Public

File No. CT-2015-010

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an Application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*.

BETWEEN:

AUDATEX CANADA, ULC

Applicant

- and -

CARPROOF CORPORATION, TRADER CORPORATION, and eBAY CANADA LIMITED

Respondents

MEMORANDUM OF FACT AND LAW OF MARKTPLAATS B.V. (RESPONSE TO APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*)

November 5, 2015

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PART I - OVERVIEW

1. Marktplaats B.V. ("**Marktplaats**") opposes the application of Audatex Canada, LLC ("**Audatex**") for leave to apply for an order under section 75 of the *Competition Act* (the "**Act**").

2. Audatex has failed to file sufficient credible evidence establishing that it is directly and substantially affected in its business by a refusal to deal or that Marktplaats has engaged in a refusal to deal that could be subject to an order by the Competition Tribunal (the "**Tribunal**") under section 75 of the Act; more particularly:

a) Marktplaats's Confidential and Proprietary Listing Data (as defined below) is the subject of intellectual property rights both under the common law of confidential information and the *Copyright Act*. As the Tribunal's precedents make clear, Marktplaats's refusal to license the intellectual property rights in its Confidential and Proprietary Data could not be subject to an order under section 75. In the alternative, there is not sufficient or credible evidence with respect to any of the conjunctive statutory requirements for a refusal to deal under section 75(1), with the result that an order could not be made under that provision; and

b) as Audatex acknowledges in its leave materials, the alleged harm to Audatex's business flows not from a refusal to deal by Marktplaats but from a practice of alleged anti-competitive acts by CarProof, involving the accumulation of licenses. Even if such a practice could be established (which it cannot), it could not be subject to an order under section 75. In the alternative, the speculative, conclusory and self-serving affidavit put forward by Audatex does not constitute either sufficient or credible evidence that it is "directly and substantially affected" in its business by a refusal to deal.

3. Given Audatex's failure to provide sufficient credible evidence for each of the requirements in sections 75 and 103.1(7) of the Act, Audatex's application for leave should be dismissed.

4. In the alternative, the Tribunal should exercise is discretion to refuse leave for at least the following reasons:

a) an order requiring Marktplaats to grant a license to Audatex would prejudice Marktplaats both by nullifying Marktplaats's rights in the Confidential and Proprietary Listing Data and by interfering with Marktplaats's contractual and economic relations through the compelled breach of the exclusive license granted to CarProof under the Data Provision Agreement (as defined below);

b) Audatex's conduct in scraping the Kijiji.ca website should disentitle it from applying for an order under section 75 that would compel Marktplaats to do business with a party that knowingly breached the Kijiji Terms of Use and violated Marktplaats's rights;

c) Audatex's disregard for Marktplaats's rights and its violation of the Kijiji Terms of Use give rise to a serious and continuing concern that Audatex would not comply with the terms of a data licensing agreement with Marktplaats; and

d) Audatex was the author of its own misfortune due to its apparent inattention and failure to act timely to attempt to secure a license from Marktplaats (and other licensors). The Tribunal should not permit the private application process in respect of section 75 of the Act to be used as a mechanism for ineffective or unsuccessful competitors to interfere with the competitive process, and to attempt to alter (or re-write) the outcomes of that process, after the fact.

5. In all of these circumstances, it would be unreasonable and inconsistent with the purposes of the Act to force Marktplaats to deal with Audatex.

PART II - CONCISE STATEMENT OF FACTS

Marktplaats and Kijiji.ca

6. Marktplaats is a Dutch company with its headquarters in Amsterdam, The Netherlands. Marktplaats operates the Kijiji.ca website ("**Kijiji**") and is the owner of the Confidential and Proprietary Listing Data (as defined and discussed below).[1]

7. Kijiji is a local classified ads website that enables Canadians to buy, sell and trade goods and services in a variety of categories, including used cars and trucks. First launched in Montreal and Quebec City in February 2005, Kijiji is now available in over 100 cities across Canada.[2]

Cars & Vehicles Ads on Kijiji

8. Local ads for used cars and trucks have been available on Kijiji under the product category "cars & vehicles" since July 2005. As a result of enormous effort and expense over more than a decade, Kijiji has become one of Canada's largest databases of used car and truck ads. Currently, during any given month, there are approximately [redacted] classified ads for used cars and trucks (together, "**Vehicles**") on Kijiji.[3]

9. Vehicle owners and dealers (collectively, "**Kijiji Sellers**") wishing to sell Vehicles through Kijiji are directed to submit a specific complement of information to Marktplaats, including price, make, model and year, kilometers, body type, location (*i.e.*, city or area), sub area (where a Kijiji Seller is located in one of the "areas" listed under "location", such as the Greater Toronto Area), address and email. Optional information that may be submitted by Kijiji Sellers includes the vehicle identification number ("**VIN**"), trim, transmission, drivetrain, colour and fuel type.[4]

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1 Affidavit of Scott Neil sworn November 5, 2015 [Neil Affidavit] at para 2.

2 *Ibid* at para 3.

3 *Ibid* at para 4.

4 *Ibid* at para 5.

10. [redacted]

11. Vehicle ads (and the data they contain) are live on Kijiji and publicly-available for only a limited time. Ads posted by Vehicle owners stay on Kijiji for 60 days, while dealer ads last 31 days (unless, in either case, they are reposted). Further, while they are live, Vehicle ads are available only on the appropriate local Kijiji webpage (*e.g.*, Belleville, Ontario; Gander, Newfoundland; Nipawin, Saskatchewan). Further, consistent with Kijiji's *raison d'etre* as a site where people can connect with others in their own community, users can only search Vehicle ads by city or area. It is therefore not possible to search or view the Vehicle ads on a national basis, across the entire site, except by separately accessing each of the more than 100 dedicated, local Kijiji webpages. As a result, the vast majority of the Vehicle ads on Kijiji are not readily or practically accessible or available to the public at large without substantial effort.[6]

12. Further, absent unauthorized scraping or other unauthorized harvesting of data from the Kijiji site with the aid of a computer script (which, as discussed below, is expressly forbidden by the Kijiji Terms of Use), it is practically impossible and commercially infeasible for a third party to (manually) amass in usable form the data displayed in the Vehicle ads across the entire site.[7]

The Confidential and Proprietary Listing Data

13. [redacted]

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5 *Ibid* at para 6.

6 *Ibid* at para 7.

7 *Ibid* at para 8.

[redacted]

14. The Confidential and Proprietary Listing Data is the result of enormous expense, effort, skill and judgment. This collection of information does not exist elsewhere. It has been extracted and mined over a long period of time and from a range of potentially available information to serve specific commercial purposes.[9]

15. As a confidential compilation of information that does not exist elsewhere, the Confidential and Proprietary Listing Data is unique, and a valuable asset of Marktplaats's business that provides an opportunity to obtain advantage over those who do not have access to it.[10]

16. Marktplaats takes measures to ensure that the secrecy of the Confidential and Proprietary Listing Data remains intact. [redacted]

17. Only a small number of authorized persons have access to the Confidential and Proprietary Listing Data. These individuals are obligated to keep the Confidential and

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8 *Ibid* at para 9.

9 *Ibid* at para 10.

10 *Ibid* at para 11.

11 *Ibid* at para 12.

Proprietary Listing Data (and all other confidential and proprietary data and information of Marktplaats), in the strictest confidence.[12]

18. Further, the Kijiji Terms of Use expressly prohibit the scraping of any data displayed on the site [redacted] without Marktplaats's express written authorization. In particular, users and/or those who access the site agree "not to copy, modify, or distribute Kijiji Services, our copyrights or trademarks" and not to:

> - copy, modify, or distribute any other person's content;
>
> - use any robot, spider, scraper or other automated means to access Kijiji and collect content for any purpose without [Marktplaats's] express written permission;
>
> - harvest or otherwise collect information about others, including email addresses, without their consent; [and]
>
> - bypass measures used to prevent or restrict access to Kijiji.[13]

19. Marktplaats defends its Confidential and Proprietary Listing Data from unauthorized use or disclosure, including scraping.[14]

Data Licensing Agreement with CarProof

20. In or about September 2012, CarProof raised the possibility of entering into a data licensing agreement in respect of Marktplaats's Confidential and Proprietary Listing Data.[15]

21. [redacted]

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[12] *Ibid* at para 13.

[13] *Ibid* at para 14.

[14] *Ibid* at para 15.

[15] *Ibid* at para 16.

[redacted]

22. [redacted]

23. [redacted]

24. [redacted]

a) [redacted]

[16] *Ibid* at para 17.

[17] *Ibid* at para 18.

[18] *Ibid* at para 19.

[redacted]

b) [redacted]

c) [redacted]

d) [redacted]

25. [redacted]

[redacted]

19 *Ibid* at para 20.

[redacted]

26. [redacted]

[redacted]

27. [redacted]

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[20] *Ibid* at para 21.

[21] *Ibid* at para 22.

[redacted]

Audatex Has Not Previously Been a "Customer" of Marktplaats

28. In late November 2014, [redacted] (and more than two years after CarProof first proposed a licensing agreement), Audatex raised the possibility of entering into a licensing agreement in respect of Marktplaats's Confidential and Proprietary Listing Data. In response, Scott Neil, the Managing Director, Verticals for Kijiji.ca, advised that, [redacted] Marktplaats was unable to license the Confidential and Proprietary Listing Data to Audatex for total loss calculations or vehicle valuations for insurance purposes. This was reiterated by Mr. Neil to Audatex in a subsequent conversation in the late November timeframe. During that conversation, Mr. Neil also confirmed that, [redacted]

29. There was no further communication regarding the license sought by Audatex until July 2015. In the interim, however, Audatex began using, [redacted] to secretly scrape [redacted] from the Kijiji website. As noted above, such scraping is directly contrary to the express terms of the Kijiji Terms of Use which state, in relevant part, that those who access and/or use the site shall not "use any robot, spider, scraper or other automated means to access Kijiji and collect content for any purpose without [Marktplaats's] express written permission".[24]

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22 *Ibid* at para 23.

23 *Ibid* at para 24 and Exhibit 8 to the Toth Affidavit.

24 *Ibid* at para 25.

30. On or about July 1, 2015, it was determined that Audatex was scraping the Kijiji site and reproducing Kijiji ads within its Autosource reports.[25]

31. By email dated July 6, 2015, Mr. Neil requested that Audatex immediately cease and desist. In relevant part, his email stated as follows:

[redacted]

[25] *Ibid* at para 26.

[26] *Ibid* at para 27 and Exhibit 9 to the Toth Affidavit.

32. Audatex ceased scraping the Kijiji site and, by email dated July 15, 2015, advised that it "remain[ed] very interested in pursuing a formal data license agreement with Kijiji".[27] [emphasis added]

33. In response, by email dated August 12, 2015, Mr. Neil again advised that Marktplaats was "unable to consider that possibility at this time". [redacted] Audatex's disregard for Marktplaats's intellectual property rights and its violation of the Kijiji Terms of Use gave rise to significant concerns – which persist today – that Audatex would not comply with the terms of a data licensing agreement with Marktplaats.[28] As can be seen from the chronology set out above, paragraph 18 of the Toth Affidavit, which states that "[u]ntil recently, Audatex [redacted] Canadian automobile listings, which is no longer available to it. In short, CarProof has entered into exclusive contracts with [...] eBay and other companies, which have, despite Audatex's efforts, prevented it from negotiating access to such data going forward", is inaccurate and misleading.[29]Those statements are inaccurate and misleading insofar as they purport to suggest that Marktplaats (or another eBay entity) had previously licensed the Confidential and Proprietary Listing Data to Audatex but (recently) ceased doing so due to an exclusive data licensing agreement with CarProof, when in fact Audatex has never had authorized access to Marktplaats's Confidential and Proprietary Listing Data and has never been a "customer" of Marktplaats.[30]

36. Further, it was Audatex's failure to approach Marktplaats on a timely basis about the possibility of negotiating a formal data licensing agreement, not the Data Provision Agreement with CarProof, that prevented it from negotiating access to the Confidential and Proprietary Listing Data.[31]

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27 *Ibid* at para 28, [redacted]

28 *Ibid* at para 29.

29 *Ibid* at para 30.

30 *Ibid* at para 31.

31 *Ibid* at para 32.

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37. There was no response by Audatex to Mr. Neil's email of August 12, 2015, and there was no further communication from Audatex in respect of the licensing of Marktplaats's Confidential and Proprietary Listing Data (or otherwise) until October 6, 2015, when eBay Canada Limited was served with Audatex's redacted application for leave to apply for an order under section 75 of the *Competition Act*.[32]

PART III - STATEMENT OF THE POINTS IN ISSUE

38. This application raises two issues:

(I) whether Audatex has satisfied each of the elements of the test for leave to apply for an order under section 75; and

(II) whether the Tribunal should exercise its discretion under section 103.1(7) to refuse to grant leave, even if it finds that the test for leave has been met.

PART IV - CONCISE STATEMENT OF SUBMISSIONS

I. THE TEST FOR LEAVE TO COMMENCE A PRIVATE APPLICATION HAS NOT BEEN MET

39. The test for leave to commence a private application under section 103.1 is set out in the Federal Court of Appeal's decision in *Symbol Technologies Canada ULC v Barcode Systems Inc.*[33] The Tribunal must be satisfied that the leave application is "supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order".[34]

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[32] *Ibid* at para 33.

[33] 2004 FCA 339 [*Barcode*].

[34] *Barcode*, *supra* at para 16.

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40. Importantly, under the second part of this test, the Tribunal must be satisfied that there is "sufficient credible evidence" with respect to *each of the conjunctive statutory conditions* under section 75(1) of the Act. As the Federal Court of Appeal cautioned in *Barcode*:

> [...] it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under s. 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in s. 75(1). <u>These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under s. 103.1(7)</u>. That is because, unless the Tribunal considers all the elements of the practice set out in s. 75(1) on the leave application, it could not conclude, as required by s. 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under s. 75(1).[35] [emphasis added]

41. Audatex's application for leave must fail if the Tribunal finds that Audatex has not provided sufficient credible evidence with respect to <u>any one</u> of the requirements in paragraphs (a) to (e) of section 75(1). That provision reads as follows:

Jurisdiction of Tribunal where refusal to deal	*Compétence du Tribunal dans les cas de refus de vendre*
75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that	**75.** (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,	a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the	b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de

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[35] *Barcode, supra* at para 18.

product in the market,	ce produit sur ce marché;
(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,	c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
(d) the product is in ample supply, and	d) que le produit est disponible en quantité amplement suffisante;
(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,	e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.	le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

42. As set out more fully below, Audatex has failed to meet the test for leave to commence a private application in this case. First, there is not sufficient credible evidence that Audatex is "directly and substantially affected" in its business by a refusal to deal by Marktplaats, or at all. Second, Maktplaats's refusal to license Audatex could not be subject to an order under section 75 because the Tribunal does not have jurisdiction under section 75 to compel Marktplaats to grant Audatex a license to the intellectual property rights in Marktplaats's Confidential and Proprietary Listing Data. Further, or in the alternative, there is not sufficient credible evidence with respect to <u>any</u> of the conjunctive statutory requirements for a refusal to deal under section 75(1), with the result that an order could not be made under that provision.

A. There is Not Sufficient Credible Evidence that Audatex is Directly and Substantially Affected by a Refusal to Deal

43. Audatex alleges in its Memorandum of Fact and Law[36] that it is *CarProof's conduct* in allegedly "accumulat[ing] exclusive rights from multiple [licensors]", not a refusal to deal by Marktplaats or "the exclusive rights flowing from any single" licensing agreement, "that has allowed [CarProof] to harm Audatex", by purportedly foreclosing access by Audatex to an essential input required for its business. In other words, the harm alleged by Audatex flows from a practice of alleged anti-competitive acts by CarProof, involving the accumulation of licenses, and not from a refusal to deal.[37]

44. Further, or in the alternative, for the reasons set out in CarProof's Memorandum of Fact and Law (which Marktplaats adopts and relies upon) the speculative, conclusory and self-serving assertions in the Toth Affidavit do not constitute sufficient or credible evidence that Audatex's business has been directly and substantially affected by a refusal to deal.

45. Audatex's request for leave should be dismissed on these bases alone.

B. There is Not Sufficient Credible Evidence of a Refusal to Deal by Marktplaats under Section 75 of the Act

46. As indicated above, the Tribunal may only grant leave in respect of Marktplaats's alleged refusal to deal under section 103.1 if Marktplaats's conduct could be subject to an order under section 75(1).

47. Marktplaats submits that section 75 does not give the Tribunal jurisdiction to make the order that Audatex would seek against Marktplaats if leave were granted, with the result that Marktplaats's refusal to license could not be subject to an order under that provision.

48. Further, or in the alternative, Marktplaats submits that Audatex has not provided sufficient or credible evidence with respect to <u>any</u> of the conditions in section 75(1) and that, as

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36 See Audatex's Memorandum of Fact and Law at para 17.

37 See, *e.g.*, Audatex's Memorandum of Fact and Law at para 12 and 14, Statement of Grounds and Materials Facts at paras 29, 37-39 and 47 and Toth Affidavit at paras 30 and 38-40.

a consequence, its application for leave must fail. In support of its position in this regard, Marktplaats adopts and relies upon the submissions made by CarProof in its Memorandum of Fact and Law.

(i) Audatex is Improperly Seeking to Use Section 75 as a Compulsory Licensing Provision for Intellectual Property

49. It is the right of Audatex to use Marktplaats's Confidential and Proprietary Listing Data that is at issue in this proposed application, as it relates to Marktplaats (rather than obtaining title to the data itself). As Audatex has acknowledged in its correspondence seeking to negotiate a "formal data licence agreement"[38] in respect of the Confidential and Proprietary Listing Data (and [redacted] this right to use is conditional upon a license granted by Marktplaats in favour of Audatex.

50. Such a license is necessary due to the fact that the Confidential and Proprietary Listing Data is clearly intellectual property under both the common law of confidential information and the *Copyright Act*.

51. The common law protects information that is not generally known, gives its owner a competitive or economic advantage over others who do not know of it or have access to it, and is subject to efforts that are reasonable under the circumstances to maintain its secrecy.[40] Protected confidential information (or "trade secrets") includes any compilation of information

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38 See Exhibit 9 to the Toth Affidavit (emails dated July 15 and 29, 2015) and Neil Affidavit at para 28.

39 [redacted]

40 See Ronald E. Dimock, Intellectual Property Disputes: Resolution and Remedies (Toronto: Carswell, c2002-2014), ch 5 at Section 5. [Dimock]

(including information that may be in the public domain) used in a person's business that, in sum, is not publicly known and has unique value on that account.[41]

52. In *Essentially Yours Industries Corp. v Infinitec Marketing Group Inc*, for example, the Court considered whether a list of the names of 7,000 of the plaintiff's sales associates constituted confidential information. The defendant, which had come into possession of the list in the course of performing its contract with the plaintiff to create individual websites for each of those sales associates (and was now threatening to sell the list to the plaintiff's competitors), argued that the list was not confidential as "once the website is prepared, the individual [sales associate] is accessible to any member of the public by searching the Internet for persons selling the plaintiff's product".[42] The Court rejected this submission, concluding that the list was confidential and worthy of protection:

> Accessibility, however, to this list involves a considerable degree of searching, though not providing all of the information available on the list which the defendants possess as a result of developing the individual web sites. The plaintiff argues that the discrete list of 7,000 persons, representing approximately 10% of the plaintiff's overall IBA list, is in a form and contains information which would take any other individual a considerable length of time to amass, even though the possibility of being able to do so is real.
>
> The availability of the names in the public domain by culling them from a huge list involving considerable difficulty speaks to the issue of confidentiality. The effort needed to search for the list on an individual basis would, to say the least, be tedious, as each individual web site must be accessed through individual computer search and, therefore, would involve a considerable degree of time and energy.
>
> The defendants, on the other hand, have a ready-made discrete list of all of the information without the need to tediously obtain it through individual searches on the Internet.
>
> The process of sophisticated searching on the Internet might simplify the process although, if easily carried out, it was not made known to the court. <u>I am left with the belief that, although it is possible to ultimately obtain much of the information contained in the list, the defendants</u>

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41 See *ibid* and *Essentially Yours Industries Corp v Infinite Marketing Group Inc*, 1999 CarswellMan 499 at paras 18 and 20-24 (QB) [*EYI*].

42 *EYI*, *supra* at para 20.

> could have avoided this litigation had the names been readily available. In my view, having the names in the organized fashion the defendants have it, renders it confidential information and worthy of protection.[43] [emphasis added]

53. The Confidential and Proprietary Listing Data is clearly confidential information protected by the common law. Marktplaats's Confidential and Proprietary Listing Data is a specialized, closely held and valuable compilation of information, compiled and maintained in confidence on an ongoing basis, over more than a decade and through great effort and expense. It is not publicly-known and is not reasonably capable of lawful acquisition by others from any other public or private source and, for these reasons, has a unique commercial value.[44]

54. Inherent in the very nature of confidential information – which gives proprietary rights in perpetuity for however long the owner maintains the relative secrecy of that information – is the right of its owner to determine whether or not, to what extent, and to whom, to grant a license.[45] Further, an owner of confidential information is entitled to protect such information on the basis of common law and equitable causes of action which are recognized by the courts and, as with other intellectual property rights, injunctions to enforce exclusive rights and prevent unauthorized use and disclosure of confidential information are available and commonly awarded.[46] Marktplaats's Confidential and Proprietary Listing Data is a valuable asset. The decision to license this confidential information – and thus to share the competitive and economic advantages associated with that data – is a right that rests entirely with Marktplaats.

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[43] *EYI, supra* at paras 21-24.

[44] See Neil Affidavit at paras 4-15.

[45] Dimock, *supra*.

[46] See *International Corona Resources Ltd v LAC Minerals Ltd*, 1989 CarswellOnt 126 at para 67 (SCC), Keith Fairbairn and Julie Thorburn, *Law of Confidential Business Information* (Toronto: Thomson Reuters, 2015) at 7-1 to 7-3 and *EYI, supra*.

55. Further, the Confidential and Proprietary Listing Data is not "merely factual data" (as Audatex claims[47]). If the Confidential and Proprietary Listing Data were "merely" factual data in the public domain then Audatex would already have access to it. It does not because the Confidential and Proprietary Listing Data is confidential information constituting a unique asset of great commercial value to Marktplaats (and its sole authorized licensee). At the same time, the Confidential and Proprietary Listing Data is also a compilation of data resulting from significant labour, as well as skill and judgment.[48]

56. Copyright subsists in Canada "in every original literary, dramatic, musical and artistic work," which under the *Copyright Act* includes "compilations," including those "resulting from the selection or arrangement of data."[49] For a work (including a compilation of data) to be "original," it need not be creative, novel or unique. The work must merely be the result of an exercise of "skill" and "judgment." The term "skill" meaning the use of one's knowledge, aptitude or ability. The term "judgment" meaning the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. The skill and judgment involved in producing the work in question must not be so trivial as to amount to a purely mechanical exercise.[50]

57. The Confidential and Proprietary Listing Data is thus also an original work protected by copyright. It is an infringement of copyright for anyone to produce, reproduce or otherwise exploit such work absent the copyright owner's consent.[51]

58. In sum, Marktplaats's Confidential and Proprietary Listing Data is the subject of intellectual property rights both under the common law of confidential information and the

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47 See Audatex's Memorandum of Fact and Law at para 17.

48 See Neil Affidavit at paras 4-11.

49 See *Copyright Act*, section 2 (Definitions) "every original literary, dramatic, musical and artistic work" and "compilation" and section 5 (Conditions for subsistence of copyright).

50 See *CCH Canadian Ltd v Law Society of Upper Canada* (2004), 30 CPR (4th) 1 at para 25 (SCC).

51 See *Copyright Act*, section 3 (Copyright in works) which defines copyright as the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever. See also section 27 (Infringement generally).

Copyright Act. Without a license, Audatex has no right to use or access the Confidential and Proprietary Listing Data.

(ii) The License Sought by Audatex is Not a "Product" within the Meaning of Section 75, it Cannot be in "Ample Supply" and there are No "Usual Trade Terms"

59. On these facts, the Tribunal's decision in *Canada (Director of Investigation and Research) v Warner Music Canada Ltd*[52] makes it clear that the Tribunal does not have the jurisdiction under section 75 to make the order that would be sought against Marktplaats if Audatex were granted leave.

60. In *Warner Music*, the Director brought an application to the Tribunal alleging that the respondents' refusal to grant licenses to make sound recordings contravened section 75 of the Act. The Director alleged that BMG (Canada) needed those licenses in order to compete in the mail-order record club business in Canada and requested an order compelling the respondents to issue licenses to BMG (Canada). It was undisputed in that case that BMG (Canada) would be substantially affected and would not be able to continue its mail-order record club business in Canada if it was unable to obtain licenses from the respondents.[53]

61. While *Warner Music* dealt with copyright rights in particular, the Tribunal made general comments with respect to the inapplicability of section 75 to licenses and intellectual property rights. In concluding that section 75 of the Act did not give it jurisdiction to make the order sought by the Director and that the application should be summarily dismissed, the Tribunal found that: (i) a license and exclusive legal rights over intellectual property cannot be a "product" within the meaning of section 75; (ii) "there cannot be an 'ample supply' of legal rights over intellectual property which are exclusive by their very nature"; and (iii) "there cannot be usual trade terms when licenses may be withheld".[54]

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52 1997 CarswellNat 2811 (Comp Trib) at para 30. [*Warner Music*]

53 See *Warner Music, supra* at paras 10 and 16.

54 *Warner Music, supra* at para 30.

62. In making these findings, the Tribunal also commented favourably on the following statement from *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc*[55] (an abuse of dominance case involving trade-mark rights), which it described as "very compelling":

> The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to a grant a license; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark – essentially, to share the goodwill vesting in the asset – is a right which rests entirely with the owner of the mark.[56]

63. *Warner Music* is a complete (and fatal) answer to Audatex's request for what amounts to a compulsory license under section 75, and Audatex's leave application should thus be summarily dismissed.

64. Audatex has no right, whether viewed under the common law of confidential information or the *Copyright Act*, to a license in respect of Marktplaats's Confidential and Proprietary Listing Data. Marktplaats has refused to license access to its Confidential and Proprietary Listing Data and, as is its right, declines to share its competitive and economic advantages with Audatex.

65. Consistent with *Warner Music* and *Tele-Direct*, in its *Intellectual Property Enforcement Guidelines*[57] ("**IPEGs**"), the Competition Bureau also recognizes that the refusal to license an intellectual property right ("**IPR**") – which the Bureau defines as encompassing both rights granted under the federal IP statutes (such as the *Copyright Act*) and "the protection afforded IP under common law, including that given to trade secrets" [58] – is beyond the scope of the

55 (1997), 73 CPR (3d) 1 at para 66 (Comp Trib). [*Tele-Direct*]

56 *Warner Music*, *supra* at para 32.

57 Competition Bureau, *Intellectual Property Enforcement Guidelines* (September 2014).

58 IPEGs, *supra* at 4.

general provisions of the Act, including the refusal to deal provision in section 75, "no matter to what degree competition is affected".[59]

66. Audatex's assertion that the Confidential and Proprietary Listing Data is in ample supply "[g]iven the reproducible nature of data"[60] is underpinned by precisely the logic that was rejected by the Tribunal in *Warner Music*.[61] A product (assuming that a "license" can, in fact, be a "product", which is not admitted but expressly denied) cannot be in ample supply when, as in this case, its owner has the legal right to withhold it.[62] Audatex's reasoning is directly contrary to the Tribunal's findings and conclusions in *Warner Music*, including that section 75 is not intended to operate as a compulsory licensing provision for intellectual property.[63] It is also at odds with the IPEGs which, despite acknowledging that IP is "often easy and inexpensive to copy [and] is also typically non-rivalrous – that is, two or more people can simultaneously use IP",[64] state that a refusal to license an IPR is immune from review or challenge under the general provisions of the Act, including section 75.

67. Contrary to what Audatex suggests,[65] nothing in the Federal Court of Appeal's decision in *Eli Lily v Apotex Inc*[66] alters the conclusion that the license sought by Audatex is not in ample supply (or that the Tribunal does not have the jurisdiction under section 75 to compel a license to Audatex). The fact that CarProof is allegedly accumulating exclusive licenses from multiple licensors does and cannot mean that Marktplaats's rights somehow cease to be exclusive and that a license of the Confidential and Proprietary Listing Data can be considered to be in "ample supply".

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59 IPEGs, *supra* at 10 and 11.

60 See Audatex's Memorandum of Fact and Law at para 16.

61 See *Warner Music*, *supra* at para 30.

62 See *ibid.*

63 See *ibid.*

64 IPEGs, *supra* at 7.

65 Audatex's Memorandum of Fact and Law at para 17.

66 2005 FCA 361. [*Eli Lilly*]

68. More broadly, Audatex's reliance on *Eli Lilly* is misplaced. That case did not involve or consider a refusal to license an IPR under section 75 (or at all). Rather, the issue before the Federal Court of Appeal in that appeal, which arose from a patent infringement action by Eli Lilly against Apotex, was whether, as a matter of law, an assignment of a patent can constitute an agreement or arrangement to lessen competition unduly within the meaning of the former criminal conspiracy provision in section 45 of the Act. In its defence and counterclaim, Apotex had alleged that, because of Eli Lilly's existing ownership of patents relating to processes that could be used in the making of the antibiotic cefaclor, certain agreements between Eli Lilly and a third company, Shionogi, which resulted in Eli Lilly acquiring additional patent rights in respect of such processes (thereby allowing Eli Lilly to control all of the commercially viable processes for making cefaclor), constituted a conspiracy to unduly lessen competition, contrary to section 45. The Court of Appeal answered the question before it by concluding that "when, by reason of the assignee's existing ownership of other patents, the assignment transfers more market power than that inherent in the patent assigned" it is not exempt from section 45.[67]

69. Here, CarProof is not the holder of intellectual property rights in respect of the Confidential and Proprietary Listing Data and there is no allegation, let alone evidence (much less sufficient or credible evidence), that Marktplaats's *refusal to license* the Confidential and Proprietary Listing Data to Audatex has "create[d] market power beyond that inherent in [Marktplaats] intellectual property rights".[68] In fact, as previously noted, Audatex alleges that it is *CarProof's conduct* in entering into exclusive license agreements with various licensors "that has allowed [CarProof] to harm Audatex." In other words, the market power that has allegedly been created and the purported harm to Audatex do not flow from Marktplaats's refusal to license, but rather from a practice of alleged anti-competitive acts *by CarProof*, involving the accumulation of licenses, which (even if such conduct could be established) could not be subject to an order under section 75.

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67 *Eli Lilly, supra* at para. 36.

68 Audatex's Memorandum of Fact and Law at para 17.

70. For all of these reasons, Marktplaats's decision whether to license its Confidential and Proprietary Listing Data is a right that rests with Marktplaats and is outside the Tribunal's jurisdiction under section 75. The Tribunal cannot compel Marktplaats to grant such a license to Audatex and Audatex's application for leave should therefore be dismissed as against Marktplaats.

II. THE DISCRETION OF THE TRIBUNAL SHOULD BE EXERCISED TO DENY LEAVE

71. Under section 103.1(7) of the Act, the Tribunal may exercise its discretion to refuse to grant leave. For the reasons set out above, Marktplaats respectfully submits that it ought not to be necessary for the Tribunal to consider whether to exercise its discretion to deny leave in this case. However, in the event that the Tribunal determines that it has jurisdiction under section 75 to make an order against Marktplaats (which is not admitted but expressly denied) and that Audatex has established all of the elements necessary to obtain leave (which Marktplaats denies), it is submitted that the Tribunal should exercise its discretion to refuse leave.

72. The factors relevant to the Tribunal's exercise of its discretion include whether the granting of the order would disadvantage or prejudice the respondent, the business justifications for the refusal, and the conduct of the refused party.[69]

73. Here, an order requiring Marktplaats to grant a license to Audatex permitting it to use the Confidential and Proprietary Listing Data would prejudice Marktplaats both by nullifying Marktplaats's rights in the Confidential and Proprietary Listing Data and by interfering with Marktplaats's contractual and economic relations through the compelled breach of the exclusive license granted to CarProof under the Data Provision Agreement. [redacted]

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[69] See *B-Filer Inc v Bank of Nova Scotia*, 2006 Comp Trib 42 at paras 231-36 [*B-Filer*] and *Canada (Director of Investigation and Research) v Xerox Canada Inc*, 1990 CarswellNat 1372 at para 78 (Comp Trib).

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constitutes an objective and legitimate business justification for Marktplaats's refusal to grant a license to Audatex.[70]

74. Audatex's own conduct also provides compelling bases for the Tribunal to exercise its discretion to refuse the granting of leave. Specifically, Audatex's conduct in scraping the Kijiji website should disentitle it from applying for an order under section 75 that would compel Marktplaats to do business with a party that knowingly breached the Kijiji Terms of Use and violated its rights.[71] Audatex clearly knew at all material times that its conduct in scraping the Kijiji site was prohibited.[72] [redacted]

75. In *B-Filer Inc v Bank of Nova Scotia*, the Tribunal had found that the bank's refusal to deal with the applicants was based on risks that were legitimate and continuous (including legal and reputational risks). In concluding that "this is not a proper case for the granting of discretionary relief",[74] the Tribunal determined that it "would neither be commercially reasonable nor consistent with the purposes of the Act to require the Bank to provide banking

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70 See Neil Affidavit at paras 17-22.

71 See Neil Affidavit at paras 24-28.

72 See Neil Affidavit at paras 14, 24 and 28, [redacted] and footnote 73, *infra*.

73 [redacted]

74 *B-Filer*, *supra* at para 232.

services to the applicants when to do so would expose it to such risks".[75] Additionally, the Tribunal found that the applicants' failure to comply with the reasonable terms that the Bank imposed upon all of its customers as a condition for receipt of the refused services made it "unreasonable to require the Bank to deliver the services"[76] to the applicants.

76. Here, as a result of Audatex's disregard for Marktplaats's rights and its violation of the Kijiji Terms of Use, Marktplaats had and continues to have a serious and legitimate concern that Audatex would not comply with the terms of a data licensing agreement with Marktplaats [redacted]

77. Additionally, Audatex was the author of its own misfortune due to its apparent inattention and failure to act timely to attempt to secure a license from Marktplaats (and other licensors) in respect of an input which it claims is essential to the continued operation of its business (or at least to its total loss valuation service).[78] The Tribunal should not permit the private application process in respect of section 75 of the Act to be used as a mechanism for ineffective or unsuccessful competitors to interfere with the competitive process, and to attempt to alter (or re-write) the outcomes of that process, after the fact.

78. In all of these circumstances, it would be unreasonable and inconsistent with the purposes of the Act to force Marktplaats to deal with Audatex.

PART V - OTHER MATTERS

79. Marktplaats respectfully requests an oral hearing with respect to the application for leave and that the proceedings be conducted in English.

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[75] *Ibid* at para 235.

[76] *Ibid* at para 236.

[77] See Neil Affidavit at paras 29 and 20-22.

[78] See Neil Affidavit at paras 24 and 32.

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PART VI - CONCISE STATEMENT OF THE ORDER SOUGHT

80. Marktplaats respectfully requests that this leave application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 5, 2015

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PART VII - LIST OF AUTHORITIES, STATUTES AND REGULATIONS TO BE REFERRED TO

Marktplaats will refer to the following authorities and statutes:

Authorities

1. *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339

2. Ronald E. Dimock, Intellectual Property Disputes: Resolution and Remedies (Toronto: Carswell, c2002-2014)

3. *Essentially Yours Industries Corp v Infinite Marketing Group Inc*, 1999 CarswellMan 499 (QB)

4. *International Corona Resources Ltd v LAC Minerals Ltd*, 1989 CarswellOnt 126 (SCC)

5. Keith Fairbairn and Julie Thorburn, *Law of Confidential Business Information* (Toronto: Thomson Reuters, 2015)

6. *CCH Canadian Ltd v Law Society of Upper Canada* (2004), 30 CPR (4th) 1 (SCC)

7. *Canada (Director of Investigation and Research) v Warner Music Canada Ltd*, 1997 CarswellNat 2811 (Comp Trib)

8. *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc*, (1997), 73 CPR (3d) 1 (Comp Trib)

9. Competition Bureau, *Intellectual Property Enforcement Guidelines* (September 2014)

10. *Eli Lily v Apotex Inc*, 2005 FCA 361

11. *B-Filer Inc v Bank of Nova Scotia*, 2006 Comp Trib 42

12. *Canada (Director of Investigation and Research) v Xerox Canada Inc*, 1990 CarswellNat 1372 (Comp Trib)

Statutes

13. *Competition Act*, RSC 1985, c C-34, sections 45(1), 75(1), 79(1) and 103.1(7)

14. *Copyright Act*, RSC 1985, c C-42, sections 2, 3, 5 and 27(1)

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Commissioner of Competition) v. Pearson Canada Inc. | 2014 FC 376, 2014 CF 376, 2014 CarswellNat 1313, 2014 CarswellNat 2872, 453 F.T.R. 126, 119 C.P.R. (4th) 313, 240 A.C.W.S. (3d) 354 | (F.C., Apr 23, 2014)

2004 CAF 339, 2004 FCA 339
Federal Court of Appeal

Barcode Systems Inc. v. Symbol Technologies Canada ULC

2004 CarswellNat 3582, 2004 CarswellNat 4789, 2004 CAF 339, 2004 FCA 339, [2004] F.C.J. No. 1657, [2005] 2 F.C.R. 254, 134 A.C.W.S. (3d) 592, 327 N.R. 296, 34 C.P.R. (4th) 481, 4 B.L.R. (4th) 58

Symbol Technologies Canada ULC (Appellant / Respondent) and Barcode Systems Inc. (Respondent / Applicant)

Richard C.J., Létourneau, Rothstein JJ.A.

Heard: September 28, 2004
Judgment: October 7, 2004
Docket: A-39-04

Proceedings: affirming *Barcode Systems Inc. v. Symbol Technologies Canada ULC* (2004), 2004 Comp. Trib. 1, 29 C.P.R. (4th) 554, 2004 CarswellNat 1227 (Competition Trib.)

Counsel: Mr. Steven Field, Mr. Dave Hill, for Appellant/Respondent
Ms Lindy Choy, for Respondent/Applicant

Subject: Criminal; Intellectual Property; Property; Corporate and Commercial

Table of Authorities

Cases considered by *Rothstein J.A.*:

National Capital News Canada v. Canada (Speaker of the House of Commons) (2002), 23 C.P.R. (4th) 77, (sub nom. *National Capital News Canada v. Milliken)* 2002 Comp. Trib. 41, 2002 CarswellNat 4487 (Competition Trib.) — followed

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 CarswellNat 7, 2002 CarswellNat 8, 2002 SCC 1, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3 (S.C.C.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

Pt. VIII — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — referred to

s. 75 [am. 2002, c. 16, s. 11.1] — referred to

s. 75(1) [am. 2002, c. 16, s. 11.1(1)] — considered

s. 75(1)(a) — referred to

s. 75(1)(b)-(e) — referred to

s. 75(1)(e) [en. 2002, c. 16, s. 11.1(2)] — referred to

s. 77 [am. 2002, c. 16, s. 11.2, 11.3] — referred to

s. 103.1(1) [en. 2002, c. 16, s. 12] — considered

s. 103.1(7) [en. 2002, c. 16, s. 12] — considered

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), Pt. I

s. 13(1) [rep. & sub. 2002, c. 8, s. 130] — referred to

s. 13(2) — referred to

APPEAL by company of decision reported at *Barcode Systems Inc. v. Symbol Technologies Canada ULC* (2004), 2004 Comp. Trib. 1, 29 C.P.R. (4th) 554, 2004 CarswellNat 1227 (Competition Trib.) granting leave to complainant to make application to Tribunal against company for restrictive trade practices.

***Rothstein J.A.*:**

Introduction

1 This is an appeal by Symbol Technologies Canada ULC (Symbol) from a decision of the Competition Tribunal under subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act.

2 Barcode's application before the Tribunal is for an order under subsection 75(1) of the *Competition Act* requiring Symbol to accept Barcode as a customer.

3 In this appeal, Symbol says that the Tribunal member who granted leave erred in law by refusing to take into account statutory requirements and that the decision to grant leave should be quashed by this Court.

Facts

4 The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US). Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

5 In or about January 2003, Symbol informed Barcode that it could no longer buy parts for Symbol products. In April 2003, Symbol informed Barcode that it would not accept purchase orders from Barcode. Barcode says that since May 1, 2003, Symbol has refused to deal with Barcode.

Relevant Statutory Provisions

6 Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the *Competition Act*, e.g. refusal to deal (section 75) and

tied selling (section 77). By amendments to the *Competition Act*, 2002, c. 16, ss. 11.1-11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) of the *Competition Act* provides:

> 103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

> 103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

7 The considerations the Tribunal is to take into account in determining a leave application are set out in subsection 103.1(7). To grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under sections 75 or 77 of the *Competition Act*. Subsection 103.1(7) provides:

> (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

> (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

8 The reviewable restrictive trade practice relied on by Barcode is refusal to deal. Subsection 75(1) provides:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
> (*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
>
> (*b*) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> (*c*) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
>
> (*d*) the product is in ample supply, and
>
> (*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

> 75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut_:
> *a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
> *b*) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
> *c*) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
> *d*) que le produit est disponible en quantité amplement suffisante;
> *e*) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
> le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres

personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

The Alleged Error of Law

9 Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(*e*).

10 Indeed, in his reasons, the member specifically finds that on an application for leave, the Tribunal is not to have regard to whether the refusal to deal is likely to have an adverse effect on competition in a market. At paragraphs 8 and 10, the member states:

> 8. What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.
>
> 10. As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

Standard of Review

11 Subsection 13(1) of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s. 130, provides for a statutory right of appeal to the Federal Court of Appeal from any decision or order whether final, interlocutory or interim of the Competition Tribunal as if it were a judgment of the Federal Court. The unrestricted right of appeal (except in the case of appeals on questions of fact under subsection 13(2)) is an indication of a correctness standard of review.

12 Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the question at issue here is whether, in exercising its discretion, the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal set out in subsection 75(1). That is a question of law, a straight question of statutory interpretation. It is the task of the Court to determine whether the Tribunal has exercised its discretionary power within the constraints imposed by Parliament. See *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.) at paragraph 38.

13 This question of statutory interpretation does not engage any particular expertise of the Tribunal. Economic and commercial considerations are not part of the analysis of whether, on a leave application, all the elements listed in subsection 75(1) must be considered. That expertise is not engaged on the question of statutory interpretation at issue here therefore points to the correctness standard.

14 The basic purpose of the *Competition Act* as described in subsection 1.1 is "to maintain and encourage competition in Canada" and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

15 Weighing these pragmatic and functional considerations, I conclude that the standard of review in this appeal is correctness.

Analysis

The legal test in an application under subsection 103.1(7)

16 In *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77 (Competition Trib.), Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under

subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

> Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

17 The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

18 However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

19 The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

20 The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

21 The respondent says that the words in subsection 103.1(7) "that the applicant is directly and substantially affected in the applicant's business" are essentially the words in paragraph 75(1)(*a*) and because there are no words similar to those in paragraphs 75(1)(*b*) to (*e*) in subsection 103.1(7), Parliament did not intend that each element in paragraphs (*b*) to (*e*) need be taken into account on a leave application.

22 I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is theoretically possible for someone other than a person substantially and directly affected to bring a private application. However, Parliament clearly intended to limit private applications to persons who themselves are directly and substantially affected in their businesses by the alleged reviewable practice. I think that is the reason for the use of words in subsection 103.1(7) that are substantially similar to those in paragraph 75(1)(*a*). However, the use of these words does not imply that the statutory elements in paragraphs 75(1)(*b*) to (*e*) need not be considered on a leave application. That is because, on a leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach that conclusion without considering all the elements of refusal to deal set out in that subsection.

23 Counsel for Symbol argued that on a purposive interpretation, it should be clear that on a leave application, the Tribunal must have regard to all the statutory elements in subsection 75(1). I agree. The purpose of the *Competition Act* is to maintain

and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(*e*). The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

Application of the test for leave to the facts

24 Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross examination on the affidavit filed in support of the application for leave, there is no provision for the respondent to file affidavit evidence and the time limits in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

25 Is there credible evidence to support a finding that there are reasonable grounds to believe that Symbol's refusal to supply Barcode could be subject to an order under subsection 75(1)? There is evidence that Barcode is substantially affected in its business due to its inability to obtain Symbol's products. Barcode's evidence is that it cannot obtain these products either directly from Symbol or from other Symbol distributors. Barcode says it is willing and able to meet Symbol's usual trade terms and that Symbol's products are in ample supply.

26 The only real controversy is whether there is evidence that Symbol's refusal to deal is likely to have an adverse effect on competition in a market.

27 On this point, paragraph 75(1)(*e*) has not been interpreted by the Tribunal or this Court and a leave application is not the appropriate occasion to do so. Therefore, if there are any facts in its affidavit that might meet the requirements of paragraph 75(1)(*e*), the benefit of any doubt should work in favour of granting leave in order not to finally preclude Barcode from its day before the Tribunal.

28 The evidence of Barcode is that in or about 1994, it took over Symbol's distribution in Western Canada and that by 2002 its annual revenues were in excess of $20 million. Symbol US is the largest single manufacturer of bar code equipment in the world. Barcode's evidence is that if Symbol continues to refuse to supply, Barcode will be forced into receivership, and indeed, the Tribunal member found that on December 19, 2003, Barcode was petitioned into receivership.

29 From Barcode's evidence, I think it may be inferred, for leave to apply purposes, that there are reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an order under subsection 75(1).

Conclusion

30 For these reasons I would dismiss the appeal with costs.

***Richard C.J.*:**

I agree.

***Létourneau J.A.*:**

I agree.

Appeal dismissed.

End of Document

TAB 2

IPDisputes 5.1

Dimock: Intellectual Property Disputes: Resolution and Remedies

Chapter 5 — Trade-secrets and Confidential Information

Ronald E. Dimock

5.1 — Introduction

5.1 — Introduction

Trade-secrets and confidential information are forms of information, protected by the common law, that are not generally known and give the owner a competitive or economic advantage over others who do not know of it. The information is also subject to measures taken by the owner to ensure that it remains secret.

What makes trade-secrets and confidential information unique as intellectual property is that their economic value is derived from their being kept secret. Unlike other forms of intellectual property such as trade-marks, copyright or patents that have registry systems in place, confidential information is a do-it-yourself form of protection. The protection is simply to keep the information from disclosure. This is perhaps the greatest advantage of confidential information because it gives proprietary rights in perpetuity for however long the owner is able to maintain the secrecy. Once the quality of confidence of the information is lost the protection ends.

(a) — What are Trade-secrets and Confidential Information?

It has been said that trade-secrets and confidential information are not "easily definable with exhaustive precision." [1] Canadian courts have not yet adopted a uniform definition of trade-secrets or confidential information although the Institute of Law Research and Reform, Edmonton, Alberta and A Federal Provincial Working Party [2] in 1986 proposed a definition in their Report of recommendations for changes to the law of trade-secrets in Canada. The definition mirrors that of the *Uniform Trade-Secrets Act* adopted by the majority of the state legislatures in the United States. The *Uniform Trade-Secrets Act* [2.1] provides as follows:

> 1.
> (4) "Trade Secret" means information, including a formula, pattern, compilation, program, device, method, technique or process that:
>
> > (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
> >
> > (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Ontario High Court adopted several American definitions of trade-secrets in the case *R. I. Crain Ltd. v. Ashton*: [3]

> The term, "trade-secret." as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on ... a trade-secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade-secret is a process or device for continuous use in the operation of the business. The subject matter of a trade-secret must be secret.

The Institute of Law Research and Reform [4] outlined four potential categories of trade-secrets including: (1) specific product secrets such as a chemical formula; (2) technological secrets, that is knowledge of some process of know-how that nobody else has yet developed; (3) strategic business information such as secret marketing information or customer lists; and, (4) specialized compilations of information that, in sum, are not publicly known and have unique value on that account.

In determining whether certain information is in fact confidential, the Canadian courts consider several criteria. Although the list is not exhaustive, it includes whether: an owner has taken measures to ensure that the information remains secret; the owner has made it clear that he/she regards the information as secret; [5] the information is known only to a few people within the business; and it has great value to the business and to its competitors. [6] Also determinative is whether the information is unique, novel or original even in a minimal way [7] or that the information or product is identifiable or distinctive. [8] The expenditure of time, effort and money to develop a product is sometimes considered. [9] If the information is generally known, [10] or known to others within the specific industry or trade [11] then it is probably not confidential information. However, there is a British case that provides that information in the public domain can be the subject of an action for confidential information where the confider holds the confidant to a promise not to disclose the information and where publicity of the information may have a negative effect on the confider's reputation. [12]

Moreover, in *Pastor v. Chen*, [12.1] the Court found that a dance routine comprising complicated dance moves involving multiple dance partners, that could not be easily learned from video tapes, was confidential and proprietary information belonging to the plaintiff dance instructor. The dance moves taught by the plaintiff were a mixture, being partly in the public domain (based on a dance called La Rueda) and partly having a significant element of originality.

(b) — Protection is at Common Law

Confidential information and trade-secrets are primarily dealings of a private nature and involve essentially private rights. These rights are protected by the common law of the provinces.

Trade-secrets and confidential information are dealt with to a limited extent in a number of statutes such as the *Access to Information Act*, [13] and the *Freedom of Information and Protection of Privacy Act*. [14]

In Canada, the criminal law does not extend to protect a breach of confidence under the theft provisions in the *Criminal Code* [15] and a breach of confidence is not subject to the unfair competition provisions of the *Trade-Marks Act*. [16]

(c) — International Protection

The *North American Free Trade Agreement* [17] has provisions dealing with trade-secrets. The parties to the Agreement undertake to supply legal means to protect trade-secrets in so far as the information is secret, has commercial value, and the owner of the information has taken reasonable steps to keep the information secret. Similarly, the TRIPS Agreement [18] provides that members shall protect undisclosed information from being disclosed without consent in a manner contrary to honest commercial practices so long as that information is secret, has commercial value, and has been subject to reasonable steps to keep it secret. Respecting data submitted to governments or their agencies, that information shall be protected against unfair commercial use and disclosure except where necessary to protect the public interest.

Footnotes

1 *CPC International Inc. v. Seaforth Creamery Inc.* (1996), 69 C.P.R. (3d) 297 at 304 (Ont. Gen. Div.).

2 [hereinafter the Institute of Law Research and Reform] Report No. 46, July 1986 at 256: "'trade-secret' means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process, or information contained or embodied

in a product device or mechanism which (i) is, or may be used in a trade or business, (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

2.1 1987, c. 143.

3 (1949), 9 C.P.R. 143 at 149 (Ont. H.C.); aff'd (1949), 11 C.P.R. 53 (Ont. C.A.). It is interesting to note that James D. Kokonis has also referred to these definitions in his chapter "Confidential Information" in G.F. Henderson, ed., *Copyright and Confidential Information Law of Canada* (Toronto: Carswell, 1994) 325 at 327.

4 Institute of Law Research and Reform, *supra*, note 2, at 6.

5 *Software Solutions Associates Inc. v. Depow* (1989), 25 C.P.R. (3d) 129 at 138-139 (N.B.Q.B.); *CPC International*, *supra*, note 1. *Belform Insulation Ltd. v. Toleks Insulation Ltd.* (1998), 85 C.P.R. (3d) 160 at 163 (Ont. Gen. Div.).

6 *Techform Products Ltd. v. Wolda* (2000), 5 C.P.R. (4th) 25 at 50 (Ont. S.C.J.); additional reasons at (2000), 2000 CarswellOnt 6253 (Ont. S.C.J.); reversed (2001), 15 C.P.R. (4th) 44 (Ont. C.A.); additional reasons at (2001), 2001 CarswellOnt 3881 (C.A.); leave to appeal refused [2002] 3. S.C.R. xii (S.C.C.); additional reasons at (2000), 2000 CarswellOnt 3352 (S.C.J.).

7 *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 at 47 (Eng. Ch. Div.).

8 *Cadbury Schweppes Ltd. v. FBI Foods Ltd.*, [1994] B.C.J. No. 1191 (B.C.S.C.); rev'd [1996] B.C.J. No. 1813, 138 D.L.R. (4th) 682 (B.C.C.A.); rev'd (1999), 83 C.P.R. (3d) 289, [1999] 1 S.C.R. 142 (S.C.C.). The finding that the recipe and process of manufacture were considered confidential information was not disputed in the following appeals. The B.C.S.C. determined that because no one could identify the feature that made Clamato distinct from all other tomato cocktail products spoke to the importance of the particular recipe.

9 *Cadbury Schweppes*, *supra*, note 8. *Belform Insulation*, *supra*, note 5, at 163-164.

10 *Coco*, *supra*, note 7. *Faccenda Chicken Ltd. v. Fowler*, [1986] 1 All E.R. 617 at 623 (Eng. C.A.); *R. L. Crain*, *supra*, note 3, at 64.

11 *Techform Products*, *supra*, note 6.

12 *Schering Chemicals Ltd. v. Falkman Ltd.*, [1982] Q.B. 1 at 28: "Even in the commercial field, ethics and good faith are not to be regarded as merely opportunistic or expedient. In any case, though facts may be widely known, they are not ever-present in the minds of the public. To extend the knowledge or to revive the recollection of matters which may be detrimental or prejudicial to the interests of some person or organisation is not to be condoned because the facts are already known to some and linger in the memory of others."

12.1 (2002), 19 C.P.R. (4th) 206 (B.C. Prov. Ct.).

13 R.S.C. 1985, c. A-1, s. 20(1): prohibits a government institution from disclosing confidential information belonging to third parties. See *Pricewaterhousecoopers, LLP v. Minister of Canadian Heritage*, unreported (2001, Fed. Ct. No. T-1785-99); 2001 FCT 1040.

14 R.S.O. 1990, c. F-13, ss. 17 and 18.

15 *R. v. Stewart*, [1988] 1 S.C.R. 963, 21 C.P.R. (3d) 289 the criminal law does not extend to protect a breach of confidence based on the fact that confidential information is not property for the purposes of the *Criminal Code*.

16 *MacDonald. v. Vapor Canada Ltd.* (1976), 22 C.P.R. (2d) 1 (S.C.C.): Among other causes of action, the plaintiff alleged breach of confidence and appropriation of confidential information by an employee. The case was initially tried at the federal court trial division. See *Vapor Canada Ltd. v. MacDonald* (1972), 6 C.P.R. (2d) 204 (F.C.T.D.). The issue at the Supreme Court was a constitutional one involving the jurisdiction of the Federal Court to entertain the plaintiff's claims for civil redress by way of damages, an injunction and other ancillary relief. The Court considered whether the statutory basis for relief under sections 7(e), 53 and 55 of the *Trade-Marks Act* was one that Parliament may prescribe. Section 7(e) is under the unfair competition heading in the *Trade-Marks Act* and prohibits acts or business practices contrary to honest industrial or commercial usage in Canada. The *Trade-Marks Act* is a federal statute. If s. 7(e) was found to relate primarily to property and civil rights in the province, or alternatively to matters of a local or private nature then it attracted provincial jurisdiction and was *ultra vires*. If s. 7(e) was found to be within federal jurisdiction, as an exercise of the

federal trade and commerce power, then it was not *ultra vires* and the plaintiffs could have their remedy. All members of the Court found that s. 7(e) of the *Trade-Marks Act* was *ultra vires* Parliament as to its applicability to matters of civil rights in the province.

17 *North American Free Trade Agreement*, ch. 17, article 1711 respecting Trade-secrets.

18 *Agreement on Trade-Related Aspects of Intellectual Property Rights, A Multilateral Agreement*, 15 April, 1994, 33 I.L.M. 1197, s.7 art. 39 (Annex 1C to the *Marakesh Agreement Establishing the World Trade Organization*).

End of Document

TAB 3

1999 CarswellMan 499
Manitoba Court of Queen's Bench

Essentially Yours Industries Corp. v. Infinitec Marketing Group Inc.

1999 CarswellMan 499, [2000] 5 W.W.R. 283, 41 C.P.C. (4th) 342, 93 A.C.W.S. (3d) 146

Essentially Yours Industries Corp., Plaintiff and Infinitec Marketing Group Inc. and Alan Rosenberg, Defendants

Kennedy J.

Judgment: November 10, 1999 *
Docket: Winnipeg Centre CI 99-01-13809

Counsel: *Bernice R. Bowley*, for Plaintiff.
R. Beamish, for Defendants.

Subject: Civil Practice and Procedure; Corporate and Commercial

APPLICATION by plaintiff for interim injunction preventing defendants from selling list of names.

***Kennedy J.*:**

1 The plaintiff, Essentially Yours Industries Corp. (EYI), seeks an injunction against the defendants prohibiting them from selling or distributing a list of names they acquired while under contract with the plaintiff.

2 The plaintiff is in the business of selling wellness and weight loss products accessible through the Internet. The plaintiff directly sells the product through a distribution network of Independent Business Associates (IBA's). EYI claims to have in the vicinity of some 350,000 IBA's enlisted for this purpose, of which only about 65,000 are active. For the purpose of this application, the plaintiff's concern is with respect to a list of approximately 7,000 IBA's which is in the hands of the defendant, Infinitec Marketing Group Inc. (Infinitec), and its principal officer, Alan Rosenberg.

3 The sale of the plaintiff's product is carried out through the network of IBA's and their downline IBA's, recruited by them in a multi-level distribution system which operates similar to a pyramid, with IBA's selling product and recruiting downline IBA's. The downline IBA's also sell the product with each level deriving a commission on the sale of the product ultimately purchased from the plaintiff.

4 The distribution begins with the plaintiff's web site which offers the product, but also enlists IBA's to sell the product. The plaintiff's business derives its revenue through the sales made by the IBA's, who in turn purchase the product from the plaintiff.

5 In recruiting IBA's, EYI retains a closely held list of its membership and the computerized ability to contact them. Various safeguards are put in place allowing only certain persons access, with the permission of the plaintiff, to the full list of IBA's.

6 The plaintiff regards the list of IBA's as the lifeline to its business and it keeps the names a closely guarded secret. The plaintiff refers to its list as its database since its marketing distribution system relies totally upon the IBA's and their downlines. The list of IBA's may not technically be a database, but its recruitment of and reliance on the IBA's is the ultimate source for generating income. In my opinion, the list is a valuable asset of the plaintiff's business.

7 The defendant, Infinitec, signed a web site development agreement with EYI, the main feature of which was to engage Infinitec to prepare individual web sites for the IBA's and their downlines, in order to complete the multi-level distribution system through the use of Infinitec's expertise in reaching the plaintiff's market.

8 The IBA's are recruited from all over the world on the World Wide Web, and the web sites developed by the defendants through their "Virtual Web Site" program purports to allow purchasers and IBA's superior access to the distribution and purchase of the plaintiff's products.

9 The web site allows the IBA's to order product through a confidential number provided to each IBA when signed up under a standard agreement with the plaintiff. The agreement also governs the sale of the plaintiff's product to the individual IBA's, and provides for the recruitment of other IBA's and the revenue for doing so.

10 To provide the service of constructing individual web sites for the IBA's, Infinitec was necessarily given access to the plaintiff's downline tracking system of all online distributors who have signed up for the Infinitec "Virtual Web Site."

11 The Infinitec Virtual Web Site is the primary service provided by the defendants to the plaintiff as it affords the IBA access to the plaintiff's services, including its accessibility to customers and EYI's product.

12 The development of the web site for the individual IBA is done at a cost to the IBA.

13 The agreement between the plaintiff and the defendants contains provisions regarding the confidentiality and protection of EYI's distribution list and these provisions were clearly known to the defendants.

14 Under the agreement with Infinitec, one of the objectives articulated was as follows: "to ensure a high level of security to protect EYI's distribution list from unauthorized use." (See Agreement Exhibit A to the Affidavit of Brian Lavorato sworn July 20, 1999). One need not speculate that an unauthorized use was to provide the names to a competitor of the plaintiff.

15 Under the contract with EYI, Infinitec generated a list of approximately 7,000 names for whom it did work in establishing a web site with new IBA's and its downline members. Infinitec and EYI terminated their agreement, and Infinitec now seeks to sell the list of approximately 7,000 names or parts thereof to the plaintiff's competitors.

16 It is respecting the sale of these names that the plaintiff seeks to enjoin the defendants from so doing.

17 The parties have examined the various headings governing when an interim injunction ought to be allowed and argued the following factors:

(a) On a cursory review of the merits of the case, is there a serious question to be tried?

(b) Would the party seeking the injunction suffer irreparable harm?

(c) Which of the two parties will suffer the greater harm from refusing or granting the interlocutory injunction pending determination on the merits?

18 While this case involves the burgeoning litigation that is likely to arise out of e-commerce, it is clear that in developing the list of 7,000 IBA's the list has considerable value. It represents numerous entrepreneurs who are disposed to selling a product through the Internet, and were the list to be sold to the plaintiff's competitors who may sell similar products, it leaves the plaintiff vulnerable in that a competitor might easily solicit the individual IBA and use his/her customer list to sell a competitor product at a lesser or more competitive price than the plaintiff. The list in its present form is also valuable to the defendants.

19 Inasmuch as the defendants obtained the list while under contract with the plaintiff, the list would not have come to them in the form that it is were it not for being engaged by the plaintiff to prepare web sites for the IBA's who have contracted with the plaintiff.

20 The defendants make the obvious argument that once the web site is prepared, the individual IBA is accessible to any member of the public by searching the Internet for persons selling the plaintiff's product. Those searches would reveal many of the names or the companies which have signed an agreement as IBA with the plaintiff. The defendants argue in that respect that the identity of the individual IBA's is within the public domain, and, therefore, the lists could hardly be referred to as confidential.

21 Accessibility, however, to this list involves a considerable degree of searching, though not providing all of the information available on the list which the defendants posses as a result of developing the individual web sites. The plaintiff argues that the discrete list of 7,000 persons, representing approximately 10% of the plaintiff's overall IBA list, is in a form and contains information which would take any other individual a considerable length of time to amass, even though the possibility of being able to do so is real.

22 The availability of the names in the public domain by culling them from a huge list involving considerable difficulty speaks to the issue of confidentiality. The effort needed to search for the list on an individual basis would, to say the least, be tedious, as each individual web site must be accessed through individual computer search and, therefore, would involve a considerable degree of time and energy.

23 The defendants, on the other hand, have a ready-made discrete list of all of the information without the need to tediously obtain it through individual searches on the Internet.

24 The process of sophisticated searching on the Internet might simplify the process although, if easily carried out, it was not made known to the court. I am left with the belief that, although it is possible to ultimately obtain much of the information contained in the list, the defendants could have avoided this litigation had the names been readily available. In my view, having the names in the organized fashion the defendants have it, renders it confidential information and worthy of protection.

25 In considering the foregoing, I am satisfied that there is a serious question to be tried, having to do with the ownership and control of the plaintiff's list of IBA's. If the defendants are not entitled to that list and it is in fact sold to competitors, which appears to be the intention of the defendants, there would be considerable losses incurred by the plaintiff, which to some extent would be difficult to calculate given the anonymity of the downline IBA's. In considering the harm that might be caused by the distribution of the plaintiff's list to others, it may not be incalculable, but would be based more or less on speculation than on real facts given the nature of the multi-level selling process. Finally, the defendants have never been involved in selling lists of this nature before, and their principal area of business is in the marketing of web sites and their particular ability to create web sites which are more readily accessible than others. It would therefore be the plaintiff's business that would be injured if the interlocutory injuction were not granted as opposed to the defendants, who haven't until this point relied upon the revenue of selling lists.

26 In considering these matters and concluding that the lists appear to be protected by the agreement entered into between the plaintiff and the defendants, and considering the nature of the lists and how they were acquired, I have no difficulty in concluding that the lists are confidential notwithstanding their availability on the Worldwide Web. By virtue of the ongoing nature of the plaintiff's business and the short term profit to be gained from the sale of these lists if it were to take place, the balance of convenience in my view favours the plaintiff.

27 It should be observed that the defendant, Alan Rosenberg, who is a principal of Infinitec Marketing Group, was also an IBA and has access to the lists through the same channel as his company. Hence, in the result, both defendants will be enjoined on an interlocutory basis from disposing and/or selling or releasing the lists.

28 If necessary, the settling of the terms of the injuction beyond the foregoing can be spoken to.

29 Interim injunction allowed.

Application granted.

Footnotes

* Affirmed (1999), [2000] 5 W.W.R. 283 (Man. Q.B.)

End of Document

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Spina v. Shoppers Drug Mart Inc. | 2012 ONSC 5563, 2012 CarswellOnt 12295, 223 A.C.W.S. (3d) 20, [2012] O.J. No. 4659 | (Ont. S.C.J., Oct 3, 2012)

1989 CarswellOnt 126
Supreme Court of Canada

International Corona Resources Ltd. v. LAC Minerals Ltd.

1989 CarswellOnt 126, 1989 CarswellOnt 965, [1989] 2 S.C.R. 574, [1989] C.L.D. 1140, [1989] S.C.J. No. 83, 101 N.R. 239, 16 A.C.W.S. (3d) 345, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 36 O.A.C. 57, 44 B.L.R. 1, 61 D.L.R. (4th) 14, 69 O.R. (2d) 287 (note), 69 O.R. (2d) 287, 6 R.P.R. (2d) 1, J.E. 89-1204, EYB 1989-67469

LAC MINERALS LTD. v. INTERNATIONAL CORONA RESOURCES LTD.

McIntyre, Lamer, Wilson, La Forest and Sopinka JJ.

Heard: October 11 and 12, 1988
Judgment: August 11, 1989

Counsel: *Earl A. Cherniak* and *J.L. McDougall*, for appellant.
Alan L. Lenczner and *Ronald G. Slaght*, for respondent.

