

Ottawa, Thursday, June 17, 1999

File No.: PR-98-047

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 that the Government compensate Novell Canada, Ltd. for the opportunity that it lost to be awarded the contract, and to profit therefrom, in the amount of one third of the profit that it would have made, had it been awarded the contract at the price at which it was awarded to Microsoft Corporation, i.e. \$359,735.07 less GST.

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

Date of Determination:	June 17, 1999
Tribunal Member:	Patricia M. Close
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Michèle Hurteau
Complainant:	Novell Canada, Ltd.
Counsel for the Complainant:	Ronald D. Lunau
Intervener:	Microsoft Corporation
Counsel for the Intervener:	Milos Barutciski Dany H. Assaf Anita Banicevic
Government Institution:	Department of Public Works and Government Services

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International Trade Tribunal Act*.

### STATEMENT OF REASONS

#### COMPLAINT

On February 18, 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*<sup>1</sup> (the CITT Act), concerning the procurement (Solicitation No. W8474-9-QQD8/A) by the Department of Public Works and Government Services (the Department) on a sole-source basis, from Microsoft Corporation (Microsoft), of 325 Microsoft Windows NT Server 4.0 licences and 12,000 client access licences (CALs) for the Department of National Defence (DND), Land Forces Command (Land Forces).<sup>2</sup>

Novell alleges that the Advance Contract Award Notice<sup>3</sup> (ACAN) is an unsubstantiated sole source, non-competitive contract that favours a single supplier not previously involved with DND. Novell contends that Land Forces does, in fact, have the ability to make its existing network operating system<sup>4</sup> (NOS), obtained from Banyan Systems Inc. (Banyan), year 2000 compliant within the Banyan family of products and that, therefore, there is no need to resort to this ACAN. Novell further submits that the fact that Land Forces wishes to introduce new features and services into its systems is a separate issue from year 2000 readiness and that such new features and services should be properly defined and procured through competitive tendering. In summary, Novell alleges that the ACAN is biased, unfair and unnecessary.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. A subset of the Canadian Forces, Land Forces is comprised of the Regular Force and the Reserve Force. It has 15 major sites and approximately 150 armories located across Canada.
3. 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.
4. The network operating system manages the network and resources such as computers, files, mail and applications, directory services, print services, etc. It allows for the interconnection of computers and the sharing of data and peripherals. It is the backbone of the information technology infrastructure. DND currently has a large installed base in Banyan. Land Forces has approximately 14,500 Banyan users: 12,000 Banyan Native VINES users with 325 servers; and 2,500 StreetTalk for NT users in the Reserve Force with 150 servers. National Defence Headquarters also has some 10,000 Banyan Native VINES users and an additional 2,000 Banyan Native VINES users in the Canadian Forces Recruiting, Education and Training System. There also exist some 13,000 users of Novell's software products in the Air Command and the Maritime Command. Source: Government Institution Report.

Novell requests, as a remedy, that the Tribunal stop the current procurement process. In addition, Novell requests that the Department and DND hold a proper competitive solicitation process for the requirement or, in the alternative, provide Novell full financial compensation in the order of \$1,956,000.

On February 24, 1999, the Tribunal informed the parties that the conditions for inquiry set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>5</sup> (the Regulations) had been met in respect of the complaint and that, pursuant to subsection 30.13(1) of the CITT Act, it had decided to conduct an inquiry into the complaint. That same day, the Tribunal issued an order postponing the award of any contract in connection with the procurement, until the Tribunal determined the validity of the complaint. On February 25, 1999, the Department informed the Tribunal, in writing, that a contract in the amount of \$359,735.07 had been awarded to Microsoft on February 10, 1999. Accordingly, on April 9, 1999, the Tribunal rescinded its postponement of award order of February 24, 1999. On March 31, 1999, the Tribunal informed the parties that Microsoft had been granted intervener status in the matter. On April 1, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>6</sup> On April 15, 1999, the Tribunal requested that the Department respond to Novell's request of April 12, 1999, for additional information. The Department responded on April 22, 1999. On April 19, 1999, Microsoft filed submissions with the Tribunal. On April 26, 1999, Novell filed with the Tribunal its comments on the GIR, on the additional information provided by the Department on April 22, 1999, and on the points raised by Microsoft.

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.

## **BACKGROUND**

By way of background and to assist in understanding the nature of the various products which are discussed in this complaint, the following information derived from the parties' submissions is provided.

