

Ottawa, Wednesday, July 7, 1999

File No.: PR-99-001

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

AND IN THE MATTER OF 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 section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services terminate the contract for the 600 Microsoft NT server licences. The Canadian International Trade Tribunal further recommends that the requirement of the Department of Human Resources Development for a contingent technical alternative to its network operating system be competed and that the specifications be drafted in generic performance terms.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Novell Canada, Ltd. its reasonable costs incurred in relation to filing and proceeding with this complaint.

Patricia M. Close

Patricia M. Close

Member

Michel P. Granger

Michel P. Granger

Secretary

The reasons for the Tribunal's determination will be issued at a later date.

Date of Determination:	July 7, 1999
Date of Reasons:	July 14, 1999
Tribunal Member:	Patricia M. Close
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Dominique Laporte
Counsel for the Tribunal:	Marie-France Dagenais
Complainant:	Novell Canada, Ltd.
Counsel for the Complainant:	Ronald D. Lunau
Intervener:	Microsoft Corporation
Counsel for the Intervener:	Milos Barutciski
Government Institution:	Department of Public Works and Government Services

Ottawa, Wednesday, July 14, 1999

File No.: PR-99-001

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

AND IN THE MATTER OF 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

On April 8, 1999, Novell Canada, Ltd. (Novell) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Solicitation No. V9344-8-0199/A) by the Department of Public Works and Government Services (the Department) on a sole source basis, from Microsoft Corporation (Microsoft), of 22,000 Microsoft Windows NT client access licences (CALs) and 600 Microsoft Windows NT server licences for the Department of Human Resources Development (HRDC).

Novell alleged that the Department, in conducting this procurement, acted contrary to several provisions of the *Agreement on Government Procurement*² (the AGP), the *North American Free Trade Agreement*³ (NAFTA) and the *Agreement on Internal Trade*⁴ (the AIT). Specifically, Novell contends that: (1) in 1994, HRDC formulated a strategy and began a process of replacing its multiple network operating systems (NOSs) with a single department-wide system; (2) it established a comprehensive strategy aimed at merging its existing HRDC and Income Security Programs (ISP) networks into one network; (3) initially, a change to either Banyan Systems Inc. (Banyan) or Novell, the then existing suppliers, was contemplated; however, at a time and by a process unknown to Novell, Microsoft Windows NT was added to HRDC's list of contenders; (4) in a draft systems document published by HRDC in 1997, HRDC stated that its plan was to convert its system from Banyan Native VINES to Microsoft Windows NT through Banyan StreetTalk for NT; (5) the implementation of HRDC's strategy unfolded by means of dividing its requirements for a department-wide NOS into a series of separate steps, leading ultimately to the procurement of the Microsoft licences at issue; (6) at no stage of its NOS implementation strategy did HRDC provide other suppliers, like Novell, with any information regarding its proposed network requirements; (7) HRDC has not permitted Novell to tender the supply of its directory service, Novell Directory Services (NDS) for NT, as the directory for the Microsoft Windows NT-based network; and (8) despite Novell's protests, HRDC has not provided

1. R.S.C. 1985, c. 47 (4th Supp.).

2. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

3. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

4. As signed at Ottawa, Ontario, on July 18, 1994.

Novell with the information necessary to permit Novell to respond to the Advance Contract Award Notice⁵ (ACAN) and to demonstrate its ability to meet HRDC's requirements.

Novell requested, as a remedy, that the proposed contract award to Microsoft not proceed and that the Department undertake a competition for the supply of the NOS to HRDC in accordance with the trade agreements. In the alternative, Novell requested compensation for lost profits. Novell also requested its costs in relation to proceeding with this complaint.

On April 13, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁶ (the Regulations). That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On April 22, 1999, the Department wrote to the Tribunal certifying that the solicitation was urgent and that a delay in awarding a contract would be contrary to the public interest. Accordingly, on April 27, 1999, the Tribunal rescinded its postponement of award order of April 13, 1999. On April 30, 1999, Novell wrote to the Tribunal requesting that the Tribunal either suspend or rescind its order of April 27, 1999, and conduct a preliminary hearing into the validity of the certification filed by the Department in this instance. On May 11, 1999, the Tribunal informed the parties that Microsoft had been granted intervener status in the matter. On May 21, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁷ Novell filed its comments on the GIR with the Tribunal on June 3, 1999. On June 4, 1999, Microsoft filed comments on the GIR with the Tribunal.