Subject: Intellectual Property; Corporate and Commercial; Estates and Trusts; Property; Insolvency

Table of Authorities

Cases considered per La Forest J.:

Air Canada v. B.C., [1989] 1 S.C.R. 1161, [1989] 4 W.W.R. 97, 36 B.C.L.R. (2d) 145, 95 N.R. 1, 59 D.L.R. (4th) 161, 2 T.C.T. 4178, [1989] 1 T.S.T. 2126 — *applied*

Burns v. Kelly Peters & Associates Ltd., 41 C.C.L.T. 257, 16 B.C.L.R. (2d) 1, [1987] 6 W.W.R. 1, [1987] I.L.R. 1-2246, 41 D.L.R. (4th) 577 (C.A.) — *referred to*

Central Trust v. Rafuse, [1986] 2 S.C.R. 147, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321, [1986] R.R.A. 527, var'd [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv — *referred to*

Chase Manhattan Bank v. Israel-British Bank, [1981] Ch. 105 — *considered*

Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41 (Ch.) — *applied*

Coomber, Re, [1911] 1 Ch. 723 (C.A.) — *considered*

Cunliffe-Owen v. Teather & Greenwood, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421 (Ch.) — *considered*

Frame v. Smith, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 78 N.R. 40, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 — *applied*

Fraser Edmunston Pty. Ltd. v. A.G.T. (Qld) Pty. Ltd. (1986), Queensland S.C. 17 — *referred to*

Girardet v. Crease & Co. (1987), 11 B.C.L.R. (2d) 361 (S.C.) — *considered*

Goodbody v. Bank of Montreal (1974), 4 O.R. (2d) 147, 47 D.L.R. (3d) 335 (H.C.) — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 — *considered*

Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417 — *considered*

Hunter Engineering Co. Inc. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, 35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385, 92 N.R. 1, 57 D.L.R. (4th) 321 — *applied*

Keech v. Sanford (1726), Sel. Cas. T. King 61, 25 E.R. 223 — *referred to*

Liquid Veneer Co. v. Scott (1912), 29 R.P.C. 639 (Ch.) — *considered*

Muschinski v. Dodds (1985), 160 C.L.R. 583 — *referred to*

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Norwich Winterthur Insurance (Insurance) Ltd. v. Can. Stan. Industries of Australia Pty. Ltd., [1983] 1 N.S.W.C.R. 461 (C.A.) — *referred to*

Pettkus v. Becker, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384 — *considered*

Pre-Cam Exploration & Development Ltd. v. McTavish, [1966] S.C.R. 551, 56 W.W.R. 697, 50 C.P.R. 299, 57 D.L.R. (2d) 557 — *considered*

Saltman Engineering Co. v. Campbell Engineering Co. (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.) — *considered*

Seager v. Copydex Ltd. (No. 2), [1969] 2 All E.R. 718, [1969] 1 W.L.R. 809 (C.A.) — *considered*

Tito v. Waddell (No. 2), [1977] Ch. 106, [1977] 3 All E.R. 129 — *considered*

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General Tire & Rubber Co. v. Firestone Tyre & Rubber Co., [1975] 2 All E.R. 173, [1975] 1 W.L.R. 819 (H.L.) — *referred to*

Girardet v. Crease & Co. (1987), 11 B.C.L.R. (2d) 361 (S.C.)*considered*

Guerin v. R., [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 — *considered*

Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417 — *considered*

Nicholson v. St. Denis (1975), 8 O.R. (2d) 315, 57 D.L.R. (3d) 699 (C.A.), leave to appeal to the Supreme Court of Canada refused (1975), 8 O.R. (2d) 315n, 57 D.L.R. (3d) 699n — *considered*

Nichrotherm Electrical Co. v. Percy, [1957] R.P.C. 207 — *considered*

Pettkus v. Becker, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384 — *considered*

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Saltman Engineering Co. v. Campbell Engineering Co. (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.), leave to appeal to H.L. refused 65 R.P.C. 215 — *considered*

Seager v. Copydex Ltd., [1967] 2 All E.R. 415, [1967] 1 W.L.R. 923 (C.A.) — *considered*

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Tito v. Waddell (No. 2), [1977] Ch. 106, [1977] 3 All E.R. 129 — *considered*

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APPEAL from a decision of the Ontario Court of Appeal, reported at (1987), 62 O.R. (2d) 1, 44 D.L.R. (4th) 592, affirming decision of trial Judge, reported at (1986), 53 O.R. (2d) 737, finding breach of fiduciary duties and imposing constructive trust.

***La Forest J. (Wilson* and *Lamer JJ.* concurring in part) :**

Introduction

1 The short issue in this appeal is whether this Court will uphold the Ontario Court of Appeal and trial Court decisions ordering LAC to deliver up to Corona land (the Williams property) on which there is a gold mine, on being compensated for the value of improvements LAC has made to the property ($153,978,000) in developing the mine.

2 The facts in this case are crucial. The trial lasted some 5-1/2 months, and the hearing before the Court of Appeal took 10 days. The trial Judge made extensive findings of fact, and the Court of Appeal examined the record in detail and with care. The latter Court emphatically dismissed any argument that the trial Judge had overlooked or misconstrued the evidence, failed to make any necessary findings or made any erroneous inferences. It stated ((1988), 44 D.L.R. (4th) 592 at 595):

> Certainly the establishment of the facts in this case was fundamental and vital to the determination of the issues. It is submitted that erroneous inferences were taken from the facts, that evidence was overlooked or misconstrued, and that relevant findings were not made at all.
>
> There is no obligation on a trial judge to refer to every bit of conflicting evidence to show he has taken it into consideration, nor is he required to cite all the evidence to support a particular finding. In the instant case, the trial judge made some rather terse findings of fact in his recital of the events and of the relationship between the parties in the course of his lengthy reasons. On occasion he encapsuled a great deal of evidence in short form. However, the trial was a lengthy one, his reasons for judgment were lengthy and, as stated, he was not called on to cite every piece of relevant evidence to show he had considered it.
>
> . . . . .
>
> We can say in opening that we have not been persuaded that the learned trial judge overlooked or misconstrued any important or relevant evidence. There was ample evidence to support his conclusions on the facts and there is no palpable or overriding error in his assessment of the facts.

3 In this Court, LAC disclaimed any attack on the facts as found by the trial Judge, but they argued that the Court of Appeal erred in making further findings and drawing inferences from the facts so found. I accept the facts as they are set out in the judgments below, and I would respectfully add that, in my view, the Court of Appeal in no way misconstrued the purport of what it describes as the trial Judge's necessarily "rather terse findings of fact" in the course of lengthy reasons.

4 I have had the advantage of reading the reasons of my colleague, Justice Sopinka. He has given a general statement of the facts as well as the judicial history of the case, and I shall refrain from doing so. I should immediately underline, however, that while I am content to accept this statement as a general outline, it will become obvious that I, at times, take a very different view of a number of salient facts and the interpretation that can properly be put upon them, in particular as they impinge on the nature, scope and effect of the breach of confidence alleged to have been committed by LAC against Corona.

5 It is convenient to set forth any conclusions at the outset. I agree with Sopinka J. that LAC misused confidential information confided to it by Corona in breach of a duty of confidence. With respect, however, I do not agree with him about the nature and scope of that duty. Nor do I agree that in the circumstances of this case it is appropriate for this Court to substitute an award of damages for the constructive trust imposed by the Courts below. Moreover, while it is not strictly necessary for the disposition of the case, I have a conception of fiduciary duties different from that of my colleague, and I would hold that a fiduciary duty, albeit of limited scope, arose in this case. In the result, I would dismiss the appeal.

The Issues

6 Three issues must be addressed:

7 1. What was the nature of the duty of confidence that was breached by LAC?

8 2. Does the existence of the duty of confidence, alone or in conjunction with the other facts as found below, give rise to any fiduciary obligation or relationship? If so, what is the nature of that obligation or relation?

9 3. Is a constructive trust an available remedy for a breach of confidence as well as for breach of a fiduciary duty, and if so, should this Court interfere with the lower Courts' imposition of that remedy?

Breach of Confidence

10 I can deal quite briefly with the breach of confidence issue. I have already indicated that LAC breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows (p. 47):

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.

This is the test applied by both the trial Judge and the Court of Appeal. Neither party contends that it is the wrong test. LAC, however, forcefully argued that the Courts below erred in their application of the test. LAC submitted that "the real issue is whether Corona proved that LAC received confidential information from it and [whether] it should have known such information was confidential".

11 Sopinka J. has set out the findings of the trial Judge on these issues, and I do not propose to repeat them. They are all supported by the evidence and adopted by the Court of Appeal. I would not interfere with them. Essentially, the trial Judge found that the three elements set forth above were met: (1) Corona had communicated information that was private and had not been published. (2) While there was no mention of confidence with respect to the site visit, there was a mutual understanding between the parties that they were working towards a joint venture and that valuable information was communicated to LAC under circumstances giving rise to an obligation of confidence. (3) LAC made use of the information in obtaining the Williams property and was not authorized by Corona to bid on that property. I agree with my colleague that the information provided by Corona was the springboard that led to the acquisition of the Williams property. I also agree that the trial Judge correctly applied

the reasonable mean test. The trial Judge's conclusion that it was obvious to Sheehan, LAC's vice-president for exploration, that the information was being communicated in circumstances giving rise to an obligation of confidence, following as it did directly on a finding of credibility against Sheehan, is unassailable.

12 In general, then, there is no difference between my colleague and me that LAC committed a breach of confidence in the present case. Where we differ — and it is a critically important difference — is in the nature and scope of the breach. The precise extent of that difference can be seen by a closer examination of the findings and evidence on the third element of the test set forth above, and I will, therefore, set forth my views on this element at greater length.

13 With respect to this aspect of the test, it is instructive to set out the trial Judge's finding in full. He said ((1986), 25 D.L.R. (4th) 504) at 542-543:

> *Has Corona established an unauthorized use of the information to the detriment of Corona?*
>
> Where the duty of confidence is breached, the confidee will not be allowed to use the information as a springboard for activities detrimental to the confider: see *Cranleigh Precision Engineering, Ltd. v. Bryant et al.*, [1964] 3 All E.R. 289 (Q.B.).
>
> Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.
>
> Certainly Lac was not authorized by Corona to bid on the Williams property.
>
> I have already reviewed the evidence dealing with the acquisition of the Williams property by Lac and the efforts made by Corona through Mr. McKinnon and also directly to acquire the Williams property. *On a balance of probabilities I find that, but for the actions of Lac, Corona would have acquired the Williams property and therefore Lac acted to the detriment of Corona.*
>
> I conclude that Corona has established the three requirements necessary for recovery based on the doctrine of breach of confidence.

[Emphasis added.] Later in his reasons he reiterated (p. 546) that "but for the actions of Lac, Corona would probably have acquired the Williams property".

14 The Court of Appeal was of the same view. It held (p. 657, D.L.R.) that:

> the evidence also amply sustains the finding that the confidential information which LAC received from Corona was of material importance in its decision to acquire the Williams property. In this latter regard it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property.

15 It was argued that this passage in the Court of Appeal's reasoning is a finding of fact that was not made by the trial Judge and that the record will not support. In my view, the Court of Appeal in no way extended the finding of the trial Judge. The portion of Holland J.'s reasons I have set out above was directed solely at the question of whether Corona had established an unauthorized use of the information to the detriment of Corona. He concluded that there had been an unauthorized use since LAC had not been authorized by Corona to bid on the Williams property. In other words, Corona did not consent to the use of the information by LAC for the purpose of acquiring the Williams land for LAC's own account, or, for that matter, for any purpose other than furthering negotiations to jointly explore and develop these properties. He also found that the information had been used to the detriment of Corona. When the sole question the learned trial Judge was addressing was whether LAC misused the confidential information Corona had provided to it and his sole conclusion was that "but for the actions of Lac, Corona would have acquired the Williams property *and therefore Lac acted to the detriment of Corona*" (emphasis added), I find the conclusion inescapable that the trial Judge found as a fact that but for the *confidential information received and misused*, Corona would have acquired the Williams property and that LAC was not authorized to obtain it.

16 If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy.

17 There was some suggestion that LAC was only restricted from using the information imparted by Corona to acquire the Williams property for its own account, and had LAC acquired the claims on behalf of both Corona and LAC, there would have been no breach of duty. This, as I have noted, seems to me to misconstrue the finding of the trial Judge. What is more, the evidence, in my view, does not support that position. While Sheehan's letter of May 19, relied on by my colleague, may have been unclear as to who should acquire the Williams property, the events on June 30 make clear to me that both LAC and Corona contemplated Corona's acquisition of the Williams claims. The trial Judge, again making a finding of creditbility against Sheehan and Allen (LAC's president), accepted the evidence of Corona's witnesses, Bell and Dragovan, that not only was the Williams property discussed at the meeting on this latter date, but that Corona's efforts to secure it were discussed and that Allen advised Corona that they had to be aggressive in pursuing a patent group such as this. LAC in no way indicated to Corona, at this time or any other, that they were also pursuing the property. Yet 3 days later, Sheehan spoke with Mrs. Williams about making a deal for her property, and on July 6, 1981, LAC's counsel and corporate secretary submitted a written bid for the 11 patented claims. It strains credulity to suggest that on June 30 either LAC or Corona contemplated that Corona had given LAC confidential information so that LAC could acquire the property on either its own behalf or on behalf of both parties jointly. Certainly Corona would not have allowed the use of the confidential information for LAC's acquisition of the property to Corona's exclusion. Had the joint acquisition of the property been an authorized use of the information, surely there would have been some discussion of LAC's efforts to that end at the June 30 meeting. Instead, LAC advised Corona to aggressively pursue the claims.

18 The evidence of LAC's president, Mr. Allen, and of the experts called on behalf of LAC also support the position that LAC was not entitled to bid on the property and that Corona could expect that LAC would not do so. Allen testified as follows, in a passage to which both Courts below attached central importance:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that *while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.*

[Emphasis added.] All the experts called by LAC agreed with the tenor of this statement. The testimony of Dr. Derry is indicative. He testified as follows:

> Q. Ah, so now we have it this way: that if some — so I understand your evidence — if Sheehan knew, as apparently he does from the way you read the evidence, that Corona was intending to acquire the Williams property; correct?
>
> A. Yes
>
> Q. That, for at least some period of time, Lac is precluded from making an offer or outbidding Corona on that property?
>
> A. I would say early on, yes.
>
> Q. Yes. And that obligation or the rationale for that preclusion comes from the fact that it is recognized in the industry, is it not?
>
> A. Yes.

Whether these statements amount to a legally enforceable custom or whether they create a fiduciary duty are separate questions, but at the very least, they show that LAC was aware that it owed some obligation to Corona to act in good faith, and that that obligation included the industry-recognized practice not to acquire the property which was being pursued by a party with which it was negotiating.

19 Corona's activity following LAC's acquisition of the property is also noteworthy. The Court of Appeal thus described it (pp. 633-634, D.L.R.):

> Upon learning from Dragovan of the LAC offer to Mrs. Williams, Pezim immediately instructed his solicitor to act for Corona in the matter and Bell ordered LAC's crew engaged in the joint geochemical sampling programme to leave Corona's property. After Sheehan had learned of the termination of the geochemical study, he telephoned Bell on August 4th and was told by him that the reason for the termination was LAC's offer to Mrs. Williams. Sheehan said that he was still interested in a deal with Corona and Bell answered that he would have to discuss the matter with Pezim. On August 18th Sheehan and Pezim met in Vancouver to discuss the Corona property. The meeting was abortive. According to Pezim's evidence, and the trial judge so found, Pezim insisted that it was a condition of any deal that LAC 'give back' to Corona the Williams property. Subsequent negotiations between Sheehan and Donald Moore, a director of Corona, also failed to resolve the differences between LAC and Corona. After his meeting with Sheehan, Pezim, according to his testimony, instructed his solicitors to press on with the matter. This action was commenced on October 27, 1981, long before it was established that a producing gold mine on the Williams property was a probability.

This is certainly inconsistent with Corona having provided LAC the information so that LAC could acquire the property, whether alone or for their joint ownership.

20 This entire inquiry appears, however, to be misdirected. In establishing a breach of a duty of confidence, the relevant question to be asked is what is the confidee entitled to do with the information, and not to what use he is prohibited from putting it. Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use. In *Coco v. A.N. Clark (Engineers) Ltd.*, supra, at 48, Megarry J. said this in regard to the burden on the confidee to repel a suggestion of confidence:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

In my view, the same burden applies where it is shown that confidential information has been used and the user is called upon to show that such use was permitted. LAC has not discharged that burden in this case.

21 I am therefore of the view that LAC breached a duty owed to Corona by approaching Mrs. Williams with a view to acquiring her property, and by acquiring that property, whether or not LAC intended to invite Corona to participate in its subsequent exploration and development. Such a holding may mean that LAC is uniquely disabled from pursuing property in the area for a period of time, but such a result is not unacceptable. LAC had the option of either pursuing a relationship with Corona in which Corona would disclose confidential information to LAC so that LAC and Corona could negotiate a joint venture for the exploration and development of the area, or LAC could, on the basis of publicly available information, have pursued property in the area on its own behalf. LAC, however, is not entitled to the best of both worlds.

22 In this regard, the case can be distinguished from *Coco v. A.N. Clark (Engineers) Ltd.*, in that here the confidential information led to the acquisition of a specific, unique asset. Imposing a disability on a party in possession of confidential information from participating in a market in which there is room for more than one participant may be unreasonable, such as where the information relates to a manufacturing process or a design detail. In such cases, it may be that the obligation on the confidee is not to use the confidential information in its possession without paying compensation for it or sharing the benefit derived from it. Where, however, as in the present case, there is only one property from which LAC is being excluded, and

there is only one property that Corona was seeking, the duty of confidence is a duty not to use the information. The fact that LAC is precluded from pursuing the Williams property does not impose an unreasonable restriction on LAC. Rather, it does the opposite by encouraging LAC to negotiate in good faith for the joint development of the property.

Fiduciary Obligation

23 Having established that LAC breached a duty of confidence owed to Corona, the existence of a fiduciary relationship is only relevant if the remedies for a breach of a fiduciary obligation differ from those available for a breach of confidence. In my view, the remedies available to one head of claim are available to the other, so that provided a constructive trust is an appropriate remedy for the breach of confidence in this case, finding a fiduciary duty is not strictly necessary. In my view, regardless of the basis of liability, a constructive trust is the only just remedy in this case. Nonetheless, in light of the argument, I think it appropriate to consider whether a fiduciary relationship exists in the circumstances here.

24 There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. Indeed, the term "fiduciary" has been described as "one of the most ill-defined, if not altogether misleading terms in our law"; see P.D. Finn, *Fiduciary Obligations* (1977), at 1. It has been said that the fiduciary relationship is "a concept in search of a principle"; see Sir Anthony Mason, "Themes and Prospects" in P.D. Finn, *Essays in Equity* (1985), at 246. Some have suggested that the principles governing fiduciary obligations may indeed be undefinable (D.R. Klinck, "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on *International Corona Resources Ltd. v. Lac Minerals Ltd.*" (1988), 33 *McGill Law Journal* 600 at 603), while others have doubted whether there can be any "universal, all-purpose definition of the fiduciary relationship" (see *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, 432; R.P. Austin, "Commerce and Equity — Fiduciary Duty and Constructive Trust" (1986), 6 O.J.L.S. 444, 445-446). The challenge posed by these criticisms has been taken up by Courts and academics convinced of the view that underlying the divergent categories of fiduciary relationships and obligations lies some unifying theme; see *Frame v. Smith*, [1987] 2 S.C.R. 99 at 134, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 78 N.R. 40, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 per Wilson J.; Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; P.D. Finn, "The Fiduciary Principle" (1988), to be published by Carswell in T. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989); J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981), 97 L.Q.R. 51; T. Frankel, "Fiduciary Law" (1983), 71 *California Law Review* 795; J.R.M. Gautreau, "Demystifying the Fiduciary Mystique" (1989), 68 C.B.R. 1. This case presents a further opportunity to consider such a principle.

25 In *Guerin v. R.*, [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161, Dickson J. (as he then was) discussed the nature of fiduciary obligations in the following passage, at 383-384 [S.C.R.]:

> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery.
>
> . . . . .
>
> Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that 'the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.' Earlier, at p. 4, he puts the point in the following way:
>
>> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> *I make no comment upon whether this description is broad enough to embrace all fiduciary obligations.* I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the

> benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

[Emphasis added.]

26 Wilson J. had occasion to consider the extension of fiduciary obligations to new categories of relationships in *Frame v. Smith*, supra. She found (p. 136, S.C.R.) that:

> there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not *the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent*.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[Emphasis added.]

27 It will be recalled that the issue in that case, though not originally raised by the parties but argued at the request of the Court, was whether the relationship of a custodial parent to a non-custodial parent could be considered a category to which fiduciary obligations could attach. Wilson J. would have been willing to extend the categories of fiduciary relations to include such parties. While the majority in that case did not consider it necessary to address the bases on which fiduciary obligations arise (essentially because it considered the statute there to constitute a discrete code), as will be seen from my reasons below, I find Wilson J.'s approach helpful.

28 Much of the confusion surrounding the term "fiduciary" stems, in my view, from its undifferentiated use in at least three distinct ways. The first is as used by Wilson J. in *Frame v. Smith*, supra. There the issue was whether a certain class of relationship, custodial and non-custodial parents, were a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the Courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. This was made clear by Southin J. (as she then was) in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (S.C.). She stated:

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But 'fiduciary' comes from the Latin "fiducia' meaning 'trust'. Thus, the adjective, 'fiduciary' means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with

> the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. In determining whether the categories of relationships which should be presumed to give rise to fiduciary obligations should be extended, the rough and ready guide adopted by Wilson J. is a useful tool for that evaluation. This class of fiduciary obligation need not be considered further, as Corona's contention is not that "parties negotiating towards a joint-venture" constitute a category of relationship, proof of which will give rise to a presumption of fiduciary obligation, but rather that a fiduciary relationship arises out of the particular circumstances of this case.

29 This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected. I agree with this comment of Professor Finn in "The Fiduciary Principle", supra at 64:

> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the 'fiduciary expectation'. Such a role may generate an actual expectation that that other's interests are being served. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.

It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship; see D.W.M. Waters, *The Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

30 The third sense in which the term "fiduciary" is used is markedly different from the two usages discussed above. It requires examination here because, as I will endeavour to explain, it gives a misleading colouration to the fiduciary concept. This third usage of "fiduciary" stems, it seems, from a perception of remedial inflexibility in equity. Courts have resorted to fiduciary language because of the view that certain remedies, deemed appropriate in the circumstances, would not be available unless a fiduciary relationship was present. In this sense, the label fiduciary imposes no obligations, but rather is merely instrumental or facilitative in achieving what appears to be the appropriate result. The clearest example of this is the judgment of Goulding J. in *Chase Manhattan Bank v. Israel-British Bank*, [1981] Ch. 105. There the plaintiffs had transferred some $2,000,000 to the defendant's account at a third bank. Due to a clerical error, a second payment in the same amount was made later that day. Instructions to stop the payment were made, but not quickly enough. The defendant bank was put into receivership shortly after the payment made in error was received, and as it was insolvent, the plaintiff could only recover the full amount of its money if it could trace it into some identifiable asset. Responding to the argument that, even if the funds could be identified, they could not be recovered since there was no fiduciary relationship, Goulding J. made the following comments, at 118-119, which it is worth setting out extensively:

> The facts and decisions in *Sinclair v. Brougham*, [1914] A.C. 398 and in *In re Diplock*, [1948] Ch. 465 are well known and I shall not take time to recite them. I summarise my view of the *Diplock* judgment as follows: (1) The Court of Appeal's interpretation of *Sinclair v. Brougham* was an essential part of their decision and is binding on me. (2) The court thought

that the majority of the House of Lords in *Sinclair v. Brougham* had not accepted Lord Dunedin's opinion in that case, and themselves rejected it. (3) *The court (as stated in Snell, loc. cit.) held that an initial fiduciary relationship is a necessary foundation of the equitable right of tracing. (4) They also held that the relationship between the building society directors and depositors in Sinclair v. Brougham was a sufficient fiduciary relationship for the purpose: [1948] Ch. 465, 529, 540. The latter passage reads, at p. 540: 'A sufficient fiduciary relationship was found to exist between the depositors and the directors by reason of the fact that the purposes for which the depositors had handed their money to the directors were by law incapable of fulfillment.'* It is founded, I think, on the observations of Lord Parker of Waddington at [1914] A.C. 398, 441.

This fourth point shows that the fund to be traced need not (as was the case in *In Re Diplock* itself) *have been the subject of fiduciary obligations before it got into the wrong hands. It is enough that, as in Sinclair v. Brougham [1914] A.C. 398, the payment into wrong hands itself gave rise to a fiduciary relationship.* The same point also throws considerable doubt on Mr. Stubbs's submission that the necessary fiduciary relationship must originate in a consensual transaction. It was not the intention of the depositors or of the directors in *Sinclair v. Brougham* to create any relationship at all between the depositors and the directors as principals. Their object, which unfortunately disregarded the statutory limitations of the building society's powers, was to establish contractual relationships between the depositors and the society. *In the circumstances, however, the depositors retained an equitable property in the funds they parted with, and fiduciary relationships arose between them and the directors. In the same way, I would suppose a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right.*

[Emphasis added.] It is clear that if a fiduciary relationship was necessary for the plaintiff to be entitled to a proprietary tracing remedy, then such a relationship would be found. It is equally clear that this relationship has nothing to do with the imposition of obligations traditionally associated with fiduciaries. For another example, see *Goodbody v. Bank of Montreal* (1974), 4 O.R. (2d) 147, 47 D.L.R. (3d) 335 at 339 (H.C.), where a thief was considered to be a fiduciary so as to ground an equitable tracing order.

31 Professor Birks has described this approach as follows (Peter Birks, "Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity" (1987), *Lloyd's Maritime and Commercial Law Quarterly* 421 at p. 436):

This approach moves the characterization of a relationship as fiduciary from the reasoning which justifies a conclusion to the conclusion itself: a relationship becomes fiduciary because a legal consequence traditionally associated with that label is generated by the facts in question.

Professor Weinrib has criticized it because ("The Fiduciary Obligation", supra, at 5):

This definition in terms of the effect produced by the finding of a fiduciary relation begs the question in an obvious way: one cannot both define the relation by the remedy and use the relation as a triggering device for remedy.

Megarry V-C commented on this approach to identifying a fiduciary obligation in *Tito v. Waddell (No. 2)*, [1977] Ch. 106, [1977] 3 All E.R. 129. In that case, the argument made was that [at 231-232, E.R.]:

A was in a fiduciary position towards B if he was performing a special job in relation to B which affected B's property rights, at any rate if A was self-dealing. This ... could be put in two ways. First, there was a fiduciary duty if there was a job to be performed and it was performed in a self-dealing way. Alternatively, there was a fiduciary duty if there was a job to perform, and equity then imposed a duty to perform it properly if there was any self-dealing.

He rejected this position as follows, at 232 [E.R.]:

I cannot see why the imposition of a statutory duty to perform certain functions, or the assumption of such a duty, should as a general rule impose fiduciary obligations, or even be presumed to impose any. Of course, the duty may be of such a nature as to carry with it fiduciary obligations: impose a fiduciary duty and you impose fiduciary obligations. But apart from such cases, it would be remarkable indeed if in each of the manifold cases in which statute imposes a duty, or imposes

> a duty relating to property, the person on whom the duty is imposed was thereby to be put into a fiduciary relationship with those interested in the property, or towards whom the duty could be said to be owed.
>
> . . . . .
>
> Furthermore, I cannot see that coupling the job to be performed with self-dealing in the performance of it makes any difference. If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing on some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

32 Megarry V-C held in that case that there was no fiduciary relationship and so no breach of the fiduciary obligations that would have been imposed by finding such a relationship. Self-dealing would only have been a breach of fiduciary obligation if a fiduciary obligation existed. Megarry V-C rejected the notion that one can argue from a conclusion (there has been self dealing) to a duty (therefore there is a fiduciary relationship) and then back to the conclusion (therefore there has been a breach of duty).

33 In my view, this third use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term. It will only be eliminated, however, if the Courts give explicit recognition to the existence of a range of remedies, including the constructive trust, available on a principled basis even though outside the context of a fiduciary relationship.

34 To recapitulate, the first class of fiduciary is not in issue in this appeal. It is not contended that all parties negotiating towards a joint venture are a class to which fiduciary obligations should presumptively attach. As will be clear from my discussion of the third usage of the term fiduciary, I am not prepared to hold that because a constructive trust is the appropriate remedy a fiduciary label therefore attaches, though I will deal later with why, even if the relationship is not fiduciary in any sense, a constructive trust may nonetheless be appropriate. The issue that remains for immediate discussion is whether the facts in this case, as found by the Courts below, support the imposition of a fiduciary obligation within the second category discussed above, and whether, acting as it did, LAC was in breach of the obligations thereby imposed.

35 In addressing this issue, some detailed consideration must be given to the analysis made by the Court of Appeal. Before that Court, LAC was attacking the trial Judge's conclusion that LAC was in breach of its fiduciary duty to act fairly and not to the detriment of Corona by acquiring the Williams property. I note that, in their discussions of this breach, neither Court below spoke of LAC's duty not to acquire the property for its own account to the exclusion of Corona, but rather spoke of a duty not to acquire the property *at all*. For the reasons I have outlined in my discussion of breach of confidence, and for reasons which I will more fully outline later, I am of the view that the Courts below were correct in their description of the duty owed.

36 The Court of Appeal agreed with the submission made by LAC that the law of fiduciary relations does not ordinarily apply to parties involved in commercial negotiations. Such negotiations are normally conducted at arm's length. They held, however, that in certain circumstances fiduciary obligations can arise, and it is a question of fact in each case whether the relationship of the parties, one to the other, is such as to create a fiduciary relationship. *United Dominions Corp. v. Brian Pty. Ltd.* (1985), 60 A.L.R. 741, 59 A.L.J.R. 676 (Aus. H.C.), was given as an example of where such an obligation might arise. In terms of the scheme I have outlined above, the Court of Appeal accepted that the first usage of "fiduciary" was not in issue, but that the second must be more closely examined.

37 Before undertaking that examination, the Court made the following comments on the relationship between fiduciary law and the law of confidential information, at 638-639 [D.L.R.]:

> the trial judge found that Corona imparted confidential information to LAC during the course of their negotiations. He recognized that the law regarding obligations imposed by the delivery of confidential information is distinct from the law imposing fiduciary duties and that it does not depend upon any special relationship between the parties. In *Canadian Aero Service Ltd. v. O'Malley* ... [1974] S.C.R. 592 at p. 616, Laskin J. said for the court:

> The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.

That statement recognizes that the courts will provide relief for a breach of confidence in proper circumstances where there is no fiduciary relationship between the parties. On the other hand, a fiduciary relationship between parties may co-exist with a right of one of the parties to an obligation of confidence with respect to information of a confidential nature given by that party to the other party. It is indeed difficult to conceive of any fiduciary relationship where the right to confidentiality would not exist with respect to such information.

In the case at bar, the trial judge concluded that the legal principles regarding the obligations imposed by the delivery of confidential information and the obligations imposed as a result of the existence of a fiduciary relationship are intertwined. We are of the opinion that he was correct in this conclusion and that the law of fiduciary relationships can apply to parties involved, at least initially, in arm's length commercial discussions.

[Emphasis added.]

38 The Court of Appeal then discussed the several factors which in its view supported the finding of a fiduciary obligation. In doing so, they were specifically responding to LAC's submission that the correct approach is to ask "whether the relationship by law, custom or agreement is such that one party is obligated to demonstrate loyalty and avoid taking advantage for himself". In light of this submission to the Court below, I must say that it lies ill in the mouth of LAC to now assert before this Court that the custom or usage found by the Courts below cannot as a matter of law give rise to fiduciary obligations. Were I not of the view that that submission is in error, I incline to think that LAC may be estopped by its conduct below from raising it in this Court.

39 The Court of Appeal relied on four main factors in upholding the imposition of the fiduciary obligation. First, LAC was a senior mining company and Corona a junior, and LAC had sought out Corona in order to obtain information and to discuss a joint venture. Second, the parties had arrived at a mutual understanding of how each would conduct itself in the course of their negotiations, were working towards a common objective and had in fact taken preliminary steps in the contemplated joint exploration and development venture. Third, Corona disclosed confidential information to LAC and LAC expected to receive that confidential information in the course of the negotiations. Finally, there was established by LAC's own evidence a custom, practice or usage in the mining industry that parties in serious negotiation to a joint venture not act to the detriment of the other, particularly with respect to the confidential information disclosed, and the parties had reached the stage in negotiations where such an industry practice applied. In all these circumstances, the Court of Appeal found that it was just and proper that a fiduciary relationship be found, and a legal obligation not to benefit at the expense of the other from information received in negotiations imposed. By acquiring the Williams property, LAC had breached this obligation.

40 While it is almost trite to say that a fiduciary relationship does not normally arise between arm's length commercial parties, I am of the view that the Courts below correctly found a fiduciary obligation in the circumstances of this case and correctly found LAC to be in breach of it. I turn then to a consideration of the factors which in this case support the imposition of that duty. These can conveniently be grouped under three headings: (1) trust and confidence, (2) industry practice and (3) vulnerability. As will be seen these factors overlap to some extent, but considered as a whole they support the proposition that Corona could reasonably expect LAC to not act to Corona's detriment by acquiring the Williams land, and that Corona's expectation should be legally protected.

Trust and Confidence

41 The relationship of trust and confidence that developed between Corona and LAC is a factor worthy of significant weight in determining if a fiduciary obligation existed between the parties. The existence of such a bond plays an important role in determining whether one party could reasonably expect the other to act or refrain from acting against the interests of the former. That said, the law of confidence and the law relating to fiduciary obligations are not coextensive. They are not, however, completely distinct. Indeed, while there may be some dispute as to the jurisdictional basis of the law of confidence, it is clear that equity is one source of jurisdiction: see *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948),

65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.). In *Guerin v. R.*, supra, Dickson J. noted that the law of fiduciary obligations had its origin in the law of confidence. Professor Finn thought it was settled that confidential information, whether classified as property or not, will attract fiduciary law's protection provided the circumstances are such as to attract a duty of confidence: "The Fiduciary Principle", supra, at 50. I agree with the view of both Courts below that the law of confidence and the law of fiduciary obligations, while distinct, are intertwined.

42 In a claim for breach of confidence, Gurry tells us (*Breach of Confidence* (1984), at 161-162):

> the court's concern is for the protection of a confidence which *has been created* by the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is *not* focused on the information as a medium by which a *pre-existing* duty is breached.

However, the facts giving rise to an obligation of confidence are also of considerable importance in the creation of a fiduciary obligation. If information is imparted in circumstances of confidence, and if the information is known to be confidential, it cannot be denied that the expectations of the parties may be affected so that one party reasonably anticipates that the other will act or refrain from acting in a certain way. A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confidor. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted.

43 There are other distinctions between the law of fiduciary obligations and that of confidence which need not be pursued further here, but among them I simply note that unlike fiduciary obligations, duties of confidence can arise outside a direct relationship, where for example a third party has received confidential information from a confidee in breach of the confidee's obligation to the confidor: see *Liquid Veneer Co. v. Scott* (1912), 29 R.P.C. 639 (Ch.), at 644. It would be a misuse of the term to suggest that the third party stood in a fiduciary position to the original confidor. Another difference is that breach of confidence also has a jurisdictional base at law, whereas fiduciary obligations are a solely equitable creation. Though this is becoming of less importance, these differences of origin give to the claim for breach of confidence a greater remedial flexibility than is available in fiduciary law. Remedies available from both law and equity are available in the former case, equitable remedies alone are available in the latter.

44 The Court of Appeal characterized the relationship in the present case as one of "trust and cooperation". LAC and Corona were negotiating, and on the evidence of Sheehan, negotiating in good faith, towards a joint venture or some other business relationship. It was expected during these negotiations that Corona would disclose confidential information to LAC, and Corona did so. This was in conformity with the normal and usual practice in the mining industry. The evidence accepted by both Courts below established a practice in the industry, known to LAC, that LAC would not use confidential information derived out of the negotiating relationship in a manner contrary to the interests of Corona. Holland J. found that it "must have been obvious" to Sheehan that he was receiving confidential information. In light of that finding, it should be apparent that the lowest possible significance can attach to the absence of discussions between the parties relating to confidentiality. LAC, in the view of the Court of Appeal, felt that it had some obligation to confirm areas of interest with Corona, and did so with respect to staking other property in the area. The trial Judge, noting that Corona had "agreed" to LAC staking in the area, thought that this gave rise to an "informal understanding as to how each would conduct itself in anticipation of" the conclusion of a formal business relationship. In all these circumstances, I am of the view that both parties would reasonably expect that a legal obligation would be imposed on LAC not to act in a manner contrary to Corona's interest with respect to the Williams property.

Industry Practice

45 Both Courts below placed considerable weight on the evidence of Allen to the effect that there was a "duty" not to act to the other party's detriment when in serious negotiations through the misuse of confidential information. For ease of reference, I set out his testimony here again:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.

All of LAC's experts agreed with this statement. The trial Judge, in reliance on this evidence said, at 537-538:

> **The Evidence of the Experts on Liability**
>
> .....
>
> *Whether the conduct of the parties, according to the experts, imposed fiduciary obligations on Lac*
>
> .....
>
> I conclude, following *Cunliffe-Owen*, supra, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

The Court of Appeal affirmed the conclusion that Corona had established a "custom or usage" in accordance with the principle set forth in *Cunliffe-Owen v. Teather & Greenwood*, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421 (Ch.), and that the trial Judge was correct in applying that case.

46 Undoubtedly experts on mining practice are not qualified to give evidence on whether fiduciary obligations arose between the parties, as the existence of fiduciary obligations is a question of law to be answered by the court after a consideration of all the facts and circumstances. Thus, while the term "fiduciary" was not properly used by the trial Judge in this passage, the evidence of the experts is of considerable importance in establishing standard practice in the industry from which one can determine the nature of the obligations which will be imposed by law.

47 It will be clear then, that in my view LAC's submissions relating to custom and usage were largely misdirected. The issue is not, as LAC submitted, what is "the legal effect of custom in the industry". Rather, it is what is the importance of the existence of a practice in the industry, established out of the mouth of the defendant and all its experts, in determining whether Corona could reasonably expect that LAC would act or refrain from acting against the interests of Corona. Framed thus, the evidence is of significant importance.

48 I must at this point briefly advert to the law relating to custom and usage. LAC submitted that the Court of Appeal erred in using the terms "custom" and "usage" interchangeably. "Custom" in the sense of a rule having the force of law and existing since time immemorial is not in issue in this case. Indeed, Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom. Custom in Canadian law must be given a broader definition. In any event, both Courts below were not using the term in such a technical sense, as is clear from the fact that both substituted the term "practice" as a synonym. It is not necessary to decide, and I do not decide, whether a usage, properly established on the evidence, can give rise to fiduciary obligations. For these purposes I accept the definition of "usage" from *Halsbury's Laws of England*, vol. 12, 4th ed., para. 445, at 28, as follows:

> Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life, or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary.

49 I should mention that I have the greatest hesitation in saying that the only circumstances in which a legal obligation can arise out of a notorious business practice is when a contract results. The cases cited against implying terms in a contract have no relevance to negotiating practices. When the parties have reduced their understandings to writing, it is obviously the proper course for Courts to be extremely circumspect in adding to the bargain they have set down (see, for example, *Burns v. Kelly Peters & Associates Ltd.*, 41 C.C.L.T. 257, 16 B.C.L.R. (2d) 1, [1987] 6 W.W.R. 1, [1987] I.L.R. 1-2246, 41 D.L.R. (4th) 577 (C.A.), per Lambert J.A., at 601 [D.L.R.]; *Nelson v. Dahl* (1879), 12 Ch. D. 568, 28 W.R. 57 (C.A.), aff'd (1881), 6 App. Cas. 38, [1881-85] All E.R. Rep. 572, 29 W.R. 543 (H.L.); *Norwich Winterthur Insurance (Insurance) Ltd. v. Can. Stan. Industries of Australia Pty. Ltd.*, [1983] 1 N.S.W.C.R. 461 (C.A.). In any event, it is not, in my opinion, necessary to determine if the practice established by the evidence of LAC's executives and experts amounts to a legal usage. It is clear to me that the practice in the industry is so well known that at the very least Corona could reasonably expect LAC to abide by it. There is absolutely no substance to the submission of LAC that this practice is vague or uncertain. It is premised on the disclosure of confidential information in the context of serious negotiations. I do not find it necessary to define "serious", and will not interfere with the concurrent findings of the Courts below. The industry practice therefore, while not conclusive, is entitled to significant weight in determining the reasonable expectations of Corona, and for that matter of LAC regarding how the latter should behave.

Vulnerability

50 As I indicated below, vulnerability is not, in my view, a necessary ingredient in every fiduciary relationship. It will of course often be present, and when it is found it is an additional circumstance that must be considered in determining if the facts give rise to a fiduciary obligation. I agree with the proposition put forward by Wilson J. that when determining if new classes of relationship should be taken to give rise to fiduciary obligations then the vulnerability of the class of beneficiaries of the obligation is a relevant consideration. Wilson J. put it as follows in *Frame v. Smith*, at 137-138 [S.C.R.]:

> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

However, as I indicated, this case does not require a new class of relationships to be identified, but requires instead an examination of the specific facts of this case.

51 The Oxford English Dictionary, 2nd ed., v. XIX, at 786, defines "vulnerable" as follows:

> that may be wounded; susceptible of receiving wounds or physical injury ... open to attack or injury of a non-physical nature; esp. offering an opening to the attacks of raillery, criticism, calumny, etc.

Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm. It is clear, however, that fiduciary obligations can be breached without harm being inflicted on the beneficiary. *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223, is the clearest example. In that case a fiduciary duty was breached even though the beneficiary suffered no harm and indeed could not have benefitted from the opportunity the fiduciary pursued. Beneficiaries of trusts, however, are a class that is susceptible to harm, and are therefore protected by the fiduciary regime. Not only is actual harm not necessary, susceptibility to harm will not be present in many cases. Each director of General Motors owes a fiduciary duty to that company, but one can seriously question whether General

Motors is vulnerable to the actions of each and every director. Nonetheless, the fiduciary obligation is owed because, as a class, corporations are susceptible to harm from the actions of their directors.

52 I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. As I indicated above, the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other. In any event, I would have thought it beyond argument that on the facts of this case Corona was vulnerable to LAC.

53 The argument to the contrary seems to be based on two propositions. First, Corona did not give up to LAC any power or discretion to affect its interests. Second, Corona could have protected itself by a confidentiality agreement, and the Court should not interfere if the parties could have, but did not in fact protect themselves. In my view there is no substance to either of these arguments.

54 The first is rebutted by the facts. LAC would not have acquired the property but for the information received from Corona. LAC in fact acquired the property. In doing so it affected Corona's interests. All power and discretion mean in this context is the ability to cause harm. Clearly that is present in this case. LAC acquired a power or ability to harm Corona by obtaining the Williams property. Corona gave it that power by giving up information about the property and about Corona's intentions. Having regard to the well-established practice in the mining industry, Corona would have had no expectation that LAC would use this information to the detriment of Corona.

55 This leads to the second point. This Court should not deny the existence of a fiduciary obligation simply because the parties could have by means of a confidentiality agreement regulated their affairs. That, it seems to me, is an unacceptable proposition, particularly on the facts of this case. The concurrent findings below are that Sheehan was aware the information he was receiving was confidential information and that it was being received in circumstances of confidence. It is clear that a claim for breach of confidence is then available if the information is misused. Why one would then go and enter into a confidentiality agreement simply confirming what each party knows escapes me. I cannot understand why a claim for breach of confidence is available absent a confidentiality agreement, but a claim for breach of fiduciary duty is not. The fact that the parties could have concluded a contract to cover the situation but did not in fact do so does not, in my opinion, determine that matter. Many claims in tort could be avoided through more prudent negotiation of a contract, but courts do not deny tort liability; see Gautreau, supra, at 11; *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321, [1986] R.R.A. 527, var'd [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv. The existence of an alternative procedure is only relevant in my mind if the parties would realistically have been expected to contemplate it as an alternative. It is useful here to once again refer to the evidence of LAC's experts. Dr. Robertson testified as follows:

> Q. Do large companies generally or typically make use of such agreements [confidentiality agreements]?
>
> A. *They are not common*. In the last five years they have become increasingly so. Even prospectors now ask large companies for confidentiality agreements.
>
> This whole process is data dissemination. They rarely have anything so highly confidential that a large company will trade away its right to do what it wants to do in return for, in essence, very little back.

[Emphasis added.] Dr. Derry testified to similar effect:

> Q. In 1981, in your view, how could Corona have protected itself if it both wanted to acquire more ground and it also wanted to allow the visit by Lac Minerals?
>
> A. *It would be unusual*, but I think it would have to ask the visitor to make some assurance, probably a written assurance, that he would not acquire ground or conflict with the interest of the owning company.

[Emphasis added.] The present litigation is, according to the evidence of Corona's witness Dr. Bragg, one of the reasons that confidentiality agreements are being used with increasing frequency. Where it is not established that the entering of confidentiality agreements is a common, usual or expected course of action, this Court should not presume such a procedure, particularly when the law of fiduciary obligations can operate to protect the reasonable expectations of the parties. There is no reason to clutter normal business practice by requiring a contract.

56 In this case the vulnerability of Corona at LAC's hand is clearly demonstrated by the circumstances in which LAC acquired the Williams property. Even though the offer from Corona would have paid to Mrs. Williams $250,000 within 3 years plus a 3 per cent net smelter return, Mrs. Williams accepted the offer from LAC which paid only half that return. It is nothing short of fiction to suggest that vis-à-vis third parties or each other LAC and Corona stood on an equal footing. Corona was a junior mining company which needed to raise funds in order to finance the development of its property. This is why Corona welcomed the overture of LAC in the first place. LAC was a senior mining company that had the ability to provide those funds. Indeed LAC used this as a selling point to Mrs. Williams when it advised her that it was "an exploration and development company with four gold mines in production and had been in the mining and exploration business for decades".

57 I conclude therefore that Corona was vulnerable to LAC. The fact that these are commercial parties may be a factor in determining what the reasonable expectations of the parties are, and thus it may be a rare occasion that vulnerability is found between such parties. It is, however, shown to exist in this case and is a factor deserving of considerable weight in the identification of a fiduciary obligation.

Conclusion on Fiduciary Obligations

58 Taking these factors together, I am of the view that the Courts below did not err in finding that a fiduciary obligation existed and that it was breached. LAC urged this Court not to accept this finding, warning that imposing a fiduciary relationship in a case such as this would give rise to the greatest uncertainty in commercial law, and result in the determination of the rules of commercial conduct on the basis of ad hoc moral judgments rather than on the basis of established principles of commercial law.

59 I cannot accept either of these submissions. Certainty in commercial law is, no doubt, an important value, but it is not the only value. As Mr. Justice Grange has noted ("Good Faith in Commercial Transactions" (1985), *L.S.U.C. Special Lectures* 69), at 70:

> There are many limitations on the freedom of contract both in the common law and by statute. Every one of them carries within itself the seeds of debate as to its meaning or at least its applicability to a particular set of facts.

In any event, it is difficult to see how giving legal recognition to the parties' expectations will throw commercial law into turmoil.

60 Commercial relationships will more rarely involve fiduciary obligations. That is not because they are immune from them, but because in most cases, they would not be appropriately imposed. I agree with this comment of Mason J. in *Hospital Products Ltd. v. United States Surgical Corp.*, supra, at 455:

> There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

61 A fiduciary relationship is not precluded by the fact that the parties were involved in pre-contractual negotiations. That was made clear in the *United Dominions Corp.* case, supra, where the majority held, at 680 [A.L.J.R.], that:

A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them.

The fact that the relationship between the parties in that case was more advanced than in the case at bar does not affect the value of the conclusion. See also *Fraser Edmunston Pty. Ltd. v. A.G.T. (Qld) Pty. Ltd.* (1986), Queensland S.C. 17. It is a question to be determined on the facts whether the parties have reached a stage in their relationship where their expectations should be protected. In this case the facts support the existence of a fiduciary obligation not to act to the detriment of Corona's interest by acquiring the Williams property by using confidential information acquired during the negotiation process.

62 The argument on morality is similarly misplaced. It is simply not the case that business and accepted morality are mutually exclusive domains. Indeed, the Court of Appeal, after holding that to find a fiduciary relationship here made no broad addition to the law, a view I take to be correct, noted that the practice established by the evidence to support the obligation was consistent with "business morality and with encouraging and enabling joint development of the natural resources of the country". This is not new. Texts from as early as 1903 refer to the obligation of "good faith by partners in their dealings with each other extend[ing] to negotiations culminating in the partnership, although in advance of its actual creation" (C.H. Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands*, 2nd ed. (Salem: Ayer Pub. Co., 1983). In my view, no distinction should be drawn here between negotiations culminating in a partnership or a joint venture.

Remedy

63 The appropriate remedy in this case can not be divorced from the findings of fact made by the Courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of LAC in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy. Both Courts below awarded the Williams property to Corona on payment to LAC of the value to Corona of the improvements LAC had made to the property. The trial Judge dealt only with the remedy available for a breach of a fiduciary duty, but the Court of Appeal would have awarded the same remedy on the claim for breach of confidence, even though it was of the view that it was artificial and difficult to consider the relief available for that claim on the hypothesis that there was no fiduciary obligation.

64 The issue then is this. If it is established that one party (here LAC) has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.

65 In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by LAC, Corona would have acquired the property. In *Air Canada v. B.C.*, [1989] 1 S.C.R. 1161, [1989] 4 W.W.R. 97, 36 B.C.L.R. (2d) 145, 95 N.R. 1, 59 D.L.R. (4th) 161, 2 T.C.T. 4178, [1989] 1 T.S.T. 2126, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession *or would have accrued for his benefit*, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." In my view the fact that Corona never owned the property should not preclude it from pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution* (New York: Oxford U. Press, 1985), at 133-39. LAC has therefore been enriched at the expense of Corona.

66 That enrichment is also unjust, or unjustified, so that the plaintiff is entitled to a remedy. There is, in the words of Dickson J. in *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, "an absence of any juristic reason for the enrichment". The determination that the enrichment is "unjust" does not refer

to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the Courts will grant relief. Restitution is a distinct body of law governed by its own developing system of rules. Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate. It is not every case of such a breach of duty, however, that will attract recovery based on the gain of the defendant at the plaintiff's expense. Indeed this has long been recognized by the courts. In *Re Coomber*, [1911] 1 Ch. 723 at 728-29, (C.A.), Fletcher Moulton L.J. said:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. *There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.*

[Emphasis added.]

67 In breach of confidence cases as well, there is considerable flexibility in remedy. Injunctions preventing the continued use of the confidential information are commonly awarded. Obviously that remedy would be of no use in this case where the total benefit accrues to the defendant through a single misuse of information. An account of profits is also often available. Indeed in both Courts below an account of profits to the date of transfer of the mine was awarded. Usually an accounting is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense. Occasionally, as in this case, the measures coincide. In a case quite relevant here, this Court unanimously imposed a constructive trust over property obtained from the misuse of confidential information: *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, 56 W.W.R 697, 50 C.P.R. 299, 57 D.L.R. (2d) 557. More recently, a compensatory remedy has been introduced into the law of confidential relations. Thus in *Seager v. Copydex Ltd.*, [1969] 2 All E.R. 718, [1969] 1 W.L.R. 809 (C.A.), an inquiry was directed concerning the market value of the information between a willing buyer and a willing seller. The defendant had unconsciously plagiarized the plaintiff's design. In those circumstances it would obviously have been unjust to exclude the defendant from the market when there was room for more than one participant.

68 I noted earlier that the jurisdictional base for the law of confidence is a matter of some dispute. In the case at bar however, it is not suggested that either the contractual or property origins of the doctrine can be used to found the remedy. Thus while there can be considerable remedial flexibility for such claims, it was not argued that the Court may not have jurisdiction to award damages as compensation and not merely in lieu of an injunction in the exercise of its equitable jurisdiction, and since I am of the view that a constructive trust is in any event the appropriate remedy, I need not consider the question of jurisdiction further.

69 In view of this remedial flexibility, detailed consideration must be given to the reasons a remedy measured by LAC's gain at Corona's expense is more appropriate than a remedy compensating the plaintiff for the loss suffered. In this case, the Court of Appeal found that if compensatory damages were to be awarded, those damages in fact equalled the value of the property. This was premised on the finding that but for LAC's breach, Corona would have acquired the property. Neither at this point nor any other did either of the Courts below find Corona would only acquire one half or less of the Williams property. While I agree that, if they could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures, even if they would not, a restitutionary measure would be appropriate.

70 The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by

the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources. The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary. If by breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset. In the present case, it is true that had negotiations been concluded, LAC could also have acquired an interest in the Corona land, but that is only an expectation and not a certainty. Had Corona acquired the Williams property, as they would have but for LAC's breach, it seems probable that negotiations with LAC would have resulted in a concluded agreement. However, if LAC, during the negotiations, breached a duty of confidence owed to Corona, it seems certain that Corona would have broken off negotiations and LAC would be left with nothing. In such circumstances, many business people, weighing the risks, would breach the obligation and acquire the asset. This does nothing for the preservation of the institution of good faith bargaining or relationships of trust and confidence. The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect. The elements of a claim in unjust enrichment having been made out, I have found no reason why the imposition of a restitutionary remedy should not be granted.

71 This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, 35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385, 92 N.R. 1, 57 D.L.R. (4th) 321. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, supra, where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker*, supra, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In *Hunter v. Syncrude*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.

72 In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that LAC hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "the principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v. Becker*, at 847 [S.C.R.], the converse is not true. The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances. Where it could be more appropriate than in the present case, however, it is difficult to imagine.

73 The trial Judge assessed damages in this case at $700,000,000 in the event that the order that LAC deliver up the property was not upheld on appeal. In doing so he had to assess the damages in the face of evidence that the Williams property would be valued by the market at up to 1.95 billion dollars. Before us there is a cross-appeal that damages be reassessed at $1.5 billion. The trial Judge found that no one could predict future gold prices, exchange rates or inflation with any certainty, or even on the balance of probabilities. Likewise he noted that the property had not been fully explored and that further reserves may be found. The Court of Appeal made the following comment, at 651 [D.L.R.], with which I am in entire agreement:

> there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.

To award only a monetary remedy in such circumstances when an alternative remedy is both available and appropriate would in my view be unfair and unjust.

74 There is no unanimous agreement on the circumstances in which a constructive trust will be imposed. Some guidelines can, however, be suggested. First, no special relationship between the parties is necessary. I agree with this comment of Wilson J. in *Hunter v. Syncrude*, supra, at 213 [B.C.L.R.]:

> Although both *Pettkus v. Becker* and *Sorochan v. Sorochan* were 'family' cases, unjust enrichment giving rise to a constructive trust is by no means confined to such cases: see *Deglman v. Guaranty Trust Co.*, [1954] S.C.R. 725. Indeed, to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles.

As I noted earlier, the constructive trust was refused in *Hunter v. Syncrude*, not because the parties did not stand in any special relationship to one another, but because the claim for unjust enrichment was not made out. Similarly, in *Pre-Cam Exploration*, supra, it cannot be said that the parties stood in a "special relationship" to one another, but a constructive trust was nonetheless awarded. In *Chase Manhattan*, supra, a constructive trust was imposed, but to describe the banks as standing in a special relationship one to the other would be as much of a fiction as describing them as fiduciaries. Insistence on a special relationship would undoubtedly lead to that same sort of reasoning from conclusions. Courts, coming to the conclusion that a proprietary remedy is the only appropriate result will be forced to manufacture "special relationships" out of thin air, so as to justify their conclusions. In my view that result can and should be avoided.

75 Secondly, it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property. When a constructive trust is imposed as a result of successfully tracing a plaintiff's asset into another asset, it is indeed debatable which the Court is doing. Goff and Jones, *The Law of Restitution*, 3rd ed. (London: Sweet & Maxwell, 1986), at 78, take the position that:

> the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over such assets.
>
> It is the nature of the plaintiff's claim itself which is critical in determining whether a restitutionary proprietary claim should be granted; the extent of that claim is a different matter, which should be dependent upon the defendant's knowledge of the true facts. There are certain claims which must always be personal. Such are claims for services rendered under an ineffective contract; the plaintiff is then in no different position from any unsecured creditor. In contrast there are other claims, for example, those arising from payment made under mistake, compulsion or another's wrongful act, where a restitutionary proprietary claim should presumptively be granted, although the court should always retain a discretion whether to do so or not.

76 In their view, a proprietary claim should be granted when it is just to grant the plaintiff the additional benefits that flow from the recognition of a right of property. It is not the recognition of a right of property that leads to a constructive trust. It is not necessary, therefore, to determine whether confidential information is property, though a finding that it was would only strengthen the conclusion that a constructive trust is appropriate. This is the view of Fridman and McLeod, *Restitution* (Toronto: Carswell, 1982), at 539, where they say:

> there appears to be no doubt that a fiduciary who has consciously made use of confidential information for private gain will be forced to account for the entire profits by holding such profits made from the use of the confidential information on a constructive trust for the beneficiary-estate. The proprietary remedy flows naturally from the conclusion that the information itself belonged to the beneficiary and there has been no transaction effective to divest his rights over the property.

77 I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to "some mix of judicial discretion ... subjective views about which party 'ought to win' ..., and 'the formless void of individual moral opinion'", per Deane J. in *Muschinski v. Dodds* (1985), 160 C.L.R. 583 at 616. As Deane J. further noted at 616:

> Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other.

78 Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter*, supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer. Here as well it is justified to grant a right of property since the concurrent findings below are that the defendant intercepted the plaintiff and thereby frustrated its efforts to obtain a specific and unique property that the Courts below held would otherwise have been acquired. The recognition of a constructive trust simply redirects the title of the Williams property to its original course. The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property. This situation will be more rare, since the focus of the inquiry should be upon the reasons for recognizing a right of property in the plaintiff, not on the reasons for denying it to the defendant.

79 Having specific regard to the uniqueness of the Williams property, to the fact that but for LAC's breaches of duty Corona would have acquired it, and recognizing the virtual impossibility of accurately valuing the property, I am of the view that it is appropriate to award Corona a constructive trust over that land.

80 Before turning to the cross-appeal, I must make brief reference to the relevance of the fact that Corona entered an arrangement with Teck under which the latter not only obtained an interest in the Corona property, but also an interest in the result of this lawsuit. Since I view this case as one where a restitutionary claim has been made out, the position of Teck is irrelevant. The focus must be on the enrichment LAC received at Corona's expense. That enrichment was found as a fact to be the Williams property. Subsequent to acquiring it, Corona would likely have entered a joint venture agreement with LAC. LAC has no one to blame but itself for that joint venture not coming about. Only because of LAC's breach of duty did the arrangement with Teck result. The fact that it is not proved that Teck demanded a share of the litigation as the price for joining with Corona is irrelevant. It cannot be said that such an agreement was unreasonable in the circumstances. Given LAC's breach of duty to Corona, and Corona's awareness of that breach, there is no way that LAC would ever have acquired an interest in the Williams property. Corona was entitled to cease negotiating with LAC and pursue other opportunities.

81 If, however, this case is viewed as my colleague Sopinka J. views it, as a case of compensation, then the position of Teck is relevant. Corona had to enter into an agreement with someone. Corona contemplated eventually owning approximately a one-half interest in the developed properties. To award only an estimated value of a one-half interest in the property when that half will be further subdivided is, in essence, to award Corona only a one-quarter interest in the Williams property. As I am of the view that damages are not an appropriate award, I need not discuss this matter further.

The Cross-Appeal

82 I can deal shortly with the cross-appeal. LAC has been enriched at the expense of Corona by acquiring the Williams property. Having acquired that property in breach of a duty of confidence and in breach of a fiduciary obligation, that enrichment is unjustified. Likewise, however, Corona will receive an enrichment when LAC hands over the property, in the amount of the value of the improvement of the land to Corona. That value is equal to what would have been spent by Corona to develop both properties, less what Corona in fact spent. The trial Judge made a $50,000,000 downward adjustment to the amount LAC spent, directing a reference to determine the exact amount in the event the parties disputed the adjustment. I would affirm that award. The three elements of a claim for restitution are made out, namely there is an enrichment (the mine), that enrichment accrued to Corona at LAC's expense, and the enrichment is unjustified. The enrichment is not justified since, on the assumption that Corona had acquired the Williams property, it would of necessity have had to expend funds to develop the mine. In these circumstances, LAC is entitled to a restitutionary remedy, namely a lien on the Williams property to the extent that Corona was saved a necessary expenditure.

83 In view of this conclusion it becomes unnecessary to address the contingent cross-appeal by which Corona asked that damages be reassessed at $1.5 billion. I would dismiss the appeal with costs and dismiss the cross-appeal with costs.

***Lamer J.* (concurring in part):**

84 I have read the judgments of my colleagues, La Forest J. and Sopinka J. I am in agreement with my brother Sopinka J. and for the reasons set out in his judgment that the evidence does not establish in this case the existence of a fiduciary relationship.

85 I am in agreement with both of my colleagues, and concur in their reasons in support thereof, that there was a breach of confidence on the part of LAC Minerals Ltd.

86 As regards the appropriate remedy, I am of the view that the approach taken by La Forest J. is the proper one.

87 I would accordingly dismiss the appeal with costs and dismiss the cross-appeal with costs.

***Wilson J.* (concurring in part):**

88 I have had the advantage of reading the reasons of my colleagues, Mr. Justice Sopinka and Mr. Justice La Forest and I agree with my colleague, Mr. Justice La Forest, as to the appropriate remedy in this case. I propose to comment briefly on the three issues before the Court on this appeal as identified by them:

(1) Fiduciary Duty

89 It is my view that, while no ongoing fiduciary *relationship* arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine, a fiduciary *duty* arose in LAC when Corona made available to LAC its confidential information concerning the Williams property, thereby placing itself in a position of vulnerability to LAC's misuse of that information. At that point LAC came under a duty not to use that information for its own exclusive benefit. LAC breached that fiduciary duty by acquiring the Williams property for itself.

90 It is, in other words, my view of the law that there are certain relationships which are almost per se fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and that where such relationships subsist they give rise to fiduciary duties. On the other hand, there are relationships which are not in their essence fiduciary, such as the relationship brought into being by the parties in the present case by virtue of their arm's length negotiations towards a joint venture agreement, but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by them or either of them within the confines of the relationship. This, in my view, is what happened here when Corona disclosed to LAC confidential information concerning the Williams property. LAC became at that point subject to a fiduciary duty *with respect to that information* not to use it for its own use or benefit.

(2) Breach of Confidence

91 I agree with my colleagues that LAC's conduct may also be characterized as a breach of confidence *at common law* with respect to the information concerning the Williams property. The breach again consisted of LAC's acquisition of the Williams property for itself, such property being the subject of the confidence.

(3) The Remedy

92 It seems to me that when the same conduct gives rise to alternate causes of action, one at common law and the other in equity, *and the available remedies are different*, the Court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy. Since the result of LAC's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust on LAC in favour of Corona with respect to the property. Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. It can most surely be achieved in this case through the award of an in rem remedy. I would therefore award such a remedy. The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award.

93 It is, however, my view that this is not a case in which the available remedies are different. I believe that the remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty. The distinction between the two causes of action as they arise on the facts of this case is a very fine one. Inherent in both causes of action are concepts of good conscience and vulnerability. It would be strange indeed if the law accorded them widely disparate remedies. In his article on "The Role of Proprietary Relief in the Modern Law of Restitution", John D. McCamus, Cambridge Lecture 1987, 141 at 150, Professor McCamus poses the rhetorical question:

> Would it not be anomalous to allow more sophisticated forms of relief for breach of fiduciary duty than for those forms of wrongdoing recognized by the law of torts, some of which, at least, would commonly be more offensive from the point of view of either public policy or our moral sensibilities than some breaches of fiduciary duty?

94 I believe that where the consequence of the breach of either duty is the acquisition by the wrongdoer of property which rightfully belongs to the plaintiff or, as in this case, ought to belong to the plaintiff if no agreement is reached between the negotiating parties, then the in rem remedy is appropriate to either cause of action.

95 I would dismiss the appeal with costs. I would also dismiss the cross-appeal with costs.

***Sopinka J.* (dissenting — concurred in part by *McIntyre* and *Wilson JJ.*):**

96 This appeal and cross-appeal raise important issues relating to fiduciary duty and breach of confidence. In particular, they require this Court to consider whether fiduciary obligations can arise in the context of abortive arm's-length negotiations between parties to a prospective commercial transaction. Also at issue are the nature of confidential information and the appropriate remedy for its misuse.

The Facts

97 The facts are fully developed in the reasons for judgment of the trial Judge, Holland J., (1986) 53 O.R. (2d) 737, and in the judgment of the Ontario Court of Appeal, (1987) 62 O.R. (2d) 1. My recital of them, here, will therefore be skeletal in nature. From time to time in these reasons, some of the facts relating to specific issues will be examined in greater detail.

98 The parties to these proceedings are International Corona Resources Ltd. (which I will refer to as either "Corona" or the "respondent") and LAC Minerals Ltd. (which I will refer to as either "LAC" or the "appellant"). Corona, which was incorporated in 1979, was at material times a junior mining company listed on the Vancouver Stock Exchange. LAC is a senior

mining company which owns a number of operating mines and is listed on several stock exchanges. This action arises out of negotiations between Corona and LAC relating to the Corona property, the Williams property and the Hughes property, all of which are located in the Hemlo area of northern Ontario.

99 The Corona property consists of 17 claims with an area of approximately 680 acres. The Williams property consists of 11 patented claims, covering a total of about 400 acres, and is contiguous to the Corona property and to the west. The Hughes property consists of approximately 156 claims and surrounds both the Corona and Williams properties, except to the north of the Williams property. It is now in the names of Golden Sceptre Resources Ltd., Goliath Gold Mines Ltd. and Noranda Exploration Co.

100 In October 1980, Corona had retained Mr. David Bell, a geologist consultant to carry out an extensive exploration program on its property which involved extensive diamond drilling. Bell hired Mr. John Dadds, a mining technician, to assist him. The core that was obtained from the drilling was identified, logged and then stored inside a core shack built on the Corona property. Assay results were sent to Bell and to the Corona office in Vancouver. Some of the results were communicated to the Vancouver Stock Exchange in the form of news releases and assay results, and were published from time to time in the George Cross Newsletter, a daily newsletter published in Vancouver.

101 The results of this exploratory work led Bell to an interesting theory. The trial Judge describes it in some detail:

> Mr. Bell testified that by February, 1981, he was sufficiently encouraged by the results of the drilling programme that he decided that it was time to acquire the Williams property and the claims to the north. Mr. Bell stated that within the first month of drilling his opinion of the geology changed from what he initially thought was a secondary intrusive model, from reading the literature of the area, to a syngenetic deposit, that is a deposit formed at the same time and by the same process as the enclosing rocks. He concluded that the mineralization and gold values were not tied into a vein but rather that the mineralization was in a zone, or beds, of megasediment that indicated a volcanic origin. In Mr. Bell's opinion, in all likelihood, the distribution of gold could be spread over quite a large area and there could be pools or puddles of ore, indicating to him that the exploration programme should be extended along the zone to adjoining properties.