At one time, two suppliers, Banyan and Novell, were the dominant companies in the NOS<sup>7</sup> market with their Banyan Native VINES and Novell NetWare products. Microsoft then entered the market with its Windows NT software. Although Banyan, Novell and Microsoft all provide local area network (LAN) solutions, only Banyan and Novell have directories<sup>8</sup> as part of their operating systems. The Banyan directory is called StreetTalk, and the Novell directory is called Novell Directory Services (NDS). At present, Microsoft does not control its LAN functions through a directory, but is in the process of developing one, the Microsoft Active Directory.

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5. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

6. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

7. A NOS is comprised of three principal building blocks: the operating system kernel, the networking protocol and the network directory. Novell's April 26, 1999, submission at para. 45.

8. Novell explains, in its submissions, that a directory application may be thought of as a sophisticated telephone book for the network. Directories make it possible to organize, categorize and name all of the available resources to create an easy-to-access and easy-to-manage network, including client computers; file, application and communication servers; gateways; hubs; routers and printers; databases; Web servers; GroupWare; E-mail; and document management; and to allow to identify the "rights" of each user on the network.

Prior to 1993, Banyan provided the only major NOS that had a directory. Banyan developed a product called StreetTalk for NetWare (i.e. for Novell's NOS); however, the same year that it was released (1993), Novell released its own directory product (i.e. NDS). According to Novell, for a period of time, the two products competed with one another but, over time, the Novell product was the most successful of the two products.

According to Novell, Banyan made a corporate decision to get out of the business of producing network products and to concentrate on offering professional services. In this context, Banyan needed a technology solution to allow the holders of Banyan products to move to another supplier, as well as to support Banyan Native VINES users. Recognizing that Microsoft did not have a directory, Banyan developed StreetTalk for NT, a directory product that offered existing Banyan clients the ability to interconnect two separate networks (Banyan Native VINES and Microsoft Windows NT) through a common directory.

### **PROCUREMENT PROCESS**

On October 8, 1998, the Department received a requisition from DND for the acquisition of 325 Microsoft Windows NT Server 4.0 upgrade server licences to migrate 12,000 of its Banyan users from the existing Banyan Native VINES NOS to a Banyan StreetTalk for NT solution. On November 18, 1998, DND amended the requisition to add a requirement for 12,000 Microsoft CALs.

On December 11, 1998, an ACAN was published for the above requirements on Canada's Electronic Tendering Service (MERX) with a closing date of December 22, 1998. The ACAN indicates that the solicitation is conducted under the provisions of the *North American Free Trade Agreement*<sup>9</sup> (NAFTA), the *Agreement on Government Procurement*<sup>10</sup> (the AGP) and the *Agreement on Internal Trade*<sup>11</sup> (the AIT). The ACAN reads, in part, as follows:

#### **UPGRADE SERVER SOFTWARE LICENSES - ACAN**

##### **STATEMENT OF WORK:**

Proposed callup against the *Microsoft* standing offer for *Microsoft Windows NT* Server 4.0 (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. Articles 1016.2(b) and 1016.2(d) of NAFTA are applicable in this procurement for the basis for limited tendering. Specifically, 1016.2(d) is applicable because of the operational requirement to continue using as much of the existing Banyan Product as possible and achieve year 2000 compliance. 1016.2(b) also applies for technical reasons as Banyan's Product direction is clearly based on an *NT* platform. 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.

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9. 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).

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

11. As signed at Ottawa, Ontario, on July 8, 1994.

On January 11, 1999, Novell objected to the proposed procurement.

On January 13, 1999, Banyan and Microsoft announced a strategic alliance to bring enhanced business value and a competitive advantage to enterprise customers through integrated messaging, networking and Internet solutions. The announcement<sup>12</sup> indicates that “[t]he 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.” (Emphasis added)

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

## **VALIDITY OF THE COMPLAINT**

### **Department’s Position**

The Department contends that Land Forces will have the primary role in the conduct of Operation ABACUS, on behalf of DND. This operation is designed to assist civil authorities in the mitigation of the potential effects of the year 2000 problem, including possibly deploying about 20,000 troops in domestic operations. To this end, Land Forces must be able to deploy elements and connect anywhere in the Canadian Forces’ information technology infrastructure. Furthermore, to be able to conduct Operation ABACUS, the Department indicated that Land Forces must first reconfigure its information technology infrastructure to be year 2000 compliant and be able to support all of its sites.

According to the GIR, Banyan confirmed, in a letter addressed to DND dated November 3, 1998, that, while not abandoning the Banyan Native VINES product, the development of new features and services would be primarily developed on StreetTalk for NT software. Faced with this situation, the GIR submitted, Land Forces had no other choice, from an immediate operational (year 2000 compliancy) and technical standpoint, but to “upgrade” its existing Banyan NOS using StreetTalk and Banyan StreetTalk for NT to a single Banyan StreetTalk for NT configuration. This change implied the legal requirement to obtain Microsoft Windows NT Server 4.0 licences and CALs.

