

Ottawa, Thursday, August 17, 2000

File No.: PR-98-047R

IN THE MATTER OF a determination by the Canadian International Trade Tribunal, dated June 17, 1999, relating to a complaint filed by Novell Canada, Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, (4th Supp.), c. 47;

AND IN THE MATTER OF a decision of the Federal Court of Appeal which referred the above-mentioned determination back to the Canadian International Trade Tribunal to consider whether, in respect of the designated contract, the Department of Public Works and Government Services and the Department of National Defence are engaged in contract splitting to avoid their obligations under the *North American Free Trade Agreement* and other trade agreements and, if so, to determine an appropriate remedy.

DETERMINATION OF THE TRIBUNAL

The Canadian International Trade Tribunal, further to a judgment of the Federal Court of Appeal dated May 26, 2000, considered Novell Canada, Ltd.'s ground of complaint whether, in respect of Solicitation No. W8474-9-QQD8/A, concerning the procurement by the Department of Public Works and Government Services for the provision of 325 Microsoft Windows NT Server 4.0 licences and 12,000 client access licences for the Department of National Defence, the Department of Public Works and Government Services and the Department of National Defence are engaged in contract splitting to avoid their obligations under the *North American Free Trade Agreement*, the *Agreement on Internal Trade* and the *Agreement on Government Procurement*.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal, after finding that the solicitation at issue relates to components of a network operating system rationalization project of the Department of National Defence, recommends, as a remedy, that the Department of National Defence dispose, outside the federal government, of the 325 Microsoft Windows NT Server 4.0 licences and the 12,000 client access licences that it acquired as a result of the above-mentioned solicitation and, if the need still exists, that it invite new proposals for this requirement in accordance with the trade agreements.

Should the Department of National Defence decide not to dispose of the server and client access licences, the Tribunal recommends, as an alternative, that, in addition to the recommendation for compensation for lost profits that it made in its determination of June 17, 1999, the Government compensate Novell Canada, Ltd. by a further amount, to be determined jointly by the Department of Public Works and Government Services and Novell Canada, Ltd. and to be submitted for the consideration of the Canadian International Trade Tribunal, which reflects the implications for Novell Canada, Ltd. of leaving undisturbed the acquisition by the Department of National Defence by means of unjustified limited tendering procedures

from Microsoft Corporation of the server and client access licences, which has handicapped and will handicap Novell Canada, Ltd.'s opportunity to be successful in competing for the requirements of the Department of National Defence's network operating system.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: August 17, 2000

Tribunal Member: Patricia M. Close

Counsel for the Tribunal: Michèle Hurteau

Complainant: Novell Canada, Ltd.

Government Institution: Department of Public Works and Government Services

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AND IN THE MATTER OF a decision of the Federal Court of Appeal which referred the above-mentioned determination back to the Canadian International Trade Tribunal to consider whether, in respect of the designated contract, the Department of Public Works and Government Services and the Department of National Defence are engaged in contract splitting to avoid their obligations under the *North American Free Trade Agreement* and other trade agreements and, if so, to determine an appropriate remedy.

STATEMENT OF REASONS

The Canadian International Trade Tribunal (the Tribunal), further to a judgment of the Federal Court of Appeal (the Court) dated May 26, 2001,¹ has reviewed the determination² which was referred back to it.

The Tribunal's inquiry in File No. PR-98-047 was conducted as a result of a complaint filed by Novell Canada, Ltd. (Novell) on February 18, 1999. On June 17, 1999, the Tribunal issued a determination that the complaint was valid because the Department of Public Works and Government Services (the Department) had used, in the award of the contract for 325 Microsoft NT 4.0 Server licences and 12,000 client access licences (the licences) for the Department of National Defence (DND), limited tendering procedures without successfully establishing that the conditions of Articles 1016(2)(b) and (d) of the *North American Free Trade Agreement*³ and provisions to the same effect in the *Agreement on Government Procurement*⁴ and the *Agreement on Internal Trade*⁵ authorizing such usage had been met. The Tribunal issued its statement of reasons with its determination on June 17, 1999.