102 This increased the interest in surrounding properties and Bell, on behalf of Corona, requested Mr. Donald McKinnon, a prospector who was familiar with the properties, to attempt to acquire the Williams property. Representatives of LAC read about these results in the March 20, 1981 George Cross Newsletter and arranged to visit the Corona property. This property visit took place on May 6, and Bell had arranged for Dadds to have core, assay results, sections, maps and a drill plan available at the core shack. Those present at the meeting consisted of Nell Dragovan, then president of Corona, and Messrs. Bell, Dadds, Sheehan (vice-president for exploration of LAC), and Pegg (a LAC geologist). The visitors were shown cores, sections, logs with assay results added and a map showing the staking in the area. Bell discussed progress to date, plans for the future and his theory of the geology. Sheehan and Pegg both examined the cores and, after the meeting in the core shack, which Bell said lasted about 45 minutes, they went outside. Bell took a map and explained where the earlier drilling had taken place as well as the location of future holes, and discussed the geology further. He also indicated that the formation was continuing to the west on the Williams property and that Corona wanted to continue its exploration there. Outcrops in the area were also inspected. Bell said that before he left, Sheehan told him that he "wanted me to drop into Toronto when I was there and to further the discussions of their visit and talk about possible terms". A meeting was arranged for May 8 in Toronto at LAC's head office.

103 Holland J. found as a fact that there were no discussions regarding confidentiality during the May 6 property visit except in connection with an unrelated matter.

104 Following the site visit, Sheehan and Pegg returned quickly to LAC's exploration office in Toronto and instructed LAC personnel to gather information on the Hemlo area from the LAC library of files. They then went to the assessment office of the Ontario department of mines to obtain copies of all claim maps, reports, publications and assessment work files that were available on the area. Sheehan told a LAC geologist to ascertain what claims would be necessary to cover the favourable belt to the east of the Corona property. The geologist decided that about 600 claims should be staked and immediately thereafter, on May 8, LAC began staking what are now known as the White River claims.

105 On May 8, Bell and Sheehan met and discussed the geology of the area, its similarity to the Bousquet area of Quebec, at which both Pegg and Sheehan had worked, and the possible terms of an agreement between Corona and LAC. Sheehan told Bell of LAC's staking to the east. Bell said that the two men discussed the properties around the Corona property. Corona's interest in the Williams and Hughes properties was mentioned and Sheehan gave Bell advice on how to pursue a patented claim. Bell told Sheehan that Corona had somebody doing that, without mentioning McKinnon by name. A number of avenues for progress were discussed and Sheehan said that he would send a letter outlining the terms that were discussed. Again, nothing was said regarding confidentiality.

106 On May 19, Sheehan wrote to Bell as follows:

> Further to our meeting in Toronto I would like to give you this letter as further evidence of our sincerity in joining with Corona re exploration in the Hemlo area.
>
> As we discussed there are a number of avenues that could be explored regarding a working arrangement re the property and to that end I will list the various possibilities:
>
> (a) Corona could have our Company do a financing and ultimately we would scale it forward so as to control Corona.
>
> (b) We form a joint venture where Long Lac [a Lac subsidiary] spends say 1.5 to 2.0 times amount spent by Corona for a 60% interest. Beyond that point we spend on a 60-40 basis or use a dilution formula down to a minimum should one party decide to stop contributing. In addition Lac would have to spend a definite amount of money to reach a threshold before they would acquire any interest.
>
> (c) A possible significant cash payment with a variation in interests as a result of the amount of cash payment. Followed by a Lac work proposal.
>
> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.
>
> I believe at some point within the next few weeks we should have an understanding that Corona and Lac should seriously examine an avenue for continual work in the area. Perhaps you could give our management a presentation of results to date i.e., sections, general geology, longitudinal presentation — location potential etc. Based on foregoing we could then arrive at a sound basis for structuring a working agreement.

107 The trial Judge found that the reference to the Hughes ground was intended to include the Williams property as well. Bell replied by letter dated May 22 as follows:

> I am in receipt of your letter dated May 19, 1981 regarding the Hemlo Property.
>
> First may I thank you for your fine hospitality during my brief visit to Toronto.
>
> I am forwarding a copy of your proposal to Vancouver for the other directors to review. We are presently well into our Phase II, exploring and extending the previous examined parameters outlined in Phase I. Our present plans are to complete 30,000 to 35,000 feet of diamond drilling at which time a general over-all review will take place.
>
> At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.
>
> In the mean time I do believe we should keep in touch and maintain the fine relationship presently established.

108 Bell wrote to Dragovan by letter dated May 23 which stated, in part, the following:

Enclosed is a copy of a letter received from Long Lac Minerals Exploration Limited, also please find a copy of my letter to Lac in reply. This letter from Lac should be discussed with all directors.

109 On May 27, Corona released to the Vancouver Stock Exchange encouraging assay results of a drill hole, which the trial Judge referred to as the "discovery hole". These results were published in the George Cross Newsletter of May 29, and further results confirming an extension of the "discovery hole" were released on June 4 and published in the George Cross Newsletter of June 8.

110 Subsequently, the results of further drill holes that were encouraging were published by Corona. On June 8, Mr. Murray Pezim, a stock promoter from Vancouver, became a director of Corona. Pezim arranged for Bell to make a presentation in Vancouver on behalf of Corona to a large number of brokers. Some of the information developed by Bell was imparted to those present at this meeting.

111 On June 15 a meeting was also arranged for June 30 at LAC's head office in Toronto, at which Bell was to make a presentation in accordance with Sheehan's letter of May 19. Following the meeting, sections, a detailed drill plan and apparently a vertically longitudinal section were left with LAC. Mr. Peter Allen, the president of LAC, advised Bell to be aggressive in his pursuit of the Williams property and Bell responded that Corona had somebody pursuing this property on their behalf. Allen told Sheehan to get a proposal out to Corona and Sheehan indicated that he would have such a proposal out within 3 weeks.

112 According to Bell, no one from LAC ever told him that they would not acquire the Williams property and LAC was never told that the information given to it was private, privileged or confidential. Although the evidence was contradictory, the trial Judge found as a fact that the pursuit by Corona of the Williams property was mentioned at the meeting. This and other information revealed to LAC went beyond the information that had been made public. This finding was confirmed by the Court of Appeal. The trial Judge also found that it was agreed that a proposal would be sent by LAC to Corona within 3 weeks, and that the purpose of the meeting was to discuss a possible deal between Corona and LAC in order to provide Corona with the financing needed to develop a mine.

113 Meanwhile, on June 8, McKinnon had spoken to Mrs. Williams by telephone and made an oral offer for the Williams property, which was followed by a written offer prepared by solicitors. On July 3, after some searching, Sheehan located Mrs. Williams by telephone and made an oral offer to her. She asked for a written offer and by letter dated July 6, 1981, LAC's legal counsel put it in writing.

114 On July 21, McKinnon again spoke to Mrs. Williams who told him that she had another offer and that he should contact her Toronto solicitor. On July 22, McKinnon told Bell of the other offer and it was agreed by Bell and Dragovan that Corona should make an offer to Williams directly. At this time, no one from Corona knew that the other offer was from LAC. On July 23, Corona's solicitor prepared an offer, which was delivered on July 27. Also on July 23, Mrs. Williams' Toronto solicitor disclosed LAC's name to Corona's solicitor. LAC's offer was accepted on July 28 and a formal agreement was signed on August 25, 1981.

115 After hearing that the LAC offer had been accepted, Pezim turned the matter over to his solicitors. On August 18, 1981, Sheehan went to Vancouver to attempt to resume negotiations with Pezim, who asked for the return of the Williams property. No agreement was reached. Later, Mr. Donald Moore, another director of Corona attempted to revive negotiations with Sheehan, without success.

116 After the Corona — LAC relationship had come to an end, Corona concluded an agreement with Teck Corp. (hereinafter referred to as "Teck") dated December 10, 1981, which was subsequently amended by agreements dated August 13, 1982 and December 14, 1983. These agreements, while providing for a joint venture in connection with the possible development of a mine on the Corona property, also purport to give Teck a 50 per cent interest in the fruits of Corona's lawsuit against LAC, with Teck agreeing to pay certain costs.

The Judgments Below

Ontario High Court

117 The trial Judge considered the liability of LAC under three heads pleaded by Corona: contract, breach of confidence and breach of fiduciary duty. Holland J. concluded that no binding contract was entered into by the parties but found LAC liable under the other two heads of liability, breach of confidence and breach of fiduciary duty. He decided that the appropriate remedy for breach of fiduciary duty was the return of the Williams property to Corona but allowed LAC's claim for a lien for the cost of improvements, and the amounts paid to Williams excluding royalty payments. The actual amount spent by LAC on developing the property was $203,978,000 but this was discounted by $50,000,000 to take into account the fact that if Corona had not been deprived of the Williams property, it would have developed the property and the Williams property as one mine, thereby achieving a saving represented by the discount. Either party was entitled to undertake a reference to determine the amount by which the Williams property was enhanced by virtue of LAC's expenditure if dissatisfied with the trial Judge's estimate of the discount of $50,000,000. LAC was ordered to transfer the property to Corona upon payment by Corona to LAC of these amounts.

118 A reference was also ordered to determine the amount of the profits obtained by LAC from the Williams property. LAC was ordered to pay the amount of such profits to Corona with interest.

119 With the agreement of counsel, damages were assessed in the event that, on appeal, a court should decide that damages were the appropriate remedy. The assessment was made on the principles applicable to breach of fiduciary duty. The amount was $700,000,000 being the value of the mine as of January 1, 1986 on the basis of a discounted cash flow approach.

Court of Appeal

120 The Court of Appeal affirmed the findings of the trial Judge with respect to breach of confidence and fiduciary duty. It also confirmed the remedy with the addition of its opinion that a constructive trust was an appropriate remedy for both the breach of confidence and fiduciary duty. The Court did not deal with the appellant's attack on the assessment of damages. In the result, the appeal was dismissed with costs. I will deal more fully with the reasons of both the trial Judge and the Court of Appeal when discussing the issues.

The Issues Before This Court

121 The issues raised in this appeal can be conveniently grouped under three headings:

(1) Fiduciary Duty

122 Did a fiduciary relationship exist between Corona and LAC which was breached by LAC's acquisition of the Williams property?

(2) Breach of Confidence

123 Did LAC misuse confidential information obtained by it from Corona and thereby deprive Corona of the Williams property?

(3) Remedy

124 What is the appropriate remedy if the answer to (1) or (2) is in the affirmative?

(1) Did a Fiduciary Relationship Arise between LAC and Corona?

125 The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. Kennedy J., in "Equity in a Commercial Context" in *Equity and Commercial Relationships*, ed., P.D. Finn, The Law Book Company, 1987, explains why:

It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.

It was submitted that the departure of the Courts below from this salutary rule has resulted in a plethora of claims that would impose fiduciary relationships in a commercial-type setting. Writing in *The Advocates' Society Journal*, Aug. 1988, Colin L. Campbell supports this point of view. He states at 44:

The *Lac-Corona* decision, together with the decision in *Standard Investments v. Canadian Imperial Bank of Commerce* determining that a banker could be held to a fiduciary duty when he revealed information obtained in confidence, has given rise to a plethora of claims to impose fiduciary obligations where the parties' relationship has been formalized by a contract. In addition to the above principles, such obligations have been imposed on bankers, lawyers, stockbrokers, accountants, and others.

126 In *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, Dawson J. continued, at 493-94:

The undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one another was referred to in *Weinberger v. Kendrick* (1982) 34 Fed Rules Serv (2d) 450. And in *Barnes v. Addy* (1874) 9 Ch App 244 at 251, Lord Selborne LC said: 'It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.'

127 In our own Court, in *Guerin v. R.*, [1984] 2 S.C.R. 335, at 384, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 Dickson J. (as he then was) referred to a passage from Professor Weinrib's article, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1 at 4, wherein the fiduciary obligation is described as "the law's blunt tool". In my opinion, equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

128 While equity has refused to tie its hands by defining with precision when a fiduciary relationship will arise, certain basic principles must be taken into account. There are some relationships which are generally recognized to give rise to fiduciary obligations: director-corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and the like. The categories of relationships giving rise to fiduciary duties are not closed nor do the traditional relationships invariably give rise to fiduciary obligation. As pointed out by Dickson J. in *Guerin v. R.*, supra, p. 384 [S.C.R.]:

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

129 The nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional circumstances it is not. See J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1986), at 21-22. Furthermore, not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature. Southin J., in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.), observed that the obligation of a solicitor to use care and skill is the same obligation as that of any person who undertakes to carry out a task for reward. Failure to do so does not necessarily result in a breach of fiduciary duty but simply a breach of contract or negligence. She issued this strong caveat against the overuse of claim for breach of fiduciary duty (at 362):

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But 'fiduciary' comes from the Latin 'fiducia' meaning 'trust'. Thus, the adjective, 'fiduciary' means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty — if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

130 When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 78 N.R. 40, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 . The majority, although disagreeing in the result, did not disapprove of the following statement, at 135-136:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts arising from the case-law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, *A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts*, (3rd ed. 1955); Ernest J. Weinrib, 'The Fiduciary Obligation' (1975), 25 U.T.L.J. 1; Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968), 84 *L.Q.R.* 472; George W. Keeton and L.A. Sheridan, *Equity* (1969), at pp. 336-52; Shepherd, *supra*, at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

131 It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

132 The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in *Hospital Products v. United States Surgical Corp.*, supra, at 488, that:

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.

133 The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin*, supra, that [at 384, S.C.R.]:

> [T]he Hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion.

To the same effect is the discussion by Professor D.S.K. Ong in "Fiduciaries: Identification and Remedies" (1986), 8 Univ. of Tasmania Law Rev. 311, in which he suggests that the element which gives rise to and is common to all fiduciary relationships is the "implicit dependency by the beneficiary on the fiduciary". This condition of dependency moves equity to subject the fiduciary to its strict standards of conduct.

134 Two caveats must be issued. First, the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. In *Tito v. Waddell (No. 2)*, [1977] Ch. 106 at 230, [1977] 3 All E.R. 129 Megarry V-C said:

> If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

135 Second, applying the same principle, the fact that confidential information is obtained and misused cannot itself create a fiduciary obligation. No doubt one of the possible incidents of a fiduciary relationship is the exchange of confidential information and restrictions on its use. Where, however, the essence of the complaint is misuse of confidential information, the appropriate cause of action in favour of the party aggrieved is breach of confidence and not breach of fiduciary duty.

136 In my opinion, both the trial Judge and the Court of Appeal erred in coming to the conclusion that a fiduciary relationship existed between Corona and LAC. In my respectful opinion, both the trial Judge and the Court of Appeal erred by not giving sufficient weight to the essential ingredient of dependency or vulnerability and too much weight to other factors. The latter are as follows:

(a) that the state of the negotiations attracted the principle in *United Dominions Corp. Ltd. v. Brian Pty. Ltd.* (1985), 60 A.L.R. 741, 59 A.L.J.R. 676 (Aust. H.C.);

(b) that LAC had sought out Corona;

(c) that the geochemical program constituted an embarkation on a joint venture;

(d) that Corona had divulged confidential information to LAC;

(e) that a practice in the mining industry supported the existence of a fiduciary relationship;

(f) that the parties were negotiating towards a common object.

The United Dominions Case

137 This is a decision of the High Court of Australia involving a joint venture between three parties, United Dominion Corp. (UDC), Security Projects Ltd. (SPL) and Brian Pty Ltd. (Brian). Land was purchased with money provided by the joint venture and was to be developed for a hotel and shopping centre. SPL acted as agent for the joint venturers and held moneys in trust which had been provided by the joint venture. UDC acted as principal financier of the project with the balance of the funds being provided by the other joint venturers. Prior to the alleged breach of fiduciary duty, the percentage participation of each joint venturer had been set and substantial amounts had been contributed by them. The land was mortgaged to UDC as security

for borrowings by SPL which acted as agents for Brian and others in this respect. All this was consistent with the terms of a draft joint venture agreement that had been circulated among the participants and eventually was executed.

138 The mortgage which SPL granted to UDC contained a "collateralisation clause" which had the effect of subjecting lands of the joint venture to debts incurred by SPL extraneous to the joint venture. UDC was "fully aware that the land registered in the name of SPL was held in circumstances which required SPL to account to the intended partners" (per Gibbs C.J. at 678).

139 The enforcement of the collateralisation clause by UDC resulted in the loss of Brian's investment and of course it obtained no return thereon.

140 In light of the above, the Court concluded that the parties had embarked on a joint venture which the Court found to be plainly a partnership. The Court further found that prior to the grant of the first mortgage, the "arrangements between the prospective joint venturers had passed far beyond the stage of mere negotiations" (at 680). Clearly, if the draft agreement had not been signed subsequently, an agreement substantially in accordance with its terms would have been found to exist by the Court. Prior to its execution, the relationship of UDC, SPL and Brian was that of a de facto partnership or joint venture. Furthermore, Brian entrusted SPL with its funds and its interest in the land with the full knowledge of UDC. Brian was therefore "at the mercy of their discretion". In this respect the case is clearly distinguishable from the case at bar. The trial Judge found that LAC and Corona "were clearly negotiating towards a joint venture or some other business relationship". The respondent had pleaded that a partnership agreement existed between it and the appellant but this claim was abandoned. In this respect, the trial Judge found as follows: "The most that can be said is that the parties came to an informal oral understanding as to how each would conduct itself in anticipation of a joint venture *or some other business arrangement*". [Emphasis added.]

141 The parties here had not advanced beyond the negotiation stage. Indeed, they had not as yet identified what precisely their relationship should be. Furthermore, Corona did not confer on LAC any discretionary power to acquire the Williams property. LAC proceeded unilaterally to acquire the property for itself allegedly making use of confidential information, and that essentially is the ground of Corona's complaint.

142 The Court of Appeal recognized that this case differed from the *United Dominions* case, supra, (p. 317). In its opinion, however, the other factors present in the case which I have enumerated above, (a) to (f), made up for the difference.

143 I cannot find that (b) adds very much to the case in favour of a finding that a fiduciary relationship existed. In every commercial venture, one of the parties approaches the other. Corona was seeking a senior mining company and LAC responded with an expression of interest. This is not an indicium of a fiduciary relationship. Nor can I accept that (c), the arrangement as to the geochemical program, was a step in the implementation of a joint venture. The trial Judge did not so find and the evidence is too sketchy to be able to relate this activity to any proposed agreement between the parties, the nature of which itself was undetermined. With respect to (d) as explained above, the supply of confidential information is not necessarily referable to a fiduciary relationship and is therefore at best a neutral factor. The other two factors, (e) and (f), require more extensive consideration.

(e) The Practice in the Industry

144 The trial Judge concluded as follows:

> I conclude, following *Cunliffe-Owen*, supra, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

145 He did so on the basis of the following evidence with which all experts were in agreement:

> [Mr. Allen] A. If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the

case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.

. . . . .

Q. ... Does the obligation not to harm each other that you referred to, et cetera, flow from the fact that they were in negotiation or discussion about a possible deal itself so long as it's a serious matter as you said?

. . . . .

[Mr. Allen]. Yes.

No examples were apparently given illustrating the operation of this practice. *Cunliffe-Owen v. Teather & Greenwood*, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421 (Ch.), which was referred to by the trial Judge and relied on by the Court of Appeal, is a contract case. The principle is well established in contract law. It is accurately expressed by Ungoed-Thomas J. at 1438 [W.L.R.]:

For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.

The burden lies on those alleging 'usage' to establish it.

The practice that has to be established consists of a continuity of acts, and those acts have to be established by persons familiar with them, although, as is accepted before me, they may be sufficiently established by such persons without a detailed recital of instances. Practice is not a matter of opinion, of even the most highly qualified expert, as to what it is desirable that the practice should be. However, evidence of those versed in a market — so it seems to me — may be admissible and valuable in identifying those features of any transaction that attract usage

146 It is understandable that, in a contract setting, a practice that is notorious and clearly defined and relevant to the business under discussion should be incorporated as a term. It can readily be inferred that the parties agreed to it. It is a considerable leap from this principle to erect a fiduciary relationship on the basis of such a practice. No authority was cited to the Court that this concept can simply be transplanted in this fashion. It is significant that the trial Judge did not rely on this evidence in finding that a fiduciary obligation existed (pp. 776-777). Moreover, accepting the evidence at face value, it is more consistent with the obligation of confidence. The practice relates to a duty which arises upon the exchange of confidential information. Furthermore, in the absence of any illustrations of the operation of the practice, we are left with an expert's opinion on what is essentially a question of law — the existence of a fiduciary duty. The practice among geologists to act honourably towards each other is no doubt admirable and a practice to be fostered, but it should not be used to create a fiduciary relationship where one does not exist.

(f) Common Object

147 The Court of Appeal stressed that the parties were not simply negotiating an ordinary commercial contract but were negotiating in furtherance of a common object. This factor does not particularly distinguish negotiations in furtherance of any partnership or joint venture. All such negotiations seek to achieve a common object, namely the accomplishment of the business venture for which the partnership or joint venture is sought to be formed. I do not see how this factor can elevate negotiations to something more.

(1) Dependency or Vulnerability

148 In my opinion, this vital ingredient was virtually lacking in this case. Its absence cannot be replaced by any of the factors mentioned above. The Court of Appeal dealt with it as follows:

> It was a case of negotiations between a junior mining company (Corona) whose primary activities were those of locating, staking and evaluating mining claims and a senior mining company (LAC) whose activities included all of the above together with the practice and experience of bringing into production and operating gold mining properties. It was a case of the senior company seeking out the junior company in order to obtain information with respect to mining claims already owned by the junior company and to discuss a joint business venture. Having regard to the practice found to exist in the industry with respect to the obligation not to act to the detriment of each other, particularly with respect to confidential information disclosed, it was to be expected that Corona would divulge confidential information to LAC during the course of their negotiations. In those circumstances, it is only just and proper that the court find that there exists a fiduciary relationship with its attendant responsibilities of dealing fairly including, but not limited to, the obligation not to benefit at the expense of the other from information received by one from the other.

149 This statement seems to imply that there was a kind of physical or psychological dependency here which attracted fiduciary duty. Illustrations of this type of dependency are not difficult to find. They include parent and child, priest and penitent and the like. Clearly, a dependency of this type did not exist here. While it is perhaps possible to have a dependency of this sort between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers. The fact that they were anxious to make a deal with a senior mining company surely cannot attract the special protection of equity. If confidential information was disclosed and misused, there is a remedy which falls short of classifying the relationship as fiduciary. In *Frame*, supra, Wilson J. dealt with this indicia of fiduciary duty in the following language (at 137-138 [S.C.R.]):

> This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.); affirmed [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of discretion or power to be exercised, i.e., any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power ... are adequate in such a case.

150 If Corona placed itself in a vulnerable position because LAC was given confidential information, then this dependency was gratuitously incurred. Nothing prevented Corona from exacting an undertaking from LAC that it would not acquire the Williams property unilaterally. And yet the trial Judge found that while the Williams property was discussed by Bell and Sheehan, the latter did not agree *not* to acquire the Williams property. Indeed it does not appear that LAC was ever asked to refrain from so doing. In the letter dated May 19, Sheehan wrote to Bell in part as follows:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued.

The reference to the Hughes ground included the Williams property. It would seem that the possibility of Corona participating could only come about if the property were acquired. This would suggest that the parties contemplated that LAC might acquire the property in which event Corona would have a possibility of participating. At the very least LAC might reasonably have considered that such a course of action was open to it. In view of the abandonment by Corona of any contractual claim, I conclude that even this limited protection was not secured by any contractual arrangement.

151 Accordingly, if Corona gave up confidential information, it did so without obtaining any contractual protection which was available to it. This and the fact that misuse of confidential information is the subject of an alternate remedy strongly militate against the application here of equity's blunt tool. I now turn to that alternate remedy, breach of confidence.

(2) Breach of Confidence

152 Both the trial Judge and the Court of Appeal applied three criteria in determining whether a breach of confidence had been made out by the respondent. These elements are:

(i) Confidential Information: Did Corona supply LAC with information having a quality of confidence about it?

(ii) Communication in Confidence: Did Corona communicate this information to LAC in circumstances in which an obligation of confidence arises?

(iii) Misuse of Information: Did LAC, by acquiring the Williams property to the exclusion of Corona, misuse or make an unauthorized use of the information?

153 The trial Judge made findings of fact in favour of the respondent with respect to each of these criteria:

(i) Confidential Information

In the present case much of the information transmitted by Corona to Lac was private and had not been published. There is no doubt, however, that Corona wished to attract investors. Drill hole results were published on a regular basis and incorporated in George Cross Newsletters. Mr. Bell permitted himself to be quoted in the March 20 George Cross Newsletter and made a presentation to a group of stockbrokers in Vancouver.

Mr. Bell also quite freely discussed the Corona results with brokers, investors and friends. Lac, however, was told more than the general public. Mr. Sheehan was shown the core, the drill plan and sections on May 6th. He discussed the geology with Mr. Bell on May 6th, May 8th and June 30th, and a full presentation with up-to-date results was made to Lac on June 30th.

(ii) Communication in Confidence

I find as a fact that on May 6, 1981, there was no mention of confidentiality with respect to the site visit, except in connection with New Cinch. I prefer the evidence of Messrs. Bell and Dadds to that of Messrs. Sheehan and Pegg. Clearly the information was confidential and this must have been obvious to Mr. Sheehan.

The information, although partly public, was, I have found, of value to Lac and was used by Lac. It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

(iii) Misuse of Information

Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.

Certainly Lac was not authorized by Corona to bid on the Williams property.

154 There are concurrent findings of fact and these should not be disturbed by this Court unless we are satisfied that they are clearly wrong. The appellant did not attack either the basic criteria or these findings of fact as such, but rather "the rules by which the existence of the elements as a matter of law are to be determined".

155 With respect to the first element, the appellant submitted that although some of the information was private, much of it was public. This combination did not act as a springboard to give the appellant an advantage over others. Essentially, the appellant submitted that the desirability of acquiring the Williams property could have been deduced from information which was public and it got no head start by obtaining information from the respondent.

156 In this regard the statement of Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Coy.* (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.), (leave to appeal to House of Lords refused) at 215 [R.P.C.], which was quoted by the trial Judge, is apposite:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

157 *Seager v. Copydex*, [1967] 2 All E.R. 415, [1967] 1 W.L.R. 923 (C.A.), cited by the appellant, provides a useful illustration of the concept of the use of added information to get a head start or to use it as a springboard. The plaintiff Seager was the inventor of a patented carpet grip. He negotiated with the defendant Copydex with a view to development of his invention. Negotiations were terminated without a contract. Copydex then proceeded to produce a competing grip. The Court found that much of the information which Seager gave to Copydex was public. But there was some private information that resulted from Seager's efforts such as the difficulties which had to be overcome in making a satisfactory grip. At 931 [W.L.R.], Lord Denning M.R. stated:

> When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.

158 Corona had conducted an extensive exploration program on its own property. The information which it obtained was pertinent in evaluating the Williams property. Its geologist, Bell, had developed a theory that the source of the zone of gold mineralization on Corona's property was volcanogenic. This meant that gold could be spread over a large area with "pools" of ore throughout. This led him to conclude that the exploration program should be extended to the neighbouring properties which included the Williams property. Bell was the geologist who first firmly believed that it was the land of Havilah and his enthusiasm spread to his principals. This information was developed from the results of the exploration program and the application of Bell's knowledge as a geologist. LAC got the benefit of this information. It had the advantage of several discussions with Bell who interpreted his findings and explained his volcanogenic theory. Bell allowed LAC's representatives to examine the drill cores and the individual assays. LAC's representatives were also advised that Corona was actively pursuing the Williams property. The trial Judge found as a result that:

> On all the evidence I conclude that the site visit and the information disclosed by Corona to Lac was of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams.

159 This information was the springboard which led to the acquisition of the Williams property. Sheehan admitted that the offer to Mrs. Williams was based in part on information obtained from Corona. The degree of reliance on Bell's input is graphically illustrated by the fact that after LAC had optioned the Williams property, it located its three drill holes on the Williams property in the same area in which Bell would have located his next three holes, westerly from the Corona property.

160 It was suggested in argument that although some of the information was of a private nature, it was not incremental in the sense that it did not enhance the information so as to make the Williams property more desirable. This contention is effectively refuted by the actions of LAC. Immediately after the May 6 meeting, something in that meeting triggered a frenzy of activity on the part of LAC, including a staking of 640 claims, several further meetings with Corona and the acquisition of the Williams property. I agree therefore with the conclusion of the Courts below that the information obtained from Corona by LAC went

beyond what had been imparted publicly in the George Cross Newsletters or the public investors' meeting. Furthermore, it put LAC in a preferred position vis-à-vis others with respect to knowledge of the desirability of acquiring the Williams property.

161 With respect to the second element the appellant submitted that the trial Judge did not apply the reasonable man test in determining whether the information was imparted in circumstances in which an obligation of confidence arises. The trial Judge in his reasons cited with approval the reasonable man test enunciated in *Coco v. A. N. (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.). Moreover, the trial Judge referred to the passage of Megarry J. at 48 which follows the articulation of that test:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

The trial Judge found that it was obvious to Sheehan that the information was confidential and that:

> It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

162 These findings were made at least in part on the basis of a preference of the evidence of Bell and Dadds to that of Sheehan and Pegg. As did the Court of Appeal, I accept them.

163 With respect to the third element, LAC submits that it did not misuse the information because it went to the public record and then started staking and making the inquiries which eventually culminated in the acquisition of the Williams property. The trial Judge has found, however, that the information obtained from Corona was of value to LAC in assessing the merits of the Williams property and LAC made use of this information to the detriment of Corona. This finding is amply supported by the evidence and should be accepted.

164 The trial Judge also found that LAC was not authorized by Corona to bid on the Williams property. I interpret this to mean that Corona did not advise LAC that it could bid on the Williams property. Furthermore, as noted above, Sheehan never expressly agreed that LAC would refrain from acquiring the Williams property. The trial Judge so found. There was an "informal oral understanding as to how each would conduct itself in anticipation of a joint venture or some other business arrangement". The terms of this informal arrangement as they relate to the acquisition of the Williams property are very sketchy. I have set out above the evidence and findings of fact that relate to this matter, including the portion of the letter of May 19, 1981 which states:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued.

165 As I said earlier in my reasons, that statement is neutral as to who would acquire the property. It is consistent with either Corona or LAC acquiring the property but subject to the loose oral arrangement that they were working toward a joint venture or other business arrangement which would involve participation by Corona in accordance with one of the formulae set out in the May 19 letter or an arrangement similar thereto.

166 On this basis, acquisition by LAC of the Williams property to the exclusion of Corona was not an authorized use of the confidential information which it received from Corona and which was of assistance in enabling LAC to get the property for itself.

167 In summary, the three elements of breach of confidence were made out at trial, affirmed on appeal, and notwithstanding the able submissions for the appellant, I find the decision of the trial Judge and the Court of Appeal unassailable on this branch of the case. Accordingly, with respect to liability for breach of confidence, the appeal fails.

(3) Nature of Remedy for Breach of Confidence

168 The trial Judge dealt with remedy solely on the basis of breach of a fiduciary duty. On this basis he ordered that upon payment to LAC of the amounts referred to above, the mine be transferred to Corona.

169 The Court of Appeal affirmed the trial Judge but after expressing the view that it "is artificial and difficult to consider the question of the proper remedy for breach of the obligation of confidence on the hypothesis that there is no co-existing fiduciary obligation", it concluded that a constructive trust would in such circumstances be a possible remedy.

170 Furthermore, based on the fact that (i) but for "LAC's actions, Corona would have acquired the Williams property" and (ii) "it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property", the Court of Appeal concluded that it was the appropriate remedy.

Constructive Trust or Damages

171 The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected. See Gurry, *Breach of Confidence*, (Oxford: Clarendon Press, 1984) at 25-26, and Goff & Jones, *The Law of Restitution*, 3rd ed., (London: Sweet & Maxwell, 1986) at 664-667.

172 This multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy. See *Nichrotherm Electrical Co. v. Percy*, [1957] R.P.C. 207, 213-14; Gurry, supra, at 26-27; and Goff & Jones, supra, at 664-65. A constructive trust is ordinarily reserved for those situations where a right of property is recognized. As stated by the learned authors of Goff & Jones, supra, at 673:

> In restitution, a constructive trust should be imposed if it is just to grant the plaintiff the additional benefits which flow from the recognition of a right of property.

Although confidential information has some of the characteristics of property, its foothold as such is tenuous (see Goff and Jones, supra, at 665). I agree in this regard with the statement of Lord Evershed in *Nichrotherm*, supra, at 209, that:

> a man who thinks of a mechanical conception and then communicates it to others for the purpose of their working out means of carrying it into effect does not, because the idea was his (assuming that it was), get proprietary rights equivalent to those of a patentee. Apart from such rights as may flow from the fact, for example, of the idea being of a secret process communicated in confidence or from some contract of partnership or agency or the like which he may enter into with his collaborator, the originator of the idea gets no proprietary rights out of the mere circumstance that he first thought of it.

173 As a result, there is virtually no support in the cases for the imposition of a constructive trust over property acquired as a result of the use of confidential information. In stating that such a remedy is possible, the Court of Appeal referred to Goff & Jones, supra, at pp. 659-674. The discussion of proprietary claims commences at 673 with the statement which I have quoted above and thereafter all references to constructive trust pertain to an accounting of profits. No reference is made to any case in which a constructive trust is imposed on property acquired as a result of the use of confidential information.

174 In Canada as in the United Kingdom, the existence of the constructive trust outside of a fiduciary relationship has been recognized as a possible remedy against unjust enrichment. See Waters, *Law of Trusts in Canada*, 2nd ed., 1984, at 386-397.

175 In Canada this device has been sporadically employed where the unjust enrichment occurred in the context of a pre-existing special relationship between the parties. Thus in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, Dickson J. (as he then was) spoke of "a relationship tantamount to spousal". In *Nicholson v. St. Denis* (1975), 8 O.R. (2d) 315, 57 D.L.R. (3d) 699 (C.A.), leave to appeal to the Supreme Court of Canada refused (1975), 8 O.R. (2d) 315n, 57 D.L.R. (3d) 699n, MacKinnon J.A. refused the remedy in the absence of "a special relationship" between the parties. In *Unident v. Delong* (1981), 50 N.S.R. (2d) 1, 98 A.P.R. 1, 131 D.L.R. (3d) 225 (T.D.), Hallett J., quoting MacKinnon J.A., refused restitution where a special relationship could not be shown.

176 In *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, 56 W.W.R. 697, 50 C.P.R. 299, 57 D.L.R. (2d) 557, an employee acting on information which he obtained entirely in the course of his employment, staked certain claims

which would otherwise have been staked by the employer. This Court affirmed the decision of the trial Judge who held that the employee was a trustee of the claims for his employer. In his reasons for the Court, Judson J. stated, at 555, that:

> it was a term of his employment, which McTavish on the facts of this case understood, that he could not use this information for his own advantage. The use of the term 'fraud' by the learned Chief Justice at trial was fully warranted.

In these circumstances, Judson J. referred to the use of the constructive trust. I do not consider that that decision lays down any principle that makes the remedy of a constructive trust an appropriate remedy for misuse of confidential information except in very special circumstances.

177 Although unjust enrichment has been recognized as having an existence apart from contract or tort under a heading referred to as the law of restitution, a constructive trust is not the appropriate remedy in most cases. As pointed out by Professor Waters in *Law of Trusts in Canada*, supra, at 394, although unjust enrichment gives rise to a number of possible remedies:

> the best remedy in the particular circumstances is that which corrects the unjust enrichment without contravening other established legal doctrines. In most cases, as in *Deglman v. Guar. Trust Co. of Can. and Constantineau* itself, a personal action will accomplish that end, whether its source is the common law or equity, providing as it often will monetary compensation.

178 While the remedy of the constructive trust may continue to be employed in situations where other remedies would be inappropriate or injustice would result, there is no reason to extend it to this case.

179 The conventional remedies for breach of confidence are an accounting of profits or damages. An injunction may be coupled with either of these remedies in appropriate circumstances. A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust. In a breach of confidence case, the focus is on the loss to the plaintiff and, as in tort actions, the particular position of the plaintiff must be examined. The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed. See *Dowson & Mason Ltd. v. Potter*, [1986] 2 All E.R. 418, [1986] 1 W.L.R. 1419 (C.A.) and *Talbot v. General Television Corp. Pty. Ltd.*, [1980] V.R. 224. Accordingly, this object is generally achieved by an award of damages, and a restitutionary remedy is inappropriate.

180 The Williams property was acquired as a result of information which was in part public and in part private. It would be impossible to assess the role of each. The trial Judge went no further than to find that the confidential information was "of value" to LAC and

> of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams.

181 The Court of Appeal went further and stated that "but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property". The reasons do not disclose any factual basis for extending the finding of the trial Judge and I see no basis for so doing. The best that can therefore be said is that it played a part. When the extent of the connection between the confidential information and the acquisition of the property is uncertain, it would be unjust to impress the whole of the property with a constructive trust.

182 The case has been presented on the basis that either a transfer of the property or damages is the appropriate remedy. The respondent contends that the former is appropriate and the appellant the latter. No submissions were made in oral argument for or against an accounting of profits. Moreover, damages were assessed in the alternative in the event that on appeal this was considered the appropriate remedy. In all the circumstances, therefore, I have concluded that of the two alternatives presented, damages is the proper remedy.

183 It is, therefore, necessary to determine the basis upon which damages will be assessed. The formula for the measure of damages does not appear to be seriously disputed, although the application of the formula is. In *Dowson & Mason Ltd. v. Potter*, supra, Sir Edward Eveleigh adopted the statement of Lord Wilberforce in *General Tire & Rubber Co. v. Firestone Tyre*

& Rubber Co., [1975] 2 All E.R. 173, [1975] 1 W.L.R. 819 (H.L.) in a breach of confidence action. Lord Wilberforce was dealing with the measure of damages applicable to economic torts. He stated, at 177 [E.R.]:

> As in the case of any other tort (leaving aside cases where exemplary damages can be given) the object of damages is to compensate for loss or injury. The general rule at any rate in relation to 'economic' torts is that the measure of damages is to be, so far as possible, that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the wrong (*Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn).

184 In applying this test it is necessary to consider what the wrong is and what the position of the plaintiff would have been if he had not sustained the wrong. To put it shortly, what loss was caused to the plaintiff by the defendant's wrong?

185 In my opinion, the wrong committed by LAC was the acquisition of the Williams property for itself and to the exclusion of Corona. That was contrary to the understanding found to exist by the trial Judge that the parties were working towards a joint venture or some other business arrangement.

186 This set the parameters of the permitted use of the confidential information and its use within these parameters was not a misuse of it. LAC did not agree to refrain from acquiring the property and Corona did not tell LAC not to acquire the property. This would be surprising unless the parties thought that in keeping with their efforts to conclude a joint business arrangement, either one could acquire it for that purpose. This is supported by the letter of May 19 in which Sheehan set out three alternative "possibilities" for a working arrangement with Corona. That is followed with a paragraph relating to the Williams property. For ease of reference I will again reproduce the relevant correspondence:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.

Bell's reply states in part:

> At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.

187 The correspondence reflected the discussion between the parties up to that point. In my view it can only be read as envisaging a participation by Corona with LAC in the Williams property. Either party could acquire it for this purpose. This is further supported by the following evidence of Sheehan which was elicited on cross-examination. This evidence was relied on by the trial Judge in concluding that a statement made by Bell at the meeting of May 8 that Corona was "happy with our land position" was made in the context of additional staking and not that it (Corona) was not interested in acquiring the Williams property:

> Q. Mr. Sheehan, on May 8th — and, my Lord, page 803, question 3971:
>
>> Q. Can you tell me now then, please, your discussion with Mr. Bell on the 8th as it concerns the Hughes property?
>>
>> A. My best recollection of that discussion was where the Hughes property was concerned was I was discussing the area in general. I believe I had indicated to Mr. Bell that we would be staking in the area.
>>
>> MR. McDOUGALL: You have given that evidence.
>>
>> THE DEPONENT: With respect to the Hughes property, I had suggested the possibilities that we pick up the Hughes property, that is to say Lac, that Corona may pick it up, that any combination of those factors could be addressed. In other words, if indeed we were going to make a deal, Lac could fund Corona since he had indicated that they were just a small company without much money.
>
> A. Yes, that's correct.

Q. Were you asked those questions and did you give those answers?

A. Yes.

MR. LENCZNER: And we have this already in one of the tabs, my Lord, with regard to the May 19th letter, but let me just — I had better pull out the tab. It is tab 146.

Q. Page 863, the answer you gave:

> A. Well, I think I had discussed with Mr. Bell in that meeting and I may have referred to this in previous testimony that the patented ground as well as the Hughes ground should be picked up and that's what that is referring to there.

A. Yes.

Q. So that you had discussed with Bell on May 8th, picking up the Hughes ground and the patented ground?

A. Yes.

Q. And that Lac could pick it up, Corona could pick it up?

A. Yes.

Q. Or you would even fund Corona to pick it up?

A. Yes, we would do the funding.

Q. In addition to all of that, you said you had a staking programme going down to the east and he could participate in that if he wanted?

A. Yes, we could bring him into that.

Q. In that context, I suggest to you he said, 'We are happy with our land position'?

A. It was in that context that he said, 'No, I'm happy with my land position and we will continue drilling and doing the Phase II programme'.

188 The trial Judge is correct in his finding that Corona was interested in "the possession of either Williams or Hughes". There is no finding, however, that acquisition by LAC of the Williams property as part of the joint exploration program along with continued negotiations towards an agreement on the basis of one of the scenarios outlined in the letter of May 19 would have constituted a breach of mutual understanding under which the confidential information was supplied to LAC. Furthermore, I am satisfied that had that occurred, the most likely conclusion is that LAC and Corona would have continued to negotiate and Corona would have made a deal with LAC for their respective participation in a joint venture including the Williams property. Corona could not finance the development on its own property without the assistance of a senior mining company. Accordingly, it entered into an agreement with Teck on somewhat similar terms as those proposed by LAC. Even after it discovered that LAC had acquired the Williams property, a director, Moore, sought to continue the negotiations. His evidence in part is as follows:

Q. What is it that you were setting about doing then in your attempts to reach Mr. Sheehan?

A. Well, the stage — the stage was still set, even at that point, for — to continue with this joint venture. Lac had picked up a big piece of ground in the area, 600 claims, and Corona had a nice start, that Williams' claims were off on the side. We felt that they should be ours. But it was, uh, it was still possible in that scenario, in my opinion, to make a joint venture, even with — all the pieces were still there to make a good deal.

189 But for LAC's breach, those negotiations would likely have continued and it would have resulted in Corona acquiring an interest in the Williams property of 50 per cent or perhaps a small percentage interest. It would have also acquired a corresponding obligation to contribute on the same basis. Corona's damages should therefore be calculated on the basis of the loss of this interest.

190 In his reasons the trial Judge stated:

> If Corona had obtained the Williams property, Corona may well have entered into a joint venture agreement with Lac covering the Corona and Williams properties together with the White River claims. Corona's damages would be assessed accordingly in an action for breach of contract.

Holland J. went on to hold that based on his finding of a fiduciary duty the appropriate remedy was a restitutionary remedy requiring the whole of the property to be returned to Corona upon payment of the added value. I have decided that there is no breach of a fiduciary duty and therefore, as in contract, account must be taken of the fact that but for the breach by LAC, a joint venture agreement would likely have resulted. Damages should be assessed accordingly.

Assessment of Damages

191 The appellant, in its factum, para. 177, submits as follows:

> If it is found that, through misuse of information relating to Corona's intentions or otherwise, the loss suffered by Corona was the loss of the opportunity to acquire and to explore the Williams property, Corona would be entitled to damages. However, its loss is not to be measured by LAC's gain. Corona is to be put in the same position it would have been if it had not sustained the wrong. In making that assessment in the case of a lost opportunity the correct approach is:
>
> i) to determine the form of business arrangement that Corona would have been obliged to have entered into with a senior mining partner and the proportionate interest that Corona would probably have conceded to that partner. The later arrangement with Teck suggests this would be 55%. Sheehan suggested 60%;
>
> ii) to value the property as improved by LAC. This was done by the trial judge and produced a figure of $700,000,000.00 after tax, being the value created by the size of the facilities LAC decided to put on the Williams property. LAC disputed this assessment on appeal but the Court of Appeal did not deal with this issue. LAC's submissions on the value of the property as improved by LAC are set out in Appendix 'A'. In addition, Corona may have decided or been compelled to exploit the property with a lower rate of extraction. The value of the property must be discounted to reflect that eventuality;
>
> iii) to deduct from that discounted figure the 60% (or 55%) interest of the senior partner;
>
> iv) to deduct from that figure a capitalized estimate of the costs Corona would have had to contribute to the exploration and exploitation of the property; and
>
> v) to deduct a further amount to reflect Corona's own share of responsibility for its loss.

192 I agree that this approach generally gives effect to the principles which I have stated above. I would not, however, include item (v) to deduct a further amount to reflect Corona's own share of responsibility for its loss. This is essentially a plea of contributory negligence for which there is no support in the findings of fact or evidence.

(i) The Business Arrangement

193 In determining the nature of the business arrangement that the parties would likely have concluded, the arrangement with Teck is very pertinent. This arrangement was set out in a number of agreements. For my purposes I refer primarily to an agreement dated December 10, 1981 (property agreement) with the "Joint Venture Agreement" attached as Schedule B, and the

"Area of Interest Agreement" contained in a letter dated August 13, 1982 as amended by an agreement made as of December 19, 1983, particularly paras. 3.2 and 5. Under these agreements, the parties entered into the following arrangement.

194 (a) Corona Property: Teck undertook to complete exploration and development work and prepare a feasibility study with respect to 17 properties. The initial costs were financed out of a fund to which both Teck and Corona contributed $1,000,000. Teck acquired a 55 per cent interest upon completion of the feasibility study and election to bring the property into production, leaving Corona with 45 per cent. Thereafter development was to be financed in accordance with the respective interests of the parties, i.e. 55 per cent by Teck and 45 per cent by Corona.

195 (b) Other Property: Any property in the area not covered by the property agreement subsequently acquired by either Teck or Corona would be shared on a 50-50 basis with contributions accordingly. This provision was expressly extended to the Williams property contingent on Corona obtaining a favourable judgment.

196 In the circumstances, I conclude that Corona would have concluded with LAC a business arrangement with respect to the Williams property substantially similar to that which it concluded with Teck: a 50-50 property interest with participation in the development costs in the same ratio. Although this is a slightly higher percentage in favour of Corona than that proposed by Sheehan and agreed upon with Teck in respect of Corona's own property, it is the figure that was applied to the Williams property in the Teck agreement. The benefit of any doubt as to whether it should be 45 per cent or 50 per cent should be given to the innocent party Corona rather than to the party in breach.

(ii) Value of Improved Mine

197 The trial Judge fixed the value at $700,000,000 after tax. Both parties take issue with this assessment. While there is some merit in some of the issues raised by each side, it has not been established that this is a wholly erroneous assessment and I accept it. I will deal with several of the criticisms which raise an issue of law or principle. Other objections are primarily factual and the findings of the trial Judge should be accepted.

198 First, although not directly raised in this Court, the appellant submitted below that the date for valuation was the date of breach and not the date of trial. The trial Judge chose January 1, 1986, a date during the latter period, applying equitable principles. Having regard to the flexibility possessed by the Court to do justice in an action for breach of confidence, I have no difficulty in applying those principles to this assessment to the extent of adopting the later date. To do otherwise would be to ignore the vast potential that the Williams property possessed at the time it was acquired by LAC. That potential can best be valued by determining its value as of the date fixed by the trial Judge.

199 The trial Judge elected to adopt a discounted cash flow approach to value the Williams property as opposed to a market capitalization approach. Although I recognize that each approach has its strengths and weaknesses, I am not prepared to hold that the trial Judge erred in opting for a discounted cash flow of the mine on the Williams property over the life of the mine to ascertain its present value. In my opinion, there is ample evidence to support the conclusion that this was the proper means to assess the value of the property.

200 I am also of the opinion that the trial Judge correctly applied this Court's decision in *Florence Realty Co. Ltd. v. R.*, [1968] S.C.R. 42, 65 D.L.R. (2d) 136 in deducting corporate taxes from the cash flow to determine the value of the mine.

201 Furthermore, the figure of $700,000,000 was based on the payment of a 1-1/2 per cent net smelter return to Mrs. Williams in accordance with the contract negotiated by LAC. Although Corona offered a 3 per cent net smelter return to Mrs. Williams, which would reduce the value of the property, I accept the figure of 1-1/2 per cent as the likely figure which would have been paid if LAC had not been in breach of confidence.

(iii) Damages for Loss of Interest in Mine

202 Damages for loss of Corona's interest in the mine are therefore assessed at $350,000,000 which is 50 per cent of $700,000,000.

(iv) Contribution to Development Costs

203 I agree with the appellant that Corona should not have the value by which the mine was increased by the expenditures made by LAC without contributing in accordance with its interest. LAC presented evidence that it had expended $203,978,000 in developing the Williams property. The trial Judge held that had Corona developed the two properties together then a number of savings would have been realized over the sums expended by both LAC and Corona in developing their two mines independently. The trial Judge suggested that there would have been only two shafts rather than three, only one mill and only one group of service facilities. For this reason, he estimated that LAC spent an additional $50,000,000 by virtue of its independent development of the Williams property.

204 I agree that this sum is to be deducted from the expenditures by LAC in developing the Williams property. The operative principle of damages is to place Corona in the position it would have occupied had there been no breach of confidence by LAC. If LAC had acquired the property for the benefit of both parties, the two properties would have been developed jointly rather than separately. LAC is, therefore, responsible for the extra costs incurred as a result of the inability to take advantage of any natural economies of scale.

205 Accordingly, $50,000,000 is to be deducted from the figure of $203,978,000 representing LAC's improvements to the property, for a difference of $153,978,000. One-half of this sum ($76,989,000) must be deducted from $350,000,000 for a difference of $273,011,000.

206 This does not fully dispose of the assessment of damages. Several further items having a possible bearing on the amount require consideration. In arriving at the figure of $153,978,000 the trial Judge expressed some uncertainty with respect to the quantum of the deduction of $50,000,000 from the $203,978,000 which resulted in a difference of $153,978,000. Accordingly, a reference was directed but only if either party was dissatisfied with the trial Judge's figure. The formal order expressed it as a reference concerning the amount of $153,978,000. As I read the trial Judge's reasons, the uncertainty was in the amount of the deduction and not the $203,978,000 expenditure by LAC which was based on its records. Nevertheless, I propose to direct a reference in the same terms as the trial Judge.

207 In addition, the trial Judge ordered that the amounts paid to Mrs. Williams, exclusive of royalty payments, should also be paid by Corona. This cost of the acquisition of the property would have been necessary had no breach occurred. Corona would have been obliged to pay one-half of these payments. Accordingly, one-half of the amounts paid to Mrs. Williams exclusive of royalty payments must be deducted from the award of damages of $273,011,000 or from that figure as varied by any reference undertaken as indicated above.

208 The trial Judge also directed that the appellant pay the respondent the profits, if any, obtained by the appellant from the operation of the Williams mine. The foundation for this order was the restitutionary remedy which I have found to be inappropriate. Accordingly, no such order is made. The respondent is, however, entitled to pre-judgment interest in accordance with s. 138(1)(b) of the *Courts of Justice Act, 1984,* S.O. 1984, c. 11. If, therefore, a notice has been served as provided by that provision, the respondent will be entitled to interest in accordance with that section. The respondent is also entitled to post-judgment interest in accordance with s. 139 of the *Courts of Justice Act.*

Disposition

209 In the result, I would allow the appeal in part and dismiss the cross-appeal. I would set aside the judgment at trial and the order of the Court of Appeal and direct that judgment should issue as follows:

1. The plaintiff is entitled to recover from the defendant damages in the sum of $273,011,000 less one-half of all sums paid to Mrs. Williams with the exceptioon of royalties, subject to the right of either the plaintiff or defendant to undertake a reference to the Master concerning the deduction of $153,978,000.

2. The plaintiff is entitled to recover pre-judgment interest from the defendant on the sum referred to in para. 1, or as varied on a reference, in accordance with s. 138(1)(b) of the *Courts of Justice Act* from the date of service of any notice, and post-judgment interest on the said sum in accordance with s. 139 of the *Courts of Justice Act.*

3. The plaintiff's is entitled to recover from the defendant the costs of the action.

210 I would also order that the appellant recover from the respondent the costs of the appeal and cross-appeal to the Court of Appeal and the costs of the appeal and cross-appeal to this Court.

Appeal and cross-appeal dismissed.

Footnotes

1 A similar approach was taken in the British Columbia case *57134 Manitoba Ltd. v. Palmer* (1985), 30 B.L.R. 121, 65 B.C.L.R. 355, 8 C.C.E.L. 282, 7 C.P.R. (3d) 477 (S.C.), aff'd (1989), 44 B.L.R. 94, 37 B.C.L.R. (2d) 50, 26 C.P.R. (3d) 8 (C.A.).

2 See, for example, *Bahamaconsult Ltd. v. Kellogg Salada Can. Ltd.* (1976), 15 O.R. (2d) 276 (C.A.), leave to appeal to S.C.C. dismissed (1976), 15 O.R. (2d) at 276n (S.C.C.), and *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250, 15 B.L.R. 89, 130 D.L.R. (3d) 205 (C.A.).

TAB 5

Law of Confidential Business Information

Keith G. Fairbairn
LL.B., M.B.A.

The Honourable
Julie A. Thorburn
Ontario Superior Court of Justice

CANADA LAW BOOK

7

Remedies for Breach of Confidential Business Information

7:1000 *GENERALLY*

The claimant in a suit for breach of confidential business information may seek from the courts, *inter alia*, injunctive relief, damages, an accounting, and/or a declaration of entitlement to the information. The most common remedies sought in restraint of trade and confidential business information cases are damages and injunctive relief. The Supreme Court of Canada has emphasized that the courts can exercise considerable flexibility in fashioning remedies for breach of confidence.[1]

In order to succeed in an action for breach of confidential business information, the plaintiff must establish that the information: (i) is identifiable and confidential; (ii) was imparted to the defendant in confidence; and (iii) was used by the defendant without the plaintiff's authorization.[2] However, in several cases involving the alleged misuse of confidential business information, courts have discussed the idea that the possibility of misuse will fasten a party with liability.[2a] Normally, there must be evidence of misuse of the information and a corresponding gain to the responding party.[2b]

If the disclosure of confidential business information is governed by a contract, the applicable terms will govern the circumstances in which the information may be used and disclosed to others. If disclosure of the

1. See *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), at p. 50 *per* La Forest J., and *Cadbury Schweppes Inc. v. FBI Foods Ltd.* (1999), 167 D.L.R. (4th) 577 (S.C.C.), at para. 48.

2. See Chapter 3, "Defining Confidential Business Information".

2a. *Chevron Standard Ltd. v. Home Oil Co.*, [1980] 5 W.W.R. 624, 22 A.R. 451 (Q.B.), affd [1982] 3 W.W.R. 427, 35 A.R. 550 (C.A.), leave to appeal to S.C.C. refused 50 A.R. 180*n*, 67 C.P.R. (2d) 16*n*. However, see *Speed Seal Products Ltd. v. Paddington*, [1985] 1 W.L.R. 1327 (C.A.), at p. 1332, where, although the information had been disclosed by a third party, the court prevented the defendant from issuing information for a given time in order that the defendant should not benefit from the wrongdoing.

2b. *Dynamex Canada Franchise Holdings Inc. v. P&D Investments Ltd.* (2009), 177 A.C.W.S. (3d) 794 (Ont. S.C.J.); *Booty Camp Fitness Inc. v. Jackson* (2009), 61 B.L.R. (4th) 79, 179 A.C.W.S. (3d) 681 (Ont. S.C.J.).

information is not covered by contract, it may be more difficult for the plaintiff to establish that the defendant had no right to use it or impart it to a third party.[2c] If it can be established that the information was to be kept confidential,[3] the plaintiff must then go on to provide evidence that the information was used by the defendant in an unauthorized manner.[4]

One court has held that where confidential information is at play, the deemed undertaking permitted for by the *Rules of Civil Procedure*,[4a] may be modified to protect not only the privacy of that information, but also the confidentiality.[4b]

7:2000 *EQUITABLE RELIEF*

7:2100 *Interim and Interlocutory Injunctions*

There are two interlocutory remedies for breach of confidential business information: an interlocutory injunction and an Anton Piller order.

Injunctive relief may be sought in addition to a claim for other relief such as damages or an account of profits. Unlike damages, which are available as of right, an injunction is an equitable remedy and is therefore discretionary. Injunctive relief may be granted before or after trial.

Legislative authority for the granting of injunctive relief is to be found in many of the common law provinces.[5] Injunctions may also be sought in the Federal Court pursuant to s. 44 of the *Federal Court Act* and Rule 469 of the *Federal Court Rules*.[6]

The primary consideration for the courts in deciding whether to grant an injunction is whether damages alone would provide an adequate remedy. In most restraint of trade and confidential information cases, damages are not an adequate remedy because of the difficulty in quantifying the harm suffered and the risk of future injury. An interim or interlocutory injunction may be granted to prevent further harm, to maintain the status quo, or to avoid any threatened disclosure of confidential information. Interlocutory injunctions are granted pending the final outcome at trial.[6a]

2c. *XY, Inc. v. IND Lifetech, Inc.* (2008), 61 C.P.C. (6th) 148 (B.C.S.C.). In that case, JingJing Genetic had a contractual right to sell "sex-selected inseminates" and that the transfer of these inseminates through *in vitro* fertilization did not constitute disclosure of confidential information as this activity was permitted under the agreement.

3. *Saltman Engineering Co. v. Campbell Engineering Co.*, [1963] 3 All E.R. 413n (C.A.).

4. *Chevron Standard Ltd. v. Home Oil Co., supra*, footnote 2.

4a. R.R.O. 1990, Reg. 194.

4b. *Robinson v. Medtronic Inc.*, 2011 ONSC 3663; *Jones v. Mirminachi*, 2011 CarswellBC 3488, 2011 BCCA 493.

5. For Ontario, for example, see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101 (amended 1994, c. 12, s. 40), and *Rules of Civil Procedure*, Rule 40.

6. *Federal Court Act*, R.S.C. 1985, c. F-7; *Federal Court Rules*, C.R.C. 1978, c. 663.

6a. *Fuller Western Rubber Linings Ltd. v. Spence Corrosion Services Ltd.*, 2012 CarswellAlta 777, 2012 ABCA 137; *1400467 Alberta Ltd. v. Adderley*, 2012 CarswellAlta 1173, 2012 ABCA 216; *Hub International (Richmond Auto Mall) Ltd. v. Mendham*, 2011 CarswellBC 3672, 2011 BCSC 1780.

In *Attorney General v. Newspaper Publishing plc,*[7] Sir John Donaldson described as follows the importance of injunctive relief in protecting confidential information:

> Confidential information is like an ice cube. Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube by the time the matter comes to trial. Either party may then succeed in obtaining possession of the cube. Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.

Confidential information usually becomes useless to the owner after its disclosure to other parties. The purpose of an injunction therefore is to restrain the responding party from disclosing the information.

A party seeking an injunction must satisfy the court that:[7a]

(a) there is a *prima facie* case or a serious issue to be tried (depending on the circumstances of the case);
(b) the balance of convenience favours the party seeking the injunction;
(c) the party seeking the injunction would suffer irreparable harm if it were not granted; and
(d) there is a willingness on the part of the party seeking injunctive relief to pay any damages to the responding party as a result of the issuance of the injunction.[8]

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7. [1987] 3 All E.R. 276 (C.A.), at p. 291. See also generally *C.B. Constantini Ltd. v. Slozka,* 2006 BCSC 1210; *Hargraft Schofield LP v. Schofield* (2007), 162 A.C.W.S. (3d) 819, 2007 CarswellOnt 7326 (S.C.J.).

7a. *F & G Delivery Ltd. v. MacKenzie,* 2010 CarswellBC 318, 2010 BCSC 195; *Corporate Images Holdings Partnership v. Satchell,* 2008 CarswellBC 844, 2008 BCSC 525; *Fuller Western Rubber Linings Ltd. v. Spence Corrosion Services Ltd.,* 2012 CarswellAlta 777, 2012 ABCA 137; *DCR Strategies Inc. v. Vector Card Services LLC,* 2011 ONSC 5473, 2011 CarswellOnt 11057.

8. See *Eli Lilly Canada Inc. v. Shamrock Chemicals Ltd.* (1985), 6 C.I.P.R. 5, 4 C.P.R. (3d) 196 (Ont. S.C.); *Unicure Inc. v. Thurman* (1978), 41 C.P.R. (2d) 97 (Ont. H.C.J.); *RJR-Macdonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 60 Q.A.C. 241 and *Maple Leaf Foods Inc. v. Butler* (2002), 162 Man. R. (2d) 293, 17 C.C.E.L. (3d) 44, 23 B.L.R. (3d) 141 (Man. Q.B.). See also *Diversified Metal Engineering Ltd. v. Trivett* (2006), 258 Nfld. & P.E.I.R. 13 (P.E.I.C.A.); *Trapeze Software Inc. v. Bryans,* [2007] O.J. No. 276 (S.C.J.); *Button v. Jones* (2001), 11 C.C.E.L. (3d) 312, 111 A.C.W.S (3d) 811 (Ont. S.C.J.); *Singh v. 3829537 Canada Inc.* (2005), 140 A.C.W.S. (3d) 162, [2005] O.J. No. 2402 (S.C.J.); *Hargraft Schofield LP v. Schofield, supra; Rogers Communications Inc. v. Shaw Communications Inc.* (2009), 63 B.L.R. (4th) 102, 180 A.C.W.S. (3d) 493 (Ont. S.C.J.); *Belron Canada Inc. v. TCG International Inc.* (2009), 65 B.L.R. (4th) 110, 2009 BCCA 577; *Jones v. Voldeng,* 2012 CarswellBC 952, 2012 BCSC 497, leave to appeal allowed 2012 CarswellBC 1295, 2012 BCCA 192, reversed in part 2012 CarswellBC 1901, 2012 BCCA 295; *Corona Packaging Inc. v. Singh,* 2012 CarswellOnt 5618, 2012 ONSC 2746; *F & G Delivery Ltd. v. MacKenzie,* 2010 CarswellBC 318, 2010 BCSC 195; *British Columbia (Attorney General) v. Wale,* [1991] 1 S.C.R. 62, 1991 CarswellBC 15 (S.C.C.); *Garda Canada Security Corp. v. Ramirez,* 2011 CarswellSask 530, 2011 SKQB 294; *Hub International (Richmond Auto Mall) Ltd. v. Mendham,* 2011 CarswellBC 3672, 2011 BCSC 1780.

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Public Performance of Musical Works, Re | 2012 SCC 35, 2012 CarswellNat 2378, 2012 CarswellNat 2379, 432 N.R. 1, 38 Admin. L.R. (5th) 1, J.E. 2012-1380, 102 C.P.R. (4th) 204, 216 A.C.W.S. (3d) 219, 347 D.L.R. (4th) 235, [2012] 2 S.C.R. 283, [2012] A.C.S. No. 35, [2012] S.C.J. No. 35 | (S.C.C., Jul 12, 2012)

2004 SCC 13, 2004 CSC 13
Supreme Court of Canada

CCH Canadian Ltd. v. Law Society of Upper Canada

2004 CarswellNat 446, 2004 CarswellNat 447, 2004 SCC 13, 2004 CSC 13, [2004] 1 S.C.R. 339, [2004] S.C.J. No. 12, 129 A.C.W.S. (3d) 177, 236 D.L.R. (4th) 395, 247 F.T.R. 318 (note), 30 C.P.R. (4th) 1, 317 N.R. 107, J.E. 2004-602, REJB 2004-54747

The Law Society of Upper Canada, Appellant/Respondent on cross-appeal v. CCH Canadian Limited, Respondent/Appellant on cross-appeal

The Law Society of Upper Canada, Appellant/Respondent on cross-appeal v. Thomson Canada Limited c.o.b. as Carswell Thomson Professional Publishing, Respondent/Appellant on cross-appeal

The Law Society of Upper Canada, Appellant/Respondent on cross-appeal v. Canada Law Book Inc., Respondent/Appellant on cross-appeal and Federation of Law Societies of Canada, Canadian Publishers' Council and Association of Canadian Publishers and Société québécoise de gestion collective des droits de reproduction (COPIBEC) and The Canadian Copyright Licensing Agency (Access Copyright), Interveners

Arbour J., Bastarache J., Binnie J., Deschamps J., Iacobucci J., LeBel J., Major J., McLachlin C.J.C.

Heard: November 10, 2003
Judgment: March 4, 2004
Docket: 29320

Proceedings: reversing *CCH Canadian Ltd. v. Law Society of Upper Canada* (2002), 2002 FCA 187, 2002 CarswellNat 1000, 18 C.P.R. (4th) 161, 212 D.L.R. (4th) 385, 289 N.R. 1, 2002 CAF 187, 2002 CarswellNat 2841, [2002] 4 F.C. 213, 224 F.T.R. 111 (note) (Fed. C.A.); reversing in part *CCH Canadian Ltd. v. Law Society of Upper Canada* (1999), 1999 CarswellNat 2123, 179 D.L.R. (4th) 609, 169 F.T.R. 1, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139, [2000] 2 F.C. 451, 1999 CarswellNat 3080 (Fed. T.D.); additional reasons at *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 2000 CarswellNat 168, 184 D.L.R. (4th) 186, 4 C.P.R. (4th) 129 (Fed. T.D.)