According to the GIR, the following factors were taken into consideration by DND in finalizing its requirement for the ACAN:

Banyan’s strategy to focus its development of new features on StreetTalk for NT provides no financial and technical motivation to server hardware manufacturers to pursue certification on Banyan Native VINES;

of the 475 servers used by Land Forces, 225 support Banyan Native VINES version 8.5 (Banyan’s current year 2000 compliant software version), while 425 support Banyan StreetTalk for NT. Given that only 50 servers must be replaced to accommodate Banyan StreetTalk for NT versus 250 servers to accommodate Banyan Native VINES, the estimated cost differential between these two options is \$9 million in favour of the StreetTalk for NT configuration option;

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12. GIR, Exhibit 1.

the current software distribution system, which was customized for Land Forces, only functions using the Banyan StreetTalk for NT product.

The Department submits that, because of the complexity of the task, the shortage of local information technology staff and the little time available to engineer a viable and robust solution, Land Forces had no choice but to upgrade its Banyan NOS, composed of Banyan Native VINES and Banyan StreetTalk for NT, to a common configuration, Banyan StreetTalk for NT, a solution already proven in the Reserves. As well, a common desktop configuration had to be adopted using a common desktop software, the StreetTalk for NT version, automatically distributed to all Land Forces members. This is key in making sure that, when an application is found not to be year 2000 compliant, then, using the automated distribution, the upgrade can automatically be pushed to all users' desktops.

The Department stated that it understands that Novell takes no issue with DND upgrading within Banyan's product line, as this is standard industry practice. Novell, the Department submitted, appreciates that, over the years, DND has made substantial investments in the installed base of Banyan's NOS products and that it has the inherent right to protect this investment by maintaining and upgrading the existing Banyan NOS, including the need to acquire new technologies to do so.

The Department recognized that DND has the ability to make its current Banyan NOS year 2000 compliant by upgrading within the Banyan family of products from the older version of Banyan Native VINES, which DND is presently using, to the most current release of Banyan Native VINES, i.e. version 8.5, made available by Banyan in mid-1998. This upgrade does not require the introduction of the Microsoft Windows NT servers and licences. This, the Department contends, is precisely Novell's objection, the non-competitive introduction of Microsoft products.

Notwithstanding the above, the Department submitted that Banyan StreetTalk for NT is the only solution, from an operational and technical perspective, that can allow Land Forces to meet the year 2000 deadline and to mount, conduct and support Operation ABACUS from any point of the Canadian Forces' information technology infrastructure, whether it is a Regular Force or a Reserve Force site. This is so, the Department asserted, because of the desktop software distribution system, the number of servers to be replaced and the information technology staff shortage to support the operation. Therefore, the Department submitted, although Banyan Native VINES version 8.5 is year 2000 compliant, it does not meet Land Forces' operational and technical requirements. Indeed, Land Forces has standardized its desktops by adopting a common desktop software which, by going to the Banyan StreetTalk for NT, can automatically push software application updates to all users. In addition, because some servers acquired by Land Forces do not support Banyan Native VINES, in order to achieve year 2000 compliance by means of Banyan Native VINES version 8.5, it would be necessary to upgrade, in fact "replace," these servers.

Furthermore, the Department asserted that, for the reasons explained above, it would be cost prohibitive to upgrade to Banyan Native VINES version 8.5 and impossible to do within the year 2000 time constraints and the requirement to support Operation ABACUS. In any event, the Department indicated that the Enterprise Management System Project will competitively acquire, in the 2000-2001 time frame, an automated software distribution tool.

The Department added that Novell erroneously assumed that DND always intended to use Microsoft products without resorting to competition. This, the Department submitted, is simply false insofar as the intentions of DND are concerned. 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.

Further, the Department argued that, without this misconception, it is clear that Novell is not complaining about present actions, but rather anticipated future ones. Thus, the Department submitted, Novell's complaint is, at best, premature. In the Department's submission, this view is supported by the fact that Novell is seeking lost profits in the order of \$1.95 million, while the current ACAN is only worth some \$350,000.

On the question of the introduction on a non-competitive basis of new features and services to the existing NOS, the Department argued that DND is staying within the family of Banyan products and, consequently, is entitled to product upgrades, including the new features and services offered by Banyan StreetTalk for NT operating system product. In the Department's submission, the requirement to procure licences from Microsoft in order to make legal use of the Banyan StreetTalk for NT does not constitute the procurement of a Microsoft NOS solution.

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

### **Microsoft's Position**

Microsoft substantially agrees with the facts stated in the GIR. It submitted that Novell has no standing to file this complaint because it is not a "potential supplier" as defined in section 30.1 of the CITT Act, in that it does not directly supply any product or service that is the subject of the solicitation or that could be used to make the Banyan Native VINES product year 2000 compliant. Therefore, it is not a "bidder or prospective bidder" on the designated contract.