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.

PROCUREMENT PROCESS

The following information derived from the parties' submissions is provided by way of background information.

Since 1991, HRDC has had a department-wide enterprise licence to operate its Banyan Native VINES NOS. This was obtained through a competitive solicitation process in which Novell participated. Since then, HRDC has continued to maintain and upgrade its NOS to some 22,000 users across Canada. In 1996, the developer and manufacturer of Banyan Native VINES made a corporate decision to "port" Banyan Native VINES to more open platforms, i.e. Novell NetWare and Microsoft Windows NT, through its directory application, StreetTalk. According to the GIR, StreetTalk for NT was provided by Banyan as an upgrade to the Banyan Native VINES product by "porting" the essential StreetTalk directory application to reside in an NT operating system environment. A different but comparable development was made available by Banyan with respect to the Novell NetWare product; however, market forces dictated the discontinuation

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5. A notice of intent to solicit a bid and negotiate with only one firm. This is not a competitive bid solicitation notice. Suppliers, however, on or before the closing date indicated, may identify their interest and demonstrate their capability to perform the contract.
 6. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.
 7. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

of this product line. As a result of the development of StreetTalk for NT, Banyan clients had a choice between Banyan and Microsoft operating systems.

On March 2, 1999, an ACAN for this procurement was published on Canada's Electronic Tendering Service (MERX). The ACAN reads, in part:

Background:

Human Resources Development Canada (HRDC) has a Departmental license for Banyan Vines and Banyan StreetTalk for Microsoft NT currently in place.

A single version of Native Vines (Ver 8.5) is being implemented to create the primary Year 2000 Network Operating System. In addition, for contingency purposes, the technical alternative to the primary implementation is to install Banyan's StreetTalk for Microsoft NT since it is the only Banyan alternative to Native Vines which retains Banyan functionality. This software installation needs to be in place for Year 2000 readiness.

It should be noted that Banyan's public position, as described in corporate press releases over the last several years, indicated that a transition from a Banyan Vines to a Banyan StreetTalk for Microsoft NT (ST4NT) implementation was necessary since the Native Vines product is being phased out. As a consequence HRDC has acquired a Departmental license for the Banyan StreetTalk for NT product.

Situation

HRDC management requires that a contingency plan be in place for rapid deployment. Banyan StreetTalk for Microsoft NT is the only alternative to meet this requirement. HRDC management has decided to implement this contingency plan. To accomplish this requires the acquisition of the 600 Microsoft NT Server and 22,000 Client Access Licenses.

Rationale

1. The move from Native Vines to ST4NT, does not alter HRDC's dependencies on Banyan's directories, Banyan Mail, CALANDAR, etc. Banyan is currently providing a robust directory service via its directory service (STDA), for the HRDC environment. This service is critical to the continuing functionality of the HRDC network.
2. Given that the department is already licensed for Banyan Vines and Banyan StreetTalk for Microsoft NT, on a Departmental basis, it is proposed to acquire the licensed product and rights to the Microsoft NT Client Access Licenses and Microsoft NT Server Licenses. This course of action is allowable within the existing trade Agreements.
3. The contingency plan has been deemed necessary by HRDC Management to address Year 2000 and to ensure minimum operational risk, maximum full value of existing licenses and a stable IT infrastructure, which follows Banyan's corporate and product evolution.

Applicable NAFTA Articles:

For the items listed in the Statement of Work, Articles 1016(.2)(b) and 1016(.2)(d) of NAFTA are applicable as an extension to existing supplies and for the absence of competition for technical reasons.

On March 8, 1999, Novell sent a facsimile to the Department challenging the ACAN.