On May 26, 2000, following the hearing of an application for judicial review under section 28 of the *Federal Court Act*⁶ brought by Novell, the Court referred the matter back to the Tribunal. In allowing the appeal, the Court directed the Tribunal to consider Novell's complaint as to whether, in respect of the designated contract (for the server and client access licences), the Department and DND are engaged in contract splitting to avoid their obligations under the trade agreements and, if so, to determine an appropriate remedy.

1. *Novell Canada, Ltd. v. The Minister of Public Works and Government Services Canada and Microsoft Corporation* (26 May 2000), A-440-99.
2. (17 June 1999), PR-98-047 (CITT).
3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
4. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.
5. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
6. R.S.C. 1985, c. F-7.

On July 13 and 27, 2000, the Tribunal informed Novell and the Department that it would implement the directions of the Court on the basis of the record in File No. PR-98-047, as it existed at the time of the Tribunal's determination on June 17, 1999, and that, therefore, it would not accept any new submissions from the parties.

SCOPE

In view of the Court's directions, the only issue to be addressed is whether, in conducting the procurement for the licences, the Department and DND engaged in contract splitting to avoid their obligations under the trade agreements and, if so, to determine an appropriate remedy. The Tribunal makes it clear that it is not rehearing the matter or conducting a *de novo* inquiry, but, as directed by the Court, will fully discharge its jurisdiction relative to the contract splitting issue raised by Novell in its complaint of February 18, 1999.

Consequently, the Tribunal will not repeat all the background information and findings that it set out in its statement of reasons dated June 17, 1999; rather, the Tribunal will limit such information and findings to the issue at hand. Subject to this determination, the Tribunal stands by its statement of reasons in File No. PR-98-047.

PROCUREMENT PROCESS

Background

During the period from 1994 to 1996, DND purchased some 100 servers for the Regular Force that were non-Banyan VINES certified. In 1996, DND purchased the Banyan StreetTalk for NT directory. The same year, DND acquired an additional 150 servers for the Reserve Force that were also not certified to operate in a Banyan Native VINES environment, notwithstanding the fact that the Banyan Native VINES network operating system⁷ (NOS) was the standard for Land Forces.⁸

In September 1995, the Informatics Team of the Management, Command and Control Reengineering Team (MCCRT), in a presentation on the DND IM Infrastructure and Strategic Investment Plan, identified "inefficient network management" as a problem. The project to resolve this problem was identified as "Network Management Rationalization". The cost of the project was estimated at \$9.9 million. The September 1995 presentation, under the title "Procurement Strategy", described the LAN rationalizations project as consisting mainly of software licences to be acquired by means of **competitive** National Individual Standing Offers.

On February 6, 1996, DND published its Long-term Capital Plan (Informatics). This plan identifies a funded project entitled "G2746, DND/CF NOS Rationalization" with a proposed cash phasing for the years 1996-97 to 1998-99. The 1996 Long-term Capital Plan (Informatics) describes project G2746 as follows:

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7. The network operating system manages the network and resources such as computers, files, mail and applications, directory services, print services, etc. Hence, it allows for the interconnection of computers for the purposes of sharing data and peripherals. It is the backbone of the information technology infrastructure of an organization.
 8. Land Forces, a subset of the Canadian Forces, is composed of the Regular Force and the Reserve Force.

DND/CF Network Operating Software Rationalization: This project will analyse and select among the various options for rationalizing the DND/CF Network Operating System (NOS) environment and thus facilitate the capability for departmental interoperability at the NOS level.

The 1996 edition of Hutchison Report⁹ confirms DND's intention to rationalize its NOS environment. The report states:

There is a requirement to standardize on the network operating system. Technical requirements are being developed and an RFP is to be issued in 1997/1998.

On April 22, 1997, DND published a revised version of its Long-term Capital Plan (Informatics). This version of the plan describes project G2746 as follows:

DND/CF Network Operating Software (NOS) Rationalisation: This project's initial objective was to analyse and select among the various options for rationalising the DND/CF Network Operating System (NOS) environment and thus facilitate the capability for departmental interoperability at the NOS level. After conducting several studies, it appears that a different approach would be more suitable. A cross-platform core Intranet [service] would both follow the trend of industry and achieve the global, departmental-wide communication system objectives.