Microsoft further submitted that Article 1016(2)(b) of NAFTA applies to the situation because "upgrading" to Banyan Native VINES version 8.5, as opposed to simply acquiring Banyan StreetTalk for NT, is not viable for both operational and technical reasons. Microsoft argued that Article 1016(2)(d) of NAFTA applies in this instance, as it essentially relates to additional deliveries by the original supplier that are intended as an extension of existing facilities, namely, the StreetTalk platform. Furthermore, to consider using Banyan Native VINES version 8.5 instead of Banyan StreetTalk for NT would require that DND purchase equipment which does not meet its requirements for open network architecture, interoperability, connectivity and compatibility with a great proportion of its existing equipment and automated software distribution system.

Microsoft suggested that the Banyan/Microsoft alliance reflects development in the competitive marketplace and that to allow the complaint would deprive DND of the network performance and technological advances of Banyan StreetTalk.

Microsoft argued that a procurement process driven by the requirement that suppliers not exceed the lowest common technical denominator of competing is unfair to the procuring party and fails to reward suppliers that have innovated and developed products that provide value-added solutions on an efficient and cost-effective basis.



Microsoft finally submitted that, in light of the Tribunal's role as a reviewing body, appropriate deference should be afforded to the decision of government agencies to implement one information technology solution over another because they are in the best position, from the outset, to proactively determine which solution is the most effective and cost efficient for their operational and technical requirements. If deference is not afforded, Microsoft argued that this could result in unduly encumbering the procurement process and lead to ineffective solutions and the creation of uncertainties in the government procurement process, contrary to the spirit and intent of the trade agreements. As well, Microsoft submitted, a procurement regime that so greatly diminishes the discretion of departments and that is characterized by such uncertainty will only hamper a potential supplier's ability to procure business and undertake projects with some level of comfort that their deployed efforts will not be wasted.

### **Novell's Position**

Novell submitted that, even though it moved quickly to pursue its right to object to the manner in which this procurement was conducted, the Department issued a contract on the same day that Novell was advised of the rejection of its objection, thereby depriving it of the possibility to obtain a postponement of award order from the Tribunal and to have a chance to compete for this procurement if its complaint was found to be valid by the Tribunal. This, Novell indicated, is contrary to the provision of Article 1017 of NAFTA, in that it prejudiced its rights to full remedy.

Novell submitted that the ACAN, the GIR and the April 22, 1999, letter from the Department obscure DND's actual intentions in awarding this contract. They all attempt to position the procurement as a simple "upgrade" of DND's existing Banyan Native VINES to a Banyan for NT solution. Novell argued that this is absurd. What is going on, in this instance, is that DND is moving away from its incumbent supplier without the benefit of an open competition.

Novell stated that Land Forces has used the Banyan NOS and its related technologies for many years. In addition, DND is now claiming that an upgrade of its Banyan NOS to the Microsoft Windows NT NOS is necessary to allow its systems to become year 2000 compliant. Furthermore, DND wishes to incorporate new features into its existing systems, which are apparently only available with the Microsoft Windows NT NOS. In this respect, Novell contends that DND has the ability to make its Banyan NOS year 2000 compliant by simply upgrading within the Banyan family of products to version 8.5 made available by Banyan in mid-1998. Novell takes no issue with DND upgrading within the same supplier product line, as this is standard industry practice. However, Novell does take issue with the non-competitive introduction of the Microsoft product. Novell submitted that, in its April 22, 1999, letter, the Department recognized, in response to question 5, that a "migration" to a Novell NOS would require a complete competition. Obviously, Novell argued, the same reasoning holds true for migrating to Microsoft, which is exactly what DND is doing. As regards the new features that DND wants to introduce, Novell is of the view that these requirements should be properly defined and procured using traditional competitive methods.

Novell further asserted that the procurement at issue represents the introduction of a new NOS within DND by incremental means and without competition. Despite protestations to the contrary, Novell submitted in the GIR that Microsoft Windows NT Server 4.0 is a NOS in direct competition with Novell's NetWare product.

Furthermore, Novell indicated that DND's purchase from 1994 to 1996 of some 250 NT-certified servers, at an apparent cost of approximately \$7 million, which were incompatible with Banyan Native

VINES, clearly demonstrates DND's intention to move to a new NOS which had server requirements that were not compatible with DND-stated NOS standards.