VALIDITY OF THE COMPLAINT

Department's Position

The Department indicated that, when the Banyan StreetTalk for NT upgrade was first acquired in 1996, HRDC received confirmation from Microsoft that CALs were not required for the upgrade of Banyan Native VINES to Banyan StreetTalk for NT. However, according to the GIR, in the fall of 1998, discussions with account representatives from both Banyan and Microsoft led the Department and HRDC to believe that CALs would be required in order to upgrade the Banyan Native VINES operating system to the Banyan StreetTalk for NT operating system. It is on the basis of this latter belief that the ACAN was drafted. However, according to the GIR, the Department and HRDC were not totally convinced of the necessity of the CALs and undertook an examination of the licensing requirements and conducted physical tests to determine whether the NT operating system was managing individual client access to the NOS. The tests revealed that the StreetTalk directory application was the only client of the NT operating system and that the NT operating system was not managing the individual client access requirements. On this basis, the Department and HRDC determined that CALs were not required and cancelled the requirement for 22,000 CALs. The GIR concluded that, since the CALs are not required, HRDC is neither installing nor running a "parallel" NOS. HRDC is only replacing its server operating system and retaining the basic network services provided by the StreetTalk product.

According to the GIR, on March 29, 1999, the Department informed Novell verbally that, following an investigation of the Banyan/Microsoft licensing relationship, coupled with physical testing of the user access requirements of the Microsoft Windows NT operating system "through the Banyan NOS", it was apparent that CALs were not required and that only the 600 Microsoft Windows NT Server 4.0 operating system licences had to be purchased.

Concerning the contingency plan issue, the Department noted that HRDC has installed Banyan Native VINES version 8.5 and is conducting tests to ensure the veracity of Banyan's claim of Year 2000 compliance. However, the Department indicated that installing an upgraded version of the Banyan Native VINES product does not, in and of itself, constitute a contingency plan to address the potential failure of the NOS.

The Department submitted that the fact that Novell has not reflected in its complaint that the 22,000 CALs are not required anymore, which Novell knew before it filed its complaint, is misleading to the Tribunal. Rather than concentrating on the ACAN, the Department argued that Novell has chosen to provide two categories of documents which have no bearing on, or relevancy to, the solicitation and which it uses as the basis to portray its speculations, beliefs and erroneous conclusions as fact, presumably to persuade the Tribunal that Novell is "the innocent victim of some vast conspiracy".

The Department submitted that the first category of documents⁸ is a collection of draft documents, policy statements and statements of opinion which do not represent or record internal HRDC decisions and which have no influence on any procurement process conducted by the Department. The second category of documents⁹ have not been used in the context of this ACAN.

8. October 1994, "HRDC Informatics Policy"; December 1994, draft "Strategic Information Plan"; March 1995, final "Strategic Information Plan"; and March 1997, "HRDC Target Architecture and Technology Vision".

9. March 1999, "Vendor Presentation Material"; and March 30, 1999, ACAN for project management.

With respect to the Hutchison report,¹⁰ the Department submitted that the report consolidates potential marketing opportunities for the information technology (IT) private sector and has no influence or relevancy to the operations of the government in relation to IT acquisition or strategic directions.

The Department argued that Novell makes unsubstantiated allegations of “project splitting” only to support its position that HRDC is seeking to replace its existing Banyan Native VINES NOS. Novell, the Department submitted, has no basis in fact to support this allegation. To appreciate this position, the Department submitted that it is important to understand the distinction between a NOS and a server operating system as follows. In essence, a NOS permits the consolidation of hardware and its resident software, allowing the connection, communication and processing of information between and among multiple computers and users. Through its ability to command and control users through applications such as StreetTalk, the NOS permits users to access the network and the network functions, such as network printing, filing, security, etc. The NOS is the crucial IT infrastructure backbone of the organization. A server operating system, for its part, gives users access to the common functions of the server, such as printing, filing, security, etc. However, without the communication facilities provided by the NOS, the server can only operate as an individual machine.

The Department asserted that the NOS currently installed at HRDC is the Banyan Native VINES. HRDC, the Department submitted, does not require another NOS, rather it needs licences for individual server operating systems, which will support the Banyan StreetTalk for NT NOS solution, in the event of a failure of the Banyan Native VINES server operating system.

With respect to Novell’s suggestion that its products, Novell NetWare and NDS for NT, constitute a viable alternative, this approach requires that one consider changing its NOS. This is not what HRDC is attempting to do nor intends to do in the foreseeable future. HRDC, the Department asserted, is attempting to protect its present investment in the Banyan Native VINES NOS and to address the contingency of its potential failure, year 2000 notwithstanding.