The 1997 Hutchison Report still reports that "[t]here is a requirement to rationalize the NOS with a view to reducing the number. Currently there are multiple products and multiple versions in use" and "NOS rationalization will require software".

In the March 1998 update of project G2746, "Rationalize DND/CF Network Operating Software Synopsis Sheet", the MCCRT reports: "DIRPM [Director Information Resource Product Management] will be tasked to analyse the various options for rationalizing the DND/CF NOS environment and thus facilitate the capability for departmental interoperability".

The March 1998 update to the synopsis sheet for project G2746 identifies target dates, project costs and project cash flow. The same update also addresses the issue of procurement strategy for project G2746. It states: "Once DIRPM makes a determination on a NOS solution, procurement for a single NOS for the NCR (National Capital Region) may be made from the existing NISOs, or competitively as required. At the same time as the NCR NOS selection is done, a business case will be developed for the possible roll out of a single NOS for the rest of DND/CF".

On October 8, 1998, the Department received a requisition from DND for the acquisition of 325 Microsoft NT 4.0 upgrade server licences required to migrate Banyan Native VINES servers to a Banyan StreetTalk for NT solution. On November 18, 1998, DND amended the requisition to add a further requirement for 12,000 Microsoft client access licences for the 12,000 Banyan users to access the Banyan StreetTalk for NT servers.

On November 12, 1998, DND officials confirmed that project G2746 had been cancelled and that an "alternative approach" to meeting the requirement would be taken.

On December 11, 1998, an Advance Contract Award Notice (ACAN) for the licences was published on Canada's Electronic Tendering Service (MERX) with a closing date of December 22, 1998. The ACAN reads, in part, as follows:

9. Hutchison's *Canadian Federal Government Information Technology Market Report*.

UPGRADE SERVER SOFTWARE LICENSES - ACAN

STATEMENT OF WORK:

Proposed callup against the *Microsoft* standing offer for *Microsoft Windows NT Server 4.0*^[10] (qty 325) and Client Access Licences (qty 12,000). [DND] is migrating 12,000 of its Banyan Users from a Banyan Vines to a Banyan for *NT* solution therefore *NT* Licenses are required. . . . The interchangeability of product alternatives is not an option available technically given the continued use of the Banyan Streettalk.

Post Year 2000 that the department will be reassessing its Network Operating System requirements.

On January 11, 1999, Novell challenged the proposed procurement.

On January 13, 1999, Banyan Systems Inc. announced a strategic alliance with Microsoft Corporation (Microsoft). The object of the alliance was described in a press release, in part, as follows:

The alliance will focus on meeting customer needs in the following areas: . . . enterprise internetworking and directory services, including interoperability between, and migration from Banyan VINES® and StreetTalk® to Windows NT Server and Windows® 2000 including the Windows NT directory services and the Microsoft Active Directory.

As a result of this agreement, new and existing customers will have the ability to expand their networks cost-effectively and realize the benefits of the Internet by deploying the Microsoft enterprise platform.

On February 10, 1999, the Department awarded a contract to Microsoft.

POSITION OF PARTIES

Department's Position

The Department submitted that Novell erroneously assumed that DND always intended to use the Microsoft product and never intended to use an open competitive process to acquire the best solution to its NOS requirements. Land Forces, the Department submitted, has no plan to move to a pure Microsoft NT environment. DND is committed to the Banyan product, and, in fact, a maintenance support plan contract with Banyan has been put in place for a period of two years.

The Department submitted that Land Forces is simply evolving its mixed NOS from Banyan Native VINES and Banyan StreetTalk for NT to a common configuration: Banyan StreetTalk for NT. This move, the Department submitted, requires a change in the underlying server operating system (the kernel) from a Unix system to a Microsoft NT system. This change, the Department submitted, does not constitute the procurement of a complete Microsoft NOS solution, nor does it constitute a change of the NOS from one manufacturer to another manufacturer.

