister may consider appropriate.

Article 3.1 of the RFP emphasizes the importance of the bidders explaining precisely which legal entities are making the proposal, either individually or as part of a consortium and reads, in part, as follows:

Since the Consultant submitting the winning proposal will be called upon to negotiate with a view to signing the prospective contract with CIDA for the provision of the services set out in Terms of Reference – **Appendix B**, it is important to properly identify the nature of the Consultant, including the nature of EACH member of the consortium, joint venture or other type of association (where the proposal is submitted by a consortium, joint venture or other type of association) and to identify subcontractors.

Note that, where the proposal is submitted by a consortium, joint venture or other type of association, EACH member of the consortium, joint venture or other type of association must sign a copy of **Form I** concerning the mandatory certifications in accordance with the Signature Procedures set out in the RFP and EACH member must be capable of signing the contract. Therefore, EACH member must comply with the requirements in the Mandatory Requirements Section of the RFP. Moreover, EACH member must agree to be jointly and severally liable for the whole contract in the event of default by one or more of the members. *It is thus essential to define, from the outset, who the contracting party or parties will be.*

[Emphasis added]

Since entities in recipient countries do not comply with the Canadian Eligibility Requirements set out above, these local entities MAY NOT be the Consultant, or be a member of a consortium, joint venture or other type of association submitting the proposal or be signatories of **Form I** or of the contract.. . . In order to assist CIDA in determining if the Consultant meets the requirements, the Consultant must first provide in its technical proposal:

- an identification of the nature of the Consultant who/which is submitting the proposal and who/which will sign the contract; that is to say is the proposal submitted by an individual, a corporation, a partnership (in the common law regime), a sole proprietorship or a consortium, joint venture or other type of association.

Article 3.1 of the RFP also requires a number of specific items of baseline information concerning each member of the consortium, ranging from its mailing address to a copy of the minutes of the meeting of the Board of Directors or other documentation authorizing the submission of the proposal and signing of the contract.

Despite the clear wording of the mandatory requirements, the consortium submitted a bid that made it impossible for CIDA to know, as of bid closing, which legal entity would negotiate and contract with it after completion of the sale of PwC.

Furthermore, while PwC may have submitted documentation to show that it fulfilled the mandatory requirements of the RFP,[22] the as yet unidentified "entity within IBM's group" has clearly not done so, since it has not filed any information as part of the bid. The consortium's proposal, in effect, asks CIDA to accept *a priori*, as a negotiating and contracting entity, a company that has not filed the necessary information and documentation to meet the mandatory requirements.

The Tribunal notes that the above mandatory requirements are conditions that relate primarily to the corporate entity that is submitting the bid, as opposed to the individual personnel who would be performing the services. For example, the identity of the personnel is irrelevant in assessing compliance with the mandatory requirement concerning Canadian ownership and control of the corporation. Thus, even if all the same personnel were involved in the contract under International Business Machines Corporation ownership as under ownership by PricewaterhouseCoopers, the mandatory requirements would not necessarily be fulfilled.

Furthermore, if CIDA were to accept the consortium's bid, it would potentially be applying preferential treatment to the unknown "entity within IBM's group", since the latter would not have been obligated to fulfil the mandatory requirements that applied to other potential suppliers. Such discrimination would very likely have been contrary to the trade agreements.[23]

In short, CIDA prepared the RFP in such a way that it was clear that the identification of the party with whom it would be negotiating and concluding the resulting contract and the compliance by that party with the mandatory requirements were matters that were central to the procurement. The consortium's proposal did not identify the party with which CIDA would be negotiating and contracting, and that unidentified party did not comply with the mandatory requirements. Accordingly, the proposal did not fulfil the mandatory requirements of the RFP.

The Tribunal notes that, in its view, it is entirely reasonable for CIDA to require, in the RFP, that it be told with which legal entity it would be negotiating and contracting. When the bid was submitted, it appears, on the basis of the confidential proposal,[24] that PwC as well as CIDA considered that the identity of the corporate entity entering into the contract (as opposed to merely the identity of the personnel working on the contract) was a significant factor.

The complainants also argue that CIDA should have treated PwC and IBM Canada as one enterprise for purposes of the evaluation and that CIDA erred by rejecting the complainants' clarification letter and by interpreting the RFP in too rigid a manner.

As discussed above, the Tribunal has determined that IBM Canada has standing to file this complaint. However, the Tribunal considers that there is a clear distinction between IBM Canada succeeding to PricewaterhouseCoopers' rights to pursue a complaint under the *CITT Act* in respect of the proposal, on the one hand, and CIDA recognizing PwC and IBM Canada as a single business entity for purposes of evaluating the consortium's bid, on the other.