With respect to the strategic alliance between Banyan and Microsoft, Novell submitted that, contrary to the Department's characterization in the GIR, the move from Banyan Native VINES to Microsoft Windows NT is not a consequence of the natural evolution of a "partnership" between Banyan and Microsoft. Novell argued that the focus of the alliance is to develop tools and services to permit clients that want to migrate (i.e. move) from a Banyan Native VINES environment to a Windows NT-based environment to do so.<sup>13</sup> This migration, Novell asserted, involves a decision by a customer to move to a new NOS (Windows NT) provided by another supplier (Microsoft). Novell submitted that the selection of, and migration to, a new NOS supplied by Microsoft without competition cannot be justified on the grounds that Banyan and Microsoft have, for business reasons pertaining only to those companies, decided to enter into a strategic alliance. Novell offers a product, Novell NetWare, which directly competes with the Microsoft Windows NT Server 4.0, and it should have been given the opportunity, in an open competition, to demonstrate its ability to satisfy DND's needs.

In addition, Novell suggested that, although Banyan StreetTalk for NT offers existing Banyan clients the ability to effectively interconnect Banyan Native VINES and Microsoft Windows NT, prior to deciding to operate Microsoft Windows NT in parallel with Banyan, a knowledgeable client would consider (1) whether to introduce Microsoft Windows NT or another NOS such as Novell NetWare, and (2) if the decision were to introduce a Microsoft Windows NT environment, whether to use StreetTalk for NT as a directory service or NDS for NT.

Novell asserted that, for a particular product to be considered an upgrade, it has to be a direct "evolutionary" enhancement of an existing product, in this instance the operating system kernel. Thus, Novell argued, a Banyan Native VINES upgrade would be from version X of its UNIX-based kernel and operating system to version Y of the same. For Novell NetWare, it would be from NetWare operating system X to NetWare operating system Y and, in Microsoft's case, it would be from Microsoft Micro kernel X to Microsoft kernel Y. For this reason, Novell submitted that the GIR is in error when it states that the acquisition of Microsoft Windows NT is on the upgrade path from VINES.<sup>14</sup> Novell submitted that switching from Banyan Native VINES using StreetTalk to Microsoft Windows NT using StreetTalk for NT is an operating system replacement and a directory service selection, not an upgrade.

Furthermore, Novell submitted that moving from StreetTalk to StreetTalk for NT is a very significant step which includes costly software and hardware decisions. Novell further submitted that, once a Microsoft Windows NT infrastructure is in place, with all the servers being Microsoft Windows NT-compliant, and StreetTalk for NT is deployed, any reasonable information technology manager would unplug the Banyan Native VINES network. It would simply cost too much in time, effort and maintenance to do otherwise. Furthermore, Novell submitted that, if Microsoft Active Directory were proven to be superior to StreetTalk for NT, clients would transfer from StreetTalk for NT to Active Directory, as is clearly set out in Banyan's press release dated January 13, 1999.

With respect to the Department's attempt to position this procurement as a response to an urgent requirement to be configured and ready for Operation ABACUS, Novell argued that this is not the actual

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13. GIR, Tab 1.

14. GIR at 6, para. 4.

rationale driving this procurement. The ACAN contained no reference to Operation ABACUS, and information provided by the Department indicates that, for the past several years, DND has been purchasing servers for the Regular Force and the Reserve Force that are not certified to operate in DND's Banyan Native VINES environment. Novell submitted that DND is, in fact, implementing a NOS rationalization project that has been developing since September 1995. Furthermore, Novell submitted that the procurement at issue is but a step in a well-defined DND project relating to NOS rationalization that has been underway for several years. This NOS rationalization project has been implemented by project splitting, as well as without competition, contrary to the trade agreements.

In response to specific issues raised in the GIR, Novell submitted, in part, that:

the interoperability reason invoked by the Department in this instance does not make sense since deployed army units operate by means of tactical and strategic radio systems, not by means of administrative LANs. Besides, any communications between army, air force or navy units would have to pass over the Novell LANs used by the Air Command and the Maritime Command, not to mention communications with the Royal Canadian Mounted Police and the Canadian Coast Guard, both of whom will likely be involved in Operation ABACUS;

because DND could make its existing Banyan NOS year 2000 compliant within the Banyan family of products, the issue of year 2000 in support of the procurement at issue is but a red herring;

the existence of two NOS configurations within Land Forces (Banyan Native VINES and Microsoft Windows NT) is of DND's own making and not the result of technological development or the result of competitive procurement;