In conclusion, the Department submitted that:

- the integration of the Microsoft Windows NT Server 4.0 operating system into the existing Banyan environment is necessary because it is the only product that will address the technical requirements of the exiting NOS and provide the ability to implement the HRDC contingency plans;
- technically and operationally, HRDC needs an operating system, not a NOS. Technically, Novell is proposing a complete replacement of something that already exists, namely, the Banyan Native VINES NOS, as the Novell NetWare NOS is not technically compatible with the existing Banyan Native VINES NOS;
- the Novell NDS for NT directory is a solicitation that depends technically on Microsoft Windows NT operating systems being in place and, in addition, requires the purchase of CALs. Given that the subject matter of this procurement is the acquisition of licences for a Microsoft Windows NT operating system only, the Department submitted that it is somewhat disingenuous of Novell to propose an NT-based solution;

10. Ross Hutchison & Associates Inc.

- any speculation concerning the future of Microsoft's NOS or future procurement actions to be undertaken by any Banyan Native VINES NOS user is pure conjecture and has no bearing on, or relevancy to, the subject matter of the procurement.

The Department requested the opportunity to make further submissions with respect to the award of costs in this matter.

Microsoft's Position

Microsoft substantially agreed with the facts stated in the GIR. It submitted that Novell does not have standing to file a complaint with respect to this solicitation under subsection 30.11(1) of the CITT Act, as there is no indication in the ACAN, the complaint and the GIR that Novell could directly supply any product or service that is ultimately the subject of the solicitation.

Microsoft submitted that the limited tendering procedures provided in Articles 1016(2)(b) and (d) of NAFTA, Articles XV(1)(b) and (d) of the AGP and Articles 506(12)(a) and (b) of the AIT are applicable to the solicitation because the sole source basis for the solicitation is justified both on technical grounds and/or as an extension of an existing installation.

Microsoft argued that it is appropriate to define the use of Banyan StreetTalk for NT by HRDC as an upgrade because it is merely upgrading its server operating environment, while retaining its existing NOS.

Novell's Position

Novell opened its submission by re-stating that this procurement is, in reality, the penultimate step in an HRDC project aimed at eventually replacing the existing NOS with a single department-wide Microsoft Windows NT-based operating system. The procurement is a step in HRDC's architecture and technology vision to migrate its systems from Banyan Native VINES to Microsoft Windows NT. Novell submitted that the documentary evidence in support of this position is overwhelming. Novell argued that, since HRDC is introducing a new network based on a new operating system and since there are competitive alternatives, one of which Novell provides, this requirement should have been competed.

Furthermore, Novell submitted that there is an unwarranted tendency throughout the GIR to impugn its motives and bona fides in making this complaint. This is unjustified and unsupported, and Novell obviously has nothing to gain by expending significant resources in pursuing a frivolous complaint.

Specifically, Novell emphatically rejected the allegation that its complaint is misleading, in that it failed to indicate that the solicitation had been modified and that the 22,000 CALs were not required anymore. Novell submitted that, although it challenged the ACAN on March 8, 1999, and followed up on March 24 and 29, 1999, it never received a written response to its challenge. Novell submitted that 31 days elapsed between its initial challenge to the ACAN and the submission of its complaint to the Tribunal. In all that time, the only communication that it received from the Department was the telephone call of March 29, 1999, which the Department knew was unclear to Novell. Novell argued that, if the Department's position was really as straightforward as it is now described in the GIR, then a written reply could and should have been sent immediately to Novell.

Novell noted that, although the GIR suggests that Novell's complaint came as a surprise to the Government, in fact, the Government was anticipating such a complaint, as evidenced by the

January 30, 1999,¹¹ and the February 3, 1999,¹² e-mail transmissions. The Department, Novell submitted, proceeded with this procurement with full knowledge of Novell's likely complaint and the commercial harm which would be done to Novell.

Novell added that it is absurd for the GIR to suggest that, in the absence of any amended ACAN, which the Department does routinely every day, or of any written response to its objection letter of March 8, 1999, and subsequent correspondence, Novell should have known that the HRDC requirement had been substantially changed. Furthermore, Novell indicated that, had it known of the change in the requirement, it would not have changed its mind regarding the importance of challenging HRDC's plan to consolidate its local area networks on an NT environment.

Novell submitted that the fact that HRDC may now be taking a modest step back from its agenda, in response to objections that it has received, does not change the fact that such an agenda exists, is very well documented, has been communicated and has been largely executed. Novell submitted that the mode of implementing HRDC's plan may have changed, but that the plan itself to replace HRDC's Banyan Native VINES NOS at the earliest possible time with Microsoft Windows NT through the use of Banyan StreetTalk for NT has not.