CIDA argued, citing the Supreme Court of Canada case of *The Lounsbury Company Limited v. George Duthie*,[25] that "[a]s a rule a party to a contract cannot transfer his liability thereunder without the

22. This was not brought into issue in the complaint.
23. See Article 501 of the *AIT*, which promotes "equal access to procurement for all Canadian suppliers"; Article 514(2) of the *AIT*, which promotes "fair, open and impartial procurement procedures"; Article VII(1) of the *AGP*, which states, in part, that "[e]ach Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner"; Article 1008(1)(a) of *NAFTA*, which also states that "[e]ach Party shall ensure that the tendering procedures of its entities are . . . applied in a non-discriminatory manner".
24. Protected proposal submitted by PwC and the CTPL to CIDA on September 12, 2002 at 8.
25. [1957] S.C.R 590.

consent of the other party."[26] In this case, the relevant contractual obligation is PricewaterhouseCoopers' duty to negotiate in good faith with CIDA with a view to concluding a mutually agreeable consulting contract, should it be awarded the procurement. The Tribunal agrees with CIDA's argument and finds that PricewaterhouseCoopers' purported transfer of this obligation to IBM Canada was indeed ineffective, since it lacked CIDA's consent. PwC's rights and obligations under the proposal do not constitute "commercial paper"[27] and are, therefore, not unilaterally assignable under the law of negotiable instruments. Rather, the ordinary law of contract applies, which has been more recently stated by the Supreme Court of Canada[28] as follows:

> The common law has long recognized that while one may be free to assign contractual benefits to a third party, the same cannot be said of contractual obligations. This principle results from the fusion of two fundamental principles of contract law: 1) that parties are able to make bargains with the parties of their own choice (freedom of contract); and 2) that parties do not have to discharge contractual obligations that they had no part in creating (privity of contract). Our law does, however, recognize that contractual obligations which a party has freely assumed may be extinguished in certain circumstances and the doctrine of novation provides one way of achieving this.
>
> A novation is a trilateral agreement by which an existing contract is extinguished and a new contract brought into being in its place.. . . The assent of the beneficiary (the creditor or mortgagee) of those obligations to the discharge and substitution is crucial. This is because the effect of novation is that the creditor may no longer look to the original party if the obligations under the substituted contract are not subsequently met as promised.
>
> Because assent is the crux of novation it is obvious that novation may not be forced upon an unwilling creditor and, in the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling.[29]

The purpose of the above legal rule is to prevent assignments which would result in the skill, judgement and services of another being substituted in the place of the original contracting party. When the performance of obligations is at stake, a party to a contract should be able to deal with the person with whom it signed and not some stranger to the contract. In this instance, for example, financial viability and Canadian eligibility were key requirements that, as of bid closing, CIDA could assess and accept for PwC, but could not assess with respect to the new and unknown "entity within IBM's group".

The Tribunal notes that PwC was a member firm of PricewaterhouseCoopers International at the time of the proposal. That association would have ended (although a certain level of cooperation might potentially still exist) upon completion of PwC's corporate reorganization, and CIDA might well have seen the association as being of significant interest to it.

The complainants also argued on the basis of case law, that the law of contract should be relaxed in this instance so as to bind CIDA to PricewaterhouseCoopers' purported assignment, notwithstanding CIDA's lack of consent. However, the cases that the complainants submitted in this connection are readily distinguishable from the present dispute.

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26. *Ibid.* at 596.
27. Defined as: "A bill of exchange, cheque, promissory note, negotiable instrument, conditional sale agreement, lien note, hire purchase agreement, chattel mortgage, bill of lading, bill of sale, warehouse receipt, guarantee, instrument of assignment, things in action and, in addition, any document of title that passes ownership or possession and on which credit can be raised. *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29" (*Dictionary of Canadian Law*, 2d ed. at 206).
28. *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410.
29. *Ibid.* at 426-27.

Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario[30] is a case that considered the common employer doctrine in the context of the *Employment Standards Act*,[31] which treats associated businesses as one employer, protecting employee benefits where the intent or effect of the separation of the businesses is to defeat the intent and purposes of the *Employment Standards Act*. There is no such "anti-avoidance" purpose to be served by treating PwC and IBM Canada as a single business enterprise in this instance, and it is by no means clear that this principle from employment law should also apply in procurement law.

In File No. PR-2001-059,[32] the Tribunal's finding was limited to recognizing the experience of a corporate affiliate as that of the complainant where essentially the same personnel were involved in both corporations. This determination, which was premised on specific wording in the RFP and the specific circumstances of the case, should not be interpreted to mean that the Tribunal will recognize corporate reorganizations in all circumstances for all purposes of a procurement.

Morris Knudsen Corporation[33], a decision of the U.S. General Accounting Office (GAO) was also of limited effect, in that it dealt with "past performance information for an affiliate that had performed similar contracts". Moreover, GAO decisions are of very limited value, given the significant difference between the legislative mandates of the Tribunal and the GAO. The GAO is required "to ensure that [the procuring entity's evaluation] was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations", which might potentially include measures that have nothing to do with the trade agreements.