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McCarthy Tétrault, for the interveners, Société québécoise de gestion collective des droits de reproduction (COPIBEC) and The Canadian Copyright Licensing Agency (Access Copyright)
Ogilvy Renault

Subject: Intellectual Property; Property; Civil Practice and Procedure; Constitutional

Table of Authorities

Cases considered by *McLachllin C.J.C.*:

Associated Newspapers Group plc v. News Group Newspapers Ltd. (1986), [1986] R.P.C. 515 (Eng. Ch. Div.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Beloff v. Pressdram Ltd. (1973), [1973] 1 All E.R. 241, [1973] R.P.C. 765 — referred to

Bishop v. Stevens (1990), 72 D.L.R. (4th) 97, [1990] 2 S.C.R. 467, 31 C.P.R. (3d) 394, 111 N.R. 376, 1990 CarswellNat 738, 1990 CarswellNat 1028 (S.C.C.) — referred to

C.A.P.A.C. v. CTV Television Network (1968), [1968] S.C.R. 676, 38 Fox Pat. C. 108, 55 C.P.R. 132, 68 D.L.R. (2d) 98, 1968 CarswellNat 26 (S.C.C.) — considered

C.B.S. Inc. v. Ames Records & Tapes (1981), [1981] 2 All E.R. 812, [1981] R.P.C. 407, [1981] 2 W.L.R. 973, 125 Sol. Jo. 412, [1982] Ch. 91 (Eng. Ch. Div.) — considered

Compo Co. v. Blue Crest Music Inc. (1979), [1980] 1 S.C.R. 357, 45 C.P.R. (2d) 1, 105 D.L.R. (3d) 249, (sub nom. *Blue Crest Music Inc. v. Compo Co.)* 29 N.R. 296, 1979 CarswellNat 640, 1979 CarswellNat 640F (S.C.C.) — considered

de Tervagne v. Beloeil (Town) (1993), 50 C.P.R. (3d) 419, (sub nom. *de Tervagne v. Beloeil (Ville))* 65 F.T.R. 247, [1993] 3 F.C. 227, 1993 CarswellNat 222, 1993 CarswellNat 222F (Fed. T.D.) — followed

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Feist Publications Inc. v. Rural Telephone Service Co. (1991), 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 U.S.L.W. 4251, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889, 121 P.U.R. 4th 1, 499 U.S. 340 (U.S. Kan.) — considered

Galerie d'art du Petit Champlain inc. c. Théberge (2002), 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307, (sub nom. *Théberge v. Galerie d'Art du Petit Champlain inc.)* 17 C.P.R. (4th) 161, (sub nom. *Théberge v. Galerie d'Art du Petit Champlain inc.)* 210 D.L.R. (4th) 385, 23 B.L.R. (3d) 1, (sub nom. *Théberge v. Galerie d'art du Petit Champlain inc.)* 285 N.R. 267, [2002] 2 S.C.R. 336 (S.C.C.) — considered

Goldner v. Canadian Broadcasting Corp. (1972), 7 C.P.R. (2d) 158 (Fed. T.D.) — referred to

Grignon v. Roussel (1991), 38 C.P.R. (3d) 4, 44 F.T.R. 121, 1991 CarswellNat 208 (Fed. T.D.) — referred to

Hubbard v. Vosper (1971), [1972] 2 Q.B. 84, [1972] 1 All E.R. 1023 (Eng. C.A.) — considered

Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. (1964), [1964] 1 All E.R. 465, [1964] 1 W.L.R. 273 (U.K. H.L.) — referred to

Moorehouse v. University of New South Wales (1976), [1976] R.P.C. 151 (Australia H.C.) — not followed

Moreau v. St. Vincent (1950), 10 Fox Pat. C. 194, [1950] Ex. C.R. 198, 12 C.P.R. 32, [1950] 3 D.L.R. 713, 1950 CarswellNat 4 (Can. Ex. Ct.) — considered

Muzak Corp. v. Composers, Authors & Publishers Assn. (Canada) (1953), [1953] 2 S.C.R. 182, 13 Fox Pat. C. 168, 19 C.P.R. 1, 1953 CarswellQue 18 (S.C.C.) — followed

Pro Sieben Media AG v. Carlton UK Television Ltd. (1999), [1999] F.S.R. 610, [1999] 1 W.L.R. 605 (Eng. C.A.) — referred to

Sillitoe v. Mc-Graw Hill Book Co. (U.K.) Ltd. (1983), [1983] F.S.R. 545 (Eng. Ch.) — considered

Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co. (1984), [1985] 1 W.W.R. 112, 3 C.P.R. (3d) 81, 1984 CarswellBC 765 (B.C. S.C.) — considered

Tele-Direct (Publications) Inc. v. American Business Information Inc. (1997), 221 N.R. 113, 154 D.L.R. (4th) 328, 76 C.P.R. (3d) 296, 134 F.T.R. 80 (note), 1997 CarswellNat 2111, [1998] 2 F.C. 22, 37 B.L.R. (2d) 101, 1997 CarswellNat 2752 (Fed. C.A.) — considered

U & R Tax Services Ltd. v. H & R Block Canada Inc. (1995), 62 C.P.R. (3d) 257, 97 F.T.R. 259, 1995 CarswellNat 1343 (Fed. T.D.) — considered

University of London Press v. University Tutorial Press Ltd. (1916), [1916] 2 Ch. 601 (Eng. Ch. Div.) — considered

Statutes considered:

Copyright Act, R.S.C. 1985, c. C-42
Generally — considered

Pt. I — considered

Pt. III — considered

Pt. IV — considered

s. 2 "computer program" — considered

s. 2 "dramatic work" — considered

s. 2 "every original literary, dramatic, musical and artistic work" — considered

s. 2 "library, archive or museum" — considered

s. 2 "work" — referred to

s. 2.1 [en. 1993, c. 44, s. 54] — referred to

s. 3(1) "copyright" — considered

s. 3(1) "copyright" (f) — considered

s. 5 — considered

s. 5(1) — referred to

s. 27(1) — considered

s. 27(2) — considered

s. 27(2)(a) — considered

s. 29 — considered

ss. 29-29.2 — considered

s. 29.1 [en. 1997, c. 24, s. 18(1)] — considered

s. 29.2 [en. 1997, c. 24, s. 18(1)] — considered

ss. 29.4-30 — referred to

s. 30 — considered

ss. 30.1-30.5 [en. 1997, c. 24, s. 18(1)] — referred to

s. 30.2 [en. 1997, c. 24, s. 18(1)] — referred to

s. 30.2(1) [en. 1997, c. 24, s. 18(1)] — considered

s. 34(1) — considered

Treaties considered:

Berne Convention for the Protection of Literary and Artistic Works, 1886, 828 U.N.T.S. 221
Generally — referred to

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

Words and phrases considered

AUTHORIZE

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors & Publishers Assn. (Canada)*, [1953] 2 S.C.R. 182 (S.C.C.), at p. 193; *de Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (Fed. T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "give approval to, sanction, permit, favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *C.B.S. Inc. v. Ames Records & Tapes*, [1981] 2 All E.R. 812 (Eng. Ch. Div.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak Corp.* , *supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak Corp.* , *supra*; *de Tervagne* , *supra*: see also, J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (looseleaf), at p. 21-104 and P.D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33.

CASE SUMMARY

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] A summary of judicial reasons is not simply a copy of the original reasons. Even if the summary often contains the same language as the judicial reasons, the act of choosing which portions to extract and how to arrange them in the summary requires an exercise of skill and judgment.

DEALING

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* [R.S.C. 1985, c. C-42] states that "[f]air dealing for the purpose of research or private study does not infringe copyright". The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

FAIR DEALING

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] At the Court of Appeal [2002 CarswellNat 1000], Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard , supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

HEADNOTES

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The Federal Court of Appeal [2002 CarswellNat 1000] held that "headnotes", defined as including the summary of the case, catchlines, statement of the case, case title and case information, are more than mere copies and hence "original" works in which copyright subsists. It found that the headnotes are more than simply an abridged version of the reasons; they consist of independently composed features. As Linden J.A. explained, at para. 73, the authors of the headnotes could have chosen to make the summaries "long or short, technical or simple, dull or dramatic, well written or confusing; the organization and presentation might have varied greatly".

Although headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute "original" works in which copyright subsists.

ORIGINAL

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] For a work to be "original" within the meaning of the *Copyright Act* [R.S.C. 1985, c. C-42], it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

REPORTED JUDICIAL DECISION

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The reported judicial decisions, when properly understood as a *compilation* of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright. Copyright protects originality of *form* or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of copyright, but the over-all arrangement of them which the plaintiff through his industry has produced": *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C. S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (U.K. H.L.), at p. 469.

The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright.

RESEARCH

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The fair dealing exception under s. 29 [of the *Copyright Act,* R.S.C. 1985, c. C-42] is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal [2002 CarswellNat 1000] correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research". Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act.*

TO THE PUBLIC BY TELECOMMUNICATION

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The fax transmission of a single copy to a single individual is not a communication to the public [within the meaning of s. 3(1)(f) of the *Copyright Act,* R.S.C. 1985, c. C-42]. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

TOPICAL INDEX

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The topical index is part of the book *Canada GST Cases*, (1997). It provides a listing of cases with short headings to indicate the main topics covered by the decision and very brief summaries of the decisions. The Federal Court of Appeal [2002 CarswellNat 1000] held that the index was original in that it required skill and effort to compile. I agree. The author of the index had to make an initial decision as to which cases were authorities on GST. This alone is a decision that would require the exercise of skill and judgment. The author also had to decide which headings to include and which cases should fall under which headings. He or she had to distill the essence of the decisions down to a succinct one-phrase summary. All of these tasks require skill and judgment that are sufficient to conclude that the topical index is an "original" work in which copyright subsists.

Termes et locutions cités

AUTORISER

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):]« Autoriser » signifie « sanctionner, appuyer ou soutenir » (« *sanction, approve and countenance* ») : *Muzak Corp. c. Composers, Authors and Publishers Association of Canada Ltd.*, [1953] 2 R.C.S. 182, p. 193; *De Tervagne c. Beloeil (Ville)*, [1993] 3 C.F. 227 (1re inst.). Lorsqu'il s'agit de déterminer si une violation du droit d'auteur a été autorisée, il faut attribuer au terme « *countenance* » son sens le plus fort mentionné dans le dictionnaire, soit « approuver, sanctionner, permettre, favoriser, encourager » : voir *The Shorter Oxford English Dictionary* (1993), vol. 1, p. 527. L'autorisation est néanmoins une question de fait qui dépend de la situation propre à chaque espèce et peut s'inférer d'agissements qui ne sont pas des actes directs et positifs, et notamment d'un degré suffisamment élevé d'indifférence : *CBS Inc. c. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Div. Chanc.), p. 823 et 824. Toutefois, ce n'est pas autoriser la violation du droit d'auteur que de permettre la simple utilisation d'un appareil susceptible d'être utilisé à cette fin. Les tribunaux doivent présumer que celui qui autorise une activité ne l'autorise que dans les limites de la légalité : *Muzak*, précité. Cette présomption peut être réfutée par la preuve qu'il existait une certaine relation ou un certain degré de contrôle entre l'auteur allégué de l'autorisation et les personnes qui ont violé le droit d'auteur : *Muzak*, précité; *De Tervagne*, précité. Voir également J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs* (4e éd. (feuilles mobiles)), p. 21-104 et P.D. Hitchcock, « Home Copying and Authorization » (1983), 67 C.P.R. (2d) 17, p. 29 à 33.

RÉSUMÉ DE JURISPRUDENCE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Le résumé des motifs d'un jugement n'est pas que la copie des motifs originaux. Même si le résumé reprend souvent les mêmes termes que les motifs du jugement, le choix des extraits et leur agencement requièrent l'exercice du talent et du jugement.

UTILISATION

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Cela soulève une question préliminaire : le Barreau est-il tenu de prouver que chacun des usagers utilise de manière équitable les ouvrages mis à sa disposition, ou peut-il s'appuyer sur sa pratique générale pour établir le caractère équitable de l'utilisation? Je conclus que ce dernier élément suffit. L'article 29 de la *Loi sur le droit d'auteur* [L.R.C. 1985, c. C-42] dispose que « [l]'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur ». Les termes employés sont généraux. « Utilisation » ne renvoie pas à un acte individuel, mais bien à une pratique ou à un système. Cela est compatible avec l'objet de l'exception au titre de l'utilisation équitable, qui est de faire en sorte que la faculté des utilisateurs d'utiliser et de diffuser des oeuvres protégées ne soit pas indûment limitée. La personne ou l'établissement qui invoque l'exception prévue à l'art. 29 doit seulement prouver qu'il a utilisé l'oeuvre protégée aux fins de recherche ou d'étude privée et que cette utilisation était équitable. Il peut le faire en établissant soit que ses propres pratiques et politiques étaient axées sur la recherche et équitables, soit que toutes les utilisations individuelles des ouvrages étaient de fait axées sur la recherche et équitable.

UTILISATION ÉQUITABLE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Le juge Linden, de la Cour d'appel [2002 CarswellNat 2841], a reconnu l'absence d'un critère établi permettant de dire qu'une utilisation est équitable ou non, mais il a énuméré des facteurs pouvant être pris en compte pour en décider. S'inspirant de *Hubbard*, précité, ainsi que de la doctrine américaine de l'utilisation équitable, il a énuméré les facteurs suivants : (1) le but de l'utilisation; (2) la nature de l'utilisation; (3) l'ampleur de l'utilisation; (4) les solutions de rechange à l'utilisation; (5) la nature de l'oeuvre; (6) l'effet de l'utilisation sur l'oeuvre. Bien que ces facteurs ne soient pas pertinents dans tous les cas, ils offrent un cadre d'analyse utile pour statuer sur le caractère équitable d'une utilisation dans des affaires ultérieures.

SOMMAIRES

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] La Cour d'appel fédérale [2002 CarswellNat 2841] a statué que les « sommaires », y compris le résumé de l'affaire, les mots clés, l'exposé de l'affaire, l'intitulé répertorié et les autres renseignements relatifs aux motifs du jugement, n'étaient pas que de simples copies et constituaient donc des oeuvres « originales » conférant un droit d'auteur. Elle a estimé que les sommaires étaient davantage qu'une version abrégée des motifs, qu'ils comportaient des caractéristiques composées de façon indépendante. Comme le juge Linden l'a expliqué, au par. 73, les auteurs des sommaires auraient pu choisir de rédiger des résumés « longs ou courts, techniques ou simples, ternes ou remarquables, bien écrits ou confus; leur arrangement et leur présentation auraient pu varier grandement ».

Même si un sommaire s'inspire en grande partie du jugement qu'il résume et auquel il renvoie, il ne s'agit manifestement pas d'une copie identique des motifs. L'auteur doit choisir des éléments précis de la décision et il peut les présenter de nombreuses façons différentes. Ces choix supposent l'exercice du talent et du jugement. Le rédacteur doit faire appel à ses connaissances juridiques et à l'aptitude qu'il a acquise pour cerner la *ratio dedidendi* de la décision. Il doit également faire appel à sa faculté de discernement pour décider quelles parties du jugement doivent figurer dans le sommaire. Il ne s'agit pas d'une entreprise purement mécanique. Un sommaire constitue donc une oeuvre « originale » conférant le droit d'auteur.

ORIGINALE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Pour être « originale » au sens de la *Loi sur le droit d'auteur* [L.R.C. 1985, c. C-42], une oeuvre doit être davantage qu'une copie d'une autre oeuvre. Point n'est besoin toutefois qu'elle soit créative, c'est-à-dire novatrice ou unique. L'élément essentiel à la protection de l'expression d'une idée par le droit d'auteur est l'exercice du talent et du jugement. J'entends par talent le recours aux connaissances personnelles, à une aptitude acquise ou à une compétence issue de l'expérience pour produire l'oeuvre. J'entends par jugement la faculté de discernement ou la capacité de se faire une opinion ou de procéder à une évaluation en comparant différentes options possibles pour produire l'oeuvre. Cet exercice du talent et du jugement implique nécessairement un effort intellectuel. L'exercice du talent et du jugement que requiert la production de l'oeuvre ne doit pas être négligeable au point de pouvoir être assimilé à une entreprise purement mécanique. Par exemple, tout talent ou jugement que pourrait requérir la seule modification de la police de caractères d'une d'oeuvre pour en créer une « autre » serait trop négligeable pour justifier la protection que le droit d'auteur accorde à une oeuvre « originale ».

DÉCISIONS JUDICIAIRES PUBLIÉES

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Les décisions judiciaires publiées, considérées à juste titre comme une *compilation* du sommaire et des motifs judiciaires révisés qui l'accompagnent, sont des oeuvres « originales » protégées par le droit d'auteur. Celui-ci protège l'originalité de la *forme* ou de l'expression. Une compilation consiste dans la présentation, sous une forme différente, d'éléments existants. Celui qui l'effectue n'a aucun droit d'auteur sur les composantes individuelles. Cependant, il peut détenir un droit d'auteur sur la forme que prend la compilation. [TRADUCTION] « Ce ne sont pas les divers éléments qui sont visés par le droit d'auteur, mais bien leur agencement global qui est le fruit du travail du demandeur » : *Slumber-Magic Adjustable Bed Co. c. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (C.S. C.-B.), p. 84; voir également *Ladbroke (Football) Ltd. c. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), p. 469.

Les décisions judiciaires publiées qui sont visées en l'espèce satisfont au critère d'originalité. Les auteurs ont agencé de façon particulière le résumé jurisprudentiel, les mots clés, l'intitulé répertorié, les renseignements relatifs aux motifs du jugement (les sommaires) et les motifs de la décision. L'agencement de ces différents éléments nécessite l'exercice du talent et du jugement. Considérée globalement, la compilation confère un droit d'auteur.

Cela dit, les motifs de la décision en eux-mêmes, sans les sommaires, ne constituent pas des oeuvres originales sur lesquelles les éditeurs peuvent revendiquer un droit d'auteur.

RECHERCHE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Toute personne qui est en mesure de prouver qu'elle a utilisé l'oeuvre protégée par le droit d'auteur aux fins de recherche ou d'étude privée peut se prévaloir de l'exception créée par l'art. 29 [*Loi sur le droit d'auteur*, L.R.C. 1985, c. C-42]. Il faut interpréter le mot « recherche » de manière large afin que les droits des utilisateurs ne soient pas indûment restreints. J'estime, comme la Cour d'appel, que la recherche ne se limite pas à celle effectuée dans un contexte non commercial ou privé. La Cour d'appel [v. 2002 CarswellNat 2841] a signalé à juste titre, au par. 128, que « [l]a recherche visant à conseiller des clients, donner des avis, plaider des causes et préparer des mémoires et des factums reste de la recherche ». L'avocat qui exerce le droit dans un but lucratif effectue de la recherche au sens de l'art. 29 de la *Loi sur le droit d'auteur*.

AU PUBLIC, PAR TÉLÉCOMMUNICATION

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Transmettre une seule copie à une seule personne par télécopieur n'équivaut pas à communiquer l'oeuvre au public [au sens de l'art. 3(1)f) de la *Loi sur le droit d'auteur*, L.R.C. 1985, c. C-42]. Cela dit, la transmission répétée d'une copie d'une même oeuvre à de nombreux destinataires pourrait constituer une communication au public et violer le droit d'auteur. Toutefois, aucune preuve n'a établi que ce genre de transmission aurait eu lieu en l'espèce.

INDEX ANALYTIQUE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] L'index analytique fait partie de l'ouvrage *Canada GST Cases* (1997). Il fournit une liste de décisions accompagnées de courtes rubriques indiquant les principaux sujets abordés et d'un très bref résumé. La Cour d'appel fédérale [2002 CarswellNat 2841] a statué qu'il était original en ce que sa compilation exigeait habilité et effort. C'est également mon avis. L'auteur de l'index a dû faire un tri initial pour repérer les affaires décisives en matière de TPS. À lui seul, ce tri appelle l'exercice du talent et du jugement. L'auteur a dû également décider des rubriques et choisir les décisions qui figureraient sous chacune d'elles. Il lui a fallu dégager l'essence de chacune des décisions et l'exprimer dans une phrase succincte. Toutes ces opérations nécessitent un talent et un jugement suffisamment importants pour qu'on puisse conclure que l'index analytique est une oeuvre « originale » conférant le droit d'auteur.

APPEAL and CROSS-APPEAL from judgment reported at (2002), 2002 FCA 187, 2002 CarswellNat 1000, 18 C.P.R. (4th) 161, 212 D.L.R. (4th) 385, 289 N.R. 1, 2002 CAF 187, 2002 CarswellNat 2841, [2002] 4 F.C. 213, 224 F.T.R. 111 (note) (Fed. C.A.), allowing appeal in part and dismissing counterclaim from judgment declaring that copyright did not subsist in plaintiffs' reported judicial decisions, headnotes, case summary, and topical index.

POURVOI et POURVOI INCIDENT à l'encontre de l'arrêt publié à (2002), 2002 FCA 187, 2002 CarswellNat 1000, 18 C.P.R. (4th) 161, 212 D.L.R. (4th) 385, 289 N.R. 1, 2002 CAF 187, 2002 CarswellNat 2841, [2002] 4 C.F. 213, 224 F.T.R. 111 (note) (C.A. Féd.), qui a accueilli le pourvoi en partie et a rejeté le pourvoi incident à l'encontre du jugement qui avait déclaré que les décisions judiciaires publiées, les sommaires, les résumés de jurisprudence et les index analytiques ne conféraient aucun droit d'auteur aux demandeurs.

The Chief Justice:

I. Introduction -- The Issues To Be Determined

1 The appellant, the Law Society of Upper Canada, is a statutory non-profit corporation that has regulated the legal profession in Ontario since 1822. Since 1845, the Law Society has maintained and operated the Great Library at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada. The Great Library provides a request-based photocopy service (the "custom photocopy service") for Law Society members, the judiciary and other authorized researchers. Under the custom photocopy service, legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons.

2 The respondents, CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Inc., publish law reports and other legal materials. In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in eleven specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these eleven works as well as any other works that they published.

3 The Law Society denied liability and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff or one of its patrons on a self-service photocopier for the purpose of research.

4 The key question that must be answered in this appeal is whether the Law Society has breached copyright by either (1) providing the custom photocopy service in which single copies of the publishers' works are reproduced and sent to patrons upon their request or by (2) maintaining self-service photocopiers and copies of the publishers' works in the Great Library for use by its patrons. To answer this question, the Court must address the following sub-issues:

(1) Are the publishers' materials "original works" protected by copyright?

(2) Did the Great Library authorize copyright infringement by maintaining self-service photocopiers and copies of the publishers' works for its patrons' use?

(3) Were the Law Society's dealings with the publishers' works "fair dealing[s]" under s. 29 of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended?

(4) Did Canada Law Book consent to have its works reproduced by the Great Library?

5 The publishers have filed a cross-appeal in which they submit that, in addition to infringing copyright by reproducing copies of their works, the Law Society infringed copyright both by faxing and by selling copies of the publishers' copyrighted works through its custom photocopy service. The publishers also contend that the Great Library does not qualify for the library exemption under the *Copyright Act* and, finally, that they are entitled to an injunction to the extent that the Law Society has been found to infringe any one or more of their copyrighted works. The four sub-issues that the Court must address on this cross-appeal are:

(1) Did the Law Society's fax transmissions of the publishers' works constitute communications "to the public" within s. 3(1)(*f*) of the *Copyright Act* so as to constitute copyright infringement?

(2) Did the Law Society infringe copyright by selling copies of the publishers' works contrary to s. 27(2) of the *Copyright Act*?

(3) Does the Law Society qualify for an exemption as a "library, archive or museum" under ss. 2 and 30.2(1) of the *Copyright Act*?

(4) To the extent that the Law Society has been found to infringe any one or more of the publishers' copyrighted works, are the publishers entitled to a permanent injunction under s. 34(1) of the *Copyright Act*?

6 With respect to the main appeal, I conclude that the Law Society did not infringe copyright by providing single copies of the respondent publishers' works to its members through the custom photocopy service. Although the works in question were "original" and thus covered by copyright, the Law Society's dealings with the works were for the purpose of research and were fair dealings within s. 29 of the *Copyright Act*. I also find that the Law Society did not authorize infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

7 On the cross-appeal, I conclude that there was no secondary infringement by the Law Society; the fax transmissions were not communications to the public and the Law Society did not sell copies of the publishers' works. In light of my finding on appeal that the Law Society's dealings with the publishers' works were fair, it is not necessary to decide whether the Great Library qualifies for the library exemption. This said, I would conclude that the Great Library does indeed qualify for this exemption. Finally, in light of my conclusion that there has been no copyright infringement, it is not necessary to issue an injunction in this case. I would dismiss the cross-appeal.

II. Analysis on Appeal

8 Copyright law in Canada protects a wide range of works including every original literary, dramatic, musical and artistic work, computer programs, translations and compilations of works: see s. 5 and ss. 2 and 2.1 of the *Copyright Act*. Copyright law protects the expression of ideas in these works; it does not protect ideas in and of themselves. Thorson P. explained it thus in *Moreau v. St. Vincent*, [1950] Ex. C.R. 198 (Can. Ex. Ct.), at p. 203:

> It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own.

It flows from the fact that copyright only protects the expression of ideas that a work must also be in a fixed material form to attract copyright protection: see s. 2 definitions of "dramatic work" and "computer program" and, more generally, *Goldner v. Canadian Broadcasting Corp.* (1972), 7 C.P.R. (2d) 158 (Fed. T.D.), at p. 162; *Grignon v. Roussel* (1991), 38 C.P.R. (3d) 4 (Fed. T.D.), at p. 7.

9 In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive: see *Galerie d'art du Petit Champlain inc. c. Théberge*, [2002] 2 S.C.R. 336, 2002 SCC 34 (S.C.C.), at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467 (S.C.C.), at p. 477; *Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357 (S.C.C.), at p. 373. In interpreting the scope of the *Copyright Act*'s rights and remedies, courts should apply the modern approach to statutory interpretation whereby "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26, citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

10 Binnie J. recently explained in *Théberge , supra*, at paras. 30-31, that the *Copyright Act* has dual objectives:

> The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator...

The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature.

In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.

11 Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users. Part I of the Act specifies the scope of a creator's copyright and moral rights in works. For example, s. 3 of the Act specifies that only copyright owners have the right to copy or to authorize the copying of their works:

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof...

. . . . .

and to authorize any such acts.

12 Part III of the *Copyright Act* deals with the infringement of copyright and exceptions to infringement. Section 27(1) states generally that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do". More specific examples of how copyright is infringed are set out in s. 27(2) of the Act. The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in ss. 29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss. 29-29.2. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright. Educational institutions, libraries, archives and museums are specifically exempted from copyright infringement in certain circumstances: see ss. 29.4-30 (educational institutions), and ss. 30.1-30.5. Part IV of the *Copyright Act* specifies the remedies that may be awarded in cases where copyright has been infringed. Copyright owners may be entitled to any number of different remedies such as damages and injunctions, among others.

13 This case requires this Court to interpret the scope of both owners' and users' rights under the *Copyright Act*, including what qualifies for copyright protection, what is required to find that the copyright has been infringed through authorization and the fair dealing exceptions under the Act.

(1) Are the Publishers' Materials "Original Works" Covered by Copyright?

(a) The Law

14 Section 5 of the *Copyright Act* states that, in Canada, copyright shall subsist "in every *original* literary, dramatic, musical and artistic work" (emphasis added). Although originality sets the boundaries of copyright law, it is not defined in the *Copyright Act*. Section 2 of the *Copyright Act* defines "every original literary ... work" as including "every original production in the literary ... domain, whatever may be the mode or form of its expression". Since copyright protects only the expression or form of ideas, "the originality requirement must apply to the expressive element of the work and not the idea": S. Handa, *Copyright Law in Canada* (2002), at p. 209.

15 There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. See, for example, *University of London Press v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 (Eng. Ch. Div.); *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (Fed. T.D.). This approach is consistent with the "sweat of the brow" or "industriousness" standard of originality, which is premised on a natural rights or Lockean theory of "just desserts", namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. See, for example, *Feist Publications Inc. v. Rural Telephone Service Co.* (1991), 499 U.S. 340 (U.S. Kan.) ; *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), [1998] 2 F.C. 22 (Fed. C.A.). This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that

are the product of creativity will be rewarded with copyright protection. It has been suggested that the "creativity" approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts. See *Feist Publications Inc.* , *supra*, at p. 353.

16 I conclude that the correct position falls between these extremes. For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

17 In reaching this conclusion, I have had regard to: (1) the plain meaning of "original"; (2) the history of copyright law; (3) recent jurisprudence; (4) the purpose of the *Copyright Act*; and (5) that this constitutes a workable yet fair standard.

(i) The Plain Meaning of "Original"

18 The plain meaning of the word "original" suggests at least some intellectual effort, as is necessarily involved in the exercise of skill and judgment. The *Concise Oxford Dictionary* (7th ed. 1982), at p. 720, defines "original" as follows:

> 1. *a* .... existing from the first, primitive, innate, initial, earliest; ... **2.** that has served as pattern, of which copy or translation has been made, not derivative or dependant, first-hand, not imitative, novel in character or style, inventive, creative, thinking or acting for oneself.
>
> "Original"'s plain meaning implies not just that something is not a copy. It includes, if not creativity *per se*, at least some sort of intellectual effort. As Professor Gervais has noted, "[w]hen used to mean simply that the work must originate from the author, originality is eviscerated of its core meaning. It becomes a synonym of 'originated,' and fails to reflect the ordinary sense of the word": D.J. Gervais, "*Feist* Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law" (2002), *49 J. Copyright Soc'y U.S.A.* 949, at p. 961.

(ii) History of Copyright

19 The idea of "intellectual creation" was implicit in the notion of literary or artistic work under the *Berne Convention for the Protection of Literary and Artistic Works* (1886), to which Canada adhered in 1923, and which served as the precursor to Canada's first *Copyright Act*, adopted in 1924. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), at p. 900. Professor Ricketson has indicated that in adopting a sweat of the brow or industriousness approach to deciding what is original, common law countries such as England have "depart[ed] from the spirit, if not the letter, of the [Berne] Convention" since works that have taken time, labour or money to produce but are not truly artistic or literary intellectual creations are accorded copyright protection: Ricketson, *supra*, at p. 901.

20 In the international context, France and other continental civilian jurisdictions require more than mere industriousness to find that a work is original. "Under the French law, originality means both the intellectual contribution of the author and the novel nature of the work as compared with existing works": Handa, *supra*, at p. 211. This understanding of originality is reinforced by the expression "*le droit d'auteur*" - literally the "*author's* right" -- the term used in the French title of the *Copyright Act*. The author must contribute something intellectual to the work, namely skill and judgment, if it is to be considered original.

(iii) Recent Jurisprudence

21 Although many Canadian courts have adopted a rather low standard of originality, i.e., that of industriousness, more recently, some courts have begun to question whether this standard is appropriate. For example, the Federal Court of Appeal in

Tele-Direct (Publications) Inc., *supra*, held, at para. 29, that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: "If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the *Copyright Act* and that were already recognized in Anglo-Canadian law." See also *Édutile Inc. v. Automobile Protection Assn. (APA)*, [2000] 4 F.C. 195 (Fed. C.A.), at para. 8, adopting this passage.

22 The United States Supreme Court explicitly rejected the "sweat of the brow" approach to originality in *Feist Publications Inc.*, *supra*. In so doing, O'Connor J. explained at p. 353 that, in her view, the "sweat of the brow" approach was not consistent with the underlying tenets of copyright law:

> The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement -- the compiler's original contributions -- to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information."... "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law - that no one may copyright facts or ideas.
>
> As this Court recognized in *Compo Co., supra*, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor's J. concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O'Connor J. in requiring that a work possess a minimal degree of creativity to be considered original. See *Feist, supra*, at pp. 345 and 358.

(iv) Purpose of the Copyright Act

23 As mentioned, in *Galerie d'art du Petit Champlain inc. c. Théberge, supra*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. See J. Litman, "The Public Domain" (1990), 39 *Emory L.J.* 965, at p. 969, and C.J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28 *Queen's L.J.* 1. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

(v) Workable, Yet Fair Standard

24 Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act*.

(vi) Conclusion

25 For these reasons, I conclude that an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original

work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original".

(b) Application of the Law to these Facts

26 At trial, the respondent publishers claimed copyright in eleven works: three reported judicial decisions; the three headnotes preceding these decisions; the Annotated *Martin's Ontario Criminal Practice 1999*; a case summary; a topical index; the textbook *Economic Negligence* (1989); and the monograph "Dental Evidence", being chapter 13 in *Forensic Evidence in Canada* (1991). Gibson J. held that the publishers' works should be judged against a standard of intellect and creativity in order to determine if they were original. Based on this standard of originality, the trial judge found that the publishers only had copyright in the Annotated *Criminal Practice*, the textbook and the monograph. He concluded that the remaining eight works were not original and, therefore, were not covered by copyright ((1999), [2000] 2 F.C. 451 (Fed. T.D.)).

27 On appeal, the Law Society did not challenge the trial judge's findings with respect to the three works in which he found copyright did exist, with the exception of questioning whether the monograph constituted a "work" within the meaning of the *Copyright Act*. The Federal Court of Appeal adopted the "sweat of the brow" approach to originality and found that if a work was more than a mere copy, it would be original. On this basis, Linden J.A., writing for the majority, held that all of the remaining works were original and therefore covered by copyright ([2002] 4 F.C. 213 (Fed. C.A.)). The Law Society appeals, contending that the headnotes, case summary, topical index and reported judicial decisions are not "original" within the meaning of the *Copyright Act* and, therefore, are not covered by copyright.

28 As stated, in order to be original, a work must have originated from the author, not be copied, and must be the product of the exercise of skill and judgment that is more than trivial. Applying this test, all of the works in question are original and therefore covered by copyright.

(i) Headnotes

29 The Federal Court of Appeal held that "headnotes", defined as including the summary of the case, catchlines, statement of the case, case title and case information, are more than mere copies and hence "original" works in which copyright subsists. It found that the headnotes are more than simply an abridged version of the reasons; they consist of independently composed features. As Linden J.A. explained, at para. 73, the authors of the headnotes could have chosen to make the summaries "long or short, technical or simple, dull or dramatic, well written or confusing; the organization and presentation might have varied greatly".

30 Although headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute "original" works in which copyright subsists.

(ii) Case Summary

31 For substantially the same reasons as given for headnotes, the case summary is also covered by copyright. A summary of judicial reasons is not simply a copy of the original reasons. Even if the summary often contains the same language as the judicial reasons, the act of choosing which portions to extract and how to arrange them in the summary requires an exercise of skill and judgment.

(iii) Topical Index

32 The topical index is part of the book *Canada GST Cases*, (1997). It provides a listing of cases with short headings to indicate the main topics covered by the decision and very brief summaries of the decisions. The Federal Court of Appeal held that the index was original in that it required skill and effort to compile. I agree. The author of the index had to make an initial decision as to which cases were authorities on GST. This alone is a decision that would require the exercise of skill and judgment. The author also had to decide which headings to include and which cases should fall under which headings. He or she had to distill the essence of the decisions down to a succinct one-phrase summary. All of these tasks require skill and judgment that are sufficient to conclude that the topical index is an "original" work in which copyright subsists.

(iv) Reported Judicial Decisions

33 The reported judicial decisions, when properly understood as a *compilation* of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright. Copyright protects originality of *form* or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of copyright, but the over-all arrangement of them which the plaintiff through his industry has produced": *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C. S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (U.K. H.L.), at p. 469.

34 The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

35 This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation - namely the headnote - are *not* covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.

36 In summary, the headnotes, case summary, topical index and compilation of reported judicial decisions are all works that have originated from their authors and are not mere copies. They are the product of the exercise of skill and judgment that is not trivial. As such, they are all "original" works in which copyright subsists. The appeal of these findings should be dismissed.

(2) Authorization: The Self-Service Photocopiers

(a) The Law

37 Under s. 27(1) of the *Copyright Act*, it is an infringement of copyright for anyone to do anything that the Act only allows owners to do, including authorizing the exercise of his or her own rights. It does not infringe copyright to authorize a person to do something that would not constitute copyright infringement. See *C.A.P.A.C. v. CTV Television Network*, [1968] S.C.R. 676 (S.C.C.), at p. 680. The publishers argue that the Law Society is liable for breach of copyright under this section because it implicitly authorized patrons of the Great Library to copy works in breach of the *Copyright Act*.

38 "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors & Publishers Assn. (Canada)*, [1953] 2 S.C.R. 182 (S.C.C.), at p. 193; *de Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (Fed. T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "give approval to, sanction, permit, favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that

are less than direct and positive, including a sufficient degree of indifference: *C.B.S. Inc. v. Ames Records & Tapes*, [1981] 2 All E.R. 812 (Eng. Ch. Div.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak Corp.* , *supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak Corp.* , *supra*; *de Tervagne* , *supra*: see also, J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (looseleaf), at p. 21-104 and P.D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33.

(b) Application of the Law to these Facts

39 For several decades, the Law Society has maintained self-service photocopiers for the use of its patrons in the Great Library. The patrons' use of the machines is not monitored directly. Since the mid-1980s, the Law Society has posted the following notice above each machine:

> The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by users of these machines.
>
> At trial, the Law Society applied for a declaration that it did not authorize copyright infringement by providing self-service photocopiers for patrons of the Great Library. No evidence was tendered that the photocopiers had been used in an infringing manner.

40 The trial judge declined to deal with this issue, in part because of the limited nature of the evidence on this question. The Federal Court of Appeal, relying in part on the Australian High Court decision in *Moorehouse v. University of New South Wales*, [1976] R.P.C. 151 (Australia H.C.), concluded that the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the machine's users.

41 With respect, I do not agree that this amounted to authorizing breach of copyright. *Moorhouse, supra*, is inconsistent with previous Canadian and British approaches to this issue. See D. Vaver, *Copyright Law* (2000), at p. 27, and McKeown, supra, at p. 21-108. In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.

42 Applying the criteria from *Muzak Corp.*, *supra*, and *de Tervagne*, *supra*, I conclude that the Law Society's mere provision of photocopiers for the use of its patrons did not constitute authorization to use the photocopiers to breach copyright law.

43 First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. Although the Court of Appeal assumed that the photocopiers were being used to infringe copyright, I think it is equally plausible that the patrons using the machines were doing so in a lawful manner.

44 Second, the Court of Appeal erred in finding that the Law Society's posting of the notice constitutes an express acknowledgement that the photocopiers will be used in an illegal manner. The Law Society's posting of the notice over the photocopiers does not rebut the presumption that a person authorizes an activity only so far as it is in accordance with the law. Given that the Law Society is responsible for regulating the legal profession in Ontario, it is more logical to conclude that the notice was posted for the purpose of reminding the Great Library's patrons that copyright law governs the making of photocopies in the library.

45 Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the

infringement. The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement: see, for example, *De Tervagne, supra*. Nor does the Law Society exercise control over which works the patrons choose to copy, the patron's purposes for copying or the photocopiers themselves.

46 In summary, I conclude that evidence does not establish that the Law Society authorized copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great Library. I would allow this ground of appeal.

(3) The Law Society and Fair Dealing

47 The Great Library provides a custom photocopy service. Upon receiving a request from a lawyer, law student, member of the judiciary or authorized researcher, the Great Library staff photocopies extracts from legal material within its collection and sends it to the requester. The question is whether this service falls within the fair dealing defence under s. 29 of the *Copyright Act* which provides: "Fair dealing for the purpose of research or private study does not infringe copyright."

(a) The Law

48 Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

49 As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

50 In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

51 The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research". Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

52 The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case. See McKeown, *supra*, at p. 23-6. Lord Denning explained this eloquently in *Hubbard v. Vosper* (1971), [1972] 1 All E.R. 1023 (Eng. C.A.), at p. 1027:

> It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may

be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

53 At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard*, *supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

(i) The Purpose of the Dealing

54 In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. See McKeown, *supra*, at p. 23-6. See also *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Eng. Ch. Div.). Moreover, as the Court of Appeal explained, some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.

(ii) The Character of the Dealing

55 In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. For example, in *Sillitoe v. McGraw Hill Book Co. (U.K.) Ltd.*, [1983] F.S.R. 545 (Eng. Ch.), the importers and distributors of "study notes" that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.

(iii) The Amount of the Dealing

56 Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement. As the passage from *Hubbard* indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

(iv) Alternatives to the Dealing

57 Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.

(v) The Nature of the Work

58 The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work - one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 at p. 264.

(vi) Effect of the Dealing on the Work

59 Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. See, for example, *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (Eng. C.A.), *per* Robert Walker L.J.

60 To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.

(b) Application of the law to these facts

61 In 1996, the Law Society implemented an "Access to the Law Policy" ("Access Policy") which governs the Great Library's custom photocopy service and sets limits on the types of requests that will be honoured:

> **Access to the Law Policy**
>
> The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.
>
> This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.
>
> **Guidelines to Access**
>
> 1 <u>The Access to the Law</u> service provides single copies for specific purposes, identified in advance to library staff.
>
> 2 The specific purposes are research, review, private study and criticism, as well as use in court, tribunal, and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.
>
> 3 The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
>
> 4 As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied

as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.

5 This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

62 At trial, the Law Society claimed that its custom photocopy service does not infringe copyright because it is a fair dealing within the meaning of s. 29 of the *Copyright Act*. The trial judge held that the fair dealing exception should be strictly construed. He concluded that copying for the custom photocopy service was not for the purpose of either research or study and therefore was not within the ambit of fair dealing. The Court of Appeal rejected the argument that the fair dealing exception should be interpreted restrictively. The majority held that the Law Society could rely on the purposes of its patrons to prove that its dealings were fair. The Court of Appeal concluded, however, that there was not sufficient evidence to determine whether or not the dealings were fair and, consequently, that the fair dealing exception had not been proven.

63 This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright". The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

64 The Law Society's custom photocopying service is provided for the purpose of research, review and private study. The Law Society's Access Policy states that "[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism ... may be provided to users of the Great Library". When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*.

65 The evidence also establishes that the dealings were fair, having regard to the factors discussed earlier.

(i) Purpose of the Dealing

66 The Access Policy and its safeguards weigh in favour of finding that the dealings were fair. It specifies that individuals requesting copies must identify the purpose of the request for these requests to be honoured, and provides that concerns that a request is not for one of the legitimate purposes under the fair dealing exceptions in the *Copyright Act* are referred to the Reference Librarian. This policy provides reasonable safeguards that the materials are being used for the purpose of research and private study.

(ii) Character of the Dealing

67 The character of the Law Society's dealings with the publishers' works also supports a finding of fairness. Under the Access Policy, the Law Society provides single copies of works for the specific purposes allowed under the *Copyright Act*. There is

no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession. Copying a work for the purpose of research on a specific legal topic is generally a fair dealing.

(iii) Amount of the Dealing

68 The Access Policy indicates that the Great Library will exercise its discretion to ensure that the amount of the dealing with copyrighted works will be reasonable. The Access Policy states that the Great Library will typically honour requests for a copy of one case, one article or one statutory reference. It further stipulates that the Reference Librarian will review requests for a copy of more than five percent of a secondary source and that, ultimately, such requests may be refused. This suggests that the Law Society's dealings with the publishers' works are fair. Although the dealings might not be fair if a specific patron of the Great Library submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time, there is no evidence that this has occurred.

(iv) Alternatives to the Dealing

69 It is not apparent that there are alternatives to the custom photocopy service employed by the Great Library. As the Court of Appeal points out, the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library. Twenty per cent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source. Moreover, because of the heavy demand for the legal collection at the Great Library, researchers are not allowed to borrow materials from the library. If researchers could not request copies of the work or make copies of the works themselves, they would be required to do all of their research and note-taking in the Great Library, something which does not seem reasonable given the volume of research that can often be required on complex legal matters.

70 The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act*'s balance between owner's rights and user's interests.

(v) Nature of the Work

71 I agree with the Court of Appeal that the nature of the works in question - judicial decisions and other works essential to legal research -- suggests that the Law Society's dealings were fair. As Linden J.A. explained, at para. 159: "It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained." Moreover, the Access Policy puts reasonable limits on the Great Library's photocopy service. It does not allow all legal works to be copied regardless of the purpose to which they will be put. Requests for copies will be honoured only if the user intends to use the works for the purpose of research, private study, criticism, review or use in legal proceedings. This further supports a finding that the dealings were fair.

(vi) Effect of the Dealing on the Work

72 Another consideration is that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made. Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers' markets. If there had been evidence that the publishers' markets had been negatively affected by the Law Society's custom photocopying service, it would have been in the publishers' interest to tender it at trial. They did not do so. The only evidence of market impact is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service's operation.

(vii) Conclusion

73 The factors discussed, considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.

(4) Canada Law Book's Consent

74 Under s. 27(1) of the *Copyright Act*, a person infringes copyright if he or she does something that only the owner of the copyright has the right to do without the owner's consent. On appeal to this Court, the Law Society submits that six of the items that the respondent publishers have claimed were copied in infringement of copyright were copied at the request of Jean Cummings, a lawyer who had been asked by Canada Law Book's Vice-President to obtain copies of these works from the Law Society. As such, the Law Society contends that the copies were made with the consent of Canada Law Book and therefore were not an infringement of copyright.

75 This issue was not really addressed in the courts below. In light of my findings on the issue of fair dealing, it is not necessary to answer this question to dispose of this appeal, and I decline to do so.

(5) Conclusion on Main Appeal

76 I would allow the appeal and issue a declaration that the Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its Access Policy. I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.

III. Analysis on Cross-Appeal

(1) Are the Law Society's fax transmissions communications to the public?

77 At trial, the publishers argued that the Law Society's fax transmissions of copies of their works to lawyers in Ontario were communications "to the public by telecommunication" and hence infringed s. 3(1)(*f*) of the *Copyright Act*. The trial judge found that the fax transmissions were not telecommunications to the public because they "emanated from a single point and were each intended to be received at a single point" (at para. 167). The Court of Appeal agreed, although it allowed that a series of sequential transmissions might constitute an infringement of an owner's right to communicate to the public.

78 I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

79 On the evidence in this case, the fax transmissions were not communications to the public. I would dismiss this ground of cross-appeal.

(2) Did the Law Society infringe copyright in the publishers' works by selling copies contrary to s. 27(2) of the Copyright Act?

80 Under s. 27(2)(*a*) of the *Copyright Act*, it is an infringement of copyright to sell a copy of a work that the person knows or should have known infringes copyright, a practice known as secondary infringement. The majority at the Court of Appeal

rejected the allegation of secondary infringement on the ground that it was not established that the Law Society knew or should have known it was dealing with infringing copies of the publishers' works. The publishers appeal this finding on cross-appeal.

81 At the Court of Appeal, Rothstein J.A., in his concurring judgment, properly outlined the three elements that must be proven to ground a claim for secondary infringement: (1) the copy must be the product of primary infringement; (2) the secondary infringer must have known or should have known that he or she is dealing with a product of infringement; and (3) the secondary dealing must be established; that is, there must have been a sale.

82 In the main appeal, I have concluded that the Law Society did not infringe copyright in reproducing the publishers' works in response to requests under its custom photocopy service. Absent primary infringement, there can be no secondary infringement. I would dismiss this ground of cross-appeal.

(3) Does the Law Society's Great Library qualify for an exemption as a "library, archive or museum" under ss. 2 and 30.2(1) of the Copyright Act?

83 In 1999, amendments to the *Copyright Act* came into force allowing libraries, archives and museums to qualify for exemptions against copyright infringement. Under s. 30.2(1), a library or persons acting under its authority may do anything on behalf of any person that the person may do personally under the fair dealing exceptions to copyright infringement. Section 2 of the *Copyright Act* defines library, archive or museum. In order to qualify as a library, the Great Library: (1) must not be established or conducted for profit; (2) must not be administered or controlled by a body that is established or conducted for profit; and (3) must hold and maintain a collection of documents and other materials that is open to the public or to researchers. The Court of Appeal found that the Great Library qualified for the library exemption. The publishers appeal this finding on the ground that the Law Society, which controls the library, is indirectly controlled by the body of lawyers authorized to practise law in Ontario who conduct the business of law for profit.

84 I concluded in the main appeal that the Law Society's dealings with the publishers' works were fair. Thus, the Law Society need not rely on the library exemption. However, were it necessary, it would be entitled to do so. The Great Library is not established or conducted for profit. It is administered and controlled by the Benchers of the Law Society. Although some of the Benchers, when acting in other capacities, practise law for profit, when they are acting as administrators of the Great Library, the Benchers are not acting as a body established or conducted for profit. The Court of Appeal was correct in its conclusion on this point. I would dismiss this ground of cross-appeal.

(4) Are the publishers entitled to a permanent injunction under s. 34(1) of the Copyright Act?

85 Under s. 34(1) of the *Copyright Act*, the copyright owner is entitled to all remedies, including an injunction, for the infringement of copyright in his or her work. An injunction is, in principle, an equitable remedy and, thus, it is within the Court's discretion to decide whether or not to grant an injunction. See P.E. Kierans and R. Borenstein, "Injunctions - Interlocutory and Permanent", in R.E. Dimock, ed., *Intellectual Property Disputes: Resolutions & Remedies* (2002), vol. 2, at p. 15-4.

86 Given my finding on the main appeal that the Law Society did not infringe copyright in the publishers' works, it is unnecessary to consider whether the Court of Appeal erred in choosing not to issue an injunction in this case. I would dismiss this ground of appeal.

(5) Conclusion on Cross-Appeal

87 In the result, I would dismiss the cross-appeal.

IV. Conclusion

88 On the main appeal, I conclude that the Law Society did not infringe copyright through its custom photocopy service when it provided single copies of the publishers' works to its members. The publishers' headnotes, case summary, topical index and compilation of reported judicial decisions are all "original" works covered by copyright. They originated from their authors, are

not mere copies and are the product of the exercise of skill and judgment that is not trivial. That said, the Great Library's dealings with the works were for the purpose of research and were fair dealings within the meaning of s. 29 of the *Copyright Act* and thus did not constitute copyright infringement. I also conclude that the Law Society did not authorize copyright infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

89 My conclusions on the cross-appeal follow from those on the main appeal. No secondary infringement of copyright by the Law Society is established. The Law Society's fax transmissions did not constitute communications to the public and it did not sell copies of the publishers' works. Were it necessary, I would conclude that the Great Library qualifies for a library exemption under the *Copyright Act*. Finally, in light of my finding that there has been no copyright infringement in this case, an injunction should not be issued in this case. I would dismiss the cross-appeal.

90 In the result, the appeal is allowed and the cross-appeal dismissed. I would issue a declaration that the Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its "Access to the Law Policy". I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright. Given the appellant's success on the appeal and cross-appeal, it is entitled to costs throughout.

Appeal allowed with costs and cross-appeal dismissed with costs.

Appeal allowed; cross-appeal dismissed.

Pourvoi accueilli; pourvoi incident rejeté.

APPENDIX — Legislative Provisions:

Copyright Act, R.S.C. 1985, c. C-42, as amended.

2. "every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science "library, archive or museum" means

(*a*) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

(*b*) any other non-profit institution prescribed by regulation

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(*a*) to produce, reproduce, perform or publish any translation of the work,

(*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(*d*) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed, (*e*) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(*g*) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(*h*) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(*i*) in the case of a musical work, to rent out a sound recording in which the work is embodied, and to authorize any such acts.

5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:...

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

(*a*) sell or rent out,

(*b*) distribute to such an extent as to affect prejudicially the owner of the copyright,

(*c*) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(*d*) possess for the purpose of doing anything referred to in paragraphs (*a*) to (*c*), or

(*e*) import into Canada for the purpose of doing anything referred to in paragraphs (*a*) to (*c*), a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(*a*) the source; and

(*b*) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(*a*) the source; and

(*b*) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

30.2 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

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TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Cinémas Guzzo Inc. c. Canada (Procureur général) | 2005 FC 691, 2005 CF 691, 2005 CarswellNat 1349, 2005 CarswellNat 5321, 47 C.P.R. (4th) 250, 277 F.T.R. 39 (Eng.), 147 A.C.W.S. (3d) 985 | (F.C., May 13, 2005)

1997 CarswellNat 2811
Competition Tribunal

Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.

1997 CarswellNat 2811, 43 B.L.R. (2d) 93, 78 C.P.R. (3d) 321

In the Matter of an application by the Director of Investigation and Research pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34;

In the Matter of an inquiry relating to the refusal of Warner Music Canada Ltd. and its affiliates, Warner Music Group Inc. and WEA International Inc., to deal with BMG Direct Ltd.

The Director of Investigation and Research, Applicant and Warner Music Canada Ltd., Warner Music Group Inc., WEA International Inc., Respondents

McKeown, Simpson JJ., Bolton Member

Heard: December 4 and 5, 1997
Judgment: December 18, 1997
Docket: CT-97/3

Counsel: *D. Martin Low, Q.C.* and *Duane Schippers*, for the Applicant.
John F. Rook, Q.C., *David Stratas* and *Mahmud Jamal*, for the Respondents.

Subject: Intellectual Property; Corporate and Commercial; Property; Civil Practice and Procedure

Table of Authorities

Cases considered by *McKeown J.*:

Berneche v. R., (sub nom. *Berneche v. Canada)* [1991] 3 F.C. 383, (sub nom. *Berneche v. Canada)* 133 N.R. 232, (sub nom. *Berneche v. Canada)* 52 F.T.R. 144 (note) (Fed. C.A.) — applied

Canada (Director of Investigation & Research) v. Imperial Oil Ltd. (November 10, 1994), Doc. CT-89/3 (Competition Trib.) — applied

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc., 73 C.P.R. (3d) 1 (Competition Trib.) — applied

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
s. 31 — considered

s. 32 — considered

s. 75 — pursuant to

s. 75(1)(a) — considered

s. 75(1)(b) — considered

s. 75(1)(c) — considered

s. 75(1)(d) — considered

s. 79 — considered

s. 79(5) — considered

Copyright Act, R.S.C. 1985, c. C-42
Generally — considered

s. 3 — considered

s. 5 — considered

s. 5(1) — considered

Federal Court Act, R.S.C. 1985, c. F-7
s. 18.3 [en. 1990, c. 8, s. 5] — considered

s. 28(2) — considered

Trade-marks Act, R.S.C. 1985, c. T-13
Generally — referred to

Rules considered:

Competition Tribunal Rules, SOR/94-290
Generally — referred to

Federal Court Rules, C.R.C. 1978, c. 663
Generally — considered

s. 419 — considered

s. 474 — considered

Words and phrases considered

product

. . . the licences are not a product as that term is used in section 75 of the Act, [Competition Act, R.S.C. 1985, c. C-34], because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" — there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld.

MOTION by record company to strike application made by Director of Investigation and Research under the *Competition Act.*

The judgment of the court was delivered by *McKeown J.*:

I. Introduction

1 The Director brought an application alleging that the respondents' refusal to grant copyright licences to make sound recordings from their master recordings to a company, BMG (Canada), which needs such licences to compete in the mail order record club business in Canada, contravenes section 75 of the *Competition Act.* The Director alleged no anti-competitive objectives nor that the existing licences include any anti-competitive provisions. The Director in his proposed order was prepared to have BMG (Canada) obtain the licences on the usual trade terms which were to be at least as favourable as the existing licences to Columbia House (Canada), a company in which one of the respondents holds a 50 percent partnership interest. The respondents moved to strike out the Director's application.

2 The issue is whether, in the circumstances, the Tribunal has jurisdiction under section 75 to hear the application.

II. Background

(a) The Parties

3 The three respondents described hereafter will be referred to collectively as the "respondents". The business of the respondents and their affiliates includes contracting with a wide variety of artists to record their performances on Warner master recordings. These master recordings are then used to manufacture sound recordings of various types including tapes, compact disks and records.

4 The respondent Warner Music Canada Ltd. ("Warner Canada") is an Ontario corporation which has its head office in Scarborough, Ontario. It has, *inter alia*, the right to grant licences to manufacture, distribute and sell in Canada sound recordings of performances by Canadian artists which have been recorded on Warner master recordings.

5 The respondent WEA International Inc. ("WEA (U.S.)") is a Delaware corporation which has its head office in New York City. It has, *inter alia*, the right to grant licences to manufacture, distribute and sell in Canada sound recordings of performances which have been recorded on Warner master recordings by non-Canadian artists.

6 The respondent Warner Music Group Inc. ("Warner Music (U.S.)") is a Delaware corporation which has its head office in New York City. It is involved in the business of managing companies affiliated with Warner Communications Inc., including the respondents Warner Canada and WEA (U.S.). Warner Music (U.S.) is alleged to be the party responsible for negotiating licences granted by Warner Canada and WEA (U.S.).

7 The Columbia House Company in Canada ("Columbia House Canada") is an equal partnership of Warner Canada and Sony Music Entertainment (Canada) Inc., and is located in Scarborough, Ontario. It operates a mail-order record club business throughout Canada which offers its customers sound recordings in most music categories.

8 BMG Direct Ltd. ("BMG (Canada)") is a wholly-owned subsidiary of BMG Direct Marketing Inc. ("BMG (U.S.)") and is located in Mississauga, Ontario. It commenced a national mail-order record club business in Canada in December 1994. With the entry of BMG (Canada), Columbia House (Canada) ceased to be the only mail-order record club in Canada offering sound recordings in most music categories.

(b) The Director's Application

9 The Director of Investigation and Research ("Director") made the application to the Competition Tribunal ("Tribunal") pursuant to section 75 of the *Competition Act* ("Act").[1]

10 In the application, the Director alleges that, contrary to section 75 of the Act, the respondents have refused to deal with BMG (Canada) by refusing to grant it licences to make sound recordings from Warner master recordings. The Director alleges that BMG (Canada) needs such licences in order to compete in the mail-order record club business in Canada. However, the Director does not allege that the respondents' conduct in refusing to grant licences is motivated by anti-competitive objectives, and does not allege that the respondents' existing licences include anti-competitive provisions.

11 In the application, the Director seeks an order from the Tribunal to compel the respondents to issue licences to BMG (Canada). The order sought in paragraph 67 of the application requires that:

> (i) the Respondents accept BMG Direct Ltd. ("BMG") as a customer on usual trade terms for the supply of licences to manufacture, advertise, distribute and sell sound recordings made from master recordings owned or controlled by the Respondents or any of their affiliates;
>
> (ii) the terms of the licences sought in (i) above be at least as favourable in all respects as the terms of any comparable licence or licences to The Columbia House Company in Canada ("CHC"). For greater certainty, the licences sought in (i) above shall provide BMG with the right to at least an equal number and variety of Warner master recordings as are supplied to CHC by the Respondents or any of their affiliates;
>
> (iii) the licences referred to above be supplied within 30 days of the issuance of the Tribunal's Order; and
>
> (iv) such further or other Order as the Tribunal may consider appropriate.

III. The Present Motion

12 The respondents' motion is to strike out the Director's application against all the respondents on the basis that section 75 of the Act does not give the Tribunal jurisdiction to compel the respondents to issue licences for the manufacture, distribution and sale of sound recordings of the performances on the Warner master recordings. The respondents also take the position that the Tribunal does not have jurisdiction over WEA (U.S.) and Warner Music (U.S.), that the Act does not have extraterritorial application, that effective service on WEA (U.S.) and Warner Music (U.S.) has not been accomplished, that this motion is timely and that this is a proper case for a reference to the Federal Court of Appeal under sections 18.3 and 28(2) of the *Federal Court Act*.[2]

13 The Director opposes the motion saying that the Tribunal has jurisdiction to order a licence under section 75, that the Tribunal has jurisdiction over WEA (U.S.) and Warner Music (U.S.), that the question of the extraterritoriality of the Act is not in issue since the Director is only seeking redress in respect of the respondents' business activities in Canada, that proper service has been effected, that this motion is premature and that a reference to the Federal Court of Appeal would also be premature.

14 At the hearing of the motion, the Tribunal heard the jurisdictional argument and arguments about the prematurity of this motion and the extraterritorial application of the Act. The parties maintained their positions in respect of a reference to the Federal Court of Appeal but did not argue the issue, preferring to rely on their memoranda.

15 The Tribunal adjourned *sine die* without hearing submissions on the other issues. As these reasons disclose, the Tribunal has decided that the motion is not premature and that a reference to the Federal Court of Appeal will not be ordered. The Tribunal has also concluded that it lacks jurisdiction to grant the relief sought by the Director in his application. For this reason, the issues of extraterritoriality, proper service and jurisdiction over the person will not be addressed.

IV. The Facts

16 For the purpose of this motion, the Tribunal relies on the following undisputed facts:

(1) WEA (U.S.) has a licence agreement with Columbia House (Canada) entitling Columbia House (Canada) to manufacture, distribute and sell in Canada sound recordings made from Warner master recordings of performances by non-Canadian artists.

(2) Warner Canada has licensed Columbia House (Canada) to manufacture, distribute and sell in Canada sound recordings made from Warner master recordings of performances by Canadian artists.

(3) When BMG (Canada) commenced its direct mail-order record club business in Canada, it had obtained reproduction, distribution and sales licences for a number of record labels, but it had not reached an agreement with Warner Music (U.S.) respecting Warner Canada and WEA (U.S.) reproduction and sales licences, and no such agreement has since been reached. It is the respondents' refusal to grant these licences on terms similar to those found in the licences to Columbia House (Canada) that triggered the Director's application. There is no issue that BMG (Canada) can purchase the respondents' manufactured CDS, tapes and records at the wholesale level. However, the prices at wholesale are too high to enable BMG (Canada) to compete in the mail-order record club business. To compete in that business, BMG (Canada) must obtain the cost savings that are possible if it manufactures the Warner sound recordings itself under licences from the respondents.

(4) BMG (Canada) is unable to offer its customers the broad range of sound recordings which is available through Columbia House (Canada), because only Columbia House (Canada) carries sound recordings of performances by artists on Warner master recordings.

(5) The respondents concede, for the purpose of this motion, that if BMG (Canada) is unable to obtain licences for the reproduction and sale of sound recordings made from Warner master recordings, it will be substantially affected and will be unable to continue its mail-order record club business in Canada.

V. Issue and Questions

17 The issue is whether the Tribunal has jurisdiction, pursuant to section 75 of the Act, to make an order compelling the respondents to licence BMG (Canada) to manufacture, distribute and sell sound recordings of performances on Warner master recordings. It is worth emphasizing that the Tribunal was only asked to order that a compulsory license be granted to BMG (Canada) where the respondents refused to do so upon BMG (Canada)'s request. The Tribunal was not asked to find that a physical product was in short supply in the market due to a refusal to grant a copyright licence.

18 Section 75 of the Act reads as follows:

75. (1) Where, on application by the Director, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

The issue raises the following questions, which will be discussed in turn:

(1) What is the nature of the respondents' intellectual property interest in the Warner master recordings?

(2) Could a copyright right be a "product" pursuant to the definitions in section 2 of the Act?

(3) Is it reasonable to conclude that a licence is a "product" as that term is used in section 75 of the Act?

(4) Does the Tribunal have sufficient evidence to decide the issue on this motion?

VI. Discussion

19 Counsel for the respondents indicated that he would be focusing on the respondents' copyright rights in the Warner master recordings for the purposes of this motion, although he mentioned in passing that other intellectual property rights also exist

20 The Director did not dispute that the respondents hold Canadian copyright in the Warner master recordings which are the subject of the application. Even so, counsel for the respondents made detailed submissions which satisfied the Tribunal that, under the *Copyright Act*, [3] the respondents have the exclusive right to reproduce musical works and to make the contrivances (i.e., records, tapes, CDS, etc.) for the performance of musical works. In particular, section 3 of the *Copyright Act* defines copyright as the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, and, for the purposes of this motion, the musical works are subject to copyright and the copyright includes the right to make a sound recording as provided under section 3. Copyright subsists in Canada for Warner Canada by reason of subsection 5(1) of the *Copyright Act* and in Canada for WEA by reason of the treaty provisions referred to in section 5. Since 1993, there has been no provision in the *Copyright Act* which limits the copyright holder's sole and exclusive right to licence. These conclusions mean that as a matter of copyright law the respondents have the right to refuse to licence the Warner master recordings to BMG (Canada).

21 The Director's counsel submitted that the definitions of "article" and "product" in section 2 of the Act are broad enough to encompass a copyright right as a form of personal property. Counsel for the respondents agreed and the Tribunal accepts this submission. However, this conclusion does not answer the next question, which is whether the licences are products within the meaning of section 75 of the Act.

22 The Director's position is that the respondents' manufacturing, distribution and sales licences are the "product" for the purpose of section 75 and that the market for the purpose of the section is Canada. The Director says that, given these definitions and, in the absence of language which excludes the recognition of intellectual property rights in section 75, the section clearly applies to the facts of this case.

23 With regard to paragraph 75(1)(a), the Director notes that the respondents do not dispute, for the purposes of this motion, that BMG (Canada) is being substantially affected in its business by reason of their refusal to grant it licences to manufacture, distribute and sell sound recordings of the Canadian and non-Canadian performances on the Warner master recordings. The Director further says that paragraph 75(1)(b) applies because BMG (Canada)'s inability to obtain adequate supplies is caused by insufficient competition among suppliers of the product in the market, i.e., among Warner Canada, WEA (U.S.) and Warner Music (U.S.). Further, with regard to paragraph 75(1)(c), the Director acknowledges that there is only one supplier of each licence (Warner Canada and WEA (U.S.)) and that the only two licences in place in Canada are the two respondents' licences

to Columbia House (Canada). However, the Director says that the Tribunal may have regard to the terms of licences granted by other comparable licensors throughout North America in order to reach a conclusion about what might be usual trade terms in Canada if additional licences were to be granted by the respondents. Finally, on the subject of paragraph 75(1)(d), the Director submits in paragraph 16 of his application that, because the two licences to Columbia House (Canada) are nonexclusive, there could be further licences if the respondents were willing to grant them. Accordingly, the product is in ample supply. For all these reasons, the Director says that section 75 can be sensibly read to apply to a refusal to grant a copyright licence.

24 The Director is also of the view that policy considerations favour the application of section 75. He states that, if a refusal to grant a licence is not caught by section 75, the effect will be that intellectual property rights will be seen to "trump" competition law. He submits that dire consequences will follow a finding that the Tribunal has no jurisdiction in this case. He is concerned that all distribution arrangements involving the licensing of manufacturing rights will be beyond the Director's reach in cases where an alleged refusal to supply is accomplished by a refusal to licence. He also suggests that this problem will augment because businesses will rearrange their affairs to increase their reliance on licence arrangements.

25 On the other hand, the respondents say that the language of section 75 has been "tortured" by the Director to force it to apply to this case. They submit that the Director's interpretation of the section ignores the respondents' copyright rights. For example, licences are only in ample supply if one assumes that the respondents do not have the right to refuse to grant them. Similarly, to find that usual trade terms may exist ignores the reality that Columbia House (Canada) is the only licensee in Canada, and that Canada is the market as defined by the Director. Furthermore, even if granted, any future licences must be negotiated. In these circumstances, the respondents submit that one could not find that there are usual trade terms.