Banyan, Novell and Microsoft all have the ability to automatically distribute software. This is one of the primary functions of any network. Further, contrary to the Department's assertion, StreetTalk, whether Native VINES or for NT, does not do software distribution. StreetTalk is a directory service which contains some of the information that the software distribution system would need in order to update desktop software;

the reason that StreetTalk for NT version 4.0 is the only Banyan solution that will allow DND to deliver its common desktop software is because Land Forces stopped doing in-house engineering work in this area, given that this work could be done via the NT file servers;

the GIR offers no explanation of why it was necessary to buy a new, third NOS (i.e. Microsoft Windows NT) when DND already owned one Banyan NOS with some 26,500 users, and a second NOS (Novell) with some 13,000 users;

Banyan makes a distinction between "support" (i.e. providing updates to make sure VINES is year 2000 compliant) and "enhancements" through the addition of new features to be primarily developed for StreetTalk for NT. If Land Forces wants new features, then it should procure these competitively;

the fact that the Regular Force bought 100 new NT servers not certified to operate in Land Forces' Banyan Native VINES environment, the fact that the Reserve Force bought 150 servers

under the same conditions and the fact that only 225 of the 475 servers owned by Land Forces are certified to operate in a Banyan Native VINES environment demonstrate that DND intends to move from a Banyan NOS to a Microsoft NOS environment;

the GIR characterization of the recent purchase of servers not certified for use with the Banyan Native VINES NOS as an oversight is not credible. The very presence of some 250 Microsoft Windows NT-certified servers clearly illustrates a pattern of behaviour, not a single isolated mistake;

the GIR statement that Novell's complaint is at best premature ignores the fact that this particular ACAN is part of a NOS rationalization project. Furthermore, the suggestion that there will be a subsequent competition fails to note the context in which such competition would occur, i.e. with a huge installed base of a particular tender's product and the attribution of significant transition costs to move to an alternative solution;

Article 1016(2)(b) of NAFTA is not applicable in this case because Novell is a potential supplier for the NOS rationalization project. Accordingly, there is no absence of competition for technical reasons, nor can it be said that no reasonable alternative to migrating to a Microsoft NOS exists;

Article 1016(2)(d) of NAFTA cannot apply, as either the initial procurement of software and equipment was not covered by NAFTA or it was covered but not procured in a manner provided for in NAFTA, as no Request for Proposal, ACAN or Contract Award Notice advising vendors of DND's initial purchase was published.

Novell stated that DND's NOS rationalization project unfolded somewhat as follows: DND non-competitively upgraded to Banyan's StreetTalk for NT and used it as a migration tool to move the StreetTalk directory service from a Banyan Native VINES environment to a Microsoft Windows NT environment. It then bought NT server software and the necessary certified hardware using the National Master Standing Offers and removed the directory from the VINES platform onto the Microsoft Windows NT platform. At this point, Novell argued, Microsoft Windows NT is fully deployed and controlled by StreetTalk for NT, and there is no need to keep or maintain the Banyan Native VINES NOS. The final stage of the migration will be the replacement of StreetTalk for NT with Microsoft Active Directory.

Novell submitted that, in the circumstances of this case, the factors listed in subsection 30.15(3) of the CITT Act justify an additional amount of compensation for the damage to the integrity of the procurement system and the prejudice that it suffered.

### **TRIBUNAL'S DECISION**

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 further provide that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA, the AGP and the AIT.

The Tribunal must address, first, Microsoft's assertion that Novell does not have standing to file this complaint because it does not directly supply any product or service that is the subject of the solicitation, i.e. Microsoft server licences and CALs, or that could be used to make the Banyan Native VINES product year 2000 compliant. Consequently, Microsoft submitted, Novell is not a potential supplier on a designated contract.

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 on a designated contract."

The Tribunal is of the opinion that, while Novell cannot supply Microsoft server licences and CALs, it can, however, challenge the aspect of the procurement process which deals with the sourcing methodology used of the ACAN. Therefore, Novell need not demonstrate 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 the procurement been open to competitive bidding, and could have supplied the goods or services proposed to be awarded. The Tribunal is satisfied that Novell meets this test. Furthermore, as DND's Air Command and Maritime Command use Novell's NOS in their operations, Novell has standing to bring this complaint.

Before addressing the core issue of this complaint, i.e. whether or not the use of limited tendering procedures is warranted in this instance, the Tribunal will address a number of peripheral questions raised by the parties.

Novell has suggested that the solicitation at issue is but a component of a comprehensive NOS rationalization project that has been unfolding at DND since September 1995. In this respect, the Tribunal makes it clear that only Solicitation No. W8474-9-QQD8/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.

With respect to the issue of "contract splitting" raised by Novell, the Tribunal notes that the trade agreements<sup>15</sup> provide that parties may not prepare, design or otherwise structure any procurement contract in order to avoid the obligations of the trade agreements. In this context, the Tribunal observes that the solicitation at issue, whether or not a component of a larger procurement, is conducted under the provisions of NAFTA, the AGP and the AIT. Consequently, in the Tribunal's opinion, DND and the Department are not avoiding the obligations of the trade agreements in this instance.