The Department submitted that, if one considers that the value of the ACAN at issue is only \$350,000 and further considers that Novell is requesting financial compensation in the order of \$1,956,000, it is clear that Novell is not complaining about present actions, but anticipated ones. Thus, the Department argued, Novell's complaint is, at best, premature.

10. The Microsoft web page describes the NT product as follows: "Since it was first released in 1993, Microsoft® Windows NT® Server has established itself as the network operating system (NOS) of choice".

Novell's Position

Novell submitted that the solicitation at issue is a step in a well-defined DND NOS rationalization project that has been underway for several years. This NOS rationalization project, Novell submitted, has been implemented by project splitting and without competition, contrary to the trade agreements and, as a result, Novell has been prejudiced.

More explicitly, Novell submitted that DND non-competitively bought or “upgraded” to the Banyan StreetTalk for NT directory, notwithstanding the fact that it is an entirely new product. StreetTalk for NT, Novell submitted, can be used as a migration tool to move the StreetTalk directory service from a Banyan VINES environment to a Microsoft NT environment. DND bought NT server software and the necessary certified hardware off the National Master Standing Offers. StreetTalk for NT then enabled DND to move the directory off the VINES platform onto the Microsoft NT platform. At this point, Novell submitted that NT is fully deployed and is controlled by StreetTalk for NT. Once this is accomplished, there is no longer a need to keep or maintain the Banyan VINES NOS. The final stage of the migration will be the replacement of the StreetTalk for NT directory with Microsoft Active Directory. At this point, Novell argued, DND will have transitioned from Banyan Native VINES to Windows NT server.

TRIBUNAL'S DECISION

In its judgment, the Court indicated that “[i]t is, therefore, difficult to understand how the Tribunal could say that only the server and client access licences contract was before it and that prior and future procurement actions were not”. The Court went on to state that “it is difficult to interpret the words ‘the solicitation at issue, whether or not a component of a larger procurement, . . .’ as meaning anything other than the Tribunal refusing to turn its mind to whether, in fact, the contract at issue was a component of a larger procurement process, one of the very issues raised by the applicant [Novell] in its complaint to the Tribunal”. The Court also indicated that it “cannot understand the difference, if there is one in these circumstances, between an ‘overarching procurement, implemented piecemeal’ and ‘the unfolding of an information technology strategy’” as the Tribunal put it in its statement of reasons. The Court concluded: “this begs the question of whether, on the evidence put before it by the applicant, the applicant was being foreclosed from bidding on future DND Network Operating System procurement contracts and if so, whether the compensation recommended by the Tribunal in lieu of competitive tendering for the designated contract was adequate”.

The Tribunal will address the concern raised by the Court. More specifically, the Tribunal will address whether the Department and DND engaged in contract splitting to avoid their obligations under the trade agreements and the adequacy of the remedy that it recommended. In this context, the Tribunal will clarify what it meant by “the solicitation at issue” and the distinction that it made between “the unfolding of an information technology strategy” and an “overarching procurement, implemented piecemeal”.

Article 1017(1)(a) of NAFTA defines the expression “procurement process” as follows: “begins after an entity has decided on its procurement requirement and continues through the contract award”. Article 1001(5) of NAFTA defines “procurement” as follows: “includes procurement by such methods as purchase, lease or rental, with or without an option to buy”. Given that NAFTA’s definition of procurement is circular, it is necessary to give the word its plain English meaning. *Webster’s Ninth New Collegiate Dictionary* defines “procure” as: “to get possession of: obtain by particular care and effort”.¹¹ Similarly, *The Canadian Oxford Dictionary* defines “procurement” as “the act or an instance of procuring” and “the act of

11. 1983, s.v. “procure”.

buying or purchasing, esp. by a government” and defines “procure” by the following: “to obtain, esp. by care or effort; acquire . . .”.¹² An additional source, Termium®, defines “procurement” as follows: “The process or responsibility of obtaining materials, supplies, or services for any organization, including the actual process of purchasing, the preparation of specifications, the submitting of call for tenders, the inspection of materials, storage, distribution and so on”. It, therefore, follows that the procurement process before the Tribunal begins once a government institution has decided to obtain certain goods or services, by such methods as lease, rent or purchase, and continues through the contract award for such goods or services.