Novell argued that the repudiation in the GIR of a large number of HRDC's documents speaks to the lack of substance and credibility of the GIR. Indeed, Novell submitted, the Systems branch of HRDC is a formal organization headed by an assistant deputy minister and supported by some eight directors general and hundreds of employees. Yet, the GIR appears to be saying that policy documents, reports, plans, target architectures, etc., prepared by public servants in the course of their official duties have no meaning.

Novell submitted that, contrary to the assertion in the GIR, Novell's letters of April 7, April 15, May 10 and 20, 1999, indicate that Novell has been and remains anxious to participate in the Request for Information process for a Request for Proposal for Office Automation and Messaging software. Furthermore, Novell submitted that the peremptory dismissal of the Hutchison report is disingenuous. The GIR, in fact, does not dispute the accuracy of the information reported in the Hutchison report. Novell argued that the internal HRDC documents and the Hutchison report are authentic, overwhelming documentary evidence which speaks volumes with respect to HRDC's plans.

Additional internal HRDC documents received after Novell filed its complaint on April 8, 1999, clearly support Novell's contentions. For example, the Project Review Document Summary for the Server Operating System Modernization project, dated October 23, 1998,¹³ clearly shows that HRDC had already decided to migrate to Banyan StreetTalk for NT as a departmental directory and to a Microsoft Windows NT server; the fact that HRDC fully intended to replace its existing Novell infrastructure for the ISP is confirmed in the Project Review Document Summary for the Year 2000 - ISSDN Compliance project dated October 23, 1998.¹⁴ Furthermore, evidence in the form of an E-mail transmission dated February 5, 1999,¹⁵ also supports the view that HRDC is migrating from a Banyan NOS to a Microsoft NOS, with year 2000 compliance being a convenient, albeit questionable, justification.

11. Tab A of Novell's comments on the GIR.

12. Tab B of Novell's comments on the GIR.

13. Tab I of Novell's comments on the GIR.

14. Tab J of Novell's comments on the GIR.

15. Tab O of Novell's comments on the GIR.

Novell submitted that, notwithstanding the claims in the GIR, the installation of an NT server environment in HRDC is not an upgrade, but rather a “Competitive Upgrade”,¹⁶ and, therefore, should have been competed.

Novell argued that the 1996 introduction of an NT-based directory (Banyan StreetTalk for NT) service to the HRDC Banyan Native VINES infrastructure was of such technical significance that it should have triggered a competition at the time. However, Novell asserted, not only was a competition not held but the Government never provided any public information about what it had done.

Furthermore, Novell submitted that the GIR makes frequent reference to the fact that Banyan Native VINES was purchased through competition in 1991, suggesting, it would seem, that, as long as the Government can make even the most tenuous connection back to that solicitation, it can do whatever it likes. Novell added that it never challenged the validity of the 1991 purchase and that it would not have challenged the Government’s decision to upgrade its NOS within the Banyan family. Novell’s objection is clear, that is, the transition from one vendor (Banyan) to another (Microsoft) without the benefit of a competitive process.

All of HRDC’s internal publications indicate that HRDC has every intention of migrating all of its existing networks to a third and new NOS besides its own and that of Banyan. According to Novell, the question of whether and when CALs will be bought to operate this new network is a secondary issue. In any event, Novell submitted that, after having installed a network composed of some 600 Microsoft Windows NT servers, when the Government finally decides (or is forced to conclude) that CALs are essential, it will have conveniently placed itself in the position of being able to issue a sole source contract to Microsoft.

Novell observed that it is apparent that the authors of the GIR are somewhat, if not totally, unfamiliar with Novell’s product. Novell does have a product called NDS for NT to provide Novell NetWare customers with the ability to manage their Microsoft Windows NT servers using the same (Novell) management tools that they currently use to administer their NetWare servers and network environment. In that same sense, NDS for NT is purchased by Novell customers that do not want to manage their NT servers with different tools.

With respect to the GIR’s assertion that Novell has accused the Government of “some vast conspiracy”, Novell submitted that it never used the term “conspiracy” in correspondence with either the Government or the Tribunal. There is a difference between conspiracy and a disregard of the procurement rules and, Novell submitted, the Government’s procurement actions are the latter.