26 The respondents also counter the Director's position by saying that nowhere in the Act is the Tribunal given the power to override the simple exercise of intellectual property rights and that, for this reason, any grant of such a power must be based on clear and unequivocal language. This is particularly true in their submission in view of the provisions of section 32 of the Act. Section 32 deals, *inter alia*, with situations in which the use of exclusive copyright rights prevents, or lessens, unduly competition in the manufacture or sale of an article. In such situations, jurisdiction is given to the Federal Court of Canada to make a wide range of orders including directing the grant of a licence.

27 Section 32 differs from section 75 in that: (i) it is specifically directed to the use of copyright rights; (ii) a competition impact test must be met before an order will be made; (iii) the Attorney General of Canada and not the Director is the applicant and; (iv) there is a defence based. on treaty provisions. Section 32 reads as follows:

> 32. (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to
>
> (*a*) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,
>
> (*b*) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,
>
> (*c*) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or
>
> (*d*) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,
>
> the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.
>
> (2) The Federal Court, on an information exhibited by the Attorney General of Canada, may, for the purpose of preventing any use in the manner defined in subsection (1) of the exclusive rights and privileges conferred by any patents for invention,

trade-marks, copyrights or registered integrated circuit topographies relating to or affecting the manufacture, use or sale of any article or commodity that may be a subject of trade or commerce, make one or more of the following orders:

(*a*) declaring void, in whole or in part, any agreement, arrangement or licence relating to that use;

(*b*) restraining any person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or licence;

(*c*) directing the grant of licences under any such patent, copyright or registered integrated circuit topography to such persons and on such terms and conditions as the court may deem proper or, if the grant and other remedies under this section would appear insufficient to prevent that use, revoking the patent;

(*d*) directing that the registration of a trade-mark in the register of trade-marks or the registration of an integrated circuit topography in the register of topographies be expunged or amended; and

(*e*) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use.

(3) No order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents, trade-marks, copyrights or integrated circuit topographies to which Canada is a party.

28 The respondents argue that, in the absence of clear language, it would be wrong to conclude that the Tribunal, as an inferior tribunal, has been given the power to ignore intellectual property rights and order the respondents to grant what are, in effect, compulsory licences in favour of BMG (Canada) when the Federal Court can make such an order only after the applicant meets a competition impact test and only after any defences based on international treaty rights are considered.

29 The respondents also rely on subsection 79(5) of the Act, which deals with abuse of dominant position and which provides, *inter alia*, that acts engaged in only pursuant to the exercise of rights under the *Copyright Act* are not anti-competitive acts. In the respondents' submission, because Parliament expressly excluded the simple exercise of copyright rights from the definition of anti-competitive acts in section 79, one cannot reasonably find jurisdiction over such matters in section 75 without a clear statement to that effect.

30 Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" — there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.

31 As well, the Tribunal has accepted the respondents' submissions that, when considered in the context of sections 32 and 79(5) of the Act, the term "product" in section 75 cannot be read to include these copyright licences. These submissions are discussed above and need not be repeated here.

32 Although the Tribunal was commenting on section 79 and intellectual property (trade-marks) in *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*, we are of the view that its statement is very compelling in the circumstances of the motion before us:

The respondents' refusal to licence their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom,

> to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark — essentially, to share the goodwill vesting in the asset — is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence. [4]

The *Copyright Act* is similar to the *Trade-marks Act*, [5] in that it allows the trade-mark owner to refuse to license and it places no limit on the sole and exclusive right to license.

33 Finally, the Tribunal adopts Rothstein J.'s response to the Director's argument about dire policy consequences in his decision regarding the Tribunal's jurisdiction over certain undertakings made to the Director pursuant to the consent order in the *Imperial Oil* case:

> The *Competition Act* does not confer open-ended jurisdiction on the Tribunal to deal with any and all competition issues. It is given specific powers which are set out in the *Competition Act* and in the *Competition Tribunal Act*. It may only act where it has been given the power to do so. [6]

34 Finally, on the issue of the prematurity of this motion, the Director's counsel pressed the Tribunal to adopt a cautious approach and to avoid making a decision without the benefit of all the relevant facts. However, when pressed in turn about what facts were missing which would be relevant to the issue of jurisdiction, counsel responded that the Tribunal needs to hear facts concerning the terms of the Columbia House (Canada) licences and similar licences in North America. When asked why these would be relevant, counsel for the Director indicated that they might support an inference of anti-competitive motive on the respondents' part.

35 There are two problems with this submission. Firstly, section 75 says nothing about motive and, secondly, the Director has not pleaded anything about motive in his application. This being the case, it is clear that the missing facts would not be relevant at a hearing on the merits as this case is presently conceived. Accordingly, the absence of such facts should not forestall a decision on this motion at this time.

36 The Director's counsel also indicated that the Tribunal needed more information about the nature of the direct mail-order record club business. He submitted that once the Tribunal was in possession of such information, it would accept that in this business the licence is a "product" because it is just a surrogate for the manufactured records, tapes and CDS which are produced pursuant to the licence. However, Director's counsel conceded that in all cases where licences grant a right to manufacture, the licence could be seen as a surrogate for the finished goods.

37 In spite of these submissions, the Tribunal has not been persuaded that it lacks any information about the nature of the direct mail-order record business which would contribute to a decision on the issue of its jurisdiction under section 75 of the Act in the circumstance of this motion.

VIII. Conclusions

38 As the *Competition Tribunal Rules* do not deal with this motion, the Tribunal has had regard to the *Federal Court Rules*, [7] wherein Rule 419 (striking a pleading for disclosing no cause of action) and Rule 474 (preliminary determination of a question of law) seem most apt. The Federal Court of Appeal considered Rule 474 in *Berneche v. R.* and said:

> What Rule 474(1)(a) requires is that the Court be satisfied (1) that there is no dispute as to any fact material to the question of law to be determined; (2) that what is to be determined is a pure question of law, and (3) that its determination will be conclusive of a matter in dispute so as to eliminate the necessity of a trial or, at least, shorten or expedite the trial. [8]

39 In the Tribunal's view, the respondents have met these tests and have also made out a plain and obvious case for striking out the application as required under Rule 419. Accordingly, the Tribunal has concluded that section 75 of the Act does not

give it jurisdiction to make the order sought by the Director in his application. An order will therefore be made granting this motion and striking out the Director's application against the respondents.

Motion granted.

Footnotes

1 R.S.C. 1985, c. C-34.

2 R.S.C. 1985, c. F-7.

3 R.S.C. 1985, c. C-42.

4 (1997), 73 C.P.R. (3d) 1 (Competition Trib.), at 32.

5 R.S.C. 1985, c. T-13.

6 *Canada (Director of Investigation & Research) v. Imperial Oil Ltd.* (November 10, 1994), Doc. CT-89/3 (Competition Trib.), Reasons for Decision Regarding Jurisdiction Over Undertakings at 14-15.

7 C.R.C. 1978, c. 663.

8 [1991] 3 F.C. 383 (Fed. C.A.), at 388.

End of Document

TAB 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: Commissioner of Competition v. Visa Canada Corp. | 2013 Comp. Trib. 10, 2013 CarswellNat 3285 | (Competition Trib., Jul 23, 2013)

1997 CarswellNat 3120
Competition Tribunal

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.

1997 CarswellNat 3120, [1997] C.C.T.D. No. 8, 73 C.P.R. (3d) 1

In the Matter of an application by the Director of Investigation and Research under sections 77 and 79 of the Competition Act, R.S.C. 1985, c. C-34

The Director of Investigation and Research, Applicant and Tele-Direct (Publications) Inc. Tele-Direct (Services) Inc., Respondents and Anglo-Canadian Telephone Company NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Limited Thunder Bay Telephone, Intervenors

Lloyd Member, Roseman Member, Rothstein J.

Judgment: February 26, 1997
Docket: CT-94/3

Counsel: *James W. Leising*, *John S. Tyhurst*, *Gene Assad* and *George D. Hunter*, for applicant
Warren Grover, Q.C., *Glenn F. Leslie*, *Mark J. Nicholson*, *Diane M. Rogers* and *Andrea E. Redway*, for respondents
Russell W. Lusk, Q.C., and *Shawn C.D. Neylan*, for intervener, Anglo-Telephone Company
John F. Rook, Q.C. and *John M. Hovland*, for interveners NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Ltd.

Subject: Intellectual Property; Property; Corporate and Commercial; Criminal

Table of Authorities

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — referred to

s. 75 — referred to

s. 77 — considered

s. 77(1) "tied selling" — considered

s. 77(1) "tied selling"(a) — considered

s. 77(1) "tied selling"(b) — considered

s, 77(2) — considered

s. 78 — referred to

s. 79 — considered

s. 79(1) — considered

s. 79(5) — considered

s. 79(6) — considered

s. 106 — referred to

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), Pt. I
s. 8 — referred to

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50
Generally — referred to

s. 32 — considered

Trade-marks Act, R.S.C. 1985, c. T-13
Generally — referred to

s. 2 "trade-mark" — considered

s. 19 — referred to

s. 50(1) [rep & sub. 1993, c. 15, s. 69] — referred to

Decision of the Board:

I. Introduction

1 This application is concerned, broadly speaking, with two aspects of telephone directory or, as it is commonly referred to "Yellow Pages", advertising. The first aspect is the provision of advertising space in a published directory or the publishing business. This aspect of the business encompasses activities such as the compilation, printing and distribution of the directory. The second aspect is the provision of the advertising services required to create a finished advertisement for publication in a directory. The services aspect of the business includes such elements as locating customers, selling advertising space, and providing advice and information to customers on the design, content, creation and placement of directory advertising.

2 The applicant in this case is the Director of Investigation and Research ("Director"), the public official charged with enforcement of the *Competition Act* ("Act").[1] The Director brings an application against the respondents, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., under sections 77 and 79 of the Act, the provisions dealing with, as they are commonly known, tied selling and abuse of dominant position:

77. (1) For the purposes of this section

. . .

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(2) Where, on application by the Director, the Tribunal finds that ... tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in ... tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

79. (1) Where, on application by the Director, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

3 In relation to section 77, the Director alleges that the respondents have engaged in a practice whereby, as a condition of supplying advertising space in telephone directories, they have required or induced customers seeking advertising space in telephone directories to acquire another product from them, namely telephone directory advertising services. As the respondents are allegedly major suppliers of advertising space, this practice of tied selling has allegedly impeded entry into or expansion of firms in the market because advertising agencies or others would provide the services or would expand to provide increased services, were space and services not tied together by the respondents. The result, it is alleged, is that competition has been, is, or is likely to be lessened substantially.

4 With respect to the alleged abuse of dominant position, the Director alleges that the respondents substantially or completely control the classes or species of business they engage in, namely the provision of advertising space and the provision of advertising services. The respondents, it is alleged, have engaged in or are engaging in a practice of anti-competitive acts in each of the markets for space and for services. In the advertising space market, the alleged practice focuses on the actions taken by the respondents upon entry by competing publishers of telephone directories into some of their markets. In the services market, the alleged practice includes acts directed by the respondents against alternative or independent suppliers of services. The acts alleged to be anti-competitive in the services market cover a wide gambit, including, among others, refusal to deal directly with

certain service suppliers as agents for advertisers, providing space to independent service suppliers on less favourable terms than to the respondents' internal sales staff, "squeezing" the return available to independent service providers by restricting the availability of commission over time, and refusing to license its Yellow Pages trade-marks to competing service suppliers. These practices allegedly have had, are having, or are likely to have the effect of preventing or lessening competition substantially in the markets for the provision of advertising space in telephone directories and advertising services, respectively.

5 The respondent Tele-Direct (Publications) Inc. is owned by Bell Canada and BCE Inc. It is comprised of two parts: a "directory" division and an "other business" division. The directory division embraces the directory publishing operations for Bell Canada in its territory, which covers most of Quebec and Ontario. The other business division is made up of various companies partly or wholly owned by BCE Inc., one of which is Tele-Direct (Services) Inc.[2] Tele-Direct (Services) Inc. publishes telephone directories under contract for non-Bell Canada telephone companies ("telcos") with discrete territories within Ontario,[3] for Télébec (owned by BCE Inc.) in parts of Quebec, and for other telcos outside of Ontario and Quebec. Tele-Direct (Services) Inc. also has international operations and includes Tele-Direct (Media) Inc., an accredited advertising agency specializing in Yellow Pages created by Tele-Direct in 1994. There is overlap between Tele-Direct (Services) Inc. and Tele-Direct (Publications) Inc. at the officer level but Tele-Direct (Services) Inc. has its own employees who run its business. In these reasons, except where the context requires separate identification, the two respondents will be referred to together as "Tele-Direct" or the respondents.

6 The respondents deny each of the allegations in the Director's application. In particular, regarding the tied selling allegation, the respondents' primary position is that advertising services and advertising space form an inseparable package for reasons of efficiency and revenue growth. In response to the abuse of dominance allegations, the respondents maintain that they do not substantially or completely control, or have market power in, the alleged market as there are many adequate substitutes for telephone directory advertising, namely other local advertising media. With respect to the specific alleged anti-competitive acts, the respondents take the position that the allegations relate to acts directed at three specific groups operating in separate markets: other directory publishers, Tele-Direct's accredited agents and non-accredited service providers. Save for publishers, they assert that they are not in competition with the groups against whom their acts are said to be directed.

7 Five requests for leave to intervene were received and granted in this proceeding although two of those were later discontinued.

8 NDAP-TMP Worldwide Ltd. ("NDAP") and Directory Advertising Consultants Limited ("DAC") are accredited Yellow Pages advertising agencies which provide services to clients who wish to advertise in telephone directories, particularly those published by or for the various telcos across Canada. They arrange for the preparation and placement of the advertisements in these directories on behalf of their clients. They presented final argument on the issues relevant to the role of agencies in the market.

9 The Anglo-Canadian Telephone Company ("Anglo-Canadian"), through one of its divisions, publishes Yellow Pages directories in British Columbia for BC Tel and in parts of Quebec for Quebec Tel. Anglo-Canadian licenses the Yellow Pages trade-marks from the respondents. Anglo-Canadian presented final argument only on the issues related to the possible compulsory licensing of the Yellow Pages trade-marks requested by the Director as part of the abuse of dominance case.

10 InfoText Limited ("InfoText"), a subsidiary of Newfoundland Tel, and Thunder Bay Telephone supply subscriber listing information to Tele-Direct for directory publication for subscribers in Newfoundland and Labrador and in the city of Thunder Bay, respectively. InfoText subsequently discontinued its intervention. Both InfoText and Thunder Bay Telephone requested intervenor status only to place their requests for leave to intervene on the record, which the Tribunal allowed.

11 White Directory of Canada, Inc. ("White") is a non-telco publisher of telephone directories in St. Catharines, Niagara Falls and Fort Erie. White discontinued its intervention prior to the commencement of the hearing.

Preliminary Comments of the Presiding Judicial Member

12 The notice of application in this matter was filed on December 22, 1994. The hearing commenced in September 1995 and ended at the beginning of March 1996. This decision has taken over 11 months to issue. In view of the Tribunal's usual practice of dealing with matters before it more expeditiously, some explanation is warranted.

13 There is no doubt that this has been the most complex case presented to the Tribunal since its inception. In addition to a strongly contested question of market definition, the case, in reality, consists of five cases, each requiring the Tribunal to address substantial competition issues (tied selling, abuse of dominance in respect of agents, consultants and publishers and trade-marks). Each of the five cases involves a multitude of sub-issues. Many of the Director's numerous specific allegations were multifaceted. To each allegation, the respondents raised a host of defences.

14 The record in this case provides a telling indication of its complexity. It consists of almost 15,000 pages of transcript taken over 70 days and involving 58 witnesses, including five expert witnesses. There were 36 volumes of documents produced in the joint book of documents alone. A further 156 exhibits not included in the joint book were entered in evidence by the parties. The parties submitted over 600 pages of written argument and oral argument took 11 days.

15 In many respects, the approach of the Director and respondents to this case does not result in a joining of issues. Counsel for the Director referred to their respective positions as "ships passing in the night". The result is that the Tribunal has often been left to identify and define, as well as resolve, the issues.

16 Indeed, the appropriate conceptual frameworks for the various issues have been very difficult to determine. The application included novel allegations of anti-competitive acts (for example, "targeting" in respect of publisher entrants) and inter-relationships between issues, such as the alleged anti-competitive acts against agents in the abuse of dominance case and tying, which required considerable deliberation.

17 Finally, there was the troubling issue of tying. This is the first case in which tying has been raised as a "principal" or substantial allegation. [4] This is a particularly difficult issue when related to services. There has been considerable debate among competition lawyers, economists and jurists about the difficulty of addressing alleged anti-competitive activity without adversely affecting efficiency in the context of tying, and the Tribunal was squarely faced with these issues in this case.

Summary of Conclusions

18

1. Telephone directory advertising is a distinct advertising medium without close substitutes and is therefore the relevant product market. Geographic markets are local, corresponding roughly to the scope of each of Tele-Direct's directories. Tele-Direct has an overwhelming share of the product market in all relevant local markets.

2. Tele-Direct has control or market power since the condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied. Direct indicators of market power, such as the level of profits and methods of pricing, reinforce this conclusion.

3. With respect to the allegation of tied selling, telephone directory space and telephone directory advertising services constitute two products solely for national and regional advertisers and Tele-Direct has tied the supply of advertising space to the acquisition of advertising services for these customers. We have prohibited the practice of tied selling.

4. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts against entrants into telephone directory publishing, particularly in the Sault Ste. Marie and Niagara regions, is rejected.

5. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts directed against agents and resulting in substantial lessening of competition is rejected.

6. The allegation that Tele-Direct has engaged in a practice of discriminatory anti-competitive acts against consultants which have or are likely to result in a substantial lessening of competition is accepted. Tele-Direct is ordered to cease the practice. Other allegations respecting consultants are rejected.

7. The allegation that Tele-Direct's refusal to license its trade-marks to certain competitors is a practice of anti-competitive acts is rejected because the refusal is protected from being an anti-competitive act by subsection 79(5) of the *Competition Act* as a legitimate exercise of its rights under the *Trade-marks Act*.

II. Background Facts

A. Telephone Directory Advertising

19 A white pages telephone directory is a comprehensive list of all telephone subscribers in a specified area. A listing includes a name, address and telephone number. A classified telephone directory, historically printed on yellow paper (hence "Yellow Pages"), [5] includes all business telephone subscriber listings plus advertising arranged by heading or descriptive category. There are often multiple headings under which a directory user might search in order to find a certain type of business.

20 Tele-Direct's Yellow Pages directories generally cover the same geographic area as the corresponding white pages. Some white pages directories, however, cover a much broader area than the Yellow Pages; in those cases, there would be several different Yellow Pages directories for a single white pages. Tele-Direct also publishes even more narrowly-scoped Yellow Pages directories for individual "neighbourhoods" in Montreal and Toronto.

21 Telcos are required by the Canadian Radio-television and Telecommunications Commission ("CRTC") to distribute the appropriate up-to-date telephone directory for their district, both white and Yellow Pages, to telephone subscribers at no additional charge. Tele-Direct pays the various telcos for subscriber listing information and the right to publish and distribute the directories to subscribers. It makes its profits from the net advertising revenues. Tele-Direct publishes directories annually.

22 Every business telephone subscriber is entitled to receive in its Yellow Pages directory one light-type listing free of charge under the heading of its choice. Any features added to a listing, for example, bold type or extra lines, a second heading or another directory must be purchased. Actual advertisements in the Yellow Pages must, of course, also be purchased. For Tele-Direct's purposes, an "advertiser" is a subscriber who has a paid item in either the white pages (an enhanced listing) or Yellow Pages of a directory. Revenues from Yellow Pages advertising is far greater than any "advertising" expenditures in the white pages. [6]

23 Approximately 50 percent of business subscribers are "advertisers". The remainder are called "non-advertisers" or "non-ads". The percentage of advertisers is smaller in the largest centres such as Montreal and Toronto and larger in smaller centres. Excluding neighbourhood directories and agency clients, [7] average advertising expenditures in 1994 in Tele-Direct (Publications) Inc. directories were approximately $1,700, with advertisers spending that amount or less constituting around 30 percent of revenues but over 80 percent of advertisers. At the other end of the spectrum, the top 30 percent of revenues comes from only about two percent of advertisers, those who spend more than approximately $10,000 annually. A few very large advertisers spending an average of $113,000 provide 6.5 percent of revenues but represent only 0.1 percent of advertisers by number.

24 A number of different types of advertising can be purchased in a Tele-Direct Yellow Pages directory. Apart from the basic upgrades to its initial free listing (e.g., second heading, bold type), a business may purchase "in-column" or "display" advertising. The pages in Tele-Direct's directories are generally divided into four columns; an "in-column" advertisement fits within the confines of one of the columns with the variation being in the height of the advertisement. In-column advertisements are arranged alphabetically, interspersed among the simple listings.

25 A variation on the in-column advertisement is the trade item advertisement, including the trade-name, trade-mark and custom trade-mark advertisements (usually referred to together as "trade-marks" or "trade-mark advertisements"). In order to place this type of advertisement, the listed businesses must have authorization to use the trade-name or mark in their directory

advertising. The trade-name or mark acts as the heading for the advertisement, followed by one or more listings of specific businesses.

26 Display advertisements range in size from a quarter column (1/16 of a page) to a full page. The placement of these advertisements is loosely alphabetical, as space on a page permits. Options like various types of borders, red, other colours, "white knockout" (white background instead of yellow) may be added to both in-column and display advertisements. They also feature a variety of design and layout techniques, print styles and sizes and graphics.

B. Publishers

27 Revenues from the telephone directory business in Canada amount to about $900 million to $1 billion annually. The vast majority of these are generated by the telco-affiliated directories. Apart from the Tele-Direct directories and other directories published by or on behalf of telcos, there are over 250 "independent" directories published in Tele-Direct's territory. These directories are independent in the sense that they have no connection to the provider of telephone service. They come in a wide variety of formats (size, subject, colour of paper) but can, generally, be characterized as two types: "niche" and "broadly-scoped" directories.

28 Niche directories operate in geographic areas which are substantially smaller than the areas covered by the corresponding telco directories. These directories have a generally smaller, more tightly-scoped distribution area than the telco directory, allowing a local retailer to advertise to a smaller geographic area at a lower cost. Niche directories are often directed at a particular religious, ethnic or demographic group.

29 Two independent publishers of broadly-scoped directories currently produce directories in parts of Tele-Direct's territory. White, which was for a brief time an intervenor in this proceeding, has published directories in the Niagara region since 1993. Dial Source Plus, Inc. ("DSP") publishes a directory in the Sault Ste. Marie area and has also done so since 1993.

C. Service Suppliers

30 Telephone directory advertising services, including the sale of space in Tele-Direct's directories, are provided by three groups: Tele-Direct's internal sales force, advertising agencies and consultants. More detail on each of these groups and their particular method of operation will be provided as appropriate throughout these reasons. For the moment, the following should suffice to introduce the various players.

31 The internal sales force of Tele-Direct consists largely of unionized sales representatives who are remunerated through a combination of salary, commission and other incentives. Services similar to those provided by Tele-Direct's internal sales force are also offered by outside advertising agencies. These include general advertising agencies which, if they deal with Yellow Pages at all, usually have a department devoted to that function, advertising agencies specializing in Yellow Pages only and in-house advertising agencies.

32 Agencies are not remunerated directly by the advertiser but, rather, through a commission paid by the publisher as a percentage of the value of the advertising purchased. While the agency receives commission, the agency's employees earn salary for providing services to the agency's clients. Agencies are restricted in the accounts that they can service as Tele-Direct only pays commission on accounts which meet certain criteria. Tele-Direct's commissionable account definition has undergone a number of changes over the years which will be discussed in further detail later. It is not controversial that fewer accounts meet the current criteria than met prior definitions. The current criteria were adopted in 1993 and are sometimes referred to as the "national" account definition. [8] In order to receive the 25 percent commission payable on these accounts, the agency placing the advertising must be accredited as a Certified Marketing Representative or "CMR" in accordance with the standards set by the Yellow Pages Publishers Association ("YPPA").

33 Services are also provided by Yellow Pages consultants. Consultants create advertisements for Yellow Pages advertisers and advise them on where and to what extent they should advertise in the Yellow Pages. Typically, consultants obtain cost savings on behalf of advertisers by advising the purchase of smaller or less colourful advertisements, more limited geographic

placement of advertisements or by redesigning the advertising. They are not recognized by Tele-Direct, which refers to them by the less complimentary term of "cut agents". Consultants do not receive commission. In general, consultants are paid by the advertiser out of the savings in advertising expenditures resulting from the adoption of the consultant's advice.

III. Time Limitations

34 The respondents argue that the Director is subject to three time constraints which limit the allegations of anti-competitive acts that can be advanced for the purposes of the Director's case under section 79. These arguments are that: the *Competition Act* is not retrospective; the Director's allegations are statute-barred by the *Crown Liability and Proceedings Act*; [9] and subsection 79(6) of the *Competition Act* further limits those allegations. Each argument will be dealt with in turn.

35 The particular allegations that are challenged relate to Tele-Direct's requirement of "issue billing" (payment from CMRs required at the time of issue of a directory as opposed to monthly payments when advertisers deal with Tele-Direct's general sales force) and its restricting of the commissionability criteria applicable to CMRs. The actual words at paragraph 65 of the application are:

> ... the Applicant says that the Respondents have engaged in the following anti-competitive acts:
>
> . . .
>
> (c) providing advertising space to independent advertising agencies on less favourable terms and conditions than to its own sales staff, including: ...
>
>> (ii) requiring that such independent agencies pay the total amount outstanding for a year's insertion of advertising in a given directory, while customers placing orders through internal sales staff may pay such amount monthly over the course of the year without interest charges; ...
>
> (d) squeezing the return available to independent advertising agencies by acts which include:
>
> . . .
>
>> (iv) further restricting the availability of commission to such agencies over time.

A. Retrospectivity

36 There is no apparent difference between the parties with respect to the broad legal principles regarding retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the particular statute. [10] Côté, one of the authorities cited by the respondents, states that a retrospective effect occurs when a new statute is applied "in such a way as to prescribe the legal regime of facts entirely accomplished prior to its commencement." He further states that it is *not* retrospective operation when a statute is applied to ongoing facts which began prior to the statute's commencement. [11] The Driedger text, also referred to by the respondents, describes ongoing facts or "continuing facts" as

> ... one or more facts that endure over a period of time, such as ownership or imprisonment or residency. A continuing fact can be any state of affairs or status or relationship that is capable of persisting over time.... [12]

The dispute between the parties is whether the allegations advanced by the Director regarding issue billing and commissionability criteria imply retrospective application of the *Competition Act*.

37 The respondents submit that since no concept of an "anti-competitive act" existed before 1986, when the *Competition Act* came into force, no act which occurred prior to 1986 can now be characterized as anti-competitive for purposes of section

79. They also argue that section 79 on its terms can *only* be applied to discrete acts or events, of which there must be multiple instances to constitute a "practice".

38 With respect to commissionability, the respondents argue that the Director is alleging that they "narrowed" the definition by discrete acts which occurred in 1975 and again in 1993. The 1975 "narrowing" cannot be anti-competitive and the 1993 "narrowing" alone is only one act and cannot amount to a "practice". Likewise, they say that the Director has alleged that Tele-Direct's "decision" to require issue billing, another discrete act which took place long before 1986, cannot be an anti-competitive act. The fact that these decisions resulted in allegedly restrictive policies that have been applied continuously ever since, they submit, is irrelevant because there is no "new act" of "requiring issue billing" or of "narrowing" besides 1993.

39 The Director argues that the respondents have mischaracterized the pleadings. The Director submits that the current situation, the day-to-day restricted state of the commissionable market and the ongoing requirement of issue billing, are the focus of the allegations of anti-competitive acts, rather than the original decisions to implement these policies. The pre-1986 events, the Director submits, shed light on history, intent and progress. Thus, the Director says there is no question of retrospectivity.

40 We are of the view that section 79 is not restricted in its application to discrete acts or events as opposed to an ongoing course of conduct or state of affairs. The meaning of "practice" in subsection 79(1) was considered by the Tribunal in the *NutraSweet* case. [13] There, the Tribunal found that a practice may exist where there is more than an "isolated act or acts". It also observed that the examples of anti-competitive acts listed in section 78 could entail both a course of conduct over time as well as discrete acts:

> ... The anti-competitive acts covered in s. 78 run a wide gamut. Some almost certainly entail a course of conduct over a period of time, such as freight equalization in para. 78(*c*), whereas others consist of discrete acts, such as the setting of product specifications in para. 78(*g*). The interpretation of "practice" must be sufficiently broad so as to allow for a wide variety of anti-competitive acts. Accordingly, the tribunal is of the view that a practice may exist where there is more than an "isolated act or acts". For the same reasons, the tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice. [14]

41 We are satisfied that the practice contemplated by subsection 79(1) must be more than an isolated act or acts but can include a number of individual anti-competitive acts taken together or a course of anti-competitive conduct over time.

42 Clearly, the Director's pleadings contemplate the violation of subsection 79(1) of the *Competition Act* by a current practice of anti-competitive acts by the respondents. The fact that the act or acts giving rise to the current practice took place prior to 1986 does not make application of the subsection retrospective. In this case, the Director is not challenging the initial decisions by Tele-Direct to commence issue billing and to restrict commission in 1975 as discrete anti-competitive acts in and of themselves. Requiring payment from CMRs at time of issue of a directory may have been instituted in 1959 but it continued after 1986 and existed when the Director's application was filed. Similarly, the "narrow" commissionability market which commenced with a change in the commissionability rules in 1975 continued after 1986. While it may have been narrowed further in 1993, it is not the discrete act of narrowing that is in issue in this case. Rather, it is the ongoing narrow commissionability rules that existed when the Director's application was filed and that were, in the view of the Director, exacerbated in 1993 with further narrowing, that are the focus of the allegations of anti-competitive conduct. As such, there is no retrospective application of the *Competition Act* in this case.

43 Nor is it inappropriate in these circumstances to have regard to events occurring prior to 1986 to consider fully the allegations made under section 79. We take guidance from the approach adopted by the Supreme Court in *Gamble v. R.* Wilson J., speaking for the majority, states:

> ... Frequently an alleged current violation [of the *Charter*] will have to be placed in the context of its pre-*Charter* history in order to be fully appreciated.... Charter standards cannot be applied to events occurring before its proclamation but it would be folly, in my view, to exclude from the Court's consideration crucial pre-*Charter* history. [15]

44 It is clear from the words of the application, and from the way the case developed before the Tribunal, that the current state of affairs is the focus of the Director's allegations of anti-competitive conduct. The respondents have not argued that the Director's pleadings misled them regarding the case they had to meet and that therefore they have suffered prejudice in preparing or presenting their case. Indeed, such an argument could not be advanced given the detailed and inclusive record regarding not only the current situation in the market but also the historical context.

B. Crown Liability and Proceedings Act

45 The respondents' second limitation argument is based on section 32 of the *Crown Liability and Proceedings Act* which reads:

> Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of a cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

46 The respondents argue that the *Crown Liability and Proceedings Act* statutorily bars the Crown (here, the Director) from acting on a cause of action which arose more than six years before the issuing of the application, that is, prior to December 22, 1988. Thus, they argue, all references to changes made in commissionability criteria or any other alleged anti-competitive act after 1986, when sections 78 and 79 were enacted, but prior to December 22, 1988 (six years before the application was filed), are statute-barred.

47 The respondents did not press this point and it will be dealt with summarily. First, as argued by the Director, the respondents cannot rely on the *Crown Liability and Proceedings Act* as they did not plead it in their response. The law is clear that a limitation period does not terminate a cause of action but provides a defendant with a procedural means of defence which must be pleaded in the defence. [16]

48 Second, section 32 of the *Crown Liability and Proceedings Act* is simply not applicable to this case. The opening words of section 32 indicate that if there is a specific limitation period in the statute governing the cause of action involved, here the *Competition Act*, that limitation period applies. [17] It is only in the absence of a specific provision that either a provincial limitation period or the six-year limitation period in section 32 is considered. Subsection 79(6) of the *Competition Act*, to which the respondents have also made reference, provides a limitation period for proceedings brought under that section.

C. Subsection 79(6)

49 Subsection 79(6) of the *Competition Act* states:

> No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Again, the respondents did not plead this limitation period. Further, while they refer to subsection 79(6), the respondents made no effort to argue how it applies in this case. No more need be said.

IV. Impact of the Consent Order

50 The respondents argue that the Director is estopped from bringing this application before the Tribunal to the extent that it deals with issues adjudicated by the Tribunal in a previous proceeding. On November 18, 1994, the Tribunal issued an order, the terms of which were agreed to by the parties, as a result of an application brought by the Director against the Yellow Pages publishers in Canada. [18] We will refer to that order as the Consent Order. The respondents in the present proceedings were among the respondents named in that order.

51 In the application which resulted in the Consent Order, the Director alleged that the respondents in those proceedings had jointly engaged in a practice of anti-competitive acts within the meaning of sections 78 and 79 of the Act. The specific allegations levied against those respondents and found at paragraph 74 of the application were as follows:

> ... it is the Director's submission that the Respondents engaged in the following anti-competitive acts to impede or prevent a competitor's entry into or eliminating a competitor from a market. The anti-competitive acts of the Respondents constituted a practice of anti-competitive acts by the Respondents which had the effect of substantially preventing or lessening competition in the relevant product market of the Selling of National Advertising into Telephone Directories in Canada. The Respondents:
>
> (i) agreed that only Publishers could Sell National Advertising directly into Telephone Directories;
>
> (ii) appointed each other as their exclusive Selling Companies for the Selling of National Advertising in Telephone Directories in each of their respective territories and therefore did not compete with such exclusive Selling Companies in those territories;
>
> (iii) agreed to a Head Office Rule, thus precluding the National Advertiser from either placing the advertisement directly with all the Respondents which actually published the advertisements or using an entity unrelated to any of the Respondents to place the advertising directly in each Respondent's Telephone Directories.

52 The Consent Order contains prohibitions designed to prevent the respondents who agreed to it from engaging in certain acts in the selling of national advertising in Yellow Pages telephone directories, including:

> With regard to the sale of national advertising in Yellow Pages telephone directories, each respondent shall be prohibited from:
>
> . . .
>
> (f) agreeing with any other respondent on the criteria for determining which national advertising accounts are commissionable;
>
> (g) agreeing with any other respondent on the rate of commission payable, except during a transition period ending June 30, 1995 during which a minimum commission of 25% will be available to selling companies for national advertising which meets the commissionability criteria established by each respondent.... [19]

53 The parties appear to be in agreement with respect to the law of issue estoppel. The doctrine of issue estoppel precludes an action being brought against a party with respect to an issue which was already decided in an earlier proceeding. There are three requirements to be met before issue estoppel applies so as to bar a new proceeding. First, there must have been an earlier proceeding in which there was a determination of the same issue. Second, the determination of the issue in the earlier proceeding must have been a final decision. Finally, the parties to each of the two proceedings must be the same. [20] The doctrine of issue estoppel applies equally to issues decided in consent orders and in contested orders. [21]

54 The Supreme Court of Canada has held that the decision upon which a party relies for issue estoppel must have dealt directly and necessarily with the issue which is being raised for a second time:

> ... It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.... The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings. [22] (references omitted)

55 Tele-Direct argues that the issues relating to its commissionability criteria alleged by the Director in this case, namely, that its policy of offering commission only on accounts which meet its "national" definition is an anti-competitive act and constitutes

tied selling, were dealt with by the Tribunal in the Consent Order. Tele-Direct's position is that the Director is estopped from re-litigating these issues in the present proceeding. According to Tele-Direct, the Director, and the Tribunal by virtue of its issuance of the Consent Order, were satisfied that any substantial lessening of competition in the sales of national advertising would be alleviated by the terms of the order. If the Director seeks to vary the Consent Order, the Director can only do so by following the procedure for rescission and variation of consent orders which is governed by section 106 of the Act; this course was not pursued by the Director.

56 The respondents further argue that, by implication, the Consent Order authorizes them to set their own commissionability criteria without interference as long as they do not agree on the rate with any other publisher. Accordingly, they say that it is inconsistent for the Director to bring this proceeding, which could result in the Tribunal interfering with Tele-Direct's decisions relating to its commissionability criteria for national advertising.

57 The Director's position is that the issues raised in the two proceedings are not the same and that, therefore, the doctrine of issue estoppel does not apply. According to the Director, the anti-competitive acts which were the subject of the Consent Order were certain *joint* practices of the Canadian Yellow Pages Service ("CANYPS") members (the telco publishers) regarding the manner in which national advertising could be placed in their directories. It was the agreements between the respondents to the Consent Order which constituted the anti-competitive acts and resulted in a substantial lessening of competition which were remedied by the order. In the present proceeding, however, it is alleged anti-competitive acts of Tele-Direct itself which are the subject of review. There was no decision in the earlier proceedings regarding how Tele-Direct sets its own commissionability criteria or how it otherwise deals with independent agencies located in its territory.

58 The requirements for issue estoppel are not met in this case. While the Consent Order was a final decision of the Tribunal, the terms of which are binding on Tele-Direct, the issues which were dealt with in that proceeding are not the same as those in the present case. This is clear from the application and supporting documentation and the Consent Order. It was the substantial lessening of competition resulting from the respondents' joint practice of anti-competitive acts or joint abuse of dominance that the Director sought to remedy by the Consent Order. The instant case deals with entirely separate allegations of anti-competitive acts of Tele-Direct acting alone. The Consent Order prohibits the respondents named in it from agreeing amongst themselves on the rate of commission payable. That order does not address the commissionability criteria which an individual publisher may set. Nothing in the Consent Order limits the jurisdiction of the Tribunal to review the commissionability criteria set by Tele-Direct.

V. Trade-Marks

59 The Director alleges that the respondents, by "refusing to licence [their] trade-marks, such as the words 'Yellow Pages' and 'Pages Jaunes' and the walking fingers logo, to competing suppliers of advertising services", have engaged in a practice of anti-competitive acts contrary to section 79 of the Act. In particular, the Director seeks to prohibit the respondents' alleged practice of "selective licensing" whereby certain competitors are refused licences, allegedly arbitrarily or pursuant to an anti-competitive intent, and others are not. As a remedy, the Director seeks an order "that the respondents licence, at the request of independent advertising agencies, including consultants, and on commercially reasonable terms and conditions, the trade-marks registered for the respondents' own use in relation to telephone directories."

60 The Director's submissions raise two issues. First, the Tribunal must determine whether the refusal to license a trade-mark to certain persons or groups of persons is an anti-competitive act. Second, if it is an anti-competitive act, the Tribunal must determine whether it has jurisdiction to order the respondents to license their trade-marks. Having carefully considered the evidence and the submissions of counsel, the Tribunal is of the view that the selective refusal to license a trade-mark is not an anti-competitive act. Accordingly, the second question need not be answered.

61 The facts concerning the respondents' refusal to license their trade-marks are not disputed. The respondents license the use of their trade-marks to CMRs and other telco-affiliated directory publishers; they do not license other advertising agencies or consultants. The respondents aggressively defend their trade-marks against what they perceive to be infringement but they

do not pursue every perceived infringement with equal zeal. The evidence is that Tele-Direct overlooks certain uses of its trade-marks but threatens to, or institutes, legal action against the use of its trade-marks by, for instance, consultants.

62 Both the *Trade-marks Act* [23] and the *Competition Act* are relevant. The purpose of a trade-mark is to distinguish the wares or services of the owner from those of others. [24] The *Trade-marks Act* provides that the owner of a trade-mark has the exclusive right to its use. [25] Further, the owner of a trade-mark may license another to use that trade-mark, and that use is deemed to have the same effect as use by the owner. [26] Subsection 79(5) of the *Competition Act* provides:

> For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

63 The Director submits that subsection 79(5) does not preclude a finding that "abuses" of intellectual property rights are anti-competitive acts. It is the Director's position that Tele-Direct's practice of selective licensing is an abuse of Tele-Direct's trade-mark rights. The Director asserts that an owner's "exclusive right to use" its trade-mark is not unlimited. The Director relies upon case law which has defined "use" not to include activities which are for purposes other than distinguishing wares or services of the owner from the wares or services of others. [27] Accordingly, the Director submits that the respondents' position that "any written use of the words 'Yellow Pages' would be dealt with" and the fact that the respondents have used their "superior resources" to assert this claim successfully is evidence of the respondents' exclusionary intent in respect of their trade-marks.

64 Tele-Direct argues that, as owner of the trade-marks, it has the statutory right to decide to whom it will or will not license those trade-marks, including the right to refuse to licence where it is not in its best interest to do so. It argues that there is no evidence that it has adopted a policy of refusing to license trade-marks to competitors for the purposes of restraining competition; rather, it does not make sense for Tele-Direct to license its trade-marks to consultants whose businesses are based on the premise that Tele-Direct "rips-off" its customers.

65 In support of his position, the Director relies on the decision of the United States District Court in *Car-Freshener Corp. v. Auto-Aid Manufacturing Corp.*, where the Court stated that there was "no doubt that a trade-mark may be utilized in such a manner as to constitute a violation of antitrust laws" [28] and offered several examples: the use of a strong trade-mark to unlawfully tie a weaker product, unlawful price discrimination exercised with respect to a trade-mark, or other illegal anti-competitive practices. The Tribunal is in agreement with the Director that there may be instances where a trade-mark may be misused. However, in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trade-mark. Subsection 79(5) explicitly recognizes this.

66 The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.

67 The owner's exclusive jurisdiction over licensing accords with the scheme of the *Trade-marks Act*. There is no statutory means by which a person can petition the Registrar of Trade-marks for a licence to use a trade-mark, implying that the decision to license rests with the owner of the mark. Furthermore, the licensing provisions of the *Trade-marks Act* provide that, in order to constitute a valid licence, the trade-mark owner should have "direct or indirect control of the character or quality of the wares or services" to which the licensee was attaching the mark. Indeed, in *Unitel Communications Inc. v. Bell Canada*, [29] the Court expunged trade-marks owned by Bell Canada, in part because Bell Canada had failed to exercise control over the use of its trade-marks by an independent telco. In the case at bar, the lack of control over the quality of the goods or services is

particularly relevant since the Director is suggesting that the respondents' trade-marks should be licensed to consultants with whom the respondents do not share identity of interest.

68 While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the *Trade-marks Act* allows trade-mark owners to decide to whom they will license their trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the *Trade-marks Act* does not prescribe any limit to the exercise of that right.

69 The respondents' legitimate desire to protect the value of the goodwill vested in their trade-marks by refusing to license them does not amount to an anti-competitive act. In view of the strength of their trade-marks, the respondents can be expected to be, and are entitled to be, protective of their rights. Indeed, if the respondents did not protect their marks, they would risk having them lose their distinctiveness, as in *Unitel*. This is a real concern, given that the Yellow Pages trade-marks are no longer registered in the United States.

70 While independent advertising agencies and consultants may wish to use the respondents' trade-marks, there is simply no basis for granting an order requiring the respondents to license their trade-marks. [30] Although the respondents may have been zealous in protecting their trade-marks, both in refusing to license and in threatening litigation for infringement, the irrefutable fact is that the respondents have been, through the provisions of the *Trade-marks Act*, accorded the right to refuse to license their trade-marks, even selectively. The exercise of this right is protected from being an anti-competitive act by subsection 79(5) of the Act.

VI. Market Definition

71 A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s], throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Director of Investigation and Research v. D & B Companies of Canada* [31] that "class or species of business" means product market and "control" means market power. The remaining phrase, "throughout Canada or any area thereof", refers to the geographic market. Therefore, in order for section 79 to apply, the Tribunal must first conclude that Tele-Direct has market power.

72 A market must also be defined in order to consider the allegation of tying, brought under section 77. Under subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market ... is likely to" have a number of detrimental effects. If Tele-Direct is found to have market power, it would qualify as a "major supplier".

A. Product Market

73 The argument and the evidence presented to us regarding the relevant product market focus on whether there are close substitutes for telephone directory advertising. The Director includes in his relevant market advertising in Tele-Direct's Yellow Pages directories and in telephone directories produced by independent (non-telco affiliated) publishers.

74 The respondents concede that advertising in independent directories is in the same relevant market as advertising in Yellow Pages directories. Their position is that both independent and Yellow Pages directories form part of a broader product market comprised of all local advertising media. The respondents define "local advertising" in this context as advertising designed to promote business at a particular location. They would include, for example, direct mail, outdoor signage, community newspapers, daily newspapers, catalogues, trade magazines, flyers, radio, television -- in fact advertising in any medium as long as the advertising is designed to promote a particular location.

75 It is important to keep in mind that our goal in defining the relevant market in this case is to determine whether other local advertising media provide competitive discipline for Tele-Direct in respect of its Yellow Pages pricing [32] and output decisions. The Director argues that they do not. The respondents argue that they do.

(1) Substitutability -- The Basic Test

76 The parties agree that the fundamental test or "touchstone" for determining the boundaries of the relevant product market is substitutability, as the Tribunal has consistently held in previous decisions, including three abuse of dominant position cases. [33] Products must be close substitutes in order to be placed in the same product market. The parties also agree that the appropriate approach to or framework for market definition is set out in the Federal Court of Appeal decision in *Director of Investigation and Research v. Southam Inc.* [34] Both parties quote the same passage from that decision:

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical *indicia*, such as functional interchangeability and industry views/ behaviour, to show that products are close substitutes. [35] (reference omitted)

It is also common ground between the parties that this approach does not represent a radical departure from the approach used by the Tribunal in previous decisions.

(2) The Southam Decision

77 The *Southam* decision is the first Court of Appeal decision to deal in any depth with market definition under the Act. [36] That the parties differ considerably on how the general approach stated by the Court of Appeal in *Southam* is to be applied to the facts of the case before us is evident from the broad product market proposed by the respondents and the narrow product market proposed by the Director.

(a) Direct Evidence of Substitutability

78 There is no dispute that, first, we must consider any direct evidence of substitutability. In *Southam* the Court of Appeal states:

> To the extent that it is possible to adduce statistical evidence of high demand elasticity, such evidence is virtually conclusive that two products are in the same product market. Evidence of price sensitivity can also come in anecdotal form which is a less conclusive, although still a persuasive factor tending to show that products are close substitutes. [37]

79 The Director did not adduce any statistical evidence. The respondents mention the two "Elliott" reports, studies conducted for Tele-Direct in early 1993 for purposes other than this proceeding, as "statistical data" on advertisers' reaction to relative price increases. [38] The Elliott reports were general surveys of "customer satisfaction" which did not deal with price sensitivity of advertisers between different media. [39] Even if they had dealt with relative prices of various different media, in our view the Elliott reports would not qualify as the type of direct statistical evidence of demand cross-elasticity that was intended by the Court of Appeal. Such a study would have to be undertaken for the purpose of determining cross-elasticity between the products alleged to be in the market, be conducted in an appropriately rigorous fashion and meet tests of statistical significance. While the Elliott reports do not qualify as statistical evidence of demand cross-elasticity, they will be considered as part of the indirect evidence of substitutability.

80 Although the Director called a number of buyers or advertisers as witnesses in this case, he does not rely on their evidence as "anecdotal evidence" of price sensitivity, from his point of view, low price sensitivity. He refers to their evidence as indirect evidence under various rubrics. The respondents likewise treat the testimony of the advertisers as indirect evidence. We will therefore not address the question of whether that testimony provides any direct evidence of price sensitivity or a lack thereof.

81 In the absence of direct evidence regarding buyer price sensitivity, we must therefore proceed to examine the available indirect evidence or "practical indicia" to draw inferences about price sensitivity.

(b) Indirect Evidence of Substitutability

82 The Director has organized the evidence of product market definition using headings similar to those set out in the *Merger Enforcement Guidelines*: [40] end use, physical and technical characteristics, views, strategies, behaviour and identity of buyers, trade views, strategies and behaviour ("inter-industry competition"), price relationships and relative price levels and switching costs. The respondents have also used the same headings to organize their evidence, although in a slightly different order. The *Merger Enforcement Guidelines* are not sacrosanct. But, as the parties are agreed that the evidence may be organized according to those guidelines, we accept that this is a practical and useful way in which to proceed.

83 The parties may use the same organizational structure but they do not agree on the respective roles to be accorded to the various practical indicia. In particular, they take different positions on the way in which the indicia of "functional interchangeability" and "inter-industry competition" should be employed in defining a product market based on the Court of Appeal decision in *Southam*. They also differ, of course, on the nature of the evidence and the conclusions to be drawn therefrom that should be considered under each heading. A detailed review of the evidence and the arguments under each heading will follow. We must first address, however, the arguments regarding the general approach to the practical indicia or indirect evidence of substitutability.

84 The Director submits that the Court of Appeal in *Southam* found that functional interchangeability is a "vital feature" and a "central part of the framework" of market definition, although it is not a sufficient condition for two products to be in the same market. The Director argues that the Court of Appeal did not state that functional interchangeability and inter-industry competition were the "sole" or "driving" factors in market definition but only found that *ignoring* those factors was an error of law.

85 The respondents in their written argument agree that the Tribunal must consider the evidence with respect to functional interchangeability and that it is central but alone does not conclusively demonstrate that two products belong in the same relevant market -- other factors must be considered. They point out that the additional factor that was "very important" to the Court of Appeal in *Southam* was inter-industry competition. During oral argument, counsel took the stricter position that the Court of Appeal held that if functional interchangeability and "broad" inter-industry competition are found, then it is an error not to place the products under consideration in the same market. If the two indicia mentioned are present, the Tribunal *must* infer price sensitivity and therefore a single product market.

86 The Tribunal must determine whether the Court of Appeal prescribed, as a matter of law, the role and importance of the factors or indicia of "functional interchangeability" and "inter-industry competition". With respect to functional interchangeability as one of the indirect indicia, the Court of Appeal stated that it was "not simply one of many criteria to be considered but a critical part of the framework." It also confirmed that functional interchangeability will generally be regarded as a "necessary but not sufficient condition to be met before products will be placed in the same market." With respect to inter-industry competition, the Court of Appeal found that evidence of "broad" competition, namely that the two types of newspapers were striving to reach many of the same advertisers with significant success by the community newspapers which, in turn, preoccupied Southam and generated responses by it, was sufficient to show competition "in fact". [41]

87 A finding that the products alleged to be in the same market serve the same relevant purpose is a necessary first step in the analysis. A finding of functional interchangeability, however, is not alone sufficient to place the products in the same market. As the Court stated:

> ... There are other factors which may tend to reinforce, or undermine, a finding that two products are functionally interchangeable. [42]

88 With respect to evidence of "broad" inter-industry competition, we do not understand the Court to be saying that the presence of such evidence, along with evidence of functional interchangeability, will, in every case, dictate that the products in question should be placed in the same product market. If the Court intended to confine the analysis to these two practical

indicia and effectively negate consideration of other factors, like, for example, the views, strategies and behaviour of buyers, the Court would have done so explicitly. It did not do so. In *Southam*, the Court confined its conclusions to the matter before it:

> While evidence of substitutability through functional interchangeability and inter-industry competition was adduced, the Tribunal ultimately ignored such evidence. In doing so, the Tribunal adopted an overly narrow approach to substitutability as it dismissed "broad" conceptions of interchangeability and inter-industry competition. In doing so, the Tribunal erred in focusing predominantly on price sensitivity. *In this case, the similarity of use between Pacific Dailies and community newspapers, and the competitiveness which existed between them, is sufficient to place both in the same product market.* [43]
>
> (emphasis added)

89 We conclude that consideration of functional interchangeability is essential in assessing indirect evidence of whether two or more products are in the same market. But this does not exclude other relevant evidence which may reinforce or undermine what functional interchangeability implies.

90 In considering the whole of the evidence, the Tribunal will bear in mind the ultimate reason why the market is being defined. In this case, the goal is to determine if the respondents have market power (or are "major suppliers"), that is, if the alleged close substitutes, other local advertising media, provide competitive discipline for Tele-Direct in making price (or quality) and output decisions.

(3) Functional Interchangeability

91 The Director submits that two headings from the *Merger Enforcement Guidelines*, "end use" and "physical and technical characteristics", are both related to the question of functional interchangeability. Certain characteristics of directories are, he argues, key factors which dictate the end use of a directory as a directional reference tool and which thus limit the "functional interchangeability" of directory advertising with directional advertising in other media.

92 The respondents argue that all local advertising has the same end use: to increase business at a particular location. They submit that the characteristics of the various media should not be considered as part of the determination of functional interchangeability.

93 Regarding functional interchangeability, the Court of Appeal in *Southam* says:

> ... But the fact that community newspapers are more local in nature does not go to the question of functional interchangeability, but to the behaviour of buyers as to preference for geographical scope. This latter *subjective* factor should not be mingled with the purely *objective* factor of functional interchangeability which focusses on use or purpose. [44]
>
> (emphasis added)

The Court imposes the constraint that the views of buyers should not enter when functional interchangeability is being decided because they are "subjective". Only "objective" factors should enter at this point.

94 Under the criterion "end use", the *Merger Enforcement Guidelines* refer to the extent to which two products are "functionally interchangeable in end use". That is the way in which the term will be used in this decision. Physical and technical characteristics, along with other indicia, serve to determine whether the products found to be functionally interchangeable in end use are close substitutes. Rather than considering physical and technical characteristics as part of the determination of functional interchangeability, as the Director proposes, the Tribunal will treat them separately from functional interchangeability.

95 The Director and one of his economics expert witnesses, Richard Schwindt, [45] have defined the relevant end use of telephone directory advertising to be use as a "directional" medium. ("Directional" and "directive" were used interchangeably in the material before us.) Two elements are said to characterize a directional advertising medium: (a) consumers consult the medium when they are at a point in the buying cycle when they are ready to buy, and (b) the medium is used as a reference

tool. Directional advertising is distinguished from creative advertising, which is widely acknowledged to be used for creating or stimulating demand. The Director admits that other advertising media besides Yellow Pages might be considered directional but names catalogues, direct mail and classified newspaper advertising as the only candidates.

96 The respondents and their economics expert witness, Robert Willig, [46] take the view that all "local" advertising [47] has the same end use, to attract customers to a particular establishment. Thus, they argue, advertising in the Yellow Pages and advertising in other local media are functionally interchangeable. In response to the Director's argument, they argue that directionality is not generally regarded as encompassing the element of use as a reference tool. They further argue that the directional/creative dichotomy is not valid. They take the position that there is no such sharp distinction in the advertising done by local advertisers. In their submission, directional means only that the advertising directs consumers to a particular establishment - which can be done in any medium. Given the respondents' definition of "local" advertising, all advertising by a local advertiser necessarily has a directional component. Similarly, since they are of the view that all local advertising, including advertising in telephone directories, has as its goal the stimulation of demand at a location, all local advertising necessarily has a creative component.

97 Since the respondents have defined "local" advertising as advertising designed to promote business at a particular location, it follows that the purpose of all local advertising is to attract customers to a business. Such a definition is at a high level of generality. While we recognize that the "end use" indicia acts as a "filter" or a "first stage" in the analysis only, it should still cast some light on the ultimate question to be determined, i.e., whether all "local" media are *close* substitutes providing sufficient competitive discipline among themselves that they should be considered to be part of the same product market in this case. We find the words of Gibson J. in *R. v. J.W. Mills & Sons Ltd.*, which the Court of Appeal in *Southam* found "worthy of replication", to be instructive on this point:

> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.
>
> At one extremity, an ill-defined description of competition is that every service, article, or commodity, which competes for the consumer's dollar is in competition with every other service, article or commodity.
>
> At the other extremity, is the narrower scope definition, which confines the market to services, articles, or commodities which have uniform quality and service.
>
> In analyzing any individual case these extremes should be avoided and instead there should be weighed the various factors that determine the degrees of competition and the dimensions or boundaries of the competitive situation. For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another. [48]

98 The criterion of functional interchangeability in end use should not be treated at such a high level of generality that it precludes objective yet contextual analysis. To say that, for example, automobiles and bicycles are in the same product market because they both provide a means of transportation would make the level of generality so high that no meaningful analysis could be performed as a result of it. Some consideration must be given to context.

99 To put functional interchangeability in end use in context in this case, it is important to look at the buying cycle and which types of media are generally regarded as directional and thus particularly effective in reaching consumers who are at the end of the buying cycle. These consumers are "ready to buy" but must decide which commercial establishment to patronize. The question is which types of media effectively bring the particular establishment to the consumer's attention in those circumstances.

100 The respondents referred us to a number of American cases which, they argue, support their broad conception of end use. We do not find these authorities particularly helpful. First, and most importantly, the product market that is arrived at in a particular case is very much dependent on the facts of that case and the context in which the case is brought, that is, the alleged

anti-competitive wrong that the plaintiff is seeking to cure. As Gibson J. stated in the passage quoted above, "two products may be in the same market in one case and not in another." Therefore, the mere fact that another court did or did not find that directory advertising was in the same market as other local media is not in itself compelling. Some of the cases cited by the respondents were not antitrust cases. [49] Others did not deal with directory advertising. [50] In addition, counsel for the Director was able to bring to our attention a number of other American cases in which the courts, either explicitly or implicitly, used Yellow Pages advertising as a relevant market. [51] Further, while the reasoning with respect to market definition in another case might provide us with some insight, one would have to be reasonably certain that the court in question was applying the same conceptual framework or "test" as we have adopted. These considerations all highlight the futility of looking for a simple, neat answer to market definition in the case law.

101 Based on the evidence, particularly materials created by the respondents themselves outside of the context of this proceeding, which we will review in more detail below, we accept the Director's position that the distinction between creative and directional media is a valid one for determining the end use of Yellow Pages and other local advertising. A fair consideration of the evidence, which will shortly be addressed, supports the position that creative advertising creates awareness of and demand for goods and services at the beginning of the buying cycle and that directional advertising refers to advertising to consumers who are at the end of the buying cycle which "directs" them where to buy a product or service. This effectively limits the number of media that can be considered to be directional.

102 Although the respondents argued that directional advertising simply means advertising (in any media including those traditionally considered creative) that contains a name, address or phone number to "direct" a consumer to particular establishment, [52] this was not Tele-Direct's view outside of this case. In the Multimedia Training Course created by Tele-Direct for its sales representatives, directional advertising is defined as:

> Media used by the advertiser to direct the buyer where to buy or use a product or service. Examples: Yellow Pages, catalogues, direct mail. Directive media complements and supports creative media. [53]

The three examples used suggest that directional media, in fact, have very specific characteristics beyond simply including a name, address or phone number. All are print media and in each case there is no editorial or entertainment content. The consumer has no reason to consult these media other than a reason related to making a purchase, i.e., at the end of the buying cycle.

103 The course material also discusses and sets out in chart form the role of the various media at the various stages of the buying cycle: awareness, interest, comprehension, trial, purchase and repurchase. The text explains:

> ... [S]uch traditional advertising media as TV, Radio and Magazines are by their nature designed to generate awareness for products and services. The impact or intrusion qualities of this advertising creates an interest for the products and services and has the ability to demonstrate the benefits to the consumer and is ultimately designed to create a need or desire in the mind of the consumer.
>
> . . .
>
> Although creative advertising is crucial at the awareness, interest and comprehension stage of the buying cycle, it loses impact at the actual purchase stage because of the time or distance between the initial awareness and the purchase. [54]

104 At the purchase stage, newspaper, direct mail, outdoor, radio and Yellow Pages are all considered to have some strengths. Television and magazines are not. Of those with strength at the purchase stage, only newspapers and direct mail (and Yellow Pages), however, are described as "directive". The strength of outdoor advertising at the purchase stage is as a "reminder message". The strength of radio at that stage is to offer price points and convey a "sense of urgency". Again, this course material supports the view that directionality imports something more than the ability to provide a consumer with a name and address. All of television, newspapers, direct mail, outdoor, radio and Yellow Pages are capable of including this information in advertising, yet Tele-Direct did not consider them all to be directional.

105 This interpretation is further supported by the letter sent to the Director by Tele-Direct during the course of the Director's investigation into the industry (referred to as the "Bourke letter"). The letter was intended to provide industry background. [55] It states that:

> The Yellow Pages traditionally is viewed as a "directional" or "considered purchase" advertising medium, which provides consumers with information on where they can purchase the goods and services they want.... Directional advertising is most attractive to local advertisers, particularly local retailers, who seek to motivate customers to visit their stores or to use their services. *Other directional media include direct marketing, catalogues, trade magazines, and specialty supplements to newspapers or magazines.* [56]
>
> (emphasis added)

There is no mention made of outdoor or television and radio as directional media. When Thomas Bourke, Tele-Direct's President, testified at the hearing he confirmed that the basic strength of Yellow Pages was to provide information on where to buy, as stated in the letter. In the list of directional media, he would, however, now include the classified sections of daily and community newspapers and specialty and other classified directories.

106 The letter continues:

> By contrast, the other major advertising media - outdoor, newspapers, radio, television and magazines - are classified as "creative" advertising media, which create awareness of and demand for products and services. Creative advertising assists advertisers who are either trying to sell a product or service, or promote their name. This service is attractive to major manufacturers or suppliers, who usually do not have a preference as to where the consumer buys its product or services. [57]

107 Since names, addresses and phone numbers could just as easily be included in advertising in the regular part of a newspaper and a magazine as in a special supplement or classified section, something more is involved in the way that the participants in the industry view directionality. As in the training material, all the examples of directional media are characterized by the absence of general editorial content. The characteristic that specialty supplements and classified sections in newspapers or magazines, other directories, catalogues and direct mail share with Yellow Pages is that the advertising in those media will be totally ineffective unless it is consulted by people who are "in the market" -- who are looking to make a purchase. As Mr. Bourke put it when describing how Yellow Pages complete the buying cycle, they must be in a "buying frame of mind". Consumers will not be involuntarily exposed to the advertising by virtue of going to the medium for entertainment or other reasons; they must voluntarily decide to consult the Yellow Pages or a catalogue, read the direct mail or an advertising supplement or classified section. These media are not picked up and browsed through idly in a spare moment.

108 The respondents argue that all directional advertising, even Yellow Pages advertising, has a "creative" component. Otherwise, they submit, no one would pay for a display advertisement in the Yellow Pages. The free business listing could provide a name, address and phone number. Clearly, there is "creativity" involved in designing an eye-catching Yellow Pages advertisement. This is not the same as creative ("creates" *demand*) as opposed to directional ("directs" consumers who are ready to buy) advertising as those terms are used in the industry, according to the evidence.

109 Mr. Bourke, echoing Raymond Greimel, Executive Director of YPPA, testified that the new attitude in the industry is that Yellow Pages are *both* directional and creative. He was unable, however, to explain how Yellow Pages advertising "creates awareness of and demand for products and services" in the words of the Bourke letter, as he recognized that people do not consult the Yellow Pages unless they already have a need for some product or service. He could only say that Yellow Pages advertising "reinforced" or "supported" the advertising in the creative media.

110 We are not satisfied from the paucity of evidence on the point that directional advertising means that the medium containing the advertising is a "reference tool", as the Director further submits. If this element were proven, virtually all media

except directories would be excluded from potentially being part of the relevant product market at this point. We do not consider that the evidence supports narrowing the definition of "directional" in this respect.

111 Functional interchangeability is simply a preliminary filter to exclude those products which evidently do not have the same end use as Yellow Pages advertising. Nevertheless, certain conclusions can be stated. First, the respondents' position that local advertising in *all* media qualifies as directional is not tenable. In particular, television, radio and outdoor media are clearly not treated as directional in Tele-Direct's own materials. Television is seen as having little relevance to the latter stages in the buying cycle; it is strong in creating awareness and interest at the beginning of the cycle only. While radio and outdoor have a role at the later stages, that role was not to present a directive message but rather to create "urgency" or serve as a "reminder" of other advertising.

112 This is not to say that these media *cannot* be used for directional advertising in any circumstances. It is a possibility, but in deciding whether various media serve the same end use, one must look to usual uses and not mere possibilities unsupported by the evidence. We are of the view that both the electronic and outdoor media can be excluded at this point as they are not directional media and thus do not have the same end use as Yellow Pages advertising. Since the electronic and outdoor media have not met this "necessary" condition for inclusion in the relevant product market, we will not deal with them further.

113 Second, there is some doubt as to whether "regular" advertising (as opposed to special supplements or classifieds) in newspapers and magazines is properly included as directional advertising. Based on the list in the Bourke letter, which was updated by Mr. Bourke in his testimony and is therefore, presumably, as comprehensive as Tele-Direct considers it should be, we could exclude "regular" newspaper and magazine advertising at this point. The Multimedia Training Course, however, does refer to "newspaper" advertising, without further details, as directive. Given the preliminary nature of the criteria of functional interchangeability and in light of the overall model used by the respondents to argue their case, we will not exclude newspapers from further consideration. Magazines will not be dealt with further, as they were largely ignored in the remainder of the evidence and argument of both parties.

(4) Other Relevant Indicia

114 Having determined that some, though not all, local advertising media pass the threshold test of functional interchangeability, we will now consider the evidence and argument on the remaining practical indicia to decide if those media are close substitutes and belong to the same product market as telephone directory advertising.

(a) Physical and Technical Characteristics

115 Telephone directories are issued annually, are comprehensive both with respect to including all suppliers and being delivered to all telephone subscribers, and they are governed by their own rules with respect to the content of advertising. The Director is of the view that these characteristics set Yellow Pages apart from other media.

116 The respondents argue that each advertising medium has different "strengths and weaknesses" and can claim to be unique. They submit that a "catalogue" of differences is not alone enough to place two products in separate markets. They state that the relevant question is whether the product is unique in some respect that significantly limits the extent to which *buyers* (here, advertisers) are willing to substitute other products for the product at issue. We agree that to deal with physical and technical characteristics separately from the views and behaviour of buyers is somewhat artificial. It is, however, the way in which the parties have chosen to organize their arguments and the evidence in this case. Therefore, in this portion of the judgment, we will restrict ourselves to the points raised by the parties in their respective arguments under that heading. We recognize that this factor is mainly important in the analysis as providing background for the next section on buyer views and behaviour.