Furthermore, the Tribunal is of the view that what Novell characterized as an overarching procurement, implemented piecemeal by DND, can also be viewed as the unfolding of an information technology strategy. The Tribunal makes this distinction to point out that there is nothing wrong with the development of an information technology strategy in generic terms that does not adopt or apply technical specifications with the purpose or the effect of creating unnecessary obstacles to trade. The Tribunal believes that this clarification is useful in light of the submission made by Microsoft that entities, not the Tribunal, are the ones in the best position to determine their needs. While the Tribunal subscribes to this view, the Tribunal

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15. Article 1001(4) of NAFTA, Article VI of the AGP and Article 504(3)(b) of the AIT.

notes that, when such strategies are implemented, the trade agreements clearly require that these generally be implemented by means of competitive tendering procedures. In the Tribunal's opinion, it is, therefore, clear that, when strategies, such as the DND NOS strategy, are implemented, the procurement contracts flowing therefrom must be conducted according to the provisions of the applicable trade agreements.

In this context, the Tribunal emphasizes that the trade agreements provide that Parties shall ensure that the tendering procedures of their entities are applied in a non-discriminatory manner with a view to promoting equal access by suppliers.<sup>16</sup> Accordingly, the Tribunal is of the view, as was stated in numerous previous decisions of the Tribunal and its predecessor, the Procurement Review Board of Canada, that, under the trade agreements, competition is the norm.<sup>17</sup> Limited tendering procedures are exceptions, to be narrowly construed by the Tribunal, which entities have the onus to establish on the basis of whichever circumstances and conditions, set out in the trade agreements to use limited tendering procedures, apply.

In the GIR and subsequent submissions, the Department argued that competitive tendering procedures were not warranted in this instance, because it would be uneconomical for DND to use such procedures; because of time constraints, such as the requirement that the Land Forces' NOS be year 2000 compliant and be able to co-ordinate Operation ABACUS on behalf of DND; and because the procurement at issue is merely an "upgrade" to the existing Banyan NOS. The Tribunal notes, however, that the Department, in the ACAN, has formally invoked only those conditions and circumstances described in Articles 1016(2)(b) and (d) of NAFTA. The Tribunal will address this more fully below.

With respect to the argument that competitive tendering would be uneconomical, the Tribunal is of the view that monetary considerations alone are not a valid reason under the trade agreements to use limited tendering procedures. Unless valid justification exists to use limited tendering procedures as specified in the trade agreements, the competitive forces of the market must be left to decide the economic issues.

With respect to the issue of urgency (the time limitations to achieve year 2000 compliance and to conduct Operation ABACUS), the Tribunal notes that, although this justification to use limited tendering procedures exists in the trade agreements,<sup>18</sup> it was not invoked by the Department and DND in the ACAN. Therefore, it cannot be invoked now as a *post facto* justification. In any event, the Tribunal notes that the terms of this justification would be difficult to meet in the circumstances, taking into consideration the fact that the condition talks about situations "of extreme urgency brought about by events unforeseeable by the

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16. Article 1008 of NAFTA, Article VII of the AGP and Article 501 of the AIT.

17. See *Encore Computer Ltd.*, Procurement Board of Canada, Board File No. G92PRF6631-021-0001, *Determination by the Board*, February 28, 1992; *Array Systems Computing Inc.*, Canadian International Trade Tribunal, File No. PR-95-023, *Determination of the Tribunal*, April 16, 1996; *Sybase Canada Ltd.*, Canadian International Trade Tribunal, File No. PR-96-037, *Determination of the Tribunal*, July 30, 1997; *Polaris Inflatable Boats (Canada) Ltd.*, Canadian International Trade Tribunal, File No. PR-98-033, *Determination of the Tribunal*, March 8, 1999; and *Wescam Inc.*, Canadian International Trade Tribunal, File No. PR-98-039, *Determination of the Tribunal*, April 19, 1999.

18. Article 1016(2)(c) of NAFTA and Article XV(1)(c) of the AGP read: "in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the goods or services could not be obtained in time by means of open or selective tendering procedures." Article 506(11)(a) of the AIT reads: "where an unforeseeable situation of urgency exists and the goods, services or construction cannot be obtained in time by means of open procurement procedures."

entity” and that, for example, since the middle of 1998, Banyan has made available to its clients a new version of StreetTalk, version 8.5, which is year 2000 compliant.