TRIBUNAL’S DECISION

Before determining the validity of the complaint, the Tribunal will address Novell’s request of April 30, 1999, that the Tribunal either suspend or rescind its order of April 27, 1999, because the Department did not provide a valid certification.

16. An acquisition which migrates a customer from one product to an entirely different product and from one vendor to a competitor. See Novell’s comments on the GIR, para. 50.

Subsection 30.13(4) of the CITT Act provides as follows:

The Tribunal shall rescind an order made under subsection (3)^[17] if, within the prescribed period after the order is made, the government institution certifies in writing that the procurement of the goods or services to which the designated contract relates is urgent or that a delay in awarding the contract would be contrary to the public interest.

Novell asserted that the condition precedent to the Tribunal's rescinding an order under subsection 30.13(4) of the CITT Act is that the government institution make a valid certification that the procurement is urgent or that a delay will be contrary to the public interest. Novel submitted that, when the Tribunal is confronted with a certificate or a purported certificate by the Department under this subsection, the Tribunal has jurisdiction to determine whether that certificate is valid for the purposes of invoking subsection 30.13(4).

Novell submitted that the certificate produced by the Department, in this instance, is not valid because the reasons of urgency and adverse effects to the public interest invoked are not supported by the facts of the case and because the certification has been signed by an officer of the Department who might be without the necessary authority to make determinations on behalf of the government institution for the purposes of subsection 30.13(4) of the CITT Act.

The Tribunal is of the view that the legislation does not provide it with the discretion to assess the validity of a government institution's certification. Moreover, there is nothing in the CITT Act, the applicable regulations or the relevant trade agreements that rebuts the presumption, both under section 11 of the *Interpretation Act*¹⁸ and in common law,¹⁹ that the word "shall" is to be construed as creating a mandatory requirement. In addition, the Tribunal does not feel that mandatory rescission invalidates the procurement appeal process, given that the Tribunal preserves a range of remedies if the complaint is determined to be valid, whether the award of the contract is postponed or not. However, in the Tribunal's opinion, a prejudice would certainly be caused to the appeal process if government institutions were to routinely certify that designated contracts were urgent or in the public interest and had to be awarded prior to the validity of complaints being determined by the Tribunal. As to the second issue, the Tribunal is satisfied that the Director, Contract Claims Resolution Board, Audit and Review Branch, is the designated contact for the Department in matters concerning procurement complaints under the CITT Act and that he has the requisite authority to produce²⁰ the certificate.

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

17. Subsection 30.13(3) reads: "Where the Tribunal decides to conduct an inquiry into a complaint that concerns a designated contract proposed to be awarded by a government institution, the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint".

18. Section 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21, reads: "The expression 'shall' is to be construed as imperative and the expression 'may' as permissive".

19. Reference Re *Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Montreal Street Railway Company v. Normandin*, [1917] A.C. 170 (P.C.); *Re Anti-dumping Act and Re Re-hearing of Decision A-16-77*, [1980] 1 F.C. 233.

20. *Canada (Minister of Human Resources Development) v. Wiemer* (June 9, 1998), F.C.J. No. 809 (C.A.).

requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements in NAFTA, the AGP and the AIT.

The Tribunal will first address Microsoft's assertion that Novell does not have standing to file this complaint because there is no indication in the ACAN, the complaint and the GIR that Novell could directly supply any product or service that is ultimately the subject of the solicitation.

Subsection 30.11(1) of the CITT Act provides that, "[s]ubject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint". Section 30.1 of the CITT Act defines "potential supplier" as a "bidder or prospective bidder or a designated contract".

The Tribunal is of the opinion that, while Novell cannot directly supply Microsoft Windows NT server licences, it can, however, challenge the aspect of the procurement process which deals with the sourcing methodology used for the ACAN. Therefore, Novell need not demonstrate to the Tribunal its ability to participate as a bidder or prospective bidder in the specific solicitation, since the restrictive nature of the sourcing methodology used in the ACAN prevents Novell from being a potential supplier on the designated contract. In the Tribunal's opinion, Novell need only demonstrate that it would have been a bidder or prospective bidder, had HRDC's requirement for a contingent technical alternative to its installed NOS been competed. The Tribunal is satisfied that Novell meets this test (indeed, the GIR diagrams alternative designs with Novell products).