(i) Time Insensitivity/Permanence

117 Advertisements in the Yellow Pages are finalized several months prior to publication and have to stand for the entire year between directories. This means that Yellow Pages advertising cannot be used to convey time-sensitive information. As noted by Professor Schwindt, for the Director, this sets Yellow Pages apart from other directional media, such as direct mail

or supplements to magazines or newspapers, in which time-sensitive information such as prices tends to be featured. In fact, until recently Tele-Direct regulations prohibited the inclusion of prices in Yellow Page advertisements to avoid potential false advertising claims. This ban has now been lifted. It is doubtful whether, in a fast-changing world, price advertising can ever be an important part of telephone directory advertising while directories are a print medium that changes only every year.[58] The evidence of the advertiser witnesses amply supported the conclusion that Yellow Pages are *not* used for time-sensitive advertising.[59]

118 The fact that Yellow Pages cannot be used to convey time-sensitive information is characterized by the respondents as a "weakness", the "flip side" of which is "permanence", a "strength". Based on a statement by Professor Willig in his rebuttal affidavit,[60] they conclude that a weakness in Yellow Pages does not suggest that advertisers *would not* substitute other media for Yellow Pages; a weakness probably suggests that they *would* substitute other media. Thus, any identified weaknesses are seen as evidence of Yellow Pages vulnerability and not as evidence that the products against which Yellow Pages is being compared may not be close substitutes.

119 We do not accept that a "weakness" alone provides evidence of or even suggests substitutability. Substitution is not a one-way process. The conclusion on whether there are close substitutes for the firm's products is not based on asymmetrical substitution. We must certainly consider whether there is ready substitution *from* Yellow Pages *to* other media but we must also be satisfied of the reverse, ready substitution *to* Yellow Pages *from* other media.

120 For the very reason that telephone directories are not suited to time-sensitive information, they are the one source of directional advertising that advertisers can be virtually certain will be retained for a long period by consumers. Apart from catalogues, which often are valid for periods of up to six months, the information in other vehicles is quickly dated and will be discarded. Catalogues, however, generally provide information on a single seller and do not cover the wide range of goods and services found in the Yellow Pages. The relative permanence of directories supports the Director's position that Yellow Pages are unique among directional media in serving as a continuing reference of all available suppliers.

(ii) Comprehensiveness

121 It is conceded by the respondents that telephone directories are unique with respect to their comprehensive list of suppliers. They argue, however, that comprehensiveness comes from the free listings and that the directory would still be comprehensive even if it contained no display advertisements. That is true. The respondents go on to state that an advertiser values comprehensiveness *only* if the advertiser is targeting customers who contact *all* listed suppliers before making a purchase, in which case the advertiser would not need a display advertisement. The latter statement simply does not follow. The advertiser witnesses who appeared before us made it clear that they value the comprehensiveness of the Yellow Pages because that is a feature that leads consumers in general to use the Yellow Pages. (Since we are talking about a directional medium, we are speaking of consumers who are ready to purchase some good or service and are looking for a supplier.) Once a consumer decides to consult the Yellow Pages because of its comprehensiveness, an advertiser finds it profitable to advertise in the Yellow Pages to cause that consumer to choose its establishment as opposed to that of another supplier.

122 On the distribution side, the respondents do not dispute that there is no other medium that is so comprehensively distributed. All telephone subscribers, the vast majority of the population, receive a telephone directory. The respondents attempt to counter this fact by pointing out that persons who receive the Yellow Pages, and thus are the potential customers of businesses listed or advertising in the Yellow Pages, are also exposed to other media which do not depend on their active involvement, that is, on their deciding to consult the Yellow Pages. This argument, in effect, simply reiterates the respondents' position that all media have the same end use, since it ignores the fact that the voluntary nature of Yellow Pages (consumers must decide to consult the Yellow Pages to be exposed to the advertising) means that it is *not* used for the same purpose as are the creative media (consumers are involuntarily exposed to the advertising by virtue of using the medium for the entertainment or information value). We have found that Yellow Pages are a directional medium. Exposure to creative media is not relevant as they serve a different purpose.

123 The respondents also point out that the scope of a particular directory may be too broad for a particular advertiser. That advertiser may wish to reach only a limited geographic area and could do so more cost-effectively with flyers. This will be addressed in the next section when we consider buyer views on whether the unique characteristics of Yellow Pages are significant to them and thus limit their choices among media.

(iii) Other Restrictions

124 In addition to the restriction on price advertising there are Yellow Pages rules regulating comparative advertising, the use of coupons and the use of superlatives. There is no evidence on the effect of these restrictions. However, their existence does indicate that the publishers of telephone directories were and are willing to create an advertising environment that sets their vehicle apart from others. Clearly Tele-Direct is not concerned that these restrictions make Yellow Pages less attractive such that advertisers would substitute other media.

125 In summary, all media have strength and weaknesses. Contrary to the respondents' arguments, however, we are of the view that "weaknesses" of the Yellow Pages as a medium do not imply that advertisers will readily switch from it to other media. If pricing information is important to advertisers and they *cannot* use Yellow Pages to convey prices because of restrictive rules or time-insensitivity, then their choice to use newspaper advertising instead cannot be seen as a *substitution of newspapers for Yellow Pages*. Likewise, if advertisers *cannot* achieve their goal of being in a "reference" medium by advertising in newspapers, then their decision to advertise in the Yellow Pages cannot be seen as a *substitution of Yellow Pages for newspapers*. In other words, strengths and weaknesses in areas important to advertisers are really characteristics that tend *against* substitutability. The existence of significant (to advertisers) differences between Yellow Pages and other media would lead to the inference that other media are not close substitutes to the Yellow Pages.

(b) Views, Strategies, Behaviour and Identity of Buyers

126 Both sides recognize the importance of the identity, views and behaviour of buyers, in this case, Yellow Pages advertisers. Before turning to the more detailed evidence, we first set out the position of each of the Director and the respondents on the question of substitutability from the perspective of the advertisers.

127 The Director submits that advertisers do not consider that there are any close substitutes for Yellow Pages advertising. He bases this on the testimony of the advertiser and agency witnesses, who although not a representative sample, gave cogent reasons for their views on substitution despite the diverse businesses involved. He argues that the advertisers cannot easily move their advertising spending from Yellow Pages to other media because of the value that they place on certain unique characteristics of Yellow Pages as a medium. In support of this position, he also points to evidence that Yellow Pages spending is not even part of the "advertising" budget at large for many Yellow Pages advertisers.

128 The respondents conceive of all advertisers, including Yellow Pages advertisers, as operating on a fixed advertising budget which is allocated among various media (the "media mix") based on the highest returns that can be obtained from the advertising expenditures. Decisions about media mix are driven by perceptions of relative cost-effectiveness. Therefore, Yellow Pages spending is vulnerable to reduction (by means of smaller size, less colour) or cancellation in favour of expanded spending on other local media which are perceived as more cost-effective. The respondents' position emphasizes the possibility of significant substitution between media "at the margin".

129 The respondents argue that the evidence supports the following propositions (although they state them in a somewhat different order):

(1) the businesses that advertise in Tele-Direct's directories ("current Tele-Direct customers") also advertise in a variety of other media;

(2) current Tele-Direct customers perceive that other media provide as good or better value than Yellow Pages advertising and may be assigned as high or a higher priority in the advertiser's media mix;

(3) current Tele-Direct customers in the same line of business may each choose a different media mix, including a different emphasis on advertising in the Yellow Pages (bigger or smaller, black and white or colour Yellow Pages advertisement);

(4) many of the businesses that do not advertise in Yellow Pages ("Tele-Direct non-advertisers") advertise elsewhere;

(5) Yellow Pages advertisers who have cancelled their advertising in Yellow Pages ("former Tele-Direct customers") continue to advertise in other media; and

(6) former Tele-Direct customers are unenthusiastic about the value provided by Tele-Direct in relation to other suppliers.

They submit that these propositions support their theory that advertisers readily shift their spending between media and thus Yellow Pages advertising and advertising in all other local media are in the same product market. The respondents also point to some evidence which they say reflects *actual* switching behaviour by Yellow Pages advertisers to other media.

130 Two preliminary comments are in order. The first relates to the use of a term such as "at the margin" which, in effect, invites the Tribunal to ignore the cellophane fallacy because of its emphasis on current price levels rather than the competitive price. [61] Any firm or group of firms that have fully exploited their market power might see some substitution if the relative price of their product goes up further. Their inability to raise their prices without buyer switching "at the margin" is, in these circumstances, because they have already exercised their market power *not* because they have *no* market power because of the presence of close substitutes.

131 Secondly, with regard to the proposition that advertising budgets are fixed, there is some support in the evidence that this is true for large companies. The situation is not so clear for small companies. We recognize, however, that some percentage of Tele-Direct's revenue is likely derived from advertisers who have advertising budgets that include Yellow Pages. Therefore, we will proceed to address the critical question of whether these advertisers and others treat Yellow Pages and other media as close substitutes. It will be convenient, in this instance, to organize our review of the evidence put forward by the parties by focusing in turn on each of the customer groups mentioned in the respondents' propositions. We will look first at the evidence regarding former Tele-Direct customers, then turn to non-advertisers and finally, current Tele-Direct customers.

(i) Former Tele-Direct Customers

132 This group comprises Tele-Direct customers who have *completely* cancelled their Yellow Pages advertising. One would expect, therefore, that these advertisers would provide the most compelling affirmation of the respondents' theory of ready shifts in spending between media.

133 At the outset, we note, however, that whatever is learned about former Tele-Direct customers cannot be generalized to the population of Yellow Pages advertisers as a whole. From Tele-Direct's 1994 Corporate Post Canvass Analysis Report we know that former Tele-Direct customers are relatively unimportant in terms of total Tele-Direct revenue, and individually they were spending far less than average annual amounts in the Yellow Pages. The 1993 revenue from advertisers who cancelled their Yellow Pages advertising completely in 1994 represented only 1.3 percent of total 1993 revenue for Tele-Direct (Publications) Inc. The average annual expenditure in the Yellow Pages for these advertisers was about $700. [62]

134 The respondents rely on the information about former customers provided by the January 1993 Elliott report on customer satisfaction. [63] The report indicates that former customers view Tele-Direct's products and services as "poor value" and generally of fair to poor quality, both absolutely and relative to other suppliers.

135 Because the former Tele-Direct customers could answer questions about other media suppliers, the results do indicate that *some* Tele-Direct former customers use other media. The study does not reveal what percentage of former customers are, in fact, using other advertising vehicles or which ones they are using. We know from the 1994 Corporate Post Canvass Analysis Report that former advertisers were spending relatively small amounts in the Yellow Pages. This would tend to indicate their options for buying other media on an annual basis with the dollars thus freed up are limited, given the cost of some of the

media (particularly newspapers, radio and television) alleged to be close substitutes. The survey also found, not surprisingly, a low level of satisfaction with Tele-Direct among former customers. The study does not provide convincing evidence that a significant portion of former customers transferred advertising spending *from* the Yellow Pages *to* other media or that Yellow Pages is vulnerable to competition from other media as opposed to losing advertisers by virtue of its own failings.

136 With respect to former Tele-Direct customers the Director refers to two Tele-Direct reports which set out the reasons which customers gave to Tele-Direct sales representatives for cancelling their advertising: the "P.A.R. (Potential Advertiser Retrieval) Summary" report and the "Wipe Out Sampling Summary". [64] One can assume from the fact that the representatives were able to contact the customers that they remained in business and maintained a business listing.

137 Tele-Direct uses the P.A.R. form completed by cancelled customers to attempt to understand why advertising was cancelled. One of the choices on the form for reason for cancellation is "trying other media". Professor Willig found it "notable" that Tele-Direct listed "trying other media" as a choice on the P.A.R. form., i.e., that Tele-Direct was alive to the possibility of its advertisers switching to other media. However, the P.A.R. Summary report printed in September 1995 shows that only four out of 203 former customers (two percent) surveyed stated that they cancelled because they were "trying other media". Professor Willig conceded that this low number would have some significance and would suggest a low level of movement between media if the study were meant to be comprehensive.

138 To counter the low percentage, the respondents argue that the relevant denominator is actually smaller than 203. To the extent that 56 customers were probably going to go out of business, they should be excluded. If we remove these customers, only three percent of the former customers surveyed gave "trying other media" as their reason for cancelling their Yellow Pages advertising.

139 The respondents would also exclude a further 84 customers who gave a variety of reasons other than "trying other media" for their cancellation (e.g., "financial reasons", "restructuring", "wouldn't discuss", "clients are mostly from referrals") to bring the sample size to 63. They would also include in the numerator, with those advertisers who answered "trying other media", another 47 advertisers who gave various other responses [65] on the argument that these advertisers were probably already using other media and, therefore, would not say they were "trying" other media when they moved their dollars to what they considered a more effective medium. Thus restructured, they argue that the report yields an 81 percent response rate in favour of substitutability between all media.

140 There is nothing in the report which supports the changes advocated by the respondents. The inclusions and exclusions are based on speculation, at best. Beyond removing the customers who have gone out of business, the report must be taken as it stands. If it is significant, as Professor Willig maintained, that Tele-Direct wanted to know if former customers were "trying other media", and included it as a possible response for former customers to choose, then it is significant whether they did choose that response or not. Any of the customers who answered could have selected "trying other media" if that were indeed their primary motivation for leaving the Yellow Pages.

141 On the whole the P.A.R. Summary report demonstrates that only a handful of customers may have discontinued Yellow Page advertising in favour of other advertising vehicles. Even for these customers little can be concluded about substitutability. They said they were "trying other media". Without some follow-up as to whether they found other advertising vehicles more effective in boosting their sales, it is not possible to tell if the other media were close substitutes for them. Indeed, some of these customers may have returned to Yellow Pages because they did *not* find the other media adequate for their purposes.

142 Similarly, the "Wipe Out Sampling Summary" by Tele-Direct shows only two of 87 (about two percent) former customers "trying other methods of advertising". The respondents attempt to re-interpret these results in the same manner as with the P.A.R. Summary report, i.e., by reducing the denominator. Again, there is no support in the document itself for such re-interpretation. This report tends to support the conclusion from the P.A.R. Summary report that very few customers discontinued Yellow Pages advertising in favour of other advertising vehicles.

(ii) Tele-Direct Non-advertisers

143 Tele-Direct's overall penetration rate is about 50 percent. This means, as the respondents state, that some businesses do not buy any Yellow Pages advertising. It is probably also true that most businesses advertise in some way. What does the evidence reveal, if anything, about this class of Tele-Direct non-advertisers? Is their advertising spending likely to be easily switched from whatever vehicles they are currently using into Yellow Pages (and vice versa)?

144 Tele-Direct divides non-advertisers into two groups: poor prospects for Yellow Pages advertising (Market 6) [66] and current non-advertisers with some potential (Market 7). Market 6 accounts are not contacted during a sales canvass; about 85 percent of Market 7 accounts are contacted. Both Valerie McIlroy, Tele-Direct's Vice-president of Marketing until July 1994, and David Giddings, a Vice-president of Sales, described the manner in which Tele-Direct contacts these non-advertisers as a "blitz". During a canvass, one or two days at various times are designated as "non-ad blitz days" and the telephone sales representatives focus on calling as many non-advertisers as they can each day, up to 20 to 30 calls. Tele-Direct's success in converting these non-advertisers is at most five percent.

145 If all media are close substitutes and advertising dollars are as fluid as the respondents argue, then Tele-Direct would seem to have a reasonable prospect of luring customers away from those other media and into the Yellow Pages. Yet, Tele-Direct's success rate with non-advertisers is very low. In addition, the approach taken to non-advertisers, namely telephone sales "blitz" days, provides little indication that Tele-Direct considers these non-advertisers "good" prospects which merit spending a lot of time and money to convert. Former Yellow Pages advertisers who have cancelled would presumably be especially good candidates but Tele-Direct does not appear to direct any special effort even to this group. One of the studies referred to by the respondents that does include some specific information on non-advertisers is the 1990 study by Impact Research. [67] The study consisted of interviews with 36 business people in Montreal and Toronto, half of whom were Yellow Pages "non-advertisers". [68] There is some indication that the non-advertisers were probably using some other media but there is no data on how many advertisers or which media.

146 The results of the study do not, in any event, support the respondents' contention about the potential to shift advertising dollars between all local media in search of the most "cost-effective" alternative. Seventeen of the 18 non-advertisers did not advertise in the Yellow Pages "mainly because of the *perceived non-use of the Yellow Pages by their potential customers*." Sixteen of the non-advertisers were not going to advertise in the next Yellow Pages edition because they were convinced it was an "*inappropriate medium* for their advertising needs". [69] Two were undecided.

147 The views of non-advertisers do not support the contention that there is ready substitution between Yellow Pages and all other local media. If anything, the evidence that is available tends in the opposite direction.

(iii) Current Tele-Direct Customers

148 The respondents place considerable emphasis on the fact that existing Yellow Pages advertisers use a variety of media and that many believe that other media are as good or a better value than Yellow Pages. Because many firms advertise in a number of different advertising vehicles, the respondents argue, they are thus able to shift advertising dollars among them as the returns on them vary.

149 The evidence from the Director's advertiser witnesses, as well as from the Tele-Direct surveys, [70] confirms that Yellow Page advertisers tend not to be solely reliant on this one vehicle. Many advertisers use a variety of media. Even within a heading, some Yellow Pages advertisers have smaller advertisements, advertisements without colour or simply a free listing, thus potentially freeing advertising dollars to spend in other media. However, there is little that we can conclude from this fact alone. As acknowledged by Professor Willig, the use of more than one advertising vehicle tells us nothing about whether the vehicles in question are substitutes, complements, [71] or have no relationship whatsoever. To draw conclusions about substitutability there must be evidence that advertisers do *in fact* shift between the various media in response to competitive moves by those media.

150 The principal evidentiary source referred to by the respondents respecting current customers is the January 1993 Elliott report. As with cancelled customers, current customers were asked to rate Tele-Direct in terms of, among other items, value for money and overall quality. Many existing customers believe that other media provide as good value or better value and quality than Yellow Pages advertising. Thirty-five percent say that the relative value for the money of Yellow Pages is much or somewhat worse than other suppliers while the relative quality is about the same as other suppliers. Likewise, 38 percent of all customers believe that Yellow Pages are high or very high priced in relation to other suppliers. In the western region (Ontario), 56 percent of large customers believe that Yellow Pages are high or very high priced while only five percent say that Yellow Pages are very low or low priced. The respondents say this evidence shows that Yellow Pages are vulnerable to advertisers switching to other media.

151 We are of the view that these results tend to contradict rather than support the respondents' premise that all media are close substitutes. It is difficult to conclude that customers who had good substitutes would choose to continue to purchase a product that they believed was too high priced and of poor value. One would expect that, if all media were close substitutes, the medium perceived as providing better value and price would be purchased in preference to the others. Yet, dissatisfied Tele-Direct customers apparently continue to advertise in the Yellow Pages despite their opinion that other media are as good or better value and lower priced. The Elliott report provides more support for the proposition that Tele-Direct has a comfortable cushion of market power that permits it to keep its customers in spite of the fact that significant numbers of them were not complimentary about its service and pricing than it does for the proposition that Tele-Direct competes with other suppliers providing easily substitutable products.

152 The respondents also refer to a 1994 study by Omnifacts Research in Newfoundland. [72] Four focus group sessions were conducted with a total of 31 Yellow Pages advertisers, two sessions with new advertisers and two sessions with established customers. [73] In-depth interviews were conducted with 16 customers, 10 of whom had reduced their Yellow Pages spending. Many of the customers also used other media, primarily print, in the form of local trade magazines, flyers and direct mail for new customers and flyers and direct mail for established customers.

153 There was a general view among the participants that they *had* to advertise in the Yellow Pages. They generally found it difficult to judge the effectiveness of the advertising they did, including Yellow Pages. In particular, they expressed considerable uncertainty about the value of larger size and coloured advertisements in Yellow Pages. Established customers "... tend to follow the competition when deciding on placement and size of Yellow Pages advertising. Most are clearly not sure whether the advertising in the Yellow Pages actually works, but the consensus is that they have to be there." [74] Some expressed displeasure at the number of headings since they felt compelled to advertise in several headings if their competitors did.

154 Particularly significant are the results of the interviews with customers who had reduced their Yellow Pages expenditures. The report states:

> Those companies who reported that their expenditures decreased fall into two main groupings: those who decreased as a cost cutting measure and those who decreased primarily because they do not perceive the Yellow Pages to be effective for reaching their target markets.
>
> Those that decreased their expenditures as a cost cutting measure essentially felt that the current economic conditions were affecting their business revenues....
>
> Clients who have decreased their Yellow Pages expenditures because they did not consider the Yellow Pages to be effective, reported that their markets are primarily industrial or business-to-business and given the nature of the products and services that they offer, the Yellow Pages are not therefore consistent with their target markets. [75]

There is no indication in either case that customers reduced their Yellow Pages advertising in order to shift dollars into other media. [76]

155 Turning to the Director's evidence, the viva voce evidence of advertisers and other market participants who represent advertisers strongly supports the position of the Director that advertisers do not regard Yellow Pages and other media as close substitutes. Although several advertisers were approximately average size in terms of spending on Yellow Pages, most were in the top two or three percent of Tele-Direct customers. That is, average expenditures ranged from about $2,000 annually to well in excess of $100,000. For the most part a large percentage of advertising dollars were spent by these advertisers on other advertising vehicles, although a small number of the advertiser witnesses devoted almost all their advertising to Yellow Pages. Advertisers spending relatively large amounts in the Yellow Pages are, nevertheless, well placed to provide evidence on the opportunities for substituting between Yellow Pages and other advertising vehicles.

156 Although the circumstances of advertisers and the language used to describe their advertising strategies varied, none of the advertisers indicated that other media could be substituted for Yellow Pages. What they did say was that they use different media for different purposes. They use Yellow Pages advertising for purposes which take advantage of its unique characteristics. They advertise in the Yellow Pages because it is a reference of all available suppliers which is received and retained by most consumers and is consulted by them. They consider that Yellow Pages is cost-effective in this regard and generates a superior level of customer response.

157 Some, particularly large-budget, advertisers use other media to "create awareness". The witnesses use media other than Yellow Pages to advertise specials, include prices or to target a specific group or occasion. Steve Kantor of Tiremag Corp., who sells aluminum wheels and tires, uses other vehicles to convey a seasonal message, selling the "sporty" look in spring and "safety" in fall. Likewise, Kenneth Flinn, who operates a taxi and courier business (Lockerby Taxi Inc.) and relies almost exclusively on Yellow Pages, uses radio during the holiday season to convey the message "don't drink and drive". Yellow Pages cannot accommodate this time-sensitive advertising.

158 On this point, the respondents attempted to demonstrate the vulnerability of Yellow Pages to substitution by a review of advertisements in a number of newspapers from Toronto, Thornhill, London, Ottawa, Niagara, Sault Ste. Marie, St. Catharines and Montreal over a three-week period. The purpose was to show that some advertisers were using both Yellow Pages and newspapers and that they could substitute one for the other. [77] Professor Willig observes that a "limited number" of advertisers employed "much the same" advertisements in both the newspaper and the Yellow Pages. He puts forward only four examples, of which only two are identical. For the other two, "the newspaper ad includes some of the same information presented in the directory display ad, but ... the newspaper ad also includes some timely information of the kind that a directory ad could not contain, due to its permanence." [78]

159 The respondents provided three further examples of advertisements that were similar in both the Yellow Pages and a newspaper. [79] These types of advertisements evidently represent a very small percentage of Yellow Pages advertisements. Equally important is the conclusion that the respondents draw from Professor Willig's survey and the other examples, that the advertisements are only "essentially" the same and that where differences arise, they often stem from the *greater timeliness* of the newspaper. For example, the newspaper advertisement contains a price. They did not, however, provide us with any basis for concluding that prices and other time-sensitive information are trivial or unimportant to advertisers.

160 Time sensitivity for some advertisers cannot mean that those advertisers are likely to *switch from* Yellow Pages *to* newspapers and vice versa. Instead, they will use newspapers to convey time-sensitive information because that is what newspapers are good at doing. Likewise, they will use Yellow Pages to convey a message that is *not* time-sensitive but that takes advantage of other characteristics of Yellow Pages as a medium.

161 Agents specialized in selling Yellow Pages, general advertising agents, a witness with a large media buying agency and the former Vice-president of Marketing with Tele-Direct also testified that they did not consider other advertising vehicles a substitute for Yellow Pages and had not observed their customers to have ever done so.

162 Professor Schwindt's evidence supports the Director's argument that certain types of businesses use or do not use the Yellow Pages because Yellow Pages have particular characteristics that set them apart from other advertising vehicles. His

evidence showed that businesses providing emergency services (glass repair, contractors, plumbers), infrequently consumed products (lawyers, moving and storage, exterminators), services used by travellers (automobile rental), products for which the use of the telephone is important (pizza), or any combination of these, tend to rely heavily on the Yellow Pages. Professor Schwindt also points out that there are types of businesses (grocers, department stores and theatres) that are known to advertise very heavily in other vehicles such as newspapers and flyers and spend virtually nothing on Yellow Pages.

163 On the other hand, Professor Willig, for the respondents, pointed out that whether Tele-Direct has market power, i.e., is vulnerable to ready substitution by advertisers to other media, depends on the combined demand of all advertisers, including those who are not necessarily very reliant on Yellow Pages. While he concedes some advertisers are more reliant than others on Yellow Pages advertising and that this affects the *average* elasticity of demand and the ability of Tele-Direct to exercise market power, he is of the view that the presence of advertisers who are willing to switch serves to discipline Tele-Direct's pricing. He acknowledges, however, that his position is subject to exception if Yellow Pages publishers could be shown to have the ability to price discriminate.

164 Price discrimination allows a firm with market power to secure higher profits (strictly, price less marginal cost) on sales to some customers than on sales to others. A firm without the ability to price discriminate may be disciplined by the ready ability of at least some of its customers to switch if prices are increased and, when considering a price increase, must weigh what it will lose against what it will gain from that action.

165 However, where a firm has found a way to price discriminate, no weighing need be considered. The prices for customers who might switch will be left at a level where they will continue to purchase. However, for those customers who are so reliant on the firm that they cannot switch, the firm may extract higher prices and therefore higher profits on sales to them. The ability to price discriminate therefore tends to demonstrate that a firm is not, at least in respect to the customers who are subject to the discrimination, vulnerable to those customers substituting other products for that of the firm.

166 On our assessment of the evidence, Tele-Direct does engage in price discrimination but not as between headings, i.e., it does not charge plumbers (a business likely to be heavily reliant on Yellow Pages) more for the same advertisement than it does grocery stores (likely to be less reliant). Rather, Tele-Direct price discriminates against those who tend to spend more in Yellow Pages by buying larger advertisements [80] or colour. Those customers are charged much more than can be explained by the additional costs associated with producing and servicing the enhanced advertisement. Thus, larger advertisers (by expenditure) under all headings contribute more to Tele-Direct's profits than smaller advertisers. Professor Willig agreed that if customers who use colour value Yellow Pages more than customers who do not, the pricing of colour is a way to price discriminate between customers who value Yellow Pages more and customers who value it less.

167 Tele-Direct does not have to target these firms; they in effect identify themselves. Firms that are heavily reliant on Yellow Pages are the ones that will buy a larger and more colourful advertisement in order to attract customers away from their competitors in the same Yellow Pages heading. This is indicated by the large average expenditures per subscriber and per advertiser under headings such as "moving and storage" and five other headings that stand out in the top 25 listed by Professor Schwindt in his report. The fact that there are advertisers under other headings who are less reliant on Yellow Pages can have no influence on the ability of Tele-Direct to extract higher returns from advertisers who compete heavily within headings.

168 Moreover, while headings provide an important first indicator of whether a business is likely to be a heavy advertiser, there may be important differences among advertisers within a heading. One advertiser in a heading may have a larger or more colourful advertisement than the advertising by its competition within that heading. This is illustrated by the evidence of Howard Kitchen of Lansing Buildall, whose firm of lumber supply outlets is a relatively large Yellow Pages advertiser in the Toronto area. When asked about the fact that a large new entrant in lumber supply was not advertising in the Yellow Pages, he pointed out that his firm encouraged telephone inquiries while his competitor did not. The pricing of Yellow Pages, therefore, is able to capture the greater need of particular customers within headings as well as between headings. Thus, Tele-Direct's ability to price discriminate causes us to conclude, at least in respect of those larger advertisers who are most reliant on Yellow Pages advertising and therefore purchase large size advertisements or colour, that there is no ready substitutability between Yellow Pages and other media.

(iv) Conclusion

169 There is little evidence supporting the respondents' position that all media are substitutes for local advertisers. Specifically, the evidence of switching behaviour between Yellow Pages and other media is extremely weak. There is almost no evidence that advertisers regard Yellow Pages as serving the same purpose as other media nor that they regard its purpose in the broad manner put forward by the respondents. While there is evidence of changes in advertising expenditures, they are associated with changes in economic conditions or advertising strategy rather than switching between media in response to competitive moves by those media.

170 While it is true as a matter of arithmetic that when expenditures are shifted within a fixed budget there will be winners and losers among the media, this fact tells us nothing about the willingness of firms to reallocate expenditures within the budget *as a result of competitive moves by advertising vehicles.* Advertisers' goals, situations and advertising needs are subject to change. Specific physical and technical differences among media limit the way that they can be used to accomplish a specific objective, such as the announcement of a sale, the listing of prices or a promotion related to a change in season and raise doubt about the willingness of advertisers to treat advertising dollars as fluid or as easily substitutable between Yellow Pages and other media. The respondents' proposition that both former and current Yellow Pages advertisers use a variety of advertising vehicles is likely correct. It was also proven that relatively large percentages of former and current advertisers do not think very highly of Yellow Pages. This tells us nothing about whether there is a sufficiently large body of Yellow Pages advertisers who are willing to switch their advertising dollars in the event that Yellow Pages were priced above the competitive level. There must be evidence that advertisers reallocate dollars in reaction to competitive moves by different media. It is insufficient just to demonstrate a fixed budget and changes in allocation by advertisers between media. In other words, there must be evidence in one form or another that advertisers regard other advertising vehicles as close substitutes for Yellow Pages.

171 The testimony of the advertiser witnesses about why they use Yellow Pages and the importance of Yellow Pages advertising to them is supported by Tele-Direct's own studies of advertisers. Many advertisers believe they *have* to be in Yellow Pages to be in a comprehensive reference tool, particularly if their competition is there. They feel they have no choice. As stated in the Omnifacts study:

> ... There were numerous comments concerning the fact that the Yellow Pages, like the telco, operates in a monopoly situation where their customers are to some extent captive advertisers, who have really no choice but to place their advertising with Tele-Direct. [81]

If they do not use Yellow Pages it is because it does not suit their purpose, not because they can readily move dollars between Yellow Pages and other media. The views of buyers, therefore, strongly tend to support the view that Yellow Pages and other local media are not close substitutes.

(c) Trade Views, Strategies and Behaviour (Inter-industry Competition)

172 The Director argues that there is little evidence that Tele-Direct or other market participants consider Yellow Pages to be in competition with other media. Whatever steps Tele-Direct took in relation to other media, he submits, are to be contrasted with its reaction to other market participants that it clearly regarded as competition. The other competitors referred to by the Director are consultants, agencies which sell Yellow Pages advertising, and independent publishers of telephone directories.

173 The respondents argue that Tele-Direct does not compete, for various reasons, with either consultants or agencies in providing *services* to advertisers. They do, however, admit that independent publishers are in the relevant market with Tele-Direct, whether that market includes only directories or all local media. We will, therefore, compare Tele-Direct's reactions to other media to its reactions to independent directory publishers, about which there is no dispute between the parties.

174 The respondents argue that the evidence reveals "broad competition" or "competition in fact", as referred to by the Court of Appeal in *Southam*, between Tele-Direct and all other local media. They submit that Tele-Direct views other media

as competitors and has taken various initiatives to compete with other media. They argue that other media, in turn, view Tele-Direct as a competitor.

175 The respondents submit that evidence of "broad competition" places all local media in the same product market. The respondents say that differences in the type or intensity of response to different "competitors" should not eliminate some "competitors" from the relevant market. We cannot agree. The type and intensity of the alleged competitive response is an element for consideration in determining if the products argued to be in the same market are close substitutes. Substitutability, as pointed out in the *J. W. Mills* case quoted above, is always a question of degree. Differences in the intensity of the reaction to players admitted to be competitors by Tele-Direct and those alleged to be competitors by Tele-Direct can help us to determine where to draw the line in this case.

(i) Tele-Direct's Views and Behaviour

• General

176 The evidence is unequivocal that other directory publishers have been referred to as competitors by Tele-Direct and the respondents concede that they are. A number of independent publishers not affiliated with a telco produce directories in Tele-Direct's territory. Over the years, Tele-Direct has collected information on and copies of directories of independent publishers. As of 1994, the information was organized into a "competitive database" as part of the creation of a "Sensitive Market Intelligence System". The sales representatives gather information and the marketing department analyzes information on independent publishers as part of this system. Tele-Direct goes to considerable lengths to track and compile data on the revenues, prices, scoping, circulation and other features of independent directories. [82]

177 Further, it is not in dispute between the parties that when a broadly-scoped independent directory entered into Tele-Direct's territory in each of the Niagara region and in Sault Ste. Marie, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns, and improvements to its own directories. [83]

178 While there are references within Tele-Direct documents to other media as "competitors" and to "competing for the advertising dollar", there was no effort on Tele-Direct's part to track revenues, prices, features or circulation in a comprehensive and detailed a fashion as there was with other directory publishers. When one compares the competition data base and sensitive markets material cited above to the documents put forward by the respondents as showing competition with other media, the difference in intensity is immediately apparent. They refer in their written argument, for example, to two speeches from 1984 and 1985 which refer to "competing with all other types of advertising media" and being in a "constant struggle for the customer's advertising dollar." Considerable emphasis is also placed on a 1993 document entitled "East Office Competition Analysis". The "east office" deals with only a portion of Tele-Direct's territory, namely the Peterborough, Orillia and Barrie areas. The document is a summary of a meeting regarding competition. It lists newspapers, flyers, consultants and television as competitors and canvasses various points of discussion. It does not identify particular competitors, give any detail on revenues likely lost, comparative pricing or features like circulation.

179 There was likewise no evidence of a Tele-Direct response to other media competition that bears any resemblance to the focused and intense response to the competing directory publishers. The respondents referred us to other initiatives by Tele-Direct that they submit are of particular significance and we will deal with them in further detail below.

• Educational Efforts

180 Educating employees to deal with the existence of competitors might be some evidence of concern by Tele-Direct about the potential for its advertisers to switch to other media. The evidence regarding Tele-Direct's educational efforts indicates, at best, a weak concern about the necessity to compete with other media. The respondents rely on the Multimedia Training Course as the principal Tele-Direct initiative to compete with other media. The only clear evidence we have, which comes from a written answer by the respondents to a question on discovery, is that the course was given once in 1992 for four days

to all sales "employees". The oral evidence on the issue was vague, suggesting that the course was not an initiative that was considered significant by Tele-Direct. [84]

181 Based on the course having been given once in 1992 to all sales representatives, the investment by Tele-Direct was 1880 (470 × 4) person-days. Based on the average remuneration of a premise sales representative, the cost to Tele-Direct was *at most* $500,000. [85] This was a one-time cost relating to *all* of Tele-Direct's territory with benefits spread over a number of years. By contrast, in reaction to the entry of DSP in Sault Ste. Marie, in one year (1993) in one relatively small market Tele-Direct spent over $215,000. Evidence of educational efforts does not suggest a great concern on Tele-Direct's part about other media competition.

• ***Sales Aids***

182 The respondents point to a variety of "sales aids" produced by Tele-Direct which contain references to other media. They submit that the specific claims made in the documents with respect to other media in relation to Yellow Pages are unimportant. Rather, they say significance lies in the simple fact that Tele-Direct created material which refers to other media to provide to its sales force. They claim that if Yellow Pages were "unique", there would be no need for this type of promotional material.

183 We are of the view that in examining the documents prepared for use by Yellow Pages representatives, we should consider whether the content of those documents points to the treatment by Tele-Direct of Yellow Pages as a separate advertising medium (the Director's position) versus whether the content indicates signs of competitive activity with other media (the respondents' position). The mere existence of sales aids which mention other media in some context cannot be solely determinative of the issue.

184 Two memoranda dated 1983 and 1985, respectively, deal with direct mail (flyers) as an alternative to Yellow Pages and provide visual aids to salespeople. The first concludes:

> We all know that any form of advertising is beneficial in one way or another but direct mail should never be an alternative to Yellow Pages when considering the circulation, permanence, or economy of the two mediums, and these visuals prove that. [86]

The second states:

> Unbelievable.
>
> When comparing the economy of Yellow Pages with the cost of Direct Mail it is hard to imagine why someone would consider Direct Mail an alternative to Yellow Pages advertising. [87]

Despite the fact that Tele-Direct sales representatives may have had, to some extent, to provide arguments on the superiority of Yellow Pages in relation to flyers and, indeed, any other media, the words used suggest non-, or at least low, substitutability between Yellow Pages and the alternative media. The authors of the memoranda appear to express disbelief and incredulity that anyone would ever consider direct mail as an economical alternative to Yellow Pages advertising.

185 Tele-Direct's Strategic Business Plan for the time period 1983-88 states:

> Part of a large, profitable but slow growth industry, the directory advertising business operates from a privileged position in a captive market. [88]

Tele-Direct has characterized its own market as "captive" in this business plan. We infer that this high level document reflects the perception of Tele-Direct management as to competition from other media. It places in context the aforementioned memoranda.

186 The respondents also refer to a set of documents that was prepared for the 1992 sales canvass which includes comparisons between the cost of advertising in Yellow Pages and two dailies and three community newspapers in the Toronto area. Other

documents give the same type of information for other cities and towns. Another similar package compares the cost of Yellow Pages to two Toronto dailies, and shows what could be purchased with the Yellow Pages dollars in television, radio, flyers, calendars, key chains and ball point pens.

187 When we examine the content of these documents, we find that, as with the direct mail examples, what is being emphasized is the *lack* of comparability between the cost of Yellow Pages and the other media. With respect to the comparisons with newspaper advertising, one document (from 1992), for example, compares a 1/4 page advertisement for 30 days in the Toronto Yellow Pages (circulation over 1.3 million) at $677 with a 1/4 page single insertion in *The Globe and Mail* (circulation about 325,000) at over $7,000. Mr. Giddings described this type of sales pitch as making a comparison to point out that there is *no* comparison between Yellow Pages and newspapers. Newspapers are simply so much more expensive that there is no comparability. Another document has a similar tone; it focuses mainly on newspapers for comparisons but also highlights how *little* can be purchased with the Yellow Pages dollars if transferred to television ("2-60 second spots, non-prime time"), radio ("2-1 minute spots") and flyers, calendars, key chains and ball point pens (15,600 flyers, 709 calendars, 1,213 key chains and 1,365 pens while Yellow Pages circulation is over 900,000).

188 Tele-Direct, unlike other print media, does not use a "CPM" or cost per thousand measure in promoting its product to advertisers. A CPM is a calculation of the cost of the medium per thousand persons reached, which can be applied to the number of copies sold (assuming one reader per copy sold) or read (if that number is known) of, for example, a magazine or newspaper. The CPM allows comparisons between print media. Tele-Direct researched the possibility of developing a CPM for its directories in the late 1980s. Its survey of general and specialized advertising agencies revealed that the agencies thought such a measure

> ... entirely unnecessary since we [Tele-Direct] are the only ones in this field and there can be no similar comparison (they absolutely cannot imagine comparing us to the other "media").
>
> . . .
>
> In the event of serious competition, all agree that such a tool would be useful.
>
> However, two of the largest agencies already understand the usefulness and even suggest the development of this type of measure to better acquaint people with the Yellow Pages on a "national" level, and to establish ourselves as the unbeatable leader in the industry. [89]

Although a later study concluded that a CPM measure should be developed for Yellow Pages that would be, to some extent, comparable to other media in order to "contribute to developing a media image for Y.P. directories, and would create a barrier for potential competition", none was developed. Tele-Direct does use a CPM-type formula internally in its pricing to ensure that its directories of similar circulation are priced similarly but CPM is not used as a marketing tool.

189 Equally relevant to the question of how Tele-Direct views its product in relation to other media is the large volume of Tele-Direct promotional material selling advertisers on the advantages of being dominant *in* a Yellow Pages heading. The virtues of size and colour are extolled in testimonial letters and other promotional material. The "YPROI study", which the respondents argue is a primary tool of their sales force in selling the "value of the medium", starts with a comparison of which media influenced persons who had made a recent purchase, [90] but also includes a page trumpeting the importance of size, colour and "impact" within the Yellow Pages so as to influence the buyer's selection of a firm once he or she consults the Yellow Pages.

190 The advantage of "standing out" that is being sold to customers is with respect to competitors advertising *in the Yellow Pages*, and not with reference to advertisements in some other medium. As pointed out by one of the Director's economics expert witnesses, Margaret Slade, [91] the amount of advertising a firm does in the Yellow Pages is dependent on how much its competitors do. When a Yellow Pages sales representative convinces a customer to increase its expenditures on Yellow Pages advertising, this creates pressure on its competitors to do likewise (referred to as the "prisoner's dilemma"). This phenomenon came through in the comments received from the established customers participating in the Omnifacts study in Newfoundland,

that they tend to follow the competition when deciding on placement and size of their Yellow Pages advertising. The pressure on advertisers to observe and to some extent follow what their competitors are doing in the Yellow Pages indicates that Yellow Pages are a distinct medium, a separate arena within which firms seek to stand out.

191 The respondents stress that competition for the advertising dollar is not so much a matter of whether firms advertise in the Yellow Pages but of how *much* they advertise, primarily whether they buy coloured advertisements and larger advertisements. The number of headings would be an additional factor determining the expenditures of customers. It is noteworthy that the attempts by Tele-Direct to sell colour and size to its advertisers are based on comparisons with black and white advertisements or smaller advertisements *within* Yellow Pages.[92] Thus, the success or failure of Tele-Direct representatives in capturing more of the advertising dollar depends on the extent to which they can convince customers that they need to upgrade their advertisements *to be more effective vis-à-vis the customers' competitors* in the Yellow Pages. It is difficult to perceive of this as "inter-media" competition.

• ***Pricing -- General Policy***

192 Another relevant area in inter-media views and conduct concerns how, if at all, the prices of other media influence Tele-Direct's pricing. Tele-Direct generally establishes its prices about a year and a half to two years in advance, with prices, for example, for the 1995 directories set in late 1993.

193 The Pricing Policy documents placed on the record reveal that Tele-Direct considers various inputs in setting prices. For example, in the 1993 Pricing Policy produced in October 1991,[93] these included rate/circulation alignment policy,[94] recent Tele-Direct price-ups (1988-92), the consumer price index ("CPI") (1991-93), the paper and allied industry price index (1990-92), the percentage change year-to-year in the number of directory copies printed by Tele-Direct (1991-93), estimated price-ups in other media for 1992 and Tele-Direct's internal rate of inflation (1991-93). Given the timing, much of the information is estimated. The 1994 Pricing Policy is a two-page document only as all 1994 issues had a zero percent price-up. In the brief text, the following are mentioned: relationship with customers, impact on profitability, prevailing economic factors, cost containment including a recent, more favourable printing contract and the rate of inflation or CPI. In the 1995 Pricing Policy, the only change from the 1993 Pricing Policy is to replace the "paper and allied industry price index" heading with "junked directories".[95] The 1996 Pricing Policy adds two additional items, gross domestic product and personal disposable income and reverts to using an indicator of paper cost increase, as for 1993.

194 In all cases, the information regarding the forecasted price-ups of other media that is contained in the policies was obtained from general advertising agencies, usually two or three different ones, and is stated as a range. The media included are television, dailies, magazines, outdoor and radio. "Business papers" also appeared in one year and "transit" in one other year.

195 To obtain insight on how the information with respect to other media entered into pricing decisions, we look to the testimony of Ms. McIlroy, who was intimately involved in the pricing decisions. According to her, the "key drivers" of pricing were, in order of importance: relationship to cost, rate/circulation re-alignment, revenue stream for the sales force and local considerations, both economic and the presence or feared entry of a competitive directory. She stated that there was no direct relationship between the prices of other media and Tele-Direct's pricing. Her view was based on her own experience and a review of all relevant pricing documents on the record, dating from the early 1980s to the 1995 Pricing Policy. Ms. McIlroy did not alter her position regarding the relative unimportance of other media in setting Yellow Pages prices when responding to questions on cross-examination.

196 Douglas Renwicke was the Senior Vice-president to whom Ms. McIlroy reported from 1991-94 and was involved in sales or marketing from 1988. He expressed general agreement with Ms. McIlroy's description of the price setting process. He disagreed over certain details that are not germane to the present discussion. However, more importantly, he also disagreed with Ms. McIlroy concerning the relevancy of other media prices in Tele-Direct price setting.

197 Mr. Renwicke stated that the three "primary" key drivers for pricing in the 1990s are CPI, other media price-ups and local market knowledge. A group of "secondary" key drivers include growth and circulation, gross domestic product and Tele-

Direct's internal rate of inflation (costs). He distinguished price setting in the 1980s when the key drivers were circulation, internal costs and, from 1987 to 1990, circulation alignment.

198 At least for the 1980s, during which Tele-Direct enjoyed exceptional growth, Mr. Renwicke agrees with Ms. McIlroy that factors such as the internal rate of inflation at Tele-Direct and circulation growth were primary determinants of Tele-Direct's prices. He also recognizes that towards the end of the 1980s discrepancies in rates per thousand in different directories became another important concern that entered at the local market level. The attempt to get prices in line across markets was abandoned for a couple of years following the recession but appears to be reemerging as an ongoing factor. Considering Ms. McIlroy's and Mr. Renwicke's evidence together, we conclude that other media prices were not a "key driver" during the 1980s.

199 Mr. Renwicke explicitly distinguishes the 1990s and it is here that he appears to take issue with Ms. McIlroy. We will, therefore, look in more detail at the information available to the officers engaged in price setting in 1991, 1993 and 1994 (for 1993, 1995 and 1996).[96]

200 The 1993 Pricing Policy document sets out the following predicted increases in various items for 1993:

Increase in CPI for Ontario: 3.6%

Increase in CPI for Quebec: 3.7%

Tele-Direct internal rate of inflation: 5%

Increase in cost of printing: 4.7%

Increase in copies to be printed: 2.9%

(proxy for circulation increase)

201 The ranges of predicted percentage price-ups for other media set out in the document were obtained by Claude Phaneuf, Manager of Marketing Research, from two general advertising agencies and a media buying firm.[97] Notably, these predicted increases are for *1992 only*:

Television: 0% - 10%

Dailies: 3% - 7%

Business Papers: 5% - 8%

Magazines: 3% - 7%

Outdoor: 3% - 5%

Radio: 4% - 7%

According to Messrs. Phaneuf and Renwicke the predicted price changes for 1992 were considered relevant even though Tele-Direct was considering price changes for 1993 because the canvass of customers for the 1993 directories was done during 1992. However, Mr. Phaneuf could not explain why predicted changes for other factors such as the CPI were obtained for 1993.

202 Two notes accompany the information on other media price increases. They state: "Demand Driven Market" and "Anybody's Crystal Ball". According to Mr. Phaneuf, the second note is a warning about the discrepancy in the information received from different sources (as indicated by the wide range of predicted price changes, such as for television). Taking the first note at its face value, it means that the prices that would actually prevail in 1992 would depend on the state of demand at that time.

203 The average Tele-Direct price increase established in October 1991 for 1993 was five percent, with a minimum of 3.5 percent and a maximum of 5.9 percent for specific directories. The average price increase of five percent for 1993 falls within the range of other media price-ups (not difficult since the range is so large) but the same average increase could just as easily have been arrived at without any reference to other media prices. This observation also applies to the pricing documents for 1995 and 1996 that were used in setting prices in 1993 and 1994.

204 Several other points emerge from a review of the information available to Mr. Renwicke and other officers. Although Mr. Renwicke stated that he would be concerned about the prices of community and daily newspapers, only the price-up of dailies was collected. While the general agencies that provided the information to Mr. Phaneuf were much more likely to be familiar with dailies than with community newspapers, it is instructive that there is no evidence of any effort by Tele-Direct to obtain pricing information about its other alleged competitors, community newspapers.

205 Further, no information on flyers or direct mail is included. Other Tele-Direct documents group flyers with Yellow Pages as directional media, indicating that prices for flyers would clearly be relevant, and perhaps more relevant than predicted prices for the electronic media, business papers and magazines. We also note that the information provided by Mr. Phaneuf for television does not reveal whether the prices in question relate to local television, network television or both. When questioned about this Mr. Renwicke was not sure but thought that the predicted price changes related to local television.

206 We conclude that Ms. McIlroy's view that the prices of other media had little or no influence on Tele-Direct's pricing policy in the 1990s is borne out. Mr. Renwicke's use of the term "key driver" when referring to the prices of other media is disingenuous. The documentary evidence does not support this characterization. Nor, in fact, does the remainder of Mr. Renwicke's own testimony. By a "key driver", he apparently meant a very tenuous relationship between Tele-Direct's price increases and the price increases of other media. He testified that other media prices enter into Tele-Direct's price setting as follows:

> ... [W]e wouldn't focus this closely on network TV as we would on community or daily newspapers, but we focus on that because we don't want to be way out of line with what newspapers are pricing up at or other comparable media that we feel our advertisers use amongst their choices of how to promote their business.
>
> ... We feel if the gap was too large and we didn't pay attention to that over time, there could be at least substitution on the margin that could take place.
>
> I think that's a real concern throughout the recession.
>
> . . .
>
>> Q. You said you would be concerned if the prices were way out of line. What do you mean by "way out of line"?
>>
>> A. Frankly, particularly with newspapers, I would consider anything, five percent or greater, to be too much out of line. [98]

A fear of losing *some* advertising dollars to other media if a *relatively large* difference in price *increases* persists over time (and during a recession) confirms only that newspaper or other media pricing provides little or no competitive discipline for Tele-Direct's pricing. Tele-Direct did not ignore the prices of other media; they were a part of the general economic environment. But given the types of media covered and the tentative conclusions that it could derive from the information we cannot conclude that it had the concern of a firm worried about close substitutes.

• Pricing -- Revision of 1993 Prices in 1992

207 The respondents place considerable emphasis on the fact that in February 1992 Tele-Direct, for the first time ever, revised its 1993 prices during the canvass for the 1993 directories as it ran into advertiser resistance due to the difficult economic times. For the remaining directories not yet canvassed the average price increase was reduced from five percent to 3.2 percent.

208 The respondents point to a brief statement in the minutes of a sales and marketing executive meeting held in February 1992 which they say reflects the reasons why prices were revised:

> The rates that were implemented for 1993 have been revised to lower levels given the reaction of our customers to our 1992 prices, *the pricing of other media* and the expected rate of inflation in Ontario and Quebec. [99]
>
> (emphasis added)

They also rely on the revised Standby Statement for 1993 Pricing which was presented at the meeting and apparently accepted by all concerned. The Statement reads:

> Our pricing policy for 1993 issues of Yellow Pages and White Pages directories has been revised downward to take into consideration the economic conditions prevailing in 1992.
>
> This policy reflects the fact that most prices are on a downward trend for 1992. It is also in step with the advertising industry where media rates for 1992 are expected to be in the 3% to 5% range for daily newspapers, magazines and out-of-home (billboards, etc.). Radio and T.V. are expected to be in the 0% to 5% range with peaks of 10% for T.V. due to high demand for last-minute buying.
>
> All media are expected to increase their rates towards the end of 1992 as the economy picks up. Forecasts for 1993 and 1994 are for prices increases of 10% or more. Based on these forecasts, it is evident that Yellow Pages directory advertising will be one of the media with the lowest price-ups during that period.
>
> Finally, our pricing structure must also reflect our own internal cost increases which have been kept to a minimum for 1992 thus allowing us to keep price-ups at their very low levels. [100]

209 Both Mr. Renwicke and Ms. McIlroy attended the meeting at which the prices were revised. Ms. McIlroy attributed no importance to the Standby Statement as a price setting document, regarding it purely as a document prepared for public relations purposes. Nor did Mr. Renwicke mention other media prices when describing the motivation for the revision in 1993 prices. He emphasized general economic conditions:

> In 1991 we clearly did not project the decrease that would take place in CPI or the recession ... [I]n February '92, we actually re-did prices for '93 for the books we could still catch and I am thinking of the border markets in particular that were being decimated with cross-border shopping, Niagara Falls, Sarnia, Windsor.
>
> We reduced those all by a percentage point. So, we did our best to try and get back down to a point where we were near CPI because our customers were reading in the paper every day that inflation in Toronto was approaching zero and why were our rates up at four per cent, five per cent, six per cent. Partly it was a function of the lag we had in setting those prices initially and not foreseeing the downturn that did take place in the economy. [101]

Taking into account both the documents and the views of two of the officers involved in the exercise, the 1993 price revision does not change our view that other media prices are not "key drivers" in Tele-Direct's pricing.

• ***New Products***

210 The respondents list four new product initiatives which they say show competition between Tele-Direct and the other media by the fact of their having been tried. These four products were coupons in directories, AdSpot and BrandSell (creative-type directory advertisements), colour and participation in the "Marketing the Medium" program which is designed to prove the value of Yellow Pages.

211 There was little evidence about the nature and cost of these programs and why they were launched, which media were considered important competitors in triggering them, what success they achieved in terms of revenue gain or loss for Tele-Direct

and if they were discontinued and why. Contrary to the respondents' submissions, we cannot accept that the mere existence of these alleged new products is instructive. Their mere existence is not indicative of substitutability between Yellow Pages and any other advertising medium.

(ii) Newspapers

• *Newspaper Consultants*

212 The respondents rely on the evidence of the activities of newspaper consultants as proof both of Tele-Direct's response to a "competitor" (daily newspapers) and of an initiative by another medium to compete against Yellow Pages. Newspaper consultants attempt to convince Yellow Pages advertisers that they are spending too much on their Yellow Pages advertising. Once the newspaper consultants have succeeded in persuading the advertiser to cut back on Yellow Pages spending, they then try to convince the advertiser to place some of the dollars "saved" in newspaper advertising.

213 Newspaper consultants first became active in Canada in 1987, having previously operated in the United States. One method used by the consultants was to hold seminars, sponsored by the newspaper that hired the consultants, to which Yellow Page advertisers were invited. A second method, apparently employed to a greater extent in recent years, is to locate good "prospects" among Yellow Pages advertisers (those with large or coloured Yellow Pages advertisements) and then visit them.

214 Newspaper consultant activity is not convincing evidence that newspapers and Yellow Pages are close substitutes. If Yellow Pages and newspapers were close substitutes, the newspaper's sales representatives would be fully familiar with Yellow Pages as part of the competitive environment. If the two media were close substitutes it would not be necessary for newspapers to hire outside "consultants" on a one-shot or periodic basis. Further, it would be expected that price discounting by the newspapers would be a more potent weapon than the rather circuitous approach of the use of consultants in regaining or capturing revenue from the Yellow Pages. The success of newspaper consultants depends on finding customers who are unhappy with Tele-Direct. An unmistakable implication is that such customers do not perceive other media as close substitutes for Yellow Pages, otherwise they would already have stopped or reduced their use of Yellow Pages.

215 Further, a successful newspaper consultant must convince the advertiser that a different, less costly Yellow Pages advertisement or set of advertisements will work *as well* as the existing Yellow Pages advertising. In other words, the question is how much does that advertiser really need to spend to have an effective advertisement *in the Yellow Pages*? This is borne out by the fact that a consultant's methodology involves two distinct steps. First, the Yellow Pages advertiser must be convinced that he or she can reduce Yellow Pages expenditures without prejudicing the results from the Yellow Pages advertising. Then, the newspaper consultant must try and sell the advertiser on spending the dollars saved elsewhere. But, this is clearly a second step. This is recognized even by Tele-Direct in a document referring to newspaper consultants:

> newspaper reps are recommending down-size YP and don't talk about newspapers (probably will go in later to make pitch). [102]

The advertiser, of course, may simply decide to pocket the savings. This process is not indicative of shifting of spending from one competing media to another. The restriction of the context to the Yellow Pages as the first step taken by newspaper consultants is a critical point in defining the relevant market. It indicates that what is occurring is not the allocation of the advertisers' overall advertising budget between newspapers and Yellow Pages but rather focusing on whether money can be saved in Yellow Pages advertising without regard to other media.

216 On the whole, the presence of newspaper consultants has been sporadic, sometimes in one local market and sometimes in another. In no case have they been continuously active in any local market. With respect to the actual success of the newspaper consultants, Ms. McIlroy testified that "they were never successful in doing any damage really of any kind, at least that we monitored. I never noticed any significant damage." [103] Mr. Giddings also testified that he could not quantify their impact. [104] This is telling evidence regarding Tele-Direct's response to the alleged "competition". The success of newspaper consultants could be easily tracked. They visit advertisers individually and try to convince them to adopt a specific advertising plan. In these

cases it is perfectly clear to the Tele-Direct sales representatives why the customer is making changes in his or her program. No data was gathered by Tele-Direct on the impact of newspaper consultants, which would have been expected had Tele-Direct considered the effort worthwhile. It apparently did not.

• ***Community Newspapers***

217 The respondents called one witness who represented community newspapers. Ginette Allard-Villeneuve of Quebecor testified that, in her opinion, community newspapers and Yellow Pages compete for the advertising budget and that the advertisements placed in each are "somewhat interchangeable". Since Ms. Allard-Villeneuve appeared to have very little familiarity with or knowledge about the Yellow Pages, it is evident that she is referring to a very attenuated form of "competition" between the two. The respondents do not, in fact, seem to be claiming anything more than that.

(iii) Conclusion

218 The evidence on inter-industry views and conduct indicates that there was some limited competition between Yellow Pages and other media, principally newspapers. When the form of this competition and Tele-Direct's response to it are contrasted with the kind of head-to-head competition that occurred in Sault Ste. Marie and Niagara Falls, where there was entry of competing broadly-scoped telephone directories, there are pronounced differences in the intensity of Tele-Direct response. [105] The same difference in intensity is found in Tele-Direct's failure to track its successes and failures relative to other media and its assiduous efforts to track the sales volumes of independent publishers that it had identified as competitors. Tele-Direct did collect anticipated prices of other media in setting its prices. However, these were broad estimates and the prices for electronic media, for which there is virtually no evidence of direct competition with Yellow Pages, are included. On the other hand, media which are closer (as opposed to "close") substitutes such as community newspapers and flyers are excluded. It is difficult to see the predicted price changes of other media as an important ingredient in Tele-Direct's pricing. In short, the evidence of inter-media competition supports the Director's position that Yellow Pages and other media are not close substitutes.

(d) Price Relationships and Relative Price Levels

219 There is little evidence that can properly be considered under this heading. Telephone directories and other media do not have a common standard of measurement that would allow valid price comparisons. While price comparisons were prepared for the use of Tele-Direct sales representatives, they were designed to show that Yellow Pages advertising was virtually non-comparable to other media (primarily newspapers). In any event, no common standard of measurement was used.

220 The respondents refer to two documents which purport to track a weighted average of annual price increases of other media and those of Tele-Direct over approximately a decade, along with the overall rate of inflation. [106] There is no rigorous analysis either in the internal documents of Tele-Direct or by the experts that would allow any conclusion to be drawn from these documents alone. Given that there are common economic forces driving prices even in very disparate industries, one would expect to see some correlation in overall price movement. An attenuated correlation in price movement does not indicate close substitutes. Even a high correlation between two sets of prices is only a *necessary* condition for the two products to be considered to be in the same market. But, it is not a *sufficient* condition to prove they are in the same market because other factors than substitutability may be responsible for the correlation.

(e) Switching Costs

221 There is no dispute that the costs of switching from one medium to another are relatively low.

(5) Conclusions Regarding Substitutability

222 Each of the indicia points in the same direction. We have little difficulty in concluding that telephone directory advertising is a distinct advertising medium without close substitutes. Directory advertising is a directional medium with a function distinct from that of creative media. Within the group of media considered to be directional, a review of the evidence regarding physical

and technical characteristics, advertiser perceptions and behaviour, inter-industry competition and price relationships leads us to conclude that telephone directory advertising is a relevant product market.

B. Geographic Market

223 There is no dispute between the parties that the geographic market is local in nature, corresponding roughly to the scope of each of Tele-Direct's directories.

VII. Control: Market Power

224 The exercise of defining a relevant market is only a step towards answering the critical question of whether Tele-Direct has "control" or market power in that market. As the Tribunal has said on previous occasions, market power is generally considered to mean an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms. In those cases, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry. [107]

225 The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded. In this case, the parties addressed both the indirect or structural approach to market power (market share and barriers to entry) and "other evidence" of market power of a more direct nature. The Tribunal will likewise address both avenues in that order.

A. Indirect Approach: Market Structure

226 Having determined that telephone directory advertising in local areas constitute relevant markets, it remains to determine Tele-Direct's market share and the conditions of entry into those markets. A large market share can support an initial determination that a firm likely has market power, absent other extenuating circumstances, in general, ease of entry. [108]

227 We will deal with the question of market power in the supply of telephone directory advertising, which includes both publishing and advertising services. The issues relating to the possible "subdivision" of the market into two (or perhaps more) component parts will be canvassed later in these reasons.

(1) Market Share

228 Based on Tele-Direct's November 1995 revenue estimates for independent publishers operating in its markets and the data on the record regarding its own published revenues for Ontario and Quebec for 1994, Tele-Direct (Publications) Inc. has approximately 96 percent share of telephone directory revenues in Ontario and Quebec. [109] It is instructive to note that, in 1992, a Tele-Direct document estimated the total *potential* sales of independent directories in Ontario and Quebec at $32 million. [110] That would indicate an upper limit on the potential growth of the independents of well under 10 percent of Tele-Direct revenues. The same year, Tele-Direct estimated the *actual* sales of independents at less than one-third of the "potential" amount set out.

229 The November 1995 estimates place the total revenues of the independents at slightly over one-half of what was described as their potential business in 1992. Even in Tele-Direct's worst case scenario regarding growth of independents, it would still be left with a market share of 90 percent.

230 Although there was no significant disagreement between the parties that the geographic markets are local in nature, largely corresponding to the scope of the relevant Tele-Direct directory, Tele-Direct's information on other publishers was presented for sales throughout the territory of Tele-Direct (Publications) Inc., namely Ontario and Quebec. No local market

information was placed on the record except for the revenues of White and DSP in the Niagara and Sault Ste. Marie areas. White publishes a directory in each of Niagara Falls, St. Catharines and Fort Erie, as does Tele-Direct. DSP publishes one directory covering the area bounded by Sault Ste. Marie, Elliot Lake and Wawa in Canada. Tele-Direct publishes three separate directories for that area. On the basis that in each of those two local markets the large independent and Tele-Direct are the only significant players, in the Niagara region based on 1994 revenues, Tele-Direct has a market share of about 85 percent, while in the Sault Ste. Marie region its market share is about 80 percent. [111]

231 Thus, even in the two markets in which Tele-Direct faces the most significant competition, its market share is still over 80 percent. In the absence of further detailed information on local market shares, which apparently even Tele-Direct does not compile, this fact, allied with Tele-Direct's overwhelming share of sales over its territory as a whole, leads us to conclude that Tele-Direct dominates telephone directory advertising in markets in Ontario and Quebec. *Prima facie*, we are of the view that Tele-Direct has market power based on its large share of the relevant market, absent compelling evidence of easy entry into the supply of telephone directory advertising.

(2) Barriers to Entry

232 In the absence of barriers to entry, even a single seller cannot exercise market power. Any attempt by the incumbent to price above the competitive level will attract immediate entry by competing sellers. We have concluded that Tele-Direct has a large share of the relevant market. Proof of easy entry would overcome the initial determination that Tele-Direct has market power in the supply of telephone directory advertising.

233 The parties have organized their arguments regarding barriers to entry under three headings, (a) observed entry and exit, (b) sunk costs and (c) incumbent advantages. We will use the same headings.

(a) Observed Entry and Exit

234 Observed entry into a market can provide some indication of the existence or non-existence and the nature of any barriers to entry. There is no dispute that entry into publishing a "niche" directory appears to be relatively easy. The Director has admitted as much, based on the large number of niche directories and the high level of observed entry and exit.

235 The Director argues that the smaller directories have captured only a "minuscule" portion of the market and that fact, combined with Tele-Direct's lack of competitive reaction to their presence, confirms that they are of little importance in constraining Tele-Direct's market power. Further, the experience of White and DSP confirms the existence of significant barriers to entry by a broadly-scoped directory.

236 The respondents submit that entry need not be on a large scale and that many independent publishers have entered on a small scale and then grown slowly, thus avoiding drawing a response from Tele-Direct. Although not directly stated, the implication is that the publishers that chose this strategy have become a competitive force in the market. They also point to White and DSP as proof that broadly-scoped directories have successfully entered, remain in the market and are even profitable.

(i) Niche/Smaller Directories

237 Relative ease of entry by niche directories is not particularly relevant to an assessment of Tele-Direct's market power as it is clear from the evidence that the presence of these directories has had and can have little competitive impact on Tele-Direct. There is no evidence of any response by Tele-Direct to the presence or entry of a niche directory. There is certainly no evidence that they currently limit Tele-Direct's pricing or encourage better service by their presence.

238 With the exception of directories published by White and DSP, virtually all of the independent directories cover smaller geographic areas than the directories produced by Tele-Direct. The Director is correct that these smaller directories account for only a small portion of the overall market (less than three percent by revenue). Further, level of activity of each of the smaller independent directories indicates why individually they are not a serious threat to Tele-Direct. If the directories of DSP and White are excluded, there are 279 other independent directories with estimated average annual sales of just over $51,000

each. Of these, the 30 Locator directories had by far the largest estimated average annual sales, of the order of $200,000 per directory. Mr. Renwicke thought that the largest Locator directory "could" be close to $1 million in revenue, which would make the remaining directories even smaller on average. The remaining 249 directories had estimated average annual sales of approximately $33,000 each. In contrast, in 1995, the broadly-scoped DSP directory had estimated annual revenues of over $1 million while each of White's three broadly-scoped directories averaged over $500,000 in revenues.