In *AmeriData*, the issue considered by the Tribunal was limited to standing to pursue a complaint, as referred to above.

The complainants also argued that CIDA's decision in this instance was contradictory to the manner in which CIDA dealt with PwC and IBM Canada in another similar tendering situation and filed confidential copies of relevant procurement documentation for that solicitation. The Tribunal notes that the circumstances in the other solicitation were different, given that a contract was entered into between CIDA and IBM Canada , clearly evidencing CIDA's consent to the assignment. Moreover, there is nothing preventing CIDA from consenting to such an assignment in one case and refusing in another, provided that, in so doing, it complies with its legal duties.

As noted above, the complainants also argue that CIDA erred by rejecting the complainants' clarification letter dated October 25, 2002. In this connection, they submit that CIDA had a duty to seek clarification of any matter relating to the proposal, about which it was uncertain, before disqualifying the proposal. They specifically alluded to their statement, in their proposal, regarding the imminent reorganization of PwC and submitted that it had been framed as nothing firmer than a statement of intention at the time.

The Tribunal does not agree with this line of argument. It is true that, in some circumstances, the Tribunal has held that a procuring department may seek clarification of a proposal when assessing against the requirements of an RFP.[34] However, the Tribunal has also held that the procuring department is not under any duty to do so,[35] even where there is doubt about whether a mandatory requirement in an RFP is

30. (22 May 2001) 54 O.R. (3d) 161 (Ont. C.A.).
31. R.S.O. 1990, c. E. 14.
32. *Re Complaint Filed by MaxSys Professionals & Solutions Inc.* (6 May 2002) (CITT).
33. (9 September 1998) B-280261.
34. *Supra* note 33 at 12.
35. *Re Complaint Filed by Safety Projects International Inc.* (24 August 1998), PR-98-007 (CITT).

met.[36] Furthermore, the Tribunal has indicated that it is inappropriate to accept clarification information that would constitute a change in a substantive element of the bid.[37]

The complainants asserted that, in letters dated October 9 and October 25, 2002, they notified CIDA that the rated personnel resources set out in the proposal would not be affected by the change in PwC's ownership and that, in any event, PricewaterhouseCoopers was authorized to negotiate and enter into the contract if the consortium was the successful bidder.

Both letters were filed after the closing date of the procurement (September 12, 2002) and, in the Tribunal's view, contradict the statement in the consortium's proposal that "once the transaction has been completed, it is our intention that any subsequent negotiations with you will be conducted by IBM or any entity within IBM's group, and that any contract which may be agreed with you will be entered into by such entity." Accordingly, the Tribunal considers that both letters constitute changes to a substantive element of the consortium's proposal after the procurement closing date and, hence, could not be considered in CIDA's evaluation.

The complainants also argued that CIDA interpreted the RFP in too rigid a manner and without regard for the flexibility that the RFP framework provided in relation to the conduct of negotiations. The Tribunal does not agree with this argument. CIDA is obligated to evaluate proposals in accordance with the requirements of the RFP. In the Tribunal's view, nothing in the RFP indicates that it is to be interpreted in a more flexible way than would be called for by the normal rules of interpretation.

The complainants also alleged that CIDA's position, i.e. disqualifying the consortium's bid for technical failure to comply with the above mandatory requirements, is "illogical", "creates a Catch-22 situation for bidders" and "leads to an apparent absurdity".[38] To the extent that the complainants are alleging that CIDA's evaluation of compliance with the mandatory requirements was inappropriate, the Tribunal does not consider the allegations to be well founded, as discussed above. To the extent that the complainants are alleging that, contrary to the trade agreements, certain requirements of the RFP are not essential for verifying the bidder's capacity to perform the contract in question, such a ground of complaint would have been filed outside the time limit prescribed by the Regulations and, hence, cannot be considered by the Tribunal.

Moreover, the Tribunal does not share the complainants' view that, if CIDA's position were upheld, it would be difficult to see how companies in like circumstances could ever bid on an RFP. The Tribunal sees no reason why, if structured correctly, the complainants could not have submitted a compliant bid, for example, by incorporating an appropriate requirement for CIDA's prior consent to the assignment or by making the appropriate IBM entity a member of the bidding consortium.

The Tribunal, therefore, finds that the complaint is not valid.

The complainants and CIDA have asked for their costs in this complaint. Given the Tribunal's determination, in which success is evenly divided between the parties, costs are denied. Moreover, the Tribunal finds that this complaint raises complex issues concerning government procurement that were in the public interest to have litigated and, therefore, each party should bear its own costs.

36. *Re Complaint Filed by Deloitte & Touche Consulting Group* (4 May 1999), PR-98-046 (CITT).
37. *Re Complaint Filed by CVDS Inc.* (22 January 2003), PR-2002-035 (CITT).
38. Complaint at 15.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

Ellen Fry
Ellen Fry
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member