The Tribunal also observes that the requirement to conduct Operation ABACUS was not mentioned in the ACAN. Furthermore, the Tribunal is not persuaded by the argument put forth in the GIR that, to allow communications from all points of DND’s establishment, it is necessary to restructure the entire DND information technology infrastructure. This leaves entirely open the question as to how, during Operation ABACUS, Land Forces will communicate with the Air Command and the Maritime Command which use Novell’s NOS, let alone the Royal Canadian Mounted Police and the Canadian Coast Guard, presumably also involved in the operation.

Concerning the “upgrade” issue, the question that the Tribunal must consider is whether the procurement of Microsoft server licences and CALs, properly viewed, constitute the procurement of “upgrades” to the Banyan Native VINES NOS. The Tribunal understands that StreetTalk for NT allows Banyan Native VINES to communicate with Microsoft Windows NT and vice versa. What the Tribunal fails to see is how the purchase of Microsoft NT Server 4.0 licences and CALs constitutes an upgrade to the Banyan Native VINES, a product developed and manufactured by a different company. The Tribunal finds that this procurement is not an upgrade of the Banyan NOS, as represented by the Department.

Turning to the core issue of this case, the Tribunal must decide whether the circumstances and conditions, set out in Articles 1016(2)(b) and (d) of NAFTA to use limited tendering procedures and, thus, derogate from Articles 1008 through 1015 of NAFTA, have been established by the Department and DND in this instance. The Tribunal notes that Article 1016(1) of NAFTA provides that, in certain circumstances and under certain conditions, limited tendering procedures may be used, provided such limited tendering procedures are not used with a view to avoid maximum possible competition. In the ACAN, the Department and DND have invoked Articles 1016(2)(b) and (d) of NAFTA to justify conducting this procurement with Microsoft using limited tendering procedures.

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

(b) when, . . . for reasons connected with the protection of patents, copyrights or other exclusive rights, proprietary information . . . or, when 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; (Emphasis added)

(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, when 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. (Emphasis added)

The Tribunal is not satisfied that the Department and DND have successfully established that the conditions of Articles 1016(2)(b) and (d) of NAFTA have been met in this instance.

With respect to Article 1016(2)(b) of NAFTA, the Tribunal is not persuaded that Novell NetWare is not a reasonable alternative to the Microsoft Windows NT Server 4.0 software for the requirement at hand.

In the Tribunal's opinion, it follows that at least one reasonable alternative or substitute exists and, therefore, 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, 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.

Novell has requested that a proper competition for this requirement be held or, in the alternative, that it be compensated for the profit that it lost.

The Tribunal does not understand why the Department acted so rapidly in issuing a contract for this solicitation. The Department was well aware of Novell's objection to the procurement as proposed and knew that Novell intended to complain about the matter to the Tribunal, as it is entitled to do under the CITT Act. Nevertheless, without any urgency being documented or invoked in the ACAN, the Department issued a contract to Microsoft on February 10, 1999, the same day that it informed Novell that its challenge had been rejected. In the Tribunal's opinion, by issuing a contract to Microsoft on that date, the Department, in fact, removed from the remedies available to Novell the possibility that the procurement be opened up to competition. In that sense, Novell was clearly prejudiced by being deprived of the ability to compete for this procurement and of the opportunity to be awarded the contract and to profit therefrom. In the circumstances where clearly Banyan, Novell and Microsoft could have competed for the requirement, the Tribunal estimates the opportunity lost by Novell at 1 in 3 and the prejudice that it suffered to be equal to one third of the profit that it would have made, had the contract awarded to Microsoft been awarded to Novell at the same price, i.e. \$359,735.07 less GST.

The Department has argued that Novell's complaint was premature and unfounded, since it is not DND's intent to cease supporting its Banyan NOS and because, as was indicated in the ACAN, DND will be reassessing its NOS requirements after the year 2000 and because the Enterprise Management System Project will competitively acquire, in the 2000-2001 time frame, an automated software distribution tool. Novell submitted that this suggestion by the Department fails to note the context in which such competition would occur, namely, a huge installed base of a particular tender's product and the attribution of significant transition costs to move to an alternative solution. In this context, the Tribunal refers the parties to its decisions in *Sybase Canada Ltd.*<sup>19</sup> and *Corel Corporation*<sup>20</sup> for an indication as to how the Tribunal has approached the question of the conversion costs in conducting a competitive solicitation.

### **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 that the Government compensate Novell for the opportunity that it lost to be awarded the contract, and to profit

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19. File No. PR-96-037, *Determination of the Tribunal*, July 30, 1997.

20. File Nos. PR-98-012 and PR-98-014, *Determination of the Tribunal*, October 26, 1998.



therefrom, in the amount of one third of the profit that it would have made, had it been awarded the contract at the price at which it was awarded to Microsoft, i.e. \$359,735.07 less GST.

Pursuant to subsection 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

Patricia M. Close

Member