239 The respondents spent some time with their witness, Mr. Renwicke, reviewing examples of directories of three independent publishers in support of their position that, instead of going "head-to-head" with Tele-Direct, an independent could enter small and gradually expand and still be a competitive force in local markets. The respondents referred specifically to the Easy to Read directory, the Locator directories and the Other Book. There are Easy to Read directories in about a dozen, mainly small, Ontario communities. Locator publishes some 30 directories in various small to medium-sized Ontario towns. The Other Book published ten directories, all in the Ottawa area, but is not published anymore. [112]

240 The argument focuses on the Easy to Read directory in Stratford, Ontario. It is described in the argument as an "impressive" directory. The fact remains, however, that it is of negligible size. The total revenues of all the Easy to Read directories are not even stated separately on the Overview of Other Publishers in Tele-Direct Markets. Presumably they are included in the group of "Other Publishers in Ontario (geographic)" which have average total annual sales of only about $31,000. Tele-Direct's 1994 revenues in Stratford were over 40 times that amount. [113]

241 Mr. Renwicke pointed out and made favourable comments about the features of the Locator directory entered in evidence, which included postal codes, audiotext [114] and community pages. He also described the Other Book, which had postal codes, amortization tables and a babysitter's guide as some of its features, as a "good-looking book".

242 Yet, despite the apparent quality of these directories, some of which contain features not offered by Tele-Direct in its directories, the respondents did not refer us to any evidence of Tele-Direct reacting to their presence in a way that would indicate that they were actually a competitive concern, in the sense of providing some discipline on Tele-Direct's quality and pricing. It is indisputable that Tele-Direct is aware of the presence of these independents and to some extent monitors their progress. That is not, in our view, evidence that these directories are a competitive force in the market. There is no indication on the record before us of any positive reaction of the type that occurred when DSP and White entered. Other than the existence of the competitive database and Mr. Renwicke's opinions, the respondents referred only to a 1993 presentation by Mr. Renwicke to the Tele-Direct board which provided information on independents and named White, DSP and Locator.

243 Moreover, even if there was evidence of some competitive response by Tele-Direct to niche directories this by itself would hardly be sufficient to conclude that Tele-Direct did not have market power given its overwhelming market share. The smaller or niche directories are, by their very nature, limited in scope and influence. Thus, although entry on this scale is easy, up to a point (since each new entrant must find a new "niche" and there is a limited number), entry by smaller directories does not limit Tele-Direct's market power.

(ii) Broadly-Scoped Independent Directories

244 The conditions of entry by a broadly-scoped independent directory covering an area similar to the corresponding Tele-Direct directory, which will compete head-to-head with Tele-Direct, are highly relevant to the question of market power. Tele-Direct's responses to the entry of broadly-scoped directories in the Niagara and Sault Ste. Marie areas indicate that only such head-to-head competition has the potential to produce the benefits to consumers that one looks to competition for, namely lower prices and better products and services.

245 Can entry by publishers of broadly-scoped directories be considered sufficiently easy so that Tele-Direct is unable to take advantage of its large market share? Additionally, assuming that entry of a single competing publisher were to occur, would this assure that Tele-Direct would no longer have market power because of either the intensity of competition or easy entry conditions for additional publishers? The respondents urge us to conclude that because White and DSP managed to enter in particular markets and have remained in business, entry barriers are low enough that Tele-Direct has no market power. We

decline to place so much emphasis on two isolated instances of entry in answering these questions. To answer both questions properly, we must review the arguments on entry conditions for broadly-scoped independent directories in some detail.

(b) Sunk Costs

246 The Director argues that sunk costs are a barrier to entry as they are perceived by potential entrants as unrecoverable if entry is unsuccessful. The respondents submit that, based on the Tribunal's decision in *Southam*, sunk costs alone are not enough. In *Southam*, the Tribunal held that neither sunk costs nor economies of scale were themselves sufficient to create an entry barrier but that together they were. [115] The respondents contend that the other source of a barrier to entry identified by the Director in this case, namely incumbent advantages, is not like economies of scale and does not operate with whatever sunk costs are present to create entry barriers in the sense required by *Southam*.

247 We agree that *Southam* held that sunk costs or economies of scale individually are not sufficient. That decision, however, should not be taken to mean that the combination of sunk costs and economies of scale is the only way in which sunk costs can form part of a barrier to entry. What is important is whether the market in question is one in which the potential entrant faces the risk that the post-entry conditions will be less favourable than pre-entry conditions because of the likely response of the incumbent. Thus, in *Southam*, the presence of sunk costs and economies of scale meant that there was a credible threat that the incumbent would maintain output in the face of new entry even if doing so drove prices down towards cost. [116] This acted as a deterrent to entry.

248 In this case, therefore, it will be necessary to ask, first, whether there are in fact significant sunk costs associated with directory publishing. Then, we must determine whether the nature of the market is such that prospective entrants face a credible threat that the incumbent will respond in a manner that will make entry unprofitable given the existence of the sunk costs.

249 Sunk costs are defined as the part of the investment required for entry that cannot be recovered in the event that the attempt fails. Assets that are of value only to a specific enterprise are sunk and those that are of value to other firms are not sunk, or only partially sunk. The Director submits that entry into the directory business requires substantial sunk costs: acquiring and compiling subscriber listing information, assembling advertising enhancements), training the sales force and promoting the directory. The respondents admit that there is no doubt that there are "some" sunk costs associated with publishing a directory for the first time but submit that the Director has overstated the sunk costs. They say the sunk costs are not, in fact, significant. However, the evidence of the witnesses from White and DSP, which was not contradicted, amply supports the premise that the activities listed must be carried out in order to produce a directory and that the costs incurred are substantial.

250 DSP and White both entered by publishing a "prototype" directory. With a prototype directory, the publisher offers advertising in the directory at no charge. The prototype is distributed to consumers and the publisher then has a history of usage to give it credibility in selling advertising in its next directory. The respondents argue that the sunk costs are substantially increased when an independent publisher chooses to enter by publishing a prototype because there are no advertising revenues to offset the costs. They say that the extent of the sunk costs is within the control of the entrant and a different entry strategy would generate lower sunk costs.

251 Establishing usage and selling advertising are inextricably linked for a directory publisher. As stated in the 1993 Simba/ Communications Trends study, achieving credibility among local advertisers is one of the biggest hurdles that a publisher must overcome. [117] It was precisely in order to overcome the credibility concerns of advertisers that both DSP and White chose initially to publish a prototype directory. Entering with a paid directory does not eliminate the credibility problem and achieving credibility, by whatever means chosen, involves costs. We have no basis on which to conclude, as urged by the respondents, that it would have been less costly overall for White and DSP to enter first with a paid directory.

252 The respondents also submit that if the entrant chose to enter with an initial paid directory, it could avoid the cost of publishing entirely if a sufficient volume of business was not confirmed during the canvass and it then abandoned its plans to enter. While we agree that the only way to avoid the costs of producing a directory is to abandon the project, we do not agree that this is a strategy that could be used with impunity by would-be entrants. The mere possibility that such a strategy

could be employed exacerbates the credibility problems facing a would-be entrant, and in the event it were employed, would detrimentally affect any prospects for the same firm or other firms to attempt entry in another market.

253 Recognizing that there are sunk costs involved in entry into directory publishing, do those sunk costs amount to a significant barrier to entry? We are of the opinion that those sunk costs do create a barrier to entry when a broadly-scoped directory is introduced because the entrant publisher is going "head-to-head" with the telco's directory. In those circumstances, the incumbent will respond and post-entry conditions will be less favourable for a would-be entrant than pre-entry conditions. As the Simba/Communications Trends study noted, under the heading "Disadvantages of Large, Head-to-Head Directories", "[u]tilities are willing to 'pull out the big guns' to protect large bread-and-butter markets."[118] It is not disputed that when White and DSP entered into Tele-Direct's markets with broadly-scoped directories, Tele-Direct responded with price freezes, incentive programs, enhancements and promotional campaigns. Thus, the combination of sunk costs and likely response by the incumbent create a significant entry barrier and entry would not necessarily occur even though Tele-Direct was pricing above competitive levels.

(c) Incumbent Advantages

(i) Subscriber Listing Information

254 Would-be entrants into the directory business do not have access to subscriber listing information from the telcos on the same terms as Tele-Direct. Access to subscriber listing information by independent publishers has been the subject of some controversy and has been dealt with on several occasions by the CRTC. In 1992, the CRTC ordered greater access to the subscriber listing information in the hands of Bell Canada. Because of the price of the information, and other conditions imposed on its distribution, this decision did not result in commercially viable access to the information. Both White and DSP witnesses testified that they were forced to wait until the Tele-Direct directory was published and then re-key, verify and update the listings to use in their own directories, a costly and time-consuming process.

255 In March 1995, the CRTC revisited the matter at the request of White and liberalized the availability of listing information, including reducing the price that could be charged by Bell Canada. There was no indication from the White or DSP witnesses who appeared before us of any problem with the 1995 resolution by the CRTC of the price and availability issues. Richard Lewis, the Executive Vice-president and Chief Executive Officer of White, stated, in fact, that White was very satisfied with that aspect of the decision.

256 The CRTC added an important proviso, however, when it ruled that consumers who wanted to opt out of having their listings sold to a "third party" could do so. From the point of view of the independent directory publishers, this caused a problem because the CRTC did not distinguish between types of "third parties". Thus, the independent publishers were grouped in with, for example, telemarketers, to whom many consumers would not want their information to be released. The 1995 decision was stayed pending an appeal to Cabinet which, in late June 1996, overturned that portion of the CRTC ruling.

257 In light of the Cabinet decision, which was rendered after the close of the hearing in this matter, the Tribunal invited further submissions from the parties regarding the impact of that decision on their respective positions. The respondents submit that the Cabinet decision has removed the only barrier to entry into publishing. The respondents point to Mr. Lewis's statement that after a favourable decision from Cabinet, White will proceed with additional directories in the Toronto/Niagara area. The Director agrees that the Cabinet decision will likely reduce *one of* the barriers to entry into directory publishing but maintains that there are still other, significant barriers into the market. The Director refers to the United States situation where, despite access to subscriber listing information for several years, independents have less than seven percent of total industry revenues.

258 The only evidence before us is that the issues of importance to the independents, availability, price and opting out, have been dealt with satisfactorily to them. We conclude that, at present, subscriber listing information cannot be considered to be a significant barrier to entry.

(ii) Reputation/Affiliation with Telco

259 An entrant into directory publishing has the related tasks of convincing users of the value of its directory and of convincing advertisers that it is a worthwhile vehicle in which to advertise. The directory will only be widely used if it has a critical mass of advertising in it. If the directory is not widely used, few businesses will advertise in it and, in the absence of advertising by its competitors in a new directory, there is no pressure on a potential customer to advertise itself in the new directory. This is not a problem that Tele-Direct ever had to face because of its (or Bell Canada's) longstanding presence in the market as the only available directory. In addition, Tele-Direct benefits from its affiliation with a large and established telco which lends a certain authenticity.

260 To overcome the preference of advertisers for the incumbent directory requires enhanced expenditures on advertising and promotion and lower prices by the entrant. There is numerical evidence on the disadvantage of entrants *vis-à-vis* the incumbent only with respect to lower prices. The Simba/Communications Trends study of the directory industry in the United States revealed that in the top 10 competitive markets, the average telco (utility) rate for a double-half column was 53 percent higher than for independent publishers competing head-to-head in those markets. The average cost of advertising, per thousand of circulation, for the utility directories was 46 percent higher than for the independents. [119]

261 Mr. Lewis of White stated that his company usually plans on pricing about 40 percent lower than the telco directory in a market they are considering entering. Gary Campbell, the General Manager of DSP, testified that on average their prices were 30 percent less than those of Tele-Direct. A comparison of published prices between Tele-Direct and the initial White and DSP directories confirms these general statements although price differences vary considerably between types of advertisements. [120]

262 In both markets, the entrants had invested in introducing new features (enhancements) into their directories that Tele-Direct had not hitherto introduced. For example, White's Niagara region directories included the following features not previously offered by Tele-Direct: free smaller size copy in addition to the regular size directory (a "mini"), audiotext, extensive community pages which provide information of regional or local interest, [121] larger size print, three column format instead of four, postal codes included in the white pages, additional colour in the advertisements. DSP also included many of the same enhancements in its directories plus other, unique, features. [122] Thus, any advantage enjoyed by Tele-Direct clearly stemmed from its incumbency and its affiliation with Bell Canada and not from the superiority of its product.

263 Based on White's experience in the United States, it appears that the rate differential between the independent and the telco does narrow over time but still remains significant. Mr. Lewis testified that in Buffalo, New York, where White has published for 27 years, its prices are still 25 to 33 percent less than those of the telco directory.

264 As part of the survey resulting in the January 1993 Elliott report, customers of Tele-Direct were asked if they would advertise in a competing directory if it offered 15 percent lower prices. Only 36 percent said that they would advertise in the new directory and a mere eight percent that they would discontinue advertising in Tele-Direct's directory. [123] As indicated by the United States data and the experience of White and DSP, to attract a significant number of advertisers the entrant would likely have to offer discounts closer to 50 percent than to 15 percent.

265 Based on both the particular experiences of White and DSP in entering Tele-Direct's markets and the more general evidence relating to the United States experience, it is our conclusion that an incumbent directory publisher's "reputation" or affiliation with a telco constitutes a significant barrier to entry into publishing a competing broadly-scoped directory. An important part of this barrier is the advantage that the incumbent directory has because it already contains the advertisements of a business's competitors. A new entrant must overcome that fact in seeking to persuade the business to advertise in its new directory. New entrants must offer substantial price discounts, even when they are publishing a product with features not included in the incumbent's directory.

(iii) "Yellow Pages" Trade-mark

266 The words "Yellow Pages" and "Pages Jaunes" and the "walking fingers" logo are both registered trade-marks of Tele-Direct in Canada. Tele-Direct only licenses those marks to publishers which are affiliated with other telcos. The same words and the logo are in the public domain in the United States.

267 As attested to by Mr. Lewis, it probably would have been easier for White (and DSP or any other entrant) to explain the nature of the product it was seeking to introduce in the Canadian market if it had been permitted to use the marks, which have a high level of public recognition, as it can and does in the United States. In fact, Mr. Lewis would have paid a "substantial" fee to use the marks in Canada. The trade-mark situation appears to confer some marketing advantage on Tele-Direct and reinforces the other barriers already discussed.

(iv) Strategic Behaviour

268 Under this heading, the Director first refers to the anti-competitive acts being alleged in a later portion of the argument regarding other publishers. Paragraph 120 states that

> ... It was Tele-Direct's objective to "make competition expensive" and "raising the bar" to entry and it succeeded.

The only way in which we could determine if the strategic behaviour referred to constitutes an entry barrier would be to assess the effects of that behaviour on the market. The Director did not deal with evidence of effects in relation to the issue of market power. The alleged anti-competitive acts regarding publishers will, of course, be dealt with in due course.

269 The Director also argues that the alleged anti-competitive acts in respect of services are relevant to entry conditions into publishing. It is submitted that one of Tele-Direct's objectives was to reduce the power of the specialized agencies in order to make it harder for new entrants into publishing to gain market share. If it had been proven that some Tele-Direct policy or initiative against agents did indeed have a deleterious effect on new publishing entrants, this would be relevant to our assessment of entry barriers. We are of the view, however, that the limited evidence provided on this point does not prove that there were such effects.

(3) Conclusion

270 We are of the view that even with subscriber listings available to independent publishers on reasonable terms, significant entry barriers in the form of the reputation effects and sunk costs reviewed above will remain. The condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied.

B. Direct Approach: Other Evidence of Market Power

271 As other evidence of market power the Director relies on the high profits earned by Tele-Direct, its lack of responsiveness to customer needs, and an allegation that it has lagged behind other media in supporting agents, in promoting the product and in using technology to process advertisements received from agents. We are of the view that there is insufficient evidence on the record, and that the question was not explored in sufficient depth, for us to draw a conclusion one way or the other regarding the allegation of lagging behind other media. The evidence regarding profitability and customer dissatisfaction, however, is extensive.

(1) Profits

272 The respondents acknowledge at paragraph 41 of their response that Tele-Direct earns very large accounting profits. It is also undisputed that Tele-Direct pays 40 percent of its collected revenues directly to Bell Canada and a similar percentage to the other telcos with which it contracts to publish a directory. This payment is said to be in return for access to subscriber lists and for services. The evidence revealed that the only service provided by the telcos is billing.

273 Where the respondents and their expert, Professor Willig, differ from the Director is with respect to the significance of Tele-Direct's admitted profitability as an indicator of market power. The respondents' argument first points out the well-

known concerns about trying to convert accounting to economic profit. While we recognize the validity of those concerns in general, we do not consider that they apply with much force to the most compelling evidence of profitability, the payment by Tele-Direct to Bell Canada. That payment is a set percentage of collected revenues. It is not an accounting "profit" figure or a "bottom line" amount produced by the application of accounting conventions. Therefore, we are of the view that an examination of the payment to Bell Canada and its possible implications for market power is not clouded by accounting conventions at the outset. The presence of such a payment indicates that Tele-Direct has revenues of at least 40 percent over its recorded costs.

274 Professor Willig took the position that the profits which allow Tele-Direct to make the payment to Bell Canada reflect a return on intangible capital which is a necessary investment in the creation of the profits. In his rebuttal affidavit he stated:

> 46. ... It is well known that there are many reasons why accounting measures of profits can deviate both randomly and systematically from being an indicator of the theoretical notion of economic profits. One reason for systematic deviation is of general significance in businesses where intangible assets are important. Here, the value of the intangible assets does not appear on the accounting books. Then, when operating margins are expressed as a percent of the book value of assets, the resulting percent is systematically too large, relative to economic meaning, simply because the book's list of assets misses the intangible ones. This effect is likely to be of specially great quantitative significance where trade-marks, brand-names, product or service reputation, proprietary technology, and organizational capital are important to the business.
>
> 47. Of course, service industries typically contain leading instances of businesses where intangible assets are important. For example, the business of any successful magazine is unlikely to rest on significant tangible assets, and instead to depend on intangible assets that include the name and design of the magazine, and perhaps the organizational capital embedded in the editorial and advertising sales teams. The rate of return on tangible assets earned by such a business will turn sensitively on whether the books include ownership of the business office and a fleet of trucks or autos, or whether the business leases such properties. In either event, the assets that really drive the success of the business will not be valued on the books, and so the rate of return on assets will indicate nothing about the economic profitability of the enterprise, and certainly nothing about market power.
>
> 48. It goes without saying that the directory publishing business is a prime example of the effects just discussed. For all the conventional reasons alluded to, the rate of return on assets, or other accounting measures of profits, are not reliable indicators of market power.... [124]

275 In other words, Tele-Direct is only earning the requisite return on its intangible assets to remain in business and not any kind of economic rents. Professor Willig returned in his oral testimony to the example of a magazine and its intangible assets which create a loyal readership. We have some difficulty seeing the same effect at work with a directory which has no editorial content, unlike a magazine. There may be creativity in the way the directory is assembled so it is of maximum utility to consumers but the evidence was that Tele-Direct lagged behind new entrants like White and DSP in this respect.

276 When asked specifically about the intangible assets or activities of Tele-Direct, Professor Willig responded:

> Evidently ... there is some value to having, and having had, the "utility" franchise in a given area. If one tries to translate that into what it means today or next year, the operative word really is "reputation", and the reputation is of significance both to advertisers and also to consumers who have to decide whether to pick the book up or not and, if so, which book to pick up. Somehow that reputation attaches to that book because of its heritage, its history, evidently, and also to its identification with the current telco.
>
> . . .
>
> I agree ... that it is hard to reach out and grab that reputation. But if we think about the character of the directory business ... the notion that, if you are an advertiser and you are being asked to pay for an ad in advance of the completion of the book and in advance of evidence about what consumers are going to do in terms of using it, then you have to reach, as an advertiser, an expectation, an anticipation of how good the book is going to be.

You have to form an image in your mind before you commit yourself to your advertising expenditure: Is everybody going to use this and will the other advertisers take ads in it? If they don't, then consumers won't use the book and, if consumers don't use the book, then my ad which I am being asked to pay for today won't have its exposure.

The key to the underlying value proposition of the advertiser is the anticipation that 18 months later or 12 months later the book is going to be out and it is going to be a really good book and people are really going to use it.

It is unusual that you can't really tell the value of what it is you are buying until it is done and many months have passed.... [125]

277 There are several difficulties with this hypothesis. First, on a factual level, there is evidence that Tele-Direct's advertisers (except the small group using agencies) do not pay for their advertising 12 to 18 months in advance. Monthly billing commences once the directory is published. Advertisers pay in instalments (interest free) after publication.

278 Second, Professor Willig emphasized that the key to the value of Tele-Direct's reputation asset was the anticipation that advertisers have that the directory is going to come out and will be a "good" directory that people are actually going to use. Surely all local media, which the respondents postulate are close substitutes for telephone directory advertising, face the same challenge in selling time or space to advertisers. Rather than paying Tele-Direct at a level that allows Tele-Direct to earn a 40 percent premium, would not advertisers simply switch to one of the other alleged close substitutes? Tele-Direct's premium would soon disappear in that scenario.

279 If, on the other hand, telephone directory advertising is somehow unique because of the close link between a critical mass of advertising in the directory and use of the directory by consumers, then this uniqueness argues against other media being close enough substitutes to provide competitive discipline. Tele-Direct's ability to exploit its association with the telco to earn returns well above its costs would then indicate market power in the market for telephone directory advertising. This latter scenario is more in accordance with the other evidence on the record which reveals that as between the telco directory and other *directory* publishers, the fact of association makes a significant difference. As was already discussed above, one cannot attribute the premium to Tele-Direct having a "superior product" to other telephone directory publishers in terms of the features of the directory. If it had a superior product, Tele-Direct would not concern itself with competing directories, which it does, and the only evidence before us was that the entrants like White and DSP were initially the superior product, until Tele-Direct responded to their enhancements.

280 Further, Professor Willig's theory of profits as a return on intangible assets cannot co-exist with the respondents' pleading that Tele-Direct's profits go to cross-subsidize Bell Canada's local telephone service as set out in their second amended response:

20. ... What was initially conceived as an essential but costly feature of telephone service has become a lucrative revenue source for the telcos....

21. In Ontario, for example, T-D Pubs pays each of the independent telcos with which it contracts 43% of the gross revenue collected from subscribers of the telco who advertise in the telephone directories. In the case of T-D Pubs, this revenue source, as well as the entire net income of T-D Pubs, are included by the CRTC in Bell Canada's revenues to reduce the cost of local service. Each residential telco subscriber in Ontario and Quebec receives a subsidy of over $2 per month as a result of the revenues captured through telephone directory advertising.

281 Bernard Courtois, Vice-president, Law and Regulatory Matters for Bell Canada, explained:

... So, both the commission revenues from Tele-Direct [the 40 percent] and all the net income of Tele-Direct, that is equivalent to adding $284 million to the revenues of Bell Canada in 1994 for regulatory purposes. Divide that by the number of residential subscribers and it amounts to $3.38 per month on the average residence telephone bill.

I should say that the average residence basic telephone bill in Bell Canada with Touchtone is about $12.75. So, if you didn't have the Tele-Direct activities going on, that bill would have to be more than $16.00. Of course, if Tele-Direct were a completely arm's length company, we would still get some of that commission revenue.

. . .

Q. I think you did point out that in any telco basically they always collect some of this profit through the 40 percent. I mean every telco seems to collect that so they all get subsidized in that way by publishers. Is that what you were saying?

A. That's correct, and I should point out that it's a very large part. I guess the commission revenues might be two-thirds and the net income one-third of that subsidy.... [126]

282 George Anderson, who was previously with NYNEX, described a similar situation in the United States. He testified that the utility directory publisher has to "impute" a substantial portion of its income, over and above the cost for subscriber listing information which has been widely available for some time in that country, back to the telco to help defer the cost of telephone service. In his words:

The [AT & T] consent decrees ... took an unregulated business, which was Yellow Pages, and at the ninety-ninth hour put it in with the regulated segment of the business to serve as a cash cow, not my words, to serve as a funding business that would help defray, defer, hold down the rate of return and hold down the cost of telephone service. [127]

James Logan, currently President of YPPA and formerly with US West, confirmed this view.

283 We observe that if all Tele-Direct and other telco directory publishers were earning was a competitive return on all assets, including intangibles, the telcos would not have "profits" available to use for a completely different purpose, namely cross-subsidization of local telephone service. Unless intangibles are to be treated as a *deus ex machina* to explain away high economic profits, they must be identifiable, as must be the activities resulting in their creation. Otherwise, simply asserting "intangibles" would always preclude high profits from demonstrating market power. We cannot accept an approach leading to such a conclusion. Intangibles that can account for *apparent* high economic profit are the result of activities that are extraordinarily successful, such as those creating new products or ways of doing things better than others. In contrast to the example of successful magazines cited by Professor Willig, there is no evidence of this in the case of Tele-Direct or the other Yellow Pages publishers. Moreover, the fact that there is such widespread subsidization of telephone services by Yellow Pages publishers associated with telcos strongly suggests that the source of the subsidies is not any outstanding effort on the part of individual publishers.

284 The Director also argues that the fact that new entrants view the market as potentially profitable, even given the large price discounts off Tele-Direct's prices that they must offer and the other expenses they must incur to establish their own credibility or reputation, is an objective measure of Tele-Direct's profitability. We agree that market participants are responding to economic profit rather than to accounting profit.

285 We conclude, therefore, that the payment to the telcos by Tele-Direct is a form of "economic rent" whose value depends on the surplus that can be earned from publishing a directory associated with a telco. The cost to the telcos of providing the subscriber listings and doing the billing is minimal. The listings are a by-product of supplying telephone service and the billing for advertising is incorporated into the subscriber's monthly telephone bill. While it is true that it would be more costly for Tele-Direct to do the billing itself, it is unlikely that it would cost, at most, more than a few percent of revenue. [128]

286 In the face of competition from other media the amount that Tele-Direct could afford to pay, and that the telcos could demand, would be considerably less. With sufficient competition the payments to the telcos would disappear entirely. Even if Tele-Direct earns no economic profit on its operations beyond what it pays out to Bell Canada, its price to average cost margin is extraordinarily high. While no benchmark was placed in evidence, merger guidelines, both in the United States and Canada,

place products in separate markets if their existence would not prevent a hypothetical monopolist, post-merger, from increasing prices by five percent. Even allowing as much as two percent for mailing costs, one is left with a margin of 38 percent. We are of the view that the evidence of economic rents provides a direct indication of Tele-Direct's market power.

(2) Dissatisfied Customers

287 The Director submits that the respondents' actions towards the advertisers, their customers, display market power. Reference is made to Tele-Direct's requirement that advertisers give up copyright in their advertisement, its restrictions on group advertising and evidence of low customer satisfaction in general. There is evidence, in the form of studies like the Elliott reports and the presence of consultants, that a significant percentage of Tele-Direct customers are less than happy with the service provided by Tele-Direct. We reviewed the evidence to this effect in the section on Market Definition when dealing with the arguments of the respondents which emphasized the low degree of customer satisfaction. As a direct indicator of market power, however, we are reluctant to rely on customer dissatisfaction because of the practical difficulties in applying such a subjective test.

(3) Other: Pricing Policies

288 In addition to the evidence of profitability advanced by the Director, the Tribunal is of the view that Tele-Direct's approach to setting prices supports the conclusion that Tele-Direct is behaving more like a firm with a comfortable margin of market power than a firm facing close substitutes. We note Professor Willig's point that evidence of price discrimination, in isolation, would not reliably indicate market power. In combination with the other evidence it is, however, compelling. Two aspects of Tele-Direct's price-setting policy are important: the premiums charged for colour and larger size (price discrimination) and the effort to equalize price per thousand across geographic markets (circulation alignment).

(a) Price Discrimination

289 As we reviewed in the section on market definition, colour and increased size are more valuable to advertisers who rely more heavily on the Yellow Pages. In broad terms, these are advertisers whose business involves infrequently purchased or emergency services (e.g., plumber, exterminator, mover, auto repairs, lawyer), infrequently purchased, expensive durables where comparison shopping is likely (e.g., cars, major appliances), services used by travellers (e.g., car rental) or which encourage orders by telephone (e.g., pizza, lumber yard with telephone order business). They need to attract attention in the Yellow Pages so that a consumer is drawn to their Yellow Pages advertisement as opposed to the Yellow Pages advertisement of their competitor. In our view, Tele-Direct systematically price discriminates against advertisers who are heavily reliant on the Yellow Pages through its pricing of colour and size and its ability to do so is direct evidence of market power.

290 Tele-Direct charges a 50 percent premium to add red to an advertisement. This premium is unrelated to costs of production. The representative of one of the independent publishers testified that at a 50 percent premium, a publisher would be realizing a very high profit margin. In other words, the additional printing and production costs are well below the price charged.

291 Ms. McIlroy explained that the object of Tele-Direct's pricing of colour at a premium is to control its penetration to ensure that it will be sufficiently uncommon so that the coloured advertisements "stand out" on the page. The price is set high enough that everyone will not buy it. In the same vein, Tele-Direct introduced multi-colour in those markets where there was already a lot of red in the directories as an alternative way of allowing advertisers to "stand out". This is not the kind of pricing policy that can be pursued by a firm under competitive pressure because its competitors would simply charge a lower price to take advantage of the profit opportunity and compete away the premium.

292 Further, the premium for red is largely invariant across local markets. It is difficult to see how there could be such uniform pricing in the face of "competition" from other local media, which would vary from market to market. Tele-Direct's pricing of red can hardly be seen as a response to these prices but is much more consistent with a company concerned only about its own, unique environment.

293 Based on the evidence before us, there is similar uniformity and lack of relationship to cost in Tele-Direct's pricing of larger advertisements. A comprehensive Tele-Direct rate card was not placed in evidence. In the 33 local markets included on the excerpt from the YPPA rates that was tendered as an exhibit, the price increases by about 90 percent for each doubling of advertisement size from a quarter column (1/16 page) to a double quarter column (1/8 page) and from a double quarter column to a double half column (1/4 page). [129] As in the case of colour, the evidence revealed that the additional costs of producing larger advertisements do not appear to justify the increase in price. Based on cost, one would expect a discount greater than ten percent for an advertisement twice as large.

294 The respondents do not dispute that Tele-Direct's premiums for red and for size cannot be explained by additional costs. Counsel conceded in argument that those were the facts but argued that Tele-Direct was engaging in "value pricing". He hypothesized that an advertiser buying a larger advertisement might get ten times the results that would have been obtained with a smaller advertisement and, therefore, paying almost twice as much for the larger advertisement is actually a bargain. The larger advertiser, the argument goes, is getting more value out of the medium. Value pricing is not a phenomenon readily associated with a competitive market, the hallmark of which is pricing which is ultimately cost-driven. [130] Value pricing is more likely to be associated with a regulated monopolist and is more an indication of the presence of market power than of its absence.

295 The ability of Tele-Direct to discriminate against customers who spend *more* on advertising by way of larger or coloured advertisements is of particular importance in assessing whether Tele-Direct lacks market power *because* other local media provide close substitutes for Yellow Pages, as argued by the respondents. Larger Yellow Pages advertisers have greater choice among the allegedly competitive media since, by definition, they have more dollars in Yellow Pages that they can switch to any other media. Smaller advertisers are less likely to be able to afford the full range of other media. While it may be true, as Professor Willig pointed out, that certain vehicles, such as community newspapers or church calendars might be more acceptable to smaller advertisers, there is no denying that, from a budget point of view, larger advertisers have more options. Thus, larger Yellow Pages advertisers should have the more elastic demand if there are, as the respondents argue, close substitutes to Yellow Pages. The fact that Tele-Direct's margin over cost increases with enhanced expenditures on colour and size indicates the opposite. The anomaly of Tele-Direct being able to price discriminate against advertisers who at first blush have the greatest range of options underscores its market power.

296 The two broadly-scoped independent publishers, White and DSP, also charge some premiums for colour or size, although neither charges a premium as high or as consistent across the board as Tele-Direct's. [131] Certainly, no one has suggested that either White or DSP has market power. Yet, Mr. Campbell provided the same explanation of DSP's pricing of red, for example, as Ms. McIlroy did -- that it is priced above incremental costs to ensure its scarcity. Does the independents' use of some premiums for colour or size imply that Tele-Direct has no market power? We think not. The presence of two publishers in Sault Ste. Marie and Niagara certainly does not indicate a "competitive" market.

297 The evidence regarding the independent publishers does not detract from our view that Tele-Direct's ability to price discriminate is evidence of market power. Although the independents can, to a much more limited extent, implement some of the same pricing policies, this is not surprising. Tele-Direct prices in each local market create an "umbrella" beneath which the new entrants can shelter which underlines that Tele-Direct has market power sufficient to create the umbrella.

(b) Circulation Alignment

298 Since 1987 (or for 1989 prices onwards), Tele-Direct has actively pursued a policy of "circulation alignment" in calculating its annual price increases. The only exception was in 1992 (for 1994 prices) when poor economic conditions resulted in a zero price increase across the board. The objective of this policy was to bring about consistency in cost per thousand or CPM between directories. Some directories had experienced rapid growth in circulation but since they were subject to the same general price increases as other directories which had not grown as much in circulation, their CPM or price relative to circulation was substantially lower. Ms. McIlroy referred to the Mississauga directory as one in which the rates were seen as too low given

the circulation of the directory. A program was therefore instituted to bring the CPMs in all markets into line over a number of years by imposing additional price increases (but not price decreases) in particular local markets.

299 In applying the alignment policy absolutely no allowance was made, or is made, for differentials in the intensity of competition from other media in each local market. The entire process can be described as a very bureaucratic one and certainly not what one would expect if Tele-Direct was forced to respond to varying degrees of competitive pressure in the numerous (approximately 100) local markets where it operates.

300 Professor Willig conceded that this "bureaucratic" approach to pricing and apparent indifference to local market conditions was puzzling but theorized that it could result from Tele-Direct's connection to a utility company. Utilities come from a culture of regulation where pricing flexibility is frowned upon. Further, if individual sales people were given latitude to discount to individual customers, the result for a large organization like Tele-Direct would be chaos.

301 Pricing individually by customer goes well beyond responding to the supposedly competitive media in a local market and thus does not directly address the point. The regulatory "culture" of utilities, is, of course, undeniable. What is more pertinent is how Tele-Direct could maintain such a culture in the form of its approach to pricing in the presence of the alleged close substitutes. If its bureaucratic price-setting led Tele-Direct to set a price too high in a particular market, surely it would see a dramatic revenue loss to other media and would quickly change its approach. There is no evidence that this has happened.

(4) Conclusion

302 The other direct evidence of market power advanced by the Director along with Tele-Direct's pricing policies affirm our previous conclusion based on the indirect approach that Tele-Direct has market power in telephone directory advertising.

VIII. Tied Selling

A. Introduction

303 Tying or "tied selling" is dealt with in section 77 of the *Competition Act*. The relevant parts of section 77 are:

(1) ... "tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(2) Where, on application by the Director, the Tribunal finds that ... tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

> with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in ... tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

304 A tie is the supply of one product *on the condition that* the buyer takes a second product as well *or* on terms that *induce* the buyer to take the second product as well. Such an arrangement may be prohibited by the Tribunal under section 77 if it meets all the other requirements of that section, namely that the tying is a practice engaged in by a major supplier and results in a substantial lessening of competition. The requirement that Tele-Direct must be a major supplier is satisfied by our earlier finding of market power in the telephone directory advertising market. The other requirements of the section are still to be resolved.

305 The Director alleges that the respondents have engaged in a practice of requiring or inducing customers for advertising space in telephone directories (the tying product) to acquire another product, telephone directory advertising services (the tied product), from the respondents. The Director further alleges that the practice of tied selling has impeded entry into or expansion of firms in the market resulting in a substantial lessening of competition.

306 The advertising space or publishing business is described at paragraph 9 of the application as including:

> ... all matters relevant to the provision of advertising space in a directory, including access to a subscriber data base (including information relating to new subscribers) upon which the books are based, compilation, physical creation of hard copy, printing, promotion and distribution.

The advertising services business refers to:

> ... the provision of services relating to the sale of advertising space in a telephone directory, including establishing new customers, calling on customers, and providing advice, information and other services relating to the design, cost, content, location, creation and placing of the advertisements.

The Director further states that the purchaser of an advertisement in a telephone directory obtains two products related to the two businesses: advertising space and advertising services.

B. Facts

307 Before we proceed further, it is necessary to review some facts relevant to the supply of advertising services to Yellow Pages advertisers.

(1) Tele-Direct's Internal Sales Force

308 Tele-Direct sells telephone directory advertising through its internal sales force. This group is sub-divided into those representatives who deal with customers over the telephone ("tel-sell") and those who attend at the customers' places of business ("premise"), together called the general sales force or "GSF". The premise sales representatives travel from place to place during the year to canvass advertisers for a particular area or directory within a confined time frame. In 1994, premise sales accounted for about 60 percent of the revenues generated by Tele-Direct's internal sales force, while tel-sell generated less than 30 percent of revenues.

309 A further category of sales representatives, sometimes included as part of the GSF and sometimes considered apart from it by Tele-Direct, is that which services so-called "national accounts". These representatives are called national account managers ("NAMs") or national account representatives ("NARs"). This group accounts for the remaining approximately 10 percent of revenues.

310 There are no hard and fast rules governing which accounts are handled by the NAM/NAR group as opposed to the remainder of the GSF. Some large accounts are serviced by the GSF. The Tele-Direct witnesses indicated that, in general,

accounts that require a great deal of servicing, for example, multiple visits over a year, are likely to be assigned to the NAM/NAR unit. Because of the canvass-based sales approach used by the GSF, often the GSF is involved in a canvass in another area and is unavailable to service a particular account repeatedly. The NAMs and NARs are located in certain centres all year long and can service these accounts more easily. A further factor is the account's complexity, including number of headings, the number of markets, and the amount of change required each year. If the account requires a lot of attention to ensure accuracy (for example, that no directories are missed) and perhaps clerical-type support, it will end up in the national group. There was also evidence that accounts which had little future growth potential or which had simply proven to be problem accounts in the past are handled by the NAM/NAR unit.

311 Tele-Direct (Publications) Inc. is divided into two geographic regions, eastern and western. The eastern region is comprised of the province of Quebec, with parts of Ontario such as Ottawa, Kingston, Sault Ste. Marie and Sudbury. The western region covers the remainder of Ontario. The structure and organization of the company in both regions is broadly similar, although the eastern region is smaller both in terms of revenue serviced and number of sales representatives.

312 The facts regarding (a) remuneration, (b) evaluation and (c) account assignment and continuity for Tele-Direct's internal sales force are relevant because one of the Director's arguments regarding Tele-Direct's motivation to engage in the alleged tied selling is that its internal sales force can be more effectively motivated to sell more Yellow Pages advertising than agents.

(a) Remuneration

313 The remuneration of the Tele-Direct representatives is highly dependent on the revenues generated by each individual as they are paid through a combination of salary and commission. Both the tel-sell and premise representatives earn a base salary (which is higher for premise) and in addition are eligible for a number of commissions and incentives.

314 The amount of commission paid to a sales representative is determined by the nature of the advertising which is sold. If the sales representative manages to generate new business (an increase over the previous year's advertising expenditure), an annual commission of 13 percent is paid on the total new business. If the advertiser is renewing the advertising which was purchased in the previous year, the sales representative is paid a 2.4 percent commission on the renewal amount. Renewal commission is paid on any portion of an account which is renewed, even if the total amount of advertising purchased is less than the previous year. The renewal commission was first introduced in the early 1980s, prior to which the representatives were paid only salary and new business commission. The final basis upon which a commission is paid to a sales representative reflects rate increases. This applies in a situation where an advertiser renews exactly the same advertising program as it had in the previous year but there has been a rate increase which is applicable to that advertising program. The sales representative receives renewal commission on the amount spent the previous year and rate increase commission on the difference between the two account totals because of the rate increase. The rate increase commission is six percent.

315 Since 1993, a premise representative also has the potential of earning a yearly bonus in the amount of $2,000. The bonus is based on factors such as the number of complaints made against the representative by advertisers, the representative's score in Tele-Direct's internal evaluation, the number of "lates" (advertising submitted after a directory closing date) and mistakes and the representative's overall work flow. Apart from the bonus, there are a number of other incentives offered to premise sales representatives, for example, awards and trips.

316 The NAM/NAR group also earn base salary plus commission but with a much larger proportion of their income accounted for by salary. Their new business commission is nine percent, with a renewal commission of 0.5 percent and a rate increase commission of 1.2 percent. They may qualify for a bonus equal to seven percent of their income for maximizing net sales or a bonus of three percent for maximizing retained revenue. An average NAM earns less than an average premise representative.

317 Sales representatives are supervised by salaried sales managers. Sales managers also qualify for various incentives and bonuses, which may vary in nature from year to year, based on the results of the sales representatives that they supervise.

(b) Evaluation

318 In the western region Tele-Direct has a formal assessment program for its sales representatives called Total Performance Assessment ("TPA"). Each representative is assessed using the TPA every six months.

319 The TPA is comprised of three categories: sales results (worth 60 percent), customer satisfaction (worth 20 percent) and job administration (worth 20 percent). The sales results score is largely based on the representative's incremental revenues in relation to other representatives (25 points of 60). Customer satisfaction is broken down into customer disputes and an overall customer survey. Customer disputes refer to the number of times customers of the representative have called in with a complaint or a concern. The customer survey component is a Gallup survey. [132] The final aspect is job administration which includes work flow (success in meeting benchmark requirements for servicing a certain percentage of revenue during a canvass by a certain date), number of internal queries and lates.

320 The TPA is not used in the eastern region which has not had a formal evaluation program since 1994 because of union disputes. Currently, sales representatives in the eastern region are evaluated by an internal management review in which their supervisors conduct follow-up interviews with clients. It is Tele-Direct's intention to replace this less formal evaluation process in the future.

(c) Account Assignment and Continuity

321 Tele-Direct uses a canvass approach to sell advertising. Each directory has a canvass period, the length of which depends on the size of the directory, during which the GSF focuses its attention on selling advertising for the next issue of that directory. The GSF is under time constraints to complete its sales and solicitations prior to the deadline, or the closing date, for the directory. Once one canvass is complete, the GSF moves on to the next one.

322 For each canvass, Tele-Direct canvass coordinators assign accounts to the sales representatives to ensure as much as possible that each salesperson ends up with a bundle of accounts which is balanced in revenue and in growth potential. Accounts are assigned based on a complex system of "markets" and "grades". For example, "Market 1" accounts are dealt with by premise representatives while "Market 2" accounts are dealt with by tel-sell. As well as being divided by market, accounts are also graded; the lower the grade assigned to an account the higher the potential that type of business will buy Yellow Pages. Grades are based on the type of business as represented by the heading under which it would appear in the directory.

323 For each canvass the grades and markets for the accounts are analyzed to determine whether, based on factors like time, the size of the cities or towns included and the number of sales representatives available, the premise representatives will cover all of the grades in Market 1, or whether, perhaps, some of the higher grades in that market should be assigned to tel-sell. For the same reasons, for a given canvass, not all accounts are assigned; those with lower potential or that are inactive may be dropped.

324 For both the premise and the tel-sell group, account assignment has traditionally been random. With a few minor exceptions, accounts were divided up at the beginning of each canvass with no intention of returning individual accounts to the same representative who serviced them in the previous year. In 1993, a test was conducted in a northern market whereby there was 100 percent continuity of tel-sell accounts. Ms. McIlroy's impression of the results was that they were positive in general; however, we have no information about whether tel-sell continuity has been adopted more generally. For premise sales, Tele-Direct adopted the Very Important Advertiser ("VIA") program in the late 1980s which provided a form of continuity: advertisers spending a certain amount per month were assigned the same representative every year. By 1992-93, there was a more general continuity policy in place whereby 30 percent of all premise accounts were assigned back to the sales representative for three years if $500 or more was being spent or a pricing incentive was involved. Currently, about 55 percent of the accounts of a typical premise representative (about 85 percent of revenue) are subject to continuity.

(2) Tele-Direct's Commissionability Rules

325 Prior to 1958, a 15 percent commission was available on "national" advertising. The definition of "national" was, however, unclear. In 1958, Bell Canada adopted a new policy, developed in consultation with and endorsed by the Canadian Association of Advertising Agencies. To be commissionable at 15 percent, the advertising had to appear in two or more directories serving

two or more "calling areas" with no more than 80 percent of the total advertising in one directory. No particular association membership was required of the agency; if the agency's ability to pay was in doubt, its credit was investigated.

326 Tele-Direct's definition of a commissionable account underwent a further change effective January 1, 1976. The amended definition of commissionability became known as the "eight-market rule". To qualify as a commissionable account under this rule, the advertiser had to purchase advertising with a minimum value of a trade-mark in eight "markets", as defined by Tele-Direct. Canada was divided into 19 markets, with six in Quebec and seven in Ontario. The entire United States constituted a single 20th market. If the account qualified and the agency provided completed artwork, Tele-Direct would pay a 15 percent commission on the account. Again, no particular membership in an industry association was required.

327 The commissionability rule was next changed effective July 1, 1993 to create the so-called "national definition" which is the current rule. Under this rule, to be commissionable an account must advertise, at a minimum, in directories in two provinces. Advertising must be placed in at least 20 directories and in each directory the value of the advertising must be a minimum of a trade-mark. Finally, 20 percent of the total value of the advertising must be placed in directories outside Tele-Direct's territory.

328 In order to receive 25 percent commission on "national accounts" the agency has to be a CMR and a member of YPPA. In addition, to be eligible for the 25 percent commission, the CMR must transmit its order to Tele-Direct via the Value-Added Network ("VAN") run by the YPPA. This facility provides for electronic transmission of account data and other information to a publisher. In order to access VAN, the CMR must be a member of the YPPA and must acquire the necessary computer hardware and software.

329 All accounts which met the eight-market rule as of July 1993 have been "grandfathered"; Tele-Direct still pays 15 percent commission on those accounts. Once an account ceases to qualify under the eight-market rule, it cannot be re-qualified. New accounts, those which reached eight-market status after July 1993, cannot be "grandfathered". Tele-Direct has made no commitment to how long the "grandfathering" of eight-market accounts will remain in place. It could be discontinued at any time.

C. Alternate Theories of the Case

330 As elaborated in the opening statement, the Director's theory of the case for tying is that the respondents, as a condition of supplying space, have required or induced customers to acquire the tied product, services, from them. We have already reviewed the structure of the market. The respondents offer a commission on accounts meeting their "national" definition and on grandfathered eight-market accounts. They service the remainder of the accounts themselves and do not offer a commission, or price space and services separately, for those "local" accounts, amounting to over 90 percent of Tele-Direct's revenue.

331 In accordance with his theory, the Director alleges that the respondents by refusing to sell either the space or the services in an unbundled fashion have violated section 77. Counsel for the Director described the Director's case in opening in alternative terms by referring to the respondents' refusal to pay commission except to the limited extent that they now do as a violation of section 77 because commission would be a means of recognizing or effecting an unbundling for the services that non-commissionable customers seek. The Director says that as matters now stand, non-commissionable customers have a choice of either obtaining services from respondents as part of the "package" price that they pay for their advertising or paying twice for the services -- once as part of the package price charged by the respondents and once directly to the service provider.

332 The respondents say that the Director's concept of tying is misconceived. They submit that there is no product known as "advertising services" separate from a product known as "advertising space". They focus on the *selling* portion of the services referred to by the Director and argue that the sales advice provided by Tele-Direct's internal sales force forms an inseparable package with the space which Tele-Direct supplies in its directories. Indeed, they emphasize, there is no advertising space without a sale. They argue that how advertisements in their directories are sold is a business decision to be made solely by Tele-Direct and is not justiciable. Tele-Direct determines when it is more appropriate to sell its product through its internal sales force and when it will "employ" and pay a commission to agents to sell its product.

333 In other words, the respondents argue that they have chosen a "hybrid" system. As their primary sales channel, they maintain an internal sales force. They have also chosen to employ agents to sell to a limited group of large advertisers who have distinct needs. Among the reasons given for primary use of the internal sales force were: efficiency, that the average cost of revenues serviced internally was lower than for revenues serviced by outside agents; revenue growth, that the internal sales force is more effective in growing revenue; and servicing, to ensure attention to small advertisers and non-advertisers that Tele-Direct considers important but external agents might not.

334 The respondents take the position that the Director's application regarding tied selling is an attack on vertical integration. They characterize Tele-Direct's decision regarding commissionability as a choice in some instances to buy services from agents and in others to make the services in-house. They refer to the words of Posner J. in *Jack Walters & Sons Corp. v. Morton Buildings, Inc.* for guidance:

> The end that Walters [a terminated dealer] alleges is that Morton [the manufacturer] wanted to take over the retail function; in the terminology of industrial organization, it wanted to integrate forward. But vertical integration is not an unlawful or even a suspect category under the antitrust laws: "Firms constantly face 'make-or-buy' decisions -- that is, decisions whether to purchase a good or service in the market or to produce it internally -- and ordinarily the decision, whichever way it goes, raises no antitrust question." ... Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.
>
> A common type of vertical integration is for a manufacturer to take over the distribution of his product....
>
> We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor. [133] (references omitted)

The respondents urge us to take from the words of Posner J. that their narrowing of the commissionability criteria is simply taking over the distribution function internally and Tele-Direct's decision about how to run its business, which it does not have to "justify" to anyone.

335 The Director underlines that he is not opposed to vertical integration in principle. He cautions, however, that if the method chosen for the vertical integration violates a section of the Act, with particular reference to sections 75, 77 and 79, then it is subject to challenge and the respondents cannot achieve immunity by "waving the flag of vertical integration". We agree that simply affixing the label of "vertical integration" does not conclusively decide anything. It does not preclude the Director from attempting to convince the Tribunal that what is going on in the case before it meets the requirements of a section of the Act. This view is not inconsistent with the *dicta* of Posner J. in the *Jack Walters* case, who indicates that the presence of market power may cast vertical integration in a different light and points out that market power was not present on the facts before him:

> ... some economists believe that monopolistic firms might integrate vertically in order to deny supplies or outlets to competitors, or to make it more costly for new firms to enter the market (because they would have to enter at more than one level of production or distribution), or to facilitate price fixing with their competitors. But nothing of this kind is suggested here. Walters does allege that Morton has a big name in the prefabricated farm buildings market, but there is no indication that this is a meaningful economic market that might be worth monopolizing, or that Morton's purpose in integrating into retail distribution was to make life harder for *its* competitors. Its object was to make more money by reducing the cost of retail distribution, not by coercing or excluding (or for that matter colluding with) its own competitors, whoever they may be, or discouraging potential competitors. *Indeed Walters' tie-in claim is premised on the ready availability, from other manufacturers, of the building parts that Morton sells in kits from which Morton Buildings are put together. This shows that Morton has no monopoly.* [134]
>
> (emphasis added; references omitted)

336 The recognition that vertical integration is generally pro-competitive on efficiency grounds raises another issue. The Director says there is no provision in section 77 for an efficiency "defence". We agree that there is no such explicit reference to an efficiency defence. However, many forced "package sales" are the product of efficiency and even a supplier with market power may sell items in combination for efficiency reasons.

337 A fundamental requirement of tying is the existence of two products, the tied product and the tying product. It is implicit in the determination of whether there are one or two products that efficiency considerations must be taken into account. We consider that demand for separate products and efficiency of bundling are the two "flip sides" of the question of separate products. Assuming demand for separate products, if efficiency is proven to be the reason for bundling, there is one product. If not, there are two products. As we will review below, this approach is consistent with the American jurisprudence regarding the test for separate products relied on by the Director.

338 The Director is of the view that, assuming that the necessary elements of the section have been met -- major supplier, two products, tying, and the exclusion of competitors resulting in a substantial lessening of competition -- it is not necessary for him to provide a plausible explanation of *why* or *how* the firm benefits from the tie. This is a valid position. The Tribunal would not impose such a requirement on the Director. It cannot be denied, however, that there is always more comfort in drawing conclusions the greater the depth of understanding.

339 In this case, the Director has in fact provided explanations as to why Tele-Direct might be engaged in tied selling. The Director submits that Tele-Direct is leveraging its market power in the sale of space into the market for advertising services through tying. One explanation of this is that Tele-Direct's policy of bundling advertising space and services allows Tele-Direct to exploit better an alleged information asymmetry it enjoys *vis-à-vis* its customers, the advertisers. As with any advertising medium, it is not possible to evaluate effectiveness of Yellow Pages advertising with any degree of precision. To the extent that data on effectiveness of the medium is available, it is in the control of Tele-Direct not the advertisers. In light of this, the Director argues that Tele-Direct prefers to keep advertising services in-house as much as possible because its representatives can be more effectively motivated to "oversell" than independent service providers. We will deal with this reasoning in due course.

340 The Director also says that the "usual" assumption of profit maximization used in determining whether a firm stands to gain from a tie does not apply in the instant case and the economic literature on the subject that relies on this assumption to analyze the possible effects of a tie is not a useful source. He says it is futile to seek a "rational" or "profit-maximizing" explanation for Tele-Direct's behaviour since Tele-Direct, because of its unique situation and relationship to Bell Canada, is not subject to the constraints of profit-maximization and its corollary, cost-minimization.

341 In support of the premise that Tele-Direct is not profit-maximizing, Thomas Wilson, [135] an economist expert witness for the Director, draws on the fact that the profits of Tele-Direct are included for regulatory purposes when decisions are made about Bell Canada's prices. He is of the view that the pressure to minimize costs is reduced and that there may also be systematic distortions such as the use of more capital than an unregulated firm would use in order to boost the capital base of the regulated firm (the "Averch-Johnson effect"). However, this particular hypothesis is not supported by the evidence which, in fact, points in the other direction insofar as Tele-Direct has chosen to subcontract capital intensive operations such as printing.

342 Professors Wilson and Slade, for the Director, are also of the view that management's decisions with respect to the commissionability of various accounts are motivated by a concern to maximize *sales* rather than to minimize *costs*. Professor Wilson sees the reduced pressure on regulated firms to minimize costs as allowing Tele-Direct's management to pursue personal interests, such as operating a larger enterprise, thereby garnering personal satisfaction and monetary rewards. Professor Slade is of the view that the ownership structure of Tele-Direct, whereby there is no threat of a takeover, contributes to allow management to pursue its hypothesized desire for larger size.

343 Even though there are several occasions when we have difficulty understanding the decisions of Tele-Direct's management if they really are pursuing cost-minimization, we are far from convinced that Tele-Direct's management is not generally constrained to follow a profit-maximizing course. The fact that Tele-Direct is a wholly-owned subsidiary should be

sufficient to ensure that there is adequate ownership control. It is obvious from the evidence of Mr. Courtois, the Bell Canada representative on Tele-Direct's Board of Directors, that Bell does not practice micro-management. The main instrument of control appears to be the requirement that Tele-Direct pay Bell the same percentage of revenues as Tele-Direct is required to pay other telcos when it contracts to perform their directory functions. This requirement was introduced precisely to impose market discipline on Tele-Direct. In addition to the forty percent of revenue that Tele-Direct remits to Bell, it also makes a substantial contribution to Bell's profits in the form of dividends. The evidence does not support the conclusion that Bell has been cavalier about allowing Tele-Direct's management to pursue other than profit-maximizing goals. Moreover, in recent years Bell's earnings have been well below its regulated allowed rate of return, a situation not conducive to permissiveness. Even when Bell earnings were not below the allowed rate of return, higher profits from Tele-Direct would still benefit Bell between applications for rate increases.

344 While we do not rule out that Tele-Direct's management may be under less than the usual amount of pressure to perform, we are reluctant to discard the usual working assumption of profit-maximization in the absence of some compelling evidence that is consistent with the assumption that Tele-Direct is pursuing other goals. The only specific evidence cited in support of the premise that Tele-Direct's management pushes revenue growth beyond the point of profit-maximization is the stress that they place on canvassing businesses that do not advertise in the Yellow Pages, the non-advertisers. The success rate from this effort is low and Professor Slade concludes that the fact that the effort is made can be explained by management's greater concern with growth of revenue than with profits. On the whole, however, the evidence on the canvass of non-advertisers is that moderate resources are devoted to this task. We are not convinced that the canvass of non-advertisers is not profit-maximizing.

345 We note here that there is another possible theory of the case. For reasons of clarity and coherence, however, it is more convenient to deal with it at a much later point in these reasons. We return to it below as an "Addendum" to our conclusion regarding the separate products issue.

346 We therefore do not accept that we should approach this case with a view to treating Tele-Direct as other than a profit-maximizing firm, albeit a firm with market power. Nor do we accept that efficiency considerations are not relevant to our section 77 analysis. Efficiency and demand, together, form the basis of the consideration of one or two products, to which we now proceed.

D. Separate Products

(1) Approach to Determining Separate Products or Single Product

347 The first element of section 77 to be considered is whether advertising space and advertising services are separate products. The Director takes the position that advertising services constitute a distinct product separate from advertising space. The respondents argue that advertising services are in fact an "input" into Yellow Pages advertising, not a separate product.

348 Merely labelling advertising services and advertising space as either two "products" or as "inputs" into a single product does not assist. As Areeda, Hovenkamp and Elhauge state:

> ... just about any product could be described as a tie of its components. And just about any two products could be described as mere parts in a more encompassing single product.... [136]

There must be some rationale for distinguishing between situations where there are two products involved, and thus at least the possibility of an illegal tie that should be prohibited, and those where there is a single product and no question of tying.

349 The parties are in agreement that the Canadian jurisprudence does not provide much guidance on the test to be applied. Both parties referred to the 1984 decision of the Supreme Court of the United States in *Jefferson Parish Hospital District No. 2 v. Hyde* [137] for guidance, although they emphasize different portions of the decision.

350 In *Jefferson Parish* the Court provided its most extensive discussion of the "single product" test. At issue in the case was the validity of an exclusive contract between the hospital and a firm of anaesthesiologists. Any patient who chose

to have an operation performed at that hospital was required to use an anaesthesiologist employed by the firm in question (Roux & Associates). The Court had to decide if this constituted an illegal tying arrangement. In making that inquiry, the Court considered two questions, whether the hospital was selling two separate products that might be tied together and, if so, whether the hospital used market power to force its patients to accept the tying arrangement. The majority answered the first question in the affirmative but the second question in the negative (the hospital was found not to have market power), so in the result it found no illegal tying arrangement. The minority found only one product and concluded for that reason that there was no illegal tying arrangement. [138]

351 In discussing the question of separate products, the majority noted that the answer to the question of one or two products turns not on the functional relationship between them but rather on the character of the demand for the two items. The majority then stated:

> ... Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services. [139] (reference omitted)

352 We adopt this statement of the majority as the applicable test for separate products. We believe that this test effectively captures both the demand and the efficiency elements necessary for us to distinguish between cases when a tie that is injurious to consumer welfare is possible and those in which the tie, although imposed by a major supplier, is efficient and should not be condemned. Demand is, of course, critical. If there is no demand, it would be pointless to require that the two products be offered separately. Efficiency is also critical as the existence of separate demand should not govern if providing the products separately would result in higher costs that would outweigh the benefits to those who want them separately.

353 Our approach will be to examine first the evidence pertaining to the demand side of the equation, to determine whether the Director has proven buyer, in this case advertiser, interest in acquiring space and service separately. By this we mean an answer to the question: "Is there a significant set of advertisers who actually want the items separated?" If this question is answered in the affirmative, then we will turn to the evidence relating to whether it is efficient to separate the products.

354 The respondents rely on a portion of the minority judgment in *Jefferson Parish*. The minority wrote:

> ... there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services, so the hospital can acquire no *additional* market power by selling the two services together.... In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes. [140]

In conclusion, they reiterated:

> ... Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the hospital may possess. *The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the hospital's decision to tie the two types of services.* [141]
>
> (emphasis added)

355 The respondents did not provide us with any reason to adopt the minority judgment over the majority. In fact, the majority opinion explicitly rejected tests based on functional relationships, including the "useless without" test. In a footnote the majority noted:

> The fact that anesthesiological services are functionally linked to the other services provided by the hospital is not in itself sufficient to remove the Roux contract from the realm of tying arrangements. We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices.... [142]

There are also sound economic reasons to reject such a test. As pointed out in the Areeda text, it may perversely save the most dangerous ties and call for review when there is little likelihood of adverse effects. The authors of that text use the example of a manufacturer with a monopoly over can-closing machinery who requires all purchasers of the machinery to buy cans from it to point out that:

> ... [s]uch a tie would bring the [manufacturer] a complete monopoly over cans, for presumably no one would buy empty cans without the machinery to close them. Yet the useless-without test would immunize this tying arrangement. Moreover, while short-run profit maximization is *generally* not enhanced when the tied product has no other use, monopoly in the tied market can impair competition severely in the long-run.... [143]

(2) Other Case Law

356 The respondents have also advanced a plethora of other American cases with respect to the question of separate products. In general, the respondents rely on these cases to urge us to view the facts before us solely from the supplier's (Tele-Direct's) perspective and to ignore demand considerations. Their fundamental premise appears to be that Tele-Direct's choice to "market" its product in a certain fashion is determinative and negates the possibility of any tying claim. We did not accept the Director's argument that considerations of demand govern; likewise we reject the respondents' argument that a supplier's choice is paramount. Both elements of demand and efficiency will be taken into account, as set out above. In any event, it is clear that the case before us is unique and does not "fit" exactly into any of the precedents cited to us. A more detailed treatment of the case law follows.

(a) Single Product

357 One tying case was referred to, *Souza v. Estate of Bishop*, [144] a case against a lessor of land in Hawaii based on the refusal of the lessor, like most other landowners in Hawaii, to sell the land. The tying product was argued to be the residences plaintiffs owned on the land while the tied product was the leasehold. The claim was dismissed on a motion for summary judgment, affirmed by the Court of Appeal.

358 From this decision, the respondents ask us to conclude that if a supplier presents two products as a package or, in other words, if they are being marketed together, that is the end of the matter and the Tribunal must conclude that there is a single product. The Court found that the plaintiffs' argument defied reason because the product being marketed was a house plus leased land and not a house purchasable separately from the land on which it stood. The Court also found that the plaintiffs presented no evidence that the house and the leased land constituted separate products. We have already set out the test we intend to apply, which takes into account both demand and supply. We do not accept that simply because a producer or a supplier bundles products together that they are, *ipso facto*, one product.

359 Four cases are relied on by the respondents because they involve the Yellow Pages industry or an analogous industry. The respondents argue that these cases indicate that the United States courts have uniformly rejected any concept of an antitrust violation because of a publisher's refusal to pay commission or its decision to change the accounts on which it will pay commission. Thus, they conclude that the courts "in effect" have treated directory advertising as one product. They make this argument despite the fact that none of these cases was based on a claim of tied selling and therefore the issue of separate products in the sense with which we are dealing here was not before the court. The respondents claim, however, that these cases indicate that there is only one product *because* the tying argument was not raised in any of them.

360 We do not accept that the absence of a tying claim makes the cases dispositive of the issues before us in a tying case. In general, we do not see how the results in these cases can be directly transferred to the case before us. We will, however,

review the decisions in order to see what, if any, assistance we can draw from the findings in resolving the issue of separate products on the facts before us.

361 In *Selten Agency, Inc. v. Pacific Telephone and Telegraph Co.*, [145] a specialized advertising agency brought an antitrust action involving numerous allegations against a number of telcos and telephone directory publishers that were members of the National Yellow Pages Service Association ("NYPSA") (the predecessor to YPPA). All of the allegations involved joint action by the NYPSA members. The only issue with any possible, although remote, relevance to this case was the claim by the agency that the NYPSA members *agreed* not to pay commissions on local advertising to agencies, constituting an illegal horizontal division of markets.

362 The Court concluded there was no evidence of an illegal agreement. The evidence was that the NYPSA agreement covered only national advertising; there was no prohibition on commissions for local advertising. Publishers were free to offer commission on local accounts and, the Court notes, some, in fact, did so. The Court also noted that those who did not offer commission on local accounts had their own sales force and therefore did not require the services of advertising agencies. The respondents rely heavily on the next sentence of the judgment, that "[i]t is not a violation of the antitrust laws for a publisher to refuse to buy a service that is not worth buying" [146] to argue that publishers do not have to buy services from agents or, in other words, provide a commission for any accounts they do not want to. As we have already stated, we do not accept that the supplier's choice is the sole governing factor in a tying case. Due consideration must be given to the supply side of the equation but we cannot ignore demand considerations.

363 In *O'Connor Agency v. General Telephone Co.*, [147] an advertising agency alleged that a Yellow Pages publisher conspired with other publishers to change the definition of local or "B" accounts so that commission would no longer be paid on those accounts. The defendants brought a motion for summary judgment which was granted.

364 In granting the motion, the Court found an "agreement" to change the criteria based on adherence to the YPPA guidelines. Using a rule of reason approach, the Court then proceeded to consider and weigh both the anti- and pro-competitive effects of the change in the relevant market. The Court found that the plaintiff had provided no admissible evidence that the relevant product market was Yellow Pages and also provided insufficient admissible evidence of actual anti-competitive effect arising from the change. The Court also found that the publisher had a legitimate business reason for adhering to YPPA standards, namely the uncontroverted evidence that the defendant changed the commission criteria to increase its national Yellow Pages advertising which was not performing up to expectation.

365 The respondents rely on this case for the very broad proposition that "the U.S. jurisprudence directly involving Yellow Pages has rejected any concept of any antitrust violation because of the refusal of a publisher to pay commission to a CMR or as a result of the publisher changing the accounts on which it will pay a CMR" and that "[i]n effect the courts have said there is only one product that we're selling and we can sell it through whatever channel we want". [148] The case certainly does not support those broad generalizations. It was a conspiracy case resolved on a motion for summary judgment because of failure to prove either a relevant market or actual anti-competitive effect.

366 The respondents submit that the case of *Thompson Everett, Inc. v. National Cable Advertising, L.P.* [149] is analogous to the case at bar. In that case an independent cable television advertiser representative brought action against exclusive contracts between the cable company and their spot advertising sales agents on the basis that the "traditional" cable representatives or sales agents were engaged in a concerted effort to exclude the independent from the business. The Court of Appeal affirmed the decision of the lower court to grant summary judgment.

367 The Court found that the exclusive contracts were not being enforced through an illegal conspiracy. It also found that the independent did not have access to the exclusive contracts because it was not willing to compete with the exclusive agents for them and was simply seeking to substitute its own method of serving the cable company for that selected by the cable company. The Court also found that there was no unlawful monopoly in the cable representative market because cable companies are part of a larger market.

368 Once again, the respondents rely on this case to argue that the Court endorsed the cable company's choice of using exclusive representatives simply because that was the way the cable company chose to do it. We have already indicated that the supplier's choice will not be the only consideration in a tying case. Indeed, the case itself does not go that far.