In the Tribunal’s opinion, the distinction that the Tribunal made between “the unfolding of an information technology strategy” and “an overarching procurement, implemented piecemeal” rests fundamentally on the differentiation between the notions of planning and strategizing versus the notion of buying or acquiring conveyed in the definition of “procurement”. It is clear from the evidence that DND has, since the mid-90s, identified a need to rationalize its NOS environment, one of several elements of its long-term “information technology strategy”. Within this strategy, there are numerous plans and project documents, which describe this NOS rationalization project. In the Tribunal’s opinion, although these documents identify a clear decision by DND to rationalize its NOS environment, these documents “as such” do not amount to a procurement or the launching of a procurement process, in that, by and of themselves, these documents do not cause “the act of buying or purchasing” any goods and/or services. In other words, such documents do not solicit or elicit responses from the supplier community. Their primary focus is the elaboration of strategy and related plans and projects within the government.

It is generally the Notice of Proposed Procurement (NPP) that triggers responses from the supplier community and, therefore, initiates a procurement process. In this instance, the NPP for the licences was in the form of an ACAN, Solicitation No. W8474-9-QQD8/A, “the solicitation at issue”. The Tribunal finds that the solicitation at issue concerns the supply of some components necessary to DND’s NOS rationalization project. The licences procured through the designated contract (i.e. the solicitation at issue) are clearly components of a NOS. However, in the Tribunal’s opinion, it cannot be said that “an overarching procurement” for a NOS has commenced since the supplier community has not been invited to respond to such an NPP. Clearly, elements of DND’s NOS rationalization project are being put into place through the procurement of the licences, but the procurement of a NOS, in its totality, is not taking place. In the Tribunal’s opinion, there is no evidence that a NOS procurement process within the meaning of the trade agreements has been initiated.

Turning to the issue of contract splitting, raised by Novell, it is clear to the Tribunal that a number of procurements have taken place (e.g. some 250 non-Banyan VINES certified servers and StreetTalk for NT licences were acquired by DND between 1994 and 1996) which, along with the licences, can reasonably be viewed as components of a NOS rationalization project. It is also clear that certain other procurements not yet initiated (e.g. Microsoft Active Directory) will be required to complete the DND NOS rationalization project, at least as argued by Novell. Although these past and potential procurements mentioned in Novell’s complaint, together with the solicitation at issue, can be viewed as components of the same NOS rationalization strategy or project, these procurements, nevertheless, constitute separate procurements (i.e. different designated contracts) within the meaning of the *Canadian International Trade Tribunal Act*¹³ and *Canadian International Trade Tribunal Procurement Inquiry Regulations*.¹⁴ The time to complain about the server procurements that took place during the period from 1994 to 1996 has long since

12. 1998, s.v. “procurement” and “procure”.

13. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].

14. S.O.R./93-602.

expired, and the time to complain about DND's alleged future procurement for Microsoft Active Directory was, at the time that the Tribunal made its determination, premature. It is, in that sense, that the Tribunal indicated in its determination of June 17, 1999, that "[t]he merits of prior or future procurement actions referred to or mentioned by the parties in the record of these proceedings are not before the Tribunal"¹⁵ [emphasis added].

The Tribunal will now examine whether the procurement of a NOS, piecemeal, necessarily amounts to "contract splitting" of a kind prohibited by the trade agreements.

Article 1001(4) of NAFTA provides that no Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of Chapter Ten. Article 1002(4) further provides that, further to Article 1001(4), an entity may not select a valuation method, **or divide procurement requirements into separate contracts**, to avoid the obligations of Chapter Ten. The AGP and the AIT contain similar provisions. The above provisions make it clear that entities cannot divide, meaning **split procurements**, in order to avoid the obligations of the trade agreements. In the Tribunal's opinion, "contract splitting" within the meaning of the trade agreements means "procurement splitting", i.e. the division into parts of a procurement as defined above (i.e. a requirement that was the object of an NPP triggering the supplier community into submitting proposals). This definition does not, in the Tribunal's opinion, encompass the splitting of an information technology strategy and related plans and projects, as argued by Novell, as these strategy, plans and projects, do not, properly speaking, form procurement contracts within the meaning of the trade agreements. As indicated above, such a strategy, plans and projects are essentially planning instruments designed for the internal use of the government and do not solicit responses from the supplier community.