Although Novell has submitted that this solicitation is the penultimate step in HRDC's project aimed at eventually replacing its existing Banyan and Novell NOSs with a single department-wide Microsoft Windows NT-based operating system, the Tribunal wishes to make clear that only Solicitation No. V9344-8-0199/A is before the Tribunal. The 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. Accordingly, the Tribunal will limit its determination of the validity of the complaint to whether or not the Department properly invoked Articles 1016(2)(b) and (d) of NAFTA and corresponding articles in the AGP and the AIT to sole-source this requirement to Microsoft.

Article 1016(2) of NAFTA provides, in part, that an entity may use limited tendering procedures as follows:

- (b) where, . . . for reasons connected with the protection of patents, copyrights or other exclusive rights, or proprietary information or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
- (d) for additional deliveries by the original supplier that are intended either as replacement parts or continuing services for existing supplies, services or installations, or as the extension of existing supplies, services or installations, where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services, including software to the extent that the initial procurement of the software was covered by this Chapter.

Articles XV(1)(b) and (d) of the AGP include the same substantive requirements. Article 506(12) of the AIT provides, in part, that "[w]here only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10

in the following circumstances: . . . (b) where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists”.

As was established in previous Tribunal decisions,²¹ competition is the norm under the trade agreements, with limited tendering procedures being the exception. The onus is on the government institutions to establish before the Tribunal that sole-sourcing is necessary. The Tribunal adopts this view in this case.

The Tribunal is not satisfied that the Department and HRDC have successfully established that the conditions of Articles 1016(2)(b) and (d) of NAFTA, Articles XV(1)(b) and (d) of the AGP and Articles 506(12)(a) and (b) of the AIT have been met in this instance.

With respect to Article 1016(2)(b) of NAFTA, Article XV(1)(b) of the AGP and Article 506(12)(b) of the AIT, the Tribunal is not persuaded that a reasonable alternative does not exist for the requirement being procured as a contingency to the existing NOS (the GIR itself diagrams alternative designs that use Novell products). Consequently, this condition is not valid to support the use of limited tendering procedures in this case.

With respect to Article 1016(2)(d) of NAFTA and Article XV(1)(d) of the AGP, the Tribunal notes that the initial procurement of the Banyan software was not made from Microsoft and, therefore, that this procurement is not “for additional deliveries by the original supplier” and, consequently, the Tribunal finds that this article does not apply to this procurement.

For the above reasons, the Tribunal finds that the complaint is valid.

In determining the most appropriate remedy in the circumstances, the Tribunal must consider the context within which the contract was let, particularly: (1) the seriousness of the deficiency in the procurement process; (2) the degree to which Novell and other interested parties have been prejudiced; (3) the degree to which the integrity and efficiency of the competitive procurement system have been prejudiced; (4) the good faith of the parties; and (5) the extent to which the contract has been performed. HRDC’s requirement, as expressed in the ACAN and in various HRDC’s planning and strategy documents, can be fairly characterized as follows. Because of year 2000 compliance requirements and because of the Banyan decision to move out of the NOS business over time, HRDC has a requirement for a technical alternative as a contingency measure in the short term and as a more permanent alternative in the medium and long term, which will take into consideration HRDC’s financial and technological investment in its Banyan NOS and the experience that its personnel has gained with Banyan products. To attempt to sole-source the contingent technical alternative in light of the overwhelming indication of future long-term needs would be a serious prejudice to Novell and, potentially, other network software suppliers and, indeed, to the competitive procurement system itself. In the Tribunal’s opinion, market forces should decide which of the available technical alternatives should prevail. In consideration of the above, the Tribunal will recommend that the Department terminate the contract with Microsoft for the 600 Microsoft Windows NT server licences and compete this requirement for a contingent technical alternative to HRDC’s existing NOS.

21. *Novell Canada, Ltd.* (June 17, 1999), PR-98-047 (C.I.T.T.).

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the applicable provisions of NAFTA, the AGP and the AIT and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department terminate the contract for the 600 Microsoft Windows NT server licences. The Tribunal further recommends that HRDC's requirement for a contingent technical alternative to its network operating system be competed and that the specifications be drafted in generic performance terms.

Pursuant to subsections 30.16(1) of the CITT Act, the Tribunal awards Novell its reasonable costs incurred in relation to filing and proceeding with this complaint.

Patricia M. Close

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Member