Because the solicitation for the procurement of the licences (the solicitation at issue/the designated contract) was covered by the trade agreements (it is by virtue of these trade agreements that the Tribunal, in File No. PR-98-047, decided that the Department and DND had improperly used limited tendering procedures), it cannot be said that this procurement was "split to avoid" the obligations of the trade agreements. Indeed, the limited tendering procedures used by the Department and DND, in this instance, are included in the trade agreements and their usage constitutes an aspect of the procurement process that is adjudicable by the Tribunal. If, for example, in splitting the solicitation at issue into smaller procurement contracts, the Department and DND had caused the estimated value of the resulting procurements to fall below the monetary thresholds of the applicable trade agreements and, thereby, subtracted such procurements from the obligation of the trade agreements, then, in the Tribunal's opinion, one could argue that the Government has divided contracts in order to avoid its obligation under the trade agreements. This is not the case here.

In the Tribunal's view, in this instance, the Department and DND have not divided an alleged procurement contract for a NOS in order to avoid their obligations under the trade agreements for two reasons. First, a NOS procurement contract within the meaning of the trade agreements did not exist that could be parcelled out, and secondly, in any event, the solicitation at issue, at all times, was covered by the provisions of the trade agreements.

Although, in finalizing its statement of remedy in File No. PR-98-047, the Tribunal realized that the solicitation at issue was but a component of a NOS rationalization project, it limited its considerations to the solicitation at issue (the designated contract). The Court indicated that, in limiting its consideration of

15. *Supra* note 2 at 11.

prejudice under subsection 30.15(3) of the CITT Act to the designated contract, the Tribunal may not have assessed a proper remedy for Novell.

The Tribunal understands from the Court's decision that its jurisdiction is not so limited and that, in fact, a proper interpretation of paragraph 30.15(3)(b) of the CITT Act requires that the Tribunal consider fully the degree to which the complainant and all other parties were prejudiced. The Tribunal, in its determination of June 17, 1999, recommended that Novell be compensated for the profit that it lost as a result of being deprived of the opportunity to participate in the solicitation at issue, to be successful and to profit therefrom. The Tribunal is persuaded that the solicitation at issue concerns component parts of a NOS rationalization project. In light of this and because, for example, the 250 non-Banyan VINES certified servers acquired during the period from 1994 to 1996 and the licences acquired by DND through the solicitation at issue will have a direct, material, lasting and conditioning impact on Novell's attempt to compete for DND NOS requirements, inasmuch as this opportunity materializes, the Tribunal will recommend, should DND decide not to dispose of the licences and because the said licences, as was determined by the Tribunal in File No. PR-98-047, were acquired in breach of the trade agreements, that Novell be further compensated by an amount to be determined through the process set out below.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal finds that the solicitation at issue relates to component parts of the DND NOS rationalization project. Because the licences acquired through the solicitation at issue will have a direct, material, lasting and conditioning effect on Novell's ability to successfully compete for the DND NOS requirements, the Tribunal recommends that DND dispose, outside the federal government, of the licences and, if the need still exists, that it invite new proposals for this requirement in accordance with the trade agreements.

In the alternative, the Tribunal recommends that, in addition to the compensation for lost profits that it recommended in its determination of June 17, 1999, the Government compensate Novell by a further amount, to be determined jointly by the Department and Novell and to be submitted for the consideration of the Tribunal. This compensation will reflect the implications for Novell of leaving undisturbed the irregular acquisition by DND of the licences, which has handicapped and will handicap Novell's opportunity to be successful in competing for DND NOS requirements.

Patricia M. Close
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Presiding Member