369 The most interesting decision referred to by the respondents is *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.* [150] The case involved a claim by an "authorized selling representative" ("ASR") for the placement of national advertising in telephone directories that the publisher had monopolized or attempted to monopolize the sale of Yellow Pages advertising. Because of problems in collecting payment for advertising placed by the ASR, the publisher started billing the advertisers directly. The ASR claimed that the publisher's direct contact with its customers resulted in a loss of accounts to it and its eventual failure.

370 The monopolization case failed because the ASR could not define any relevant market in which it and the publisher competed. The ASR had originally based its claim on the national advertising market where the publisher competed for the sale of national advertising as an ASR itself but could not show any market power on the part of the publisher in that market. The claim was then amended to allege that the relevant market was the sale of advertising space in a specific directory, shifting the focus to local advertising. Based on evidence that the ASR had received commission for the placement of advertisements for two local advertisers, apparently by accident, the ASR argued that it competed with the publisher's sales force for local advertising. The argument of the ASR was that the lawful power to publish the exclusive directory for a specific geographic area did not give the publisher the right to be the exclusive seller of advertising space within that directory as publication and sale were separate activities.

371 The Court commented that the ASR's market theory had a certain "superficial" appeal based on its similarity to a typical wholesale/retail monopolization case where a vertically integrated manufacturer uses its dominant position at one level of activity (manufacturing) to eliminate competition at another level (retailing). The Court noted that for the ASR's theory to work, the publisher must be viewed as a wholesaler or manufacturer of advertising space and the ASR as a retailer of this space. If not a retailer, the ASR could not be considered a competitor of the publisher at the retail level.

372 The Court concluded that, to the extent that the sale of Yellow Pages advertising is an activity separable from the publishing of the advertising, the sales made by independent ASRs were in the nature of an agency and not retail sales. Agents, the Court noted, do not compete with those whom they represent. The wholesale/retail analogy failed, in part, because there *could* be no "resale" of Yellow Pages:

> ... Yellow pages is not a product that is produced and distributed. The blank yellow pages do not exist prior to the sale of an advertisement, somehow awaiting distribution on a resale market. Each advertisement, that is, the space of the ad, is "created" when the advertisement is sold to the advertiser.... ASRs do not maintain an inventory of ad space to be sold. An ASR cannot purchase a page in the yellow pages and then distribute it to advertisers as it sees fit. [151]

373 The agency characterization was preferred, in part, because the Court considered the relationship between the publisher and the ASR in the case before it to be analogous to the relationship between an airline and a travel agent:

> ... The publisher lawfully establishes the price for its advertising and announces it to the public. It determines when it is going to publish directories, and has the ultimate say on how many advertisements it will accept. An advertiser may deal directly with the publisher, or may use an Authorized Sales Representative. However, should it use an ASR, the ASR must submit a request for advertising to the publisher, analogous to a reservation in the forthcoming publication. The ASR does not purchase an inventory of yellow pages space. The service which the advertiser has paid for is performed by the publisher, not the ASR. Further, should the advertisement fail to appear as requested in the appropriate directory, the publisher is under an obligation to refund the advertiser's money. Finally, should a publisher not receive enough advertisements to make a directory profitable, it must still publish the directory; the publisher retains the "risk" that not enough yellow pages advertisements will be "distributed" -- not the ASRs. [152]

The Court found ample evidence in the record that the ASR functioned as an agent, including the NYPSA guidelines which provided that ASRs represented the publisher "when selling National Yellow Pages advertising to national advertisers or their advertising agencies, or when negotiating disputes with such national advertisers or their advertising agencies". [153] The Court noted that there was also evidence that the ASR acted as an agent of the advertiser, including liability to the publisher for payment, but concluded that "[e]ither way, an ASR functions as an agent, not an 'independent contractor,' and not, in any case, as a retailer of yellow pages advertising space." [154] Thus, the leveraging argument failed as there was no "second activity" to be monopolized by using the publisher's market power to publish directories as leverage.

374 One element of this decision is the Court's insistence that the ASRs had to be considered retailers in order to be in competition with the publisher. A finding that the ASRs were merely agents of the publishers or, perhaps, agents of the customers, in the sense of having no independent existence from either or both of those two entities seems to preclude competition between the ASRs and the publisher. We do not believe, however, that the inapplicability of a strict retail model is conclusive. The Court did mention in passing, for example, independent contractors. The fundamental question is whether the publisher is in competition with the ASR or other person alleged to be excluded by the activity in question, which we agree is a question that should also be addressed in the context of a tying claim.

375 A second important element of the Court's conclusion concerned the functions performed by ASRs, that were apparently viewed as simple "order takers" insofar as the commission from the publisher was concerned. The Court indicated its assumption that the ASR was paid separately by the advertiser for other services such as layout [155] when it distinguished the case before it from a successful monopolization claim by an advertising agency against a television station. The television station had expanded its in-house advertising agency services by starting to produce commercials (for a fee) as well as selling air time. In *Ad-Vantage*, the Court stated:

> Thus, in *Six Twenty-Nine Productions*, a leveraging argument was possible. The production of [Yellow Pages] advertisements is a related activity separate from the sale of advertising space. Each is a separate source of revenue. In the context of this case, no evidence was presented indicating that ASRs receive no separate compensation from their clients when the ASRs engage in the production -- the lay out -- of the advertisements. In fact, testimony of a former NYPSA official indicated that *most* of the national yellow pages advertising is purchased through ASRs by advertising agencies on behalf of national advertisers, supporting the notion that ad agencies perform a separate function. Thus, the leveraging argument made in *Six Twenty-Nine Productions* is not available here. [156]

376 What we take from this case is that it is important to examine the actual services performed by the agents for advertisers and the relationship between Tele-Direct and the agents, with a view to determining if they do, in fact, "compete" with Tele-Direct in any relevant sense.

(b) Relationship between Agents, Advertisers and Tele-Direct

377 The respondents say that, as in the *Ad-Vantage* case, agents in the case before us function as either representatives of Tele-Direct or, on occasion, as agents of the advertisers. In the first case, Tele-Direct does not compete with itself or its own representatives and in the second, it cannot be considered to compete with its customers. Based on the evidence of Charles Mitchell, Tele-Direct's Director of Marketing Sales Support, they submit that, in fact, Tele-Direct has not competed for agency accounts since 1992. The Director argues that, unlike in *Ad-Vantage*, the Canadian CMRs are not agents of Tele-Direct. The Director submits that the evidence supports the proposition that Tele-Direct has consistently considered, and still does consider, the agencies as its competitors.

378 The initial point at issue is the exact contractual relationship between agents and Tele-Direct. In 1988, Tele-Direct required the agencies to sign new contracts with it. Under those contracts, the agent warrants that it is duly authorized to enter into the agreement on behalf of the advertiser. Further, the agency agrees that "it is not acting and does not purport to act as agent for Tele-Direct." [157] This is exemplified by the provisions that the agent agrees to pay for the advertising; to indemnify

and hold harmless Tele-Direct from claims by the advertiser; and to warrant on behalf of the advertiser the truth of all assertions in the advertising. Tele-Direct's Corporate Secretary and legal counsel, Patrick Crawford, confirmed that these contracts have not been revoked and that the agencies were not agents for or of Tele-Direct.

379 The respondents argue that the 1993 YPPA agreements entered into by the agencies in order to be accredited as CMRs supersede the earlier contracts although no steps have been taken to repudiate or amend the earlier contracts. In the application to be accredited as a CMR, the agency agrees to "represent" the publisher in the same terms as quoted in *Ad-Vantage* from the NYPSA guidelines. [158] The YPPA guidelines, however, describe a CMR as a member of YPPA which:

a. Represents to the users the Publishers' product, services and policies, while representing to the Publishers the customers' needs, desires and concerns.

b. Develops a comprehensive national Yellow Pages advertising program for prospects and/or advertisers.

c. Compiles and provides current information pertaining to all Publishers' practices affecting an advertiser's national Yellow Pages program.

d. Develops market research and cost studies for the advertiser or its agency as a basis for making advertising proposals.

e. Provides Publishers on a timely basis with the authorized list of dealers for solicitation under Advertiser's Trade Item.

f. Pays Publishers' invoices without recourse within the time period set forth in the individual Publishers' credit terms, notwithstanding its own collection status with that advertiser or its agency, unless any individual Publisher provides otherwise.

g. Absorbs all adjustment amounts incurred as a result of its own acts, errors, or omissions which including (*sic*) among other things, failure to notify Publishers of cancellations of orders, unless any individual Publisher provides otherwise. [159]

380 What comes out of this somewhat contradictory documentation of the relationship is that agents are not agents or representatives of Tele-Direct in any sense that would preclude a finding that the two are in competition. The agents are not so allied with Tele-Direct as a publisher that they have no independent existence. Their relationship has elements of both co-operation and competition.

381 The agents rely on the Yellow Pages industry, as represented by YPPA, and Tele-Direct specifically, to provide information on the effectiveness of Yellow Pages advertising. They are accredited based on industry standards. With respect to accreditation and the promotion of the medium, the relationship between Tele-Direct and the agents is undoubtedly cooperative.

382 However, the thrust of the Tele-Direct internal documentary evidence is that Tele-Direct treated the agents as competitors of its internal sales force. Prior to the 1990s, Tele-Direct sought to protect its client base from the agents by selling advertisers on using its services instead, stressing the advantages that dealing directly with Tele-Direct offered, including monthly billing and later closing dates, as well as considering more positive initiatives like assigning representatives to large accounts for a longer period of time. During the early 1990s, when Mr. Mitchell was head of the national accounts group, Tele-Direct actively competed for agents' clients. Mr. Mitchell testified that as of 1992, the approach changed to one of protecting internal accounts and revenue only but the documentation does not bear this out. Certainly, one of the reasons for the creation of Tele-Direct (Media) Inc. in 1994 was to combat the loss by Tele-Direct of national accounts to CMRs. The only "contradictory" evidence on this point is a somewhat unclear statement by Wayne Fulcher of DAC that prior to the formation of its CMR, Tele-Direct did not "normally" try to take away agency "headquartered" accounts. However, Mr. Fulcher does think that Tele-Direct's CMR is in competition with his agency.

383 Perhaps the most telling point is that Tele-Direct requires that agencies pay at the time of issue of a directory for advertising placed on behalf of their clients. If agents were only agents of Tele-Direct, they would not be financially responsible

for the obligation of third parties -- the advertisers. This is compelling evidence that the agencies do not act as agents of Tele-Direct. The evidence is that Tele-Direct has always considered agents to be, and has reacted to them, as competitors.

384 Nor can the agents be considered to have no independent existence apart from the advertisers themselves that they also "represent" in the sense of placing orders for advertising on their behalf. Yellow Pages advertising is not a simple product to buy and advertisers desire assistance in making the purchase. Agents, however, are not *mere* "order placers" for advertisers or other advertising agencies employed by advertisers. The evidence before us, which is reviewed in more detail below, is that agents provide a range of services, including advice, layout, design and administration, for which they do not receive additional compensation beyond the commission paid by Tele-Direct. [160] Further, we have no evidence that much of the agents' business consists of simply placing orders for another advertising agency employed by the customer to do the remaining work involved in producing the advertising. Advertisers want these other services in relation to their Yellow Pages advertising from agents. Thus, for advertisers, agents have a separate existence from Tele-Direct.

385 The relationship between Tele-Direct and agents is complex. Tele-Direct treats the agents as independent businesses with which they cooperate to advance their own objectives but with which they also compete. While Tele-Direct apparently recognizes that agents can service certain accounts better than its internal sales force, by reason of its creation of a class of commissionable accounts, it is also its goal, or at least the goal of certain groups within the corporation such as the national accounts group, to keep as much revenue as possible in-house and reduce its dependence on agencies to the absolute minimum possible. We conclude that the business relationship between Tele-Direct and agents is not inconsistent with Tele-Direct and agents treating each other as competitors.

(c) Additional Economic Benefit

386 The respondents argue that there is an "exception" to tying recognized in the American jurisprudence where the seller of the alleged tying product does not receive an "additional economic benefit" from the sale of the tied product. They say that Tele-Direct gets no additional economic benefit from the sale of services in this case because there is no "separate charge" for services.

387 The respondents cite two cases on this point. The first is *Directory Sales Management Corp. v. Ohio Bell*, [161] a decision affirming summary judgment granted against the plaintiff in an antitrust suit by an independent directory publisher against the telco and its directory publisher. The two defendants were wholly-owned subsidiaries of the same parent. One of the allegations was that the defendants tied business telephone service (tying product) to a free Yellow Pages listing (tied product) by refusing to reduce the price of the telephone service if the subscriber chose not to be listed.

388 The Court noted that an illegal tying arrangement might exist if the telco in some way charged for the "free" listing indirectly in the bill for telephone service, even though it did not charge for the listing directly. The evidence was that there was no hidden charge for the listing as the telco did not pay the publisher for the expenses incurred in publishing the listing. The Court stated that if the telco did not receive a "financial benefit" from the tied product, there could be no tying arrangement.

389 The second case is *Beard v. Parkview Hospital.* [162] Dr. Beard, an osteopathic radiologist, was employed by a group of doctors that was the exclusive provider of radiological services to Parkview Hospital. Dr. Beard resigned from the group with the intention of providing radiological services on his own to patients at Parkview Hospital. The hospital did not permit him to do so and Dr. Beard sued, alleging that the exclusive contract for radiological services was an illegal tie of radiological services to other hospital services. Under the terms of the contract between the hospital and the group providing the radiological services, the group billed patients directly for its services and the hospital did not share in the fee. The lower court granted summary judgment for the hospital.

390 In affirming the dismissal, the appeal court approved the lower court's reliance on the requirement that the seller of the tying product must benefit directly from the sale of the tied product. The Court held that the requirement was also consistent with *Jefferson Parish*, which stated that an illegal tying arrangement is one where a firm with market power attempts to impose restraints on competition in the market for the tied product, because the seller who "derives no economic benefit from sales of

an alleged tied product or service is not attempting to invade the alleged tied product or service market in a manner proscribed by section 1 of the Sherman Act." [163]

391 Areeda explains the purpose of this rule in American case law and its relationship to tying as a *per se* offence:

> ... a tie-in, though affecting a substantial volume of commerce in the tied product, is not per se unlawful when it does not foreclose any rival supplier or, perhaps, when any such foreclosure is inherently minor....
>
> One convenient and frequent way to capture the concept of a relevant foreclosure is to ask whether the defendant has a financial interest in the tied product. In most courts, ties do not cross the threshold of potential power or effect when the defendant lacks an economic interest in the tied product, primarily because such a tie does not ordinarily enhance the defendant's power in the tied market or bring about any other consequences of the kind that the per se rule against tying seeks to prevent. "Foreclosure" there may be but not a relevant one. [164] (reference omitted)

Further, using the example of a defendant firm accused of providing its product *A* only to buyers who purchase *B* from a second, separate firm *T*, thus "foreclosing" other suppliers of product *B*, he explains:

> The defendant who gains not a penny, directly or indirectly, from firm *T*'s sales of product *B* is no "competitor" in the market for the tied product *B*. This much is clear, although there are difficulties ahead in deciding what type and magnitude of financial connection with firm *T* makes the defendant a "competitor" of those foreclosed suppliers. [165]

Therefore, where there is no financial interest in sales of the tied product or in the tied market, the alleged tie-in does not cross the threshold for *per se* illegality, although the alleged tie does remain subject to review under the rule of reason. [166]

392 There are three points to be made regarding this argument of the respondents. First, the test of lack of any financial interest in the tied market or economic benefit from the sale of the tied product, however worded, is closely linked in American law to the *per se* nature of tying, which makes us reluctant to adopt it directly because Canadian law is based on a different standard, that of "substantial lessening of competition".

393 Second, there is some validity to the Director's argument that the question of economic benefit from the tied product, or of participation by the firm with market power in the tied market, only arises when two separate corporate entities are involved in the supply of the tying and the tied products. That was the case in both decisions cited and is not the case on our facts.

394 Further, in the *Beard* case it was abundantly clear that the hospital itself, the supplier of the alleged tying product, was not a participant in the radiological services, or tied product, market in any way as it did not receive any part of the fee for those services, which went directly from the patient to the unrelated doctors' group. In *Ohio Bell*, the situation was less clear as the two corporate entities were related but, in any event, the Court was definitive that there was no evidence of a "hidden" or "indirect" charge for the Yellow Pages listing in the telco's bill for telephone service. The telco, the firm with market power, was not attempting to, in the words from *Beard*, "invade" the market for the supply of directory listings.

395 In contrast, on the facts before us, Tele-Direct itself supplies both space and services to all advertisers, both commissionable and non-commissionable. We also have evidence that it considers both consultants (detailed elsewhere) and agencies, the alternate service suppliers, to be its competitors. Since Tele-Direct provides services, it must be compensated for them. As a rational firm it would not provide something for nothing. Therefore, it cannot be concluded that it receives "no additional benefit" from its own sales of the alleged tied product. The precise form of that compensation or "benefit" is not at issue here. [167] Whether Tele-Direct has succeeded in foreclosing any alternate suppliers in the services market is evidently a relevant question but that is not what this argument of the respondents focuses on. This argument is that Tele-Direct gets no additional economic benefit from the provision of services and that, therefore, any exclusionary effects in that market are irrelevant because of the lack of linkage to the firm with market power over the tying product. The facts do not support this hypothesis.

(d) Separate Billing/Separate Payment

396 The respondents argue that if a producer pays for the "components" of a "product" directly and then sells the "product" complete with "necessary inputs" at a specified price, there is no tying. They state that the concept of tying *only* applies where the customer pays *separately* for the alleged tied and tying products. In oral argument, this was expressed as the proposition that it is not a tie to bundle something because as long as there is only one "cost" to the buyer, what is being sold is the supplier's single "product".

397 A distinction was drawn between the case at bar and the facts in *Jefferson Parish*, in which the respondents submit the items found by the Court to be separate products were not "bundled" but were in "two pieces" because there were two bills. They argue that the patient in *Jefferson Parish* paid for both "parts", presumably hospital services and anaesthesiological services, and that if a buyer pays for two different things on two bills, there cannot be one product. Reference was also made to the case of *Collins v. Associated Pathologists, Ltd.* [168]

398 Turning to *Jefferson Parish*, the distinction drawn by the respondents between that case and the instant case on the facts relating to billing is not as apparent as argued. In *Jefferson Parish*, the hospital and Roux & Associates had a contract which provided that all anaesthesiological services required by the hospital's patients would be performed by Roux. The hospital agreed with Roux to provide an anaesthesia department, including space, equipment, maintenance and other services, drugs and supplies, and nursing personnel (subject to approval by Roux). The use of the anaesthesia department was restricted to physicians employed by Roux. As the Court said:

> The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations. At East Jefferson Hospital the package includes the services of the anesthesiologist. [169] (reference omitted)

399 The Court describes the billing arrangement as follows:

> ... The fees for *anesthesiological services* are billed separately to the patients by the hospital. They cover the hospital's costs *and* the professional services provided by Roux. After a deduction of eight percent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital. [170]
>
> (emphasis added)

400 The majority of the Supreme Court did consider the "separate billing" of "anesthesiological services" as a factor that entered into its determination of whether there were separate products. Yet, the actual billing arrangement, as described by the Court, looks very much like a combined bill for the tied product (professional anaesthesiological services) and part of the tying product (hospital services), much like Tele-Direct's bills for Yellow Pages advertising. Specifically, the amount billed included both a professional services portion for anaesthesiological services and a hospital-supplied anaesthesia equipment, facilities, support personnel and drugs portion. The fee is simply divided equally between the two, irrespective of the actual extent of professional services required in the particular case. It is not explicit separate billing of professional services.

401 In any event, there is no indication in the Court's decision that the factor of "separate billing" is essential or even critical. The most that can be said is that it is one factor to examine. We agree with the Director that if the entire resolution of the one or two products issue could be determined simply by the pricing or billing arrangements, this would allow suppliers to immunize all activity from tying claims simply by refusing to quote separate prices for items provided as a package.

402 Further, the Director submits that the mechanism or the route by which the money ends up in the hands of the separate service supplier is not relevant. In the commissionable market, the separate service supplier is paid by commission. A payment by commission may be somewhat more circuitous than, for example, direct billing by the hour by agents for their services (allied with a discounted price for space provided by Tele-Direct to persons who did not use its services) but the end result is the same -- the advertiser pays for the services, the advertiser receives the services of an agent, the agency receives payment

for the services provided. Payment to agencies by way of commission was historically, and to a large degree still is, a fact of life in all advertising media.

403 The significance of the reference to *Collins* in this context escapes us. The Court in that case found that there was no distinct demand for pathology services as a product separate from hospital services. The Court did not refer to billing arrangements at all in making its findings. It based its conclusion solely on the lack of consumer or patient requests for specific pathologists or perception of pathology services as separate from other hospital services.

404 In summary, none of the cases referred to convinces us that the approach we have adopted to the separate product question is inappropriate. Several were largely irrelevant because they dealt with completely different facts or different, non-tying, antitrust issues. To the extent issues were raised which we considered relevant, particularly in the other Yellow Pages cases, we dealt with them in that context. We will now proceed with the basic approach we outlined at the outset and consider the evidence and arguments relating to demand and efficiency.

(3) Demand by Advertisers

405 Are advertisers that fall in that portion of the market which Tele-Direct currently defines as non-commissionable interested in purchasing the services associated with creating and placing a Yellow Pages advertisement from a source other than Tele-Direct? In other words, does Tele-Direct's practice of bundling space and services for a single price "force" them to buy a product that they would rather not buy from Tele-Direct? Or, do they regard the two components as a package that they would rather not acquire separately in any event?

406 The Director called 19 advertiser witnesses; the respondents called two. All of the witnesses except the two called by the respondents expressed a desire to obtain the services associated with developing and placing Yellow Pages advertising from someone other than Tele-Direct. Seven of the 19 advertisers called by the Director are current agency clients; [171] the remainder of the advertisers are serviced directly by Tele-Direct representatives. Of those, eight use or have used a consultant. Three would like to use an agent but cannot qualify for commission.

407 Fourteen witnesses represent multi-outlet (whether franchised, licensed or corporate-owned), multi-directory advertisers. The geographic dispersion of the outlets ranges from a metropolitan area to country-wide. Three are single outlet but multi-directory advertisers because of the wide territory from which they draw business. The remaining four advertisers are single outlet, single directory advertisers. All of the witnesses called are spending above-average amounts in the Yellow Pages. Two were spending close to the average of $1,700 (at about $2,000 annually each); the remainder ranged from $7,000 to $300,000.

408 The respondents have not attempted to rebut the specific evidence of the advertisers who indicate that they would prefer to obtain advertising services from someone other than Tele-Direct. They called two witnesses to show that some advertisers prefer Tele-Direct's services, although one of those witnesses stated that advertisers should have the choice of dealing with Tele-Direct or using an agent. Counsel admitted in oral argument that in the "top end" of the market, some advertisers find the bundling of services and space by Tele-Direct problematic. He argues, however, that these advertisers constitute a "statistically insubstantial sample" and that there will always be a number of people "who would like to get something for nothing" and "as long as they aren't paying for it".

409 It is true that the customers called to give evidence constitute a very small proportion of total advertisers. They were not randomly selected and we do not treat them as a statistically significant sample. However, coupled with their anecdotal evidence of why they prefer to use agents is the evidence that in the current commissionable market, which includes grandfathered eight-market accounts, agents enjoy the lion's share of the business. When advertisers have the choice, the vast majority choose an agent, rather than Tele-Direct, for services. There is clearly separate demand beyond what Tele-Direct considers a "national" account (the 1993 definition) with respect to eight-market accounts, currently grandfathered. Moreover, there is no reason to believe that the line drawn by Tele-Direct between commissionable and non-commissionable accounts accurately reflects the boundary of demand; that those accounts that are commissionable prefer to use an alternate service provider while those who are not commissionable do not. Given the strength of demand for agents' services in the current commissionable market, we

think it is reasonable to infer that the preference shown by the large majority of commissionable accounts for the use of agents extends down into the current non-commissionable market, at least to some extent. We are satisfied there is sufficient evidence before us to conclude that there is demand for separate advertising services below the existing commissionable market and that the advertisers called by the Director can tell us something about the nature of that demand.

410 Common amongst the Director's witnesses, whether single or multi-directory advertisers, was a preference for the advice or consultative services provided by an agent or a consultant over those of Tele-Direct. A recurring theme was that the agent or consultant provides an "overall" picture, reviewing all of the client's Yellow Pages advertising, including white pages listings, which headings were being used and which should be used, all the directories involved, what the client's competitors are doing and the nature of the business's markets. These service providers help plan the Yellow Pages advertising, including recommending headings and, in some cases where the level of expenditure is higher, budgeting. In the case of agents, a representative is assigned to the account for a long period of time and the clients have the perception that the agency "understands" its particular business. That these service providers tend to pay attention to the overall picture is suggested by the testimony of two advertisers, one the client of an agent and one of a consultant, that the agency or the consultant was the one to bring to its attention duplicative advertisements in its Yellow Pages program.

411 The advertisers using agents also mentioned creative services as one of the elements of the service provided. For the clients of consultants, creative services are at least equally important since by re-designing an advertisement and by substituting other design techniques, like, for example, screening, for the more expensive size and colour, the consultants are able to reduce the cost of advertising.

412 In the case of both agents and consultants, advertisers generally perceive that these "independent" service providers are more interested in helping them get more out of their Yellow Pages advertising dollar than is the typical Tele-Direct representative. Frequently, according to the advertisers, the Tele-Direct representative does not have time to sit down and consult with the advertiser. The advertiser has to accommodate itself to the schedule of the representative faced with a full schedule and deadlines in a particular canvass. Another recurring complaint is that the Tele-Direct representative is more interested in selling more colour or a larger size than in arriving at the level and type of advertising that is right for that client; representatives are perceived as quite aggressive and prone to "upsell". Most of the advertisers also recognize that these problems result from the way in which Tele-Direct operates its canvasses and compensates its representatives; their comments were not directed at the representatives as individuals. While the agencies are also paid commission, individual representatives are paid straight salary for servicing the agency's existing client base. [172]

413 The multi-directory advertisers also prefer the services of third parties because they provide "co-ordination" or "administrative" services. These multi-directory advertisers are primarily the clients of agents rather than consultants. [173] They testified extensively about the advantages of using an agency which will keep track of publication dates for the various directories, control the uniformity of the advertisements, company image and message across directories and, where applicable, organize the contact between head office and franchisees or licensees for approval of advertisements and billing. Promoting a uniform message and image is particularly important to franchisers whose franchisees may be quite independent of head office and also to those which had enrolled businesses to their network which operate the franchised business as only a part of their overall business. [174]

414 It might be argued that the administrative services provided by agents are not supplied at all by Tele-Direct. [175] On that reasoning, administrative services would not be a component of the advertising services at issue in the tying case. The argument would be that since Tele-Direct does not supply administrative services, it is not in competition with agents because it is supplying different services and customers who want administrative services are free to purchase them separately.

415 It appears that, in fact, Tele-Direct has made some effort to provide the administrative services emphasized by the advertiser witnesses who appeared before us (uniformity and coordination) through its national accounts group and with its efforts regarding continuity. Further, while it is possible that such administrative services could *conceivably* be purchased separately, there is no reason to believe that it would be efficient to do so. There is no evidence of agents providing these

services to advertisers who use Tele-Direct for the remaining services, even though there is clearly a demand for them. The fact that Tele-Direct provides administrative services in some cases but not in others simply means that Tele-Direct and the agents are not providing precisely the same product. Indeed, one would not expect to find homogeneous packages of services. Otherwise, there would be no reason for customers to choose one service provider over the other. Therefore, we are satisfied that administrative services are a relevant and important aspect of advertiser demand for advertising services.

416 We now turn to the respondents' argument that advertisers only prefer agents because they are getting something for nothing or they are not paying for the agents. We do not accept this argument. The advertiser is paying for the advertising services whether provided by Tele-Direct or, if the account is commissionable, by an agent. With respect to the use of consultants, advertisers pay to use consultants as Tele-Direct's price remains the same but the consultant charges the advertiser a portion of the amount the advertiser saves by use of the consultant. Those savings would otherwise be for the advertiser to either spend on more Yellow Pages advertising or to pocket.

417 Even if we were to accept that the cost to advertisers of obtaining services is the same whether they choose Tele-Direct or an agent, we think it is still evidence of separate demand that where advertisers have the choice, the advertisers prefer to use agents. However, the evidence is, as will be explained, that when advertisers use agents, they bear costs additional to what they would have to bear if they placed their advertising through the Tele-Direct representative. Thus, it is apparent that customers prefer agents even if it is more costly to use an agent than to deal directly with Tele-Direct. This is strong evidence of demand for the services of agents by advertisers when they have the possibility of using them.

418 One source of higher cost derives from the billing practices of Tele-Direct. When advertising is placed through Tele-Direct's representative, the cost of advertising is divided into twelve equal parts and included in the Bell Canada telephone bill commencing upon issue of the directory. Advertisers who use agents are required to pay for their advertising on an issue basis, that is, to pay the full amount upon issue of the directory. When this occurs the advertisers' additional cost of using an agent is roughly one-half the annual cost of funds or, in other words, one-half of the commercial interest rate. [176] Given interest rates over the past 20 years, this has, depending upon the time, constituted approximately three to six percent of the advertising bill, a cost the advertiser does not pay if it uses Tele-Direct's services. In the words of Mr. Kitchen of Lansing Buildall, these advertisers are "paying a premium in terms of the payment schedule." While it is true that some advertisers that used agencies have arranged for periodic payments, no arrangement disclosed in the evidence is as favourable to them as the Tele-Direct monthly billing practice.

419 Another cost borne by some advertisers in order to use an agent is the placing of "extra" advertising in directories outside the areas from which the advertiser draws its customers so that the criteria for the eight-market rule (grandfathered accounts) are met. Five advertiser witnesses buy "extra" advertising. In one case, the cost of the additional advertisements is paid by the agent; in another the agent pays 15 percent of the cost of the additional advertisements. The other advertisers bear the full cost of the "extra" advertising.

420 How far down does the demand for separate services extend? We have evidence from a number of advertisers, both agency clients and clients of consultants, probably best described as large local or regional advertisers. Despite the amounts they are spending in Yellow Pages, these advertisers would not qualify even under the eight-market rule if they only advertised in the areas where they have locations or from where they draw business. [177] Since there are only seven market areas in Ontario and six in Quebec, that rule requires advertising outside the boundaries of each province. [178]

421 However, we did not hear from any truly "small" advertisers. Although two of the advertiser witnesses spend about average amounts in the Yellow Pages, they are the outlying examples. Most of the remaining witnesses, even those using consultants, spend at least $10,000 and most spend considerably more than that. Advertisers spending more than $10,000 annually represent only two percent of Tele-Direct's total advertisers by number and about one-third of its advertising revenues. There are, therefore, a vast number of advertisers representing a significant amount of revenue about which we know little regarding the character of their demand for separate advertising services.

422 The Director refers us to documentary evidence dating from 1975 when Tele-Direct changed to the eight-market commission rule to show that approximately 20 percent of the pre-1976 agency customers purchased less than $1,000 per year of Yellow Pages advertising. Many purchased as little as $500 worth of advertising annually. We have no reason to doubt the accuracy of these statements. We are reluctant, however, to reach conclusions about "small" advertisers based only on documentary evidence that is some 20 years old.

423 On the other hand, we have the views of Michael Trebilcock, the respondents' economist expert witness, [179] regarding "smaller" advertisers, which imply that these advertisers do not demand advertising services from a source other than the publisher. Based on the data provided in the report of the Office of Fair Trading, [180] he notes that for smaller advertisers, the cost of providing advertising services overwhelmingly comprises space and selling effort rather than advisory services. The reasoning behind these statements is sound and there has not been any evidence or argument to the contrary. It is certainly plausible that the lowest-cost "advertisements", for example a bold listing, do not contain much, if any, creative content. We therefore accept that the general thrust of this argument is valid and that, for "smaller" advertisers, it is highly doubtful that a separate demand for advertising services exists. [181]

424 The evidence supports the view that there is buyer interest in obtaining advertising services from suppliers other than Tele-Direct over at least part of the spectrum of advertisers. While it is difficult to know where exactly to draw the line, we can conclude at this point that there is no evidence that would satisfy this threshold test of separate demand from "smaller", including new, advertisers. It is apparent that the larger advertisers would have the greater need for the services of agents or consultants based on the complexity of their advertising. Smaller, including new, advertisers whose advertising is relatively more simple likely would not have such need.

425 However, based on the evidence before us, we are not prepared to draw a firm line below which we could confidently say there is no evidence of buyer demand for services of independent advertising service providers. Therefore, at this point, we only conclude that there is evidence of buyer demand for advertising services for suppliers other than Tele-Direct for "larger" advertisers.

(4) Respondents' "Efficiency" Arguments

426 Given the evidence of demand for services from suppliers other than Tele-Direct, is there evidence that efficiency considerations would dictate a single product? Based on the historical practices of Tele-Direct, the Director has ample evidence that the products can and were, in fact, sold separately. Pre-1975, a large percentage of advertisers could acquire services from a source other than Tele-Direct. Under the eight-market rule and the 1993 rule, any advertiser that qualifies or can make itself qualify by some extra advertising can acquire services separately from an agent. The respondents have put forward a number of efficiency arguments which, if valid, they say would lead to the conclusion that there is a single product and therefore, no tie. These arguments are largely based on the analysis and evidence of Professor Trebilcock, their expert witness. There were also profitability studies entered in evidence by the respondents and they will be dealt with in the next section.

(a) Impossibility of Leveraging: Fixed Proportions

427 Professor Trebilcock, for the respondents, is of the view that the Director's theory that Tele-Direct is attempting to leverage its market power (assuming it has market power) over space into the services market by bundling space and services is not valid. He states that such leveraging cannot occur because advertising space and advertising services are complements which are consumed in fixed proportions. There is agreement between the experts on both sides that complementary goods used in fixed proportions imply that the only profit-maximizing motive to bundle the two products is in order to minimize costs; all opportunities to exploit market power could be accomplished with control over either product. This implies that the bundling is socially efficient and it should be concluded that there is only one product. [182]

428 Professor Slade, for the Director, argues that space and services are at least partially substitutable. Professor Slade is of the view that:

> ... it is possible to achieve the same impact by using a large ad or one that is cleverly designed. In addition, astute targeting of the "right" directories can substitute for purchasing space in a larger group of directories. More generally, an agency that provides service can often advise on ways to cut expenditure on space while maintaining the same level of advertising impact. In addition, it might even suggest ways of obtaining a higher impact from lower expenditure by, for example, substituting white knockout for colour. [183]

Because of the failure of the assumption of complementarity, she argues, leveraging is possible. Certainly the possibility of an extension of market power over a substitute, even if only a partial substitute, is one which causes concern and should be examined further.

429 The evidence supports variable rather than fixed proportions. To the extent that agents tend, compared to Tele-Direct representatives, to be less likely to promote increased expenditures on space, the additional expenditures on advertising services by agency clients (through the purchase of extra advertising, foregoing monthly billing) lead to the substitution of advertising services for advertising space. Furthermore, once it is recognized that there is an issue of the quality and content of advertising services, as indicated by the evidence of advertisers and their willingness to pay more for agents than it would cost them to use Tele-Direct's representatives, even assuming the same expenditure on space using an agent or Tele-Direct, it is difficult to see how advertising services are being consumed in fixed proportions with advertising space.

430 The evidence regarding the activities of consultants also suggests that advertising services and advertising space are not used in fixed proportions, and that they are partial substitutes. The purchase of services from a supplier other than Tele-Direct results in reduced expenditures on space. An example provided by a consultant concerned a very large and apparently inappropriate existing advertisement for a taxi company in the Hamilton area. The existing full page advertisement included a large picture of an airplane and reference to airport service. The consultant (Serge Brouillet of Ad-Vice Communications) determined from his marketing needs analysis for the client that he actually did very little airport business. The changes proposed by the consultant were both less costly and appeared to be more effective.

431 We conclude that advertising space and service are not consumed in fixed proportions and it cannot therefore be assumed, as argued by the respondents, that only efficiency explains why they are bundled by Tele-Direct.

(b) Widespread Industry Reliance on Internal Sales Force

432 As part of his expert evidence on behalf of the respondents, Professor Trebilcock stated that any theory of the tying allegations in this case must explain four central facts. One of those facts is stated as:

> Almost all yellow pages directory publishers organize their selling functions in a similar way to TD i.e. by heavy reliance on an internal sales force. [184]

It is not in dispute that all North American publishers, whether telco-affiliated or independent, rely heavily on their internal sales force. The Director has, however, brought forward evidence indicating that where the line is drawn between accounts that are open to agency competition because they qualify for commission and those which are exclusive to the internal sales force differs from publisher to publisher. The Director further argues that Tele-Direct's current commissionability rule is one of the strictest in North America.

433 The respondents submit that Tele-Direct's national account definition simply represents the transposition of the YPPA national account definition (also referred to as the YPPA "A" account definition) into the Canadian context. The YPPA by-laws provide that, as a minimum standard, an advertising program involving two or more publishers, 20 or more directories, and at least three states with 30 percent of the advertising revenue outside the primary state is considered national Yellow Pages advertising. Publisher members must accept advertising meeting those criteria as national. They are not precluded from accepting advertising meeting less stringent criteria as national. Each publisher decides on the level of compensation for advertising it defines as national.

434 While the *terms* of the YPPA definition are similar to those used by Tele-Direct in its definition, the evidence was that the effect of applying the definition in Canada is very different. Where there are about 6,000 directories in the United States, there are only about 350 in Canada. Tele-Direct is one of only seven or eight publishers in Canada and controls 70 percent of Canadian Yellow Pages publishing revenue. Tele-Direct's definition incorporates a minimum of two provinces instead of three states. Tele-Direct requires 20 percent of the published revenue outside the primary *publisher's territory*; the YPPA definition requires 30 percent of the revenue but outside the primary *state*. Under the YPPA definition, as long as two publishers are involved, there could be minimum revenue in the second publisher's territory. According to the agency witnesses, the 20 percent requirement is especially onerous given that Tele-Direct's territory includes the two most populous provinces. Overall, commission is currently paid on 13 to 14 percent of total directory advertising revenues in the United States as opposed to seven to eight percent of total revenues in Canada.

435 Although it is true that an account wholly within a large state such as California (with a larger population than all of Canada) might not be commissionable under the "A" account definition, according to the President of the YPPA, most publishers, including telco affiliates (RBOCs) pay commission on regional accounts, called "B" accounts. For example, the evidence was that Pacific Bell has a commissionable account which could include accounts wholly within the state of California.

436 In Canada, with one exception, all the telco publishers require advertising to be placed in two publishers' territories to qualify for commission at 25 percent, [185] usually with a minimum of 20 percent of revenues required outside the dominant publisher's territory. Effectively, this generally means that two provinces will also be required. [186] Since the other publishers have much smaller territories than Tele-Direct, their "two publishers" requirement is easier to meet.

437 Professor Trebilcock places great stress on the fact that independent publishers also rely heavily on an internal sales force because "many of these directories do not remotely possess any market power (however measured) in many of the directory markets in which they operate." [187] Therefore, he concludes

> *The stark and enormously significant implication of this fact is that the decision to vertically integrate advertising selling functions clearly has nothing to do with market power*. It must be explained entirely by the kind of efficiency considerations ... outlined earlier in this opinion. [188]

438 Based on the evidence from White and DSP, we know that, in Canada at least, despite the fact that they offer commission on all accounts brought to them by CMRs, [189] the independents rely heavily on their internal sales force. The evidence that we have is that an internal sales force is a *necessity* for their survival rather than a choice based on efficiency considerations. Despite the liberal commission rules, they receive a small proportion of their overall revenues from agents and must rely on their own sales force for the bulk of their revenues. [190] In fact, recruiting an effective sales force is one of the hurdles a new publisher has to overcome.

439 While we agree that the independent publishers are unlikely to have market power, we are reluctant to conclude solely on the basis of the fact that they rely on an internal sales force that the "bundling" of sales and service by a publisher with market power is competitively benign. [191] We would likely be willing to draw that conclusion if we had evidence that the markets in which independents are operating, particularly in the United States, are competitive. If they were, yet most sales by publishers were on a bundled basis, that would be a very strong indication that efficiency was dictating the bundling and that there was only one product at issue. The only evidence we have, however, is that those markets, like Tele-Direct's market, are dominated by the telco publisher. It was pointed out to us by the respondents that most RBOCs' prices are even higher than Tele-Direct's. We also referred in the section dealing with Tele-Direct's market power to testimony that indicates that American telco publishers also have sufficient profits to subsidize local telephone service. We are, therefore, not satisfied that widespread reliance on an internal sales force across publishers, including independents, dictates a single product on efficiency grounds because it may be a function of telco dominance in all markets.

(c) Agents' Views

440 The implication of finding and prohibiting the tied selling alleged by the Director is that agents would, one way or another, be permitted to offer their services to a wider range of accounts below the level of "national" accounts currently considered by Tele-Direct as commissionable. Professor Trebilcock is of the view that agents are not interested in servicing smaller accounts.

441 In interviews with agents that the Director's staff undertook in investigations prior to filing the application, the agents stated that they were not interested in the smaller accounts. As reported by Professor Trebilcock, who had access to the summary of the interviews prepared by the Director's counsel, the smallest accounts that any of the agents expressed an interest in ranged from those spending from $10,000 to $50,000 per year on Yellow Pages. A lower limit of $10,000 excludes almost 98 percent of all customers and approximately 70 percent of total revenue but would represent a substantial increase over the amount of revenue currently commissionable.

442 When giving evidence the agents took a different position and stated that they would be interested in all customers but would handle the business differently. The only reasonable interpretation is that the early answers reflected the agents views given their current method of operation. Their answers when giving evidence, in contrast, reflected the willingness of businesspeople to consider any reasonable opportunity to turn a profit, including considering the possibilities of paddling into uncharted waters. On the whole, we regard their views during the interviews as the more reliable. Because the agents apparently have little or no interest in servicing smaller accounts, we infer that they regard themselves, at least in their current setup, as at a cost disadvantage *vis-à-vis* Tele-Direct in dealing with these smaller customers.

443 Therefore, we agree with Professor Trebilcock that agents are not interested in servicing smaller accounts, although neither he in his evidence nor the Tribunal at this stage can be more explicit than having regard to the $10,000 to $50,000 range about what constitutes "smaller" accounts.

(d) Justification for Tele-Direct's Practice of Bundling

444 Professor Trebilcock attempted the most complete explanation and justification of Tele-Direct's practice of bundling space and services over most advertiser accounts. Initially, he divides what the Director has alleged to be advertising services into selling effort and consulting advice regarding the advertisement (artwork, placement, etc.). He states that selling effort cannot be priced on its own as customers will not pay for a "sales pitch"; it must be bundled with either space or consulting advice. The overall problem facing Tele-Direct (and other publishers) is to exercise control over those selling its product and to motivate agents or internal staff, as the case may be, to provide an optimal mix of selling effort and consulting advice *from Tele-Direct's viewpoint*. The Tribunal agrees that there is what is known as a "principal/agent" problem at work here. The issue is the nature of the problem and whether Tele-Direct's viewpoint is the only relevant one or should be the operative one.

445 Professor Trebilcock divides his explanation concerning Tele-Direct's approach to commissionability into three categories: small advertisers, larger local advertisers (which presumably includes regional advertisers) and currently commissionable advertisers (larger national or regional accounts involving multiple publishers). We have accepted that it is likely that small advertisers have no separate demand for advertising services. New advertisers, with few exceptions, coincide with small advertisers. For the sake of completeness we continue with the "efficiency" or cost-side evidence for all advertisers including small advertisers.

446 Professor Trebilcock's primary explanation of why Tele-Direct prefers to rely on its own resources for servicing small customers is that it is highly likely that it is cheaper for Tele-Direct to service small customers internally. His view is that the most effective method of selling advertising to these customers, probably because of significant economies of scale, appears to entail "'blanketing' directory territories in concentrated time blocks on a sequential basis" as Tele-Direct currently does. It is, however, not self-evident that this approach results in lower per unit costs than using smaller numbers of representatives who take a longer time to do a canvass. There is simply no evidence.

447 Another factor cited by Professor Trebilcock that is likely to lead to attenuated efforts by CMRs regarding small advertisers is the possibility that advertisers would engage in opportunistic conduct. The difficulty Professor Trebilcock foresees is that once the successful selling effort has been made, which the customer is unwilling to pay for, the customer is in a position

to ask for, and other sellers are in a position to offer, a discount because they need only provide the consulting advice and not the selling effort, for which the first seller will be uncompensated. He believes that this problem is most acute for small advertisers, including first-time buyers. For large advertisers, selling effort constitutes a smaller percentage of overall advertising services. In addition, larger customers might have more difficulty engaging in opportunistic conduct because they are more likely to become known to agents. Tele-Direct can avoid this "free riding" by small advertisers by bundling space and selling effort. This is a version of the free riding argument often made in defence of vertical arrangements such as resale price maintenance which may be valid in some circumstances. There is, however, absolutely no evidence that it applies on the facts in the instant case.

448 Professor Trebilcock also points to a divergence of interest between Tele-Direct and agents which leads to an incentive compatibility problem should Tele-Direct use agents to service small advertisers, otherwise referred to as the "completeness externality". This externality, compounded by advertiser opportunism as explained above, is also the principal explanation advanced for why Tele-Direct prefers to provide services internally for "larger local" advertisers. As Professor Trebilcock recognizes, a simple cost difference cannot explain the reluctance of Tele-Direct to offer a commission on these accounts as the agents would not service them, even if commission were offered, if they were at a cost disadvantage to Tele-Direct.

449 According to Professor Trebilcock, there is a positive correlation between the "completeness" of a directory and the value that users place on it. Advertisers are willing to spend on a directory to the extent that the users find it valuable. But since each individual advertiser benefits only minimally from their own contribution to completeness, they are unwilling to pay for this effect. Tele-Direct, as the publisher, is able to internalize this externality over the longer term (the more "complete" and useful the directory, the more valuable the advertising space and the higher rates it can charge).

450 While there is no doubt that publishers value "completeness" for the reasons stated, it is largely an undefined term. There is no explanation in Professor Trebilcock's evidence, for example, of why a directory is in any sense more complete when there are paid bold listings rather than unpaid listings in ordinary type. Nor is there any adequate explanation of why users would value more advertisements in colour or larger advertisements unless they provide more information. There were also indications from the evidence that there can be *too much* advertising from the viewpoint of users. In large centres such as Montreal and Toronto, it has been necessary to split directories because of their size. Thus, while it is indisputable that directories must have sufficient representation by advertisers so that the directory is considered to be a useful reference, it is far from clear that *all* increases in advertising contribute to this objective. This point is critical because if Tele-Direct is encouraging increased selling effort beyond the range where further advertising contributes to completeness in any meaningful positive way, then the ability of Tele-Direct to sell additional advertising through its own sales force cannot be assumed to be socially beneficial in providing users with additional value.

451 Professor Trebilcock is of the view that the completeness externality leads to two results. First, Tele-Direct has a stronger incentive than CMRs to recruit new accounts; CMRs will focus most of their efforts on attracting existing advertisers from Tele-Direct or other CMRs. Second, while Tele-Direct is interested in retaining customers over the long term in order to enhance completeness, CMRs will be more concerned with immediate returns. Thus, when Tele-Direct recommends the, in Professor Trebilcock's words, "optimal" advertising package, the CMR will have an incentive to convince the advertiser that a less expensive or "sub-optimal" package is equally useful in order to recruit the customer. The risk of dissatisfaction on the part of the customer is increased; the customer may stop using Yellow Pages because of informational imperfections which make it difficult to distinguish between weakness in the medium and bad advice.

452 Further, Professor Trebilcock is of the view that it would be difficult for Tele-Direct to structure incentives to CMRs to induce them to sell a "socially optimal" quantity and quality of advertising by way of contract because of significant transactions costs. On the other hand, Tele-Direct can and does motivate its internal sales force "to sell and advise clients to purchase optimal packages by offering training, encouragement, screening of advertising sales by managers, internal promotions, awards, a team ethic, etc." [192]

453 The Tribunal is inclined to agree with Professor Trebilcock that it is probably easier for Tele-Direct to create incentives that motivate its own representatives to sell more than agents. The more important question is whether leaving Tele-Direct the unfettered choice of when to use agents and when to service internally leads to a truly "socially optimal" result. We have

already indicated some doubts that the unrestricted pursuit of completeness, while it may be in Tele-Direct's interest, is wholly in the public interest or "socially optimal".

454 The Director argues that Tele-Direct chooses to retain services in-house because this allows it to motivate its sales force to exploit better the "information asymmetry" it enjoys *vis-à-vis* its customers or, in other words, to "oversell". He submits that Tele-Direct's incentive structure results in its sales representatives convincing advertisers to buy more than they would if they were provided with balanced information or the possibility of obtaining an alternative viewpoint from another service supplier. Witnesses stated that they did not regard the advice from Tele-Direct's representatives as objective. We have acknowledged that, as a general matter, the effectiveness of marginal dollars spent on advertising is difficult to determine. This leaves customers somewhat vulnerable to the advice they receive. The incentive structure for Tele-Direct's representatives makes the Director's argument that they are motivated to "oversell" at least plausible. To the extent that the Tele-Direct representatives succeed in selling "too much" advertising to one advertiser, the effect would multiply throughout a heading, since, as the evidence revealed, many firms base their Yellow Pages expenditures on that of their competitors (the "prisoner's dilemma"). We, therefore, cannot accept Professor Trebilcock's critical assumption that the advertising a Tele-Direct representative sells is necessarily socially optimal.

455 With regard to recruiting new customers, we accept that a publisher would want to ensure that there was a thorough and efficient canvass of potential new customers, in the sense that all were approached and there was no duplication of effort. Since the prospective new Yellow Pages advertisers are easily identifiable from business telephone subscriber information in the hands of the publisher, it makes sense to assign them to specific persons rather than creating a "free for all". This can be done on an individual basis, by territory, or any other method that avoids multiple contact of the same prospect by different persons. The assignment is key; if customers are assigned it makes little difference whether the persons making the contact are employees or outside agents.

456 Professor Trebilcock also believes that a reason why Tele-Direct does not make larger local customers commissionable is that agents would curry favour with customers by recommending less than the "optimal" amount of advertising (or the amount that a Tele-Direct representative would recommend), with long-term detrimental effects, because they are primarily interested in immediate returns. While Tele-Direct may worry about the advice being given by agents, it is far from clear that the quality of their advice is a cause for concern with respect to satisfying the needs of consumers. The facts before us do not support Professor Trebilcock's view that agents tend to take a short-term view. When the actual relationships between customers and agents and customers and the internal sales force are considered, it is the former who have the long-term relationship. Until recently most Tele-Direct representatives, *unlike* agents, predominantly had a short-run relationship with customers. Professor Trebilcock also acknowledged that agents might be reluctant to be perceived as pushing current sales because customers might be inclined to switch agents. Tele-Direct's representatives do not have this concern because customers do not have freedom of choice. Much of the representatives' livelihood depends on increased sales to existing customers whereas the employees of the agents are on salary and receive no additional compensation for increased sales to existing clients. [193] Moreover, there is no evidence that agents' clients have tended to cancel advertising for any reason.

457 In Professor Trebilcock's view, the fact that Tele-Direct chooses to pay commission on multiple publisher accounts is evidence that Tele-Direct is motivated by efficiency considerations with respect to all its decisions regarding commissionability. Otherwise why would Tele-Direct choose to make any part of its sales commissionable? Professor Trebilcock interprets the fact that Tele-Direct pays commission on national accounts and that the bulk of sales to this segment is made by agents as proof that agents can more efficiently service this segment. While Professor Trebilcock believes that the tendency of agents to undersell and focus on existing advertisers and the possibility of opportunism are still present, the cost advantages of agents compensate for these weaknesses. These sophisticated advertisers are also better able to monitor whether they are being sold the "optimal" amount of advertising and the possibility of losing such a client effectively polices the agent. While the Director accepts that the agents are more efficient in servicing the commissionable segment, he disputes, as noted above, that agents in any circumstances sell "sub-optimal" amounts of advertising as defined by Tele-Direct's perspective. The Director takes issue with the view that Tele-Direct is more efficient in dealing with the rest of its customers. Detailed evidence on relative efficiency was placed before us and is the focus of the next section.

458 In summary, as indicated in the section on advertiser demand, we have accepted Professor Trebilcock's view that there is no separate demand for advertising services for "small" customers. With respect to those advertisers for which separate demand has been proven, called "larger local" advertisers by Professor Trebilcock, the Tribunal does not accept that either the completeness externality or the possibility of advertiser opportunism is supported on the evidence before us and, therefore, does not dictate that space and services are a single product with respect to those customers. The question of relative efficiency or cost advantages on the part of Tele-Direct with respect to servicing those advertisers will be addressed in detail in the next section.

(5) Comparative Profitability Studies: Agents/Internal Sales Force

459 The respondents have introduced evidence bearing on the comparative efficiency of Tele-Direct's representatives and agents to argue that the commissionability rules are, and always have been, efficiency based. The primary evidence is a comparative cost study dated 1995 created for these proceedings and entered through Michel Beauséjour, Tele-Direct's Vice-president of Finance. In addition, there are two other internal contribution-to-profit studies from 1974 and 1985, along with the descriptive evidence of Donald Richmond, Director of Manufacturing and Contract Administration for Tele-Direct, and Jan Rogers, Director of Corporate Methods and Support.

460 Before turning to a detailed discussion of the evidence it is necessary to consider its import with respect to the respondents' claim that its policies with respect to the payment of commission and the utilization of agents are dictated by efficiency considerations. While the studies referred to are relevant to the respondents' position, there are very important caveats that seriously weaken the conclusions that can be drawn from the evidence. Firstly, in an ordinary "make or buy" decision what is being compared is only the *cost* of producing a particular product in-house or buying it. This basic requirement (of looking only at cost) is violated when a comparison is made between the *contribution to Tele-Direct's profit* by the internal sales force and agents, i.e., revenue considerations enter.

461 More importantly, the products (i.e., the provision of services to commissionable and non-commissionable accounts) being compared in the Raheja study from 1974 and the 1995 study are very different. In fact, these studies are well described by the comparison of "apples and bananas". It is difficult to see what can be derived from the exercise of comparing the contribution to profit of agents and Tele-Direct's representatives who each deal with an entirely different set of customers. A significant percentage of the non-commissionable accounts are dealt with entirely over the telephone. Where representatives meet with customers, the customers' needs, for the most part, cannot be compared with the large multi-directory customers who rely on agents. What is the point of comparing the contribution to profit of agents, who are acknowledged to be relatively effective in serving complex "national" customers, with the contribution to profit of Tele-Direct's representatives in serving customers, many of whose requirements are relatively simple? While the comparison in 1985 between NAMs/NARs and agents might be considered to be a close, although not an exact comparison, the data are not current and not particularly detailed.

462 Overall, we have found these profitability studies not to be supportive of the respondents' position. The early studies are out-of-date (and Raheja is of limited relevance because of the difference in products being compared and an error in it), a critical point when considering current efficiency. At numerous points in the 1995 study, the differences in costs can be traced to differences in the characteristics of the customers being served rather than to any possible difference in the relative costs of agents and Tele-Direct's personnel. It also suffers from bias in favour of Tele-Direct because of its time frame and from methodological weaknesses.

463 For completeness, we will comment on the studies to further explain why, in our opinion, they are not reliable for the purpose advanced by the respondents, that is, to demonstrate that Tele-Direct's internal sales force is more efficient than agents.

(a) Raheja Study (1974) [194]

464 This study was prepared as part of a review of Tele-Direct's policy towards advertising agencies, including agencies specializing in Yellow Pages, which were a relatively recent phenomenon at the time, with a view to determining a commission payment. The study itself notes that the system of classifying accounts at Tele-Direct made it difficult to calculate profitability

of the various components. Nevertheless, Mr. Bourke was of the view that management at the time placed sufficient confidence in the results of the study to make decisions on the basis of it. The study showed that in the "local market", defined as all sales within Tele-Direct's own directories, agency sales were less profitable. Although there is no evidence of the weight that the study played in the decision, in 1976 Tele-Direct sharply restricted the commissionable market by moving to the eight-market rule.

465 The odd thing about the exercise is that, taken on its own terms, there is an obvious error in the study: the commission to agents is counted both as a reduction from revenue *and* as an expense. When the error is corrected the comparative ratio is somewhat better for the agents than it is for Tele-Direct's own representatives. The respondents take the position that the existence of the error is irrelevant; management acted on the information, proving that Tele-Direct was motivated by efficiency considerations and not by any other motive. While the study may suggest that Tele-Direct was at least *interested* in efficiency at the time, it is peculiar that so simple an error was not easily immediately detected by those supposedly basing decisions on it. In the circumstances, and having regard to the many qualifications in the study, the existence and results of the study are not of assistance.

(b) Profitability Study: National Accounts - Selling (1985) [195]

466 This study deals with the contribution to profit of national accounts serviced by agencies and NAMs in 1983 and 1984. Agencies included specialized and regular agencies while the NAMs included one Tele-Direct sales representative who dealt with high revenue potential customers and another who dealt with low revenue potential customers.

467 The study was entered in the record during the cross-examination of Mr. Beauséjour. Although the bottom line contributions to profit were noted, there was no examination of the study with the witness other than to establish that the then prevailing methodology regarding the payment to Bell Canada was employed. Based on the description in the document the only costs that were specifically attributed to the agents and NAMs were agency commissions and so-called sales expenses. The latter included the salaries of sales personnel in the national accounts group but also the personnel who processed orders submitted by agents. [196] All other costs were allocated on the basis of the net revenues generated by each of the two channels.

468 For the combined eastern and western regions, the contribution to profit as a percentage of total revenues generated for the agents and NAMs in 1983 was 18.7 percent and 17 percent respectively. In 1984 the contribution was 20 percent for both. While there are caveats, [197] the important point that emerges from the study is that Tele-Direct had no reason to believe at that time that it was less costly to rely on its own representatives who dealt with customers with the same or similar characteristics as those served by agents. The respondents did not bring to our attention any further study or any evidence whatsoever of internal consideration of relative efficiency leading up to the 1993 change in the commissionability rules. The only documentation on the record, and the evidence of Mr. Mitchell who was intimately involved in the preparation leading up to the change, focuses on effects on number of accounts and revenues that would be available to agents or the internal sales force under various scenarios.

(c) Profitability Study (1995) [198]

469 Towards the end of the hearing counsel for the respondents introduced through Mr. Beauséjour a document comparing the relative contribution to profit in 1994 of agents and the internal sales force, including the national accounts group. The document was admitted over the strenuous objections of counsel for the Director. During discovery, Tele-Direct provided a cost of sales figure for its internal sales force of 12.3 percent of revenue. The basis for that figure was explored through detailed follow-up questions and further explanation. There was no indication from the respondents that a second study was being undertaken by Tele-Direct, and that it contained results that were different from those that had been given on oral discovery and in follow-up answers. On December 4, 1995, counsel for the respondents produced the second study to counsel for the Director.

470 While we found the timing of the production and, in fact, counsel for the respondents' conduct of this whole matter of the new study to be, to say the least, unfortunate, we admitted the document while allowing the Director further discovery and preparation time. Despite the inappropriate timing, we were of the view that the Tribunal should not forego receiving

information that could have an important bearing on the case and which apparently went to the heart of the respondents' position that the bundling of space and services by Tele-Direct was dictated by efficiency considerations.

(i) Unrepresentative Timing of Study

471 Apart from the general difficulty, already highlighted, of comparisons being made between the servicing of very different types of accounts, there is another serious defect in the recent study. The period for which the study is done almost certainly creates a bias in favour of the internal sales force *vis-à-vis* the agents because of the state of progress of certain improvements Tele-Direct was making to its process. The study fails to take account of the fact that the application of technology is in a period of transition. While improvements favouring the internal sales force have been put in place, those favouring agents are on the immediate horizon. Despite this, the latter have been ignored in the study.

472 The system that Tele-Direct was putting in place in 1994 with respect to the publishing process was much more efficient for the internal sales force than the system that it replaced. More specifically, a computer system was introduced that allowed the electronic storage of advertisements, including finished artwork. This means that advertisements that renew without change, about 70 percent of all advertisements, are already in the computer. This is contrasted by Mr. Richmond with the previous system:

> ... In the old system, when we used an outside supplier [for pre-press functions, e.g., layout, paste-up], if we got an ad from last year, we may or may not have found that artwork because it was kept in a filing cabinet somewhere. It meant that the next year we had to have an artist redraw the artwork to match what was in the book before. This was very inefficient. We had to store logos all over the place so that everybody could get hold of it. [199]

There are also savings when there are changes to the advertisement. Under the new system, minor changes can easily be made on the electronic version of the advertisement.

473 Although agents submit their advertisements "camera ready" (as "veloxes"), they must be scanned into its system by Tele-Direct. If there is no change in an advertisement from the previous year then it follows that it should be possible to avoid re-scanning the advertisement, as it is already in the system, so some savings should be possible. Mr. Richmond did not know the percentage of agents' advertisements that are repeated without change but he did state that *all* CMR advertisements are scanned, implying they are scanned even if there is no change. It is not clear why Tele-Direct does this.

474 Thus, until recently and certainly when commission was further restricted in 1993, the costs that Tele-Direct would have experienced for the internal sales force were those that existed prior to the introduction of the new system. Under the old system the fact that agents were submitting complete advertisements meant that the cost comparison in the publishing part of creating a directory was far more favourable to agents than is presently the case. According to Mr. Richmond the cost of implementing the new system is $26 million and the annual savings are of the order of $12 million, which would have made previous publishing costs for internally-generated advertisements almost twice as high as they were in 1994.

475 Using current data disadvantages the agents with respect to the near future. There would be no need to scan agents' advertisements if the advertisements could be transmitted electronically. Currently, newspapers and magazines have systems in place for this purpose. The Yellow Pages publishers are moving in this direction, according to Mr. Logan, the President of the YPPA. He foresees this capability on the VAN system, the electronic YPPA order system, in two to three years. The pay-off would be a smoother flow with lower costs for publishers and CMRs and a reduction in errors.

476 The other area within publishing where change can be anticipated is in how Tele-Direct receives orders over the VAN. Currently a clerk in Montreal and one in Toronto take the information off the VAN as hard copy. After the order has been dealt with in this form, it is eventually re-entered into Tele-Direct's system. Ms. Rogers stated that Tele-Direct had hoped to be able to transfer all orders received through VAN directly into the contract data base without re-keying but this did not happen. According to Mr. Logan of the YPPA, "[t]he bigger publishers, both independents and utilities, now are developing and I think probably most of them -- not everybody, most of them -- can take the information directly off the VAN and run it into their

systems without re-keying".[200] For some reason Tele-Direct is lagging behind other North American publishers in taking advantage of the VAN, the system for which agents made significant investments and for which, in part, Tele-Direct agreed to raise commission rates from 15 to 25 percent over a two-year period. While there have been reductions in cost in processing agents' orders since the movement to VAN, according to Ms. Rogers these appear to be less related to the VAN than to internal reorganization and, therefore, this confirms that Tele-Direct has not taken full advantage of the VAN.

477 For all these reasons, we conclude that the study does not recognize the technological transition in publishing Yellow Pages and that failure to do so favours the internal sales force over the agents.

(ii) Methodological Weaknesses

478 There are significant methodological problems with this study. The study is based on a "causal model". Costs were analyzed by Tele-Direct personnel to determine whether particular costs would be experienced in the absence of either agents or the internal sales force. If the answer was in the affirmative those costs were assigned to the group that caused the costs in question. Costs that could not be identified as caused by one or the other channel were treated as common costs and allocated to the two channels on the basis of relative revenue. This overall methodology was submitted to Tele-Direct's auditing firm for confirmation that the approach was sound. All cost assignments and allocations were performed by Tele-Direct personnel and the results were not audited by an outside firm. The testing of the results was done only through discovery and cross-examination during the hearing.

479 In the final result, the internal sales force's contribution to profit is shown to be approximately 13.5 percentage points higher than that of the agents. If we ignore for the moment the complications created by the difference in types of accounts serviced by each, this result would mean that in order for the agents to be competitive with the internal sales force the commission rate paid to them would have to be nine percent rather than the average of 22.5 percent that in fact is paid to them (22.5 less 13.5).

480 We turn first to the method used to allocate common costs. It is, in our view, valid to allocate these costs on the basis of revenue where the common costs can be considered to be related to the level of sales. This is true for an area such as manufacturing the directories, where the costs depend on the volume of advertisements and it may make little difference whether the advertisements are generated by the internal sales force or agents. This approach to allocating common costs is far less justifiable when the costs in question relate to personnel, e.g., the personnel department itself. This is important because sales representatives and all their support personnel are internal to Tele-Direct while the agents and their support personnel are not. In areas like these it would be more appropriate to allocate costs based on the relative proportion of employees identified as devoted to servicing the internal sales force and agents. Mr. Beauséjour admitted that this was an equally valid approach as using relative sales and that either method could have been used.

481 An analysis of each of the common cost areas to see whether it was more appropriate to use one or the other weighting procedure would have produced a more objective and defensible result. We note that Tele-Direct did depart from its approach to allocating common costs on the basis of revenue in at least one instance, which also happened to work in its favour.[201]

482 In the study Tele-Direct has violated its own methodology for attributing costs on a causal basis in a way that increases the costs of dealing with agents. As noted earlier, the current system of storing advertisements in a computer is in the process of being introduced. The cost of duplication between the old and new systems which would, on the stated approach, be attributed to the internal sales force, was treated in the study as a "transition" cost and was subtracted from the total internal costs. Similar costs related to moving to the VAN system were, however, attributed to the agents. To be even-handed, they too should have been considered "transition" costs and subtracted from the agents' costs. Further, it is questionable that the large investment in the new system for dealing with internal orders should simply be ignored, as was done in the study, rather than amortized over several years. The effect of not doing so is also to understate internal costs.

483 Counsel for the Director questioned the validity of the cost attribution in the study in several areas where a relatively small percentage of costs was taken to be caused by internal sales force even though the internal sales force and its direct support account for 61 percent of total employees. With respect to the costs of the Personnel and Benefits department, Tele-

Direct concluded that there would only be a saving of about 16 percent from eliminating the internal sales force and thus only 16 percent of the total cost was attributed to the internal sales force. Similarly, in the Labour Relations department the saving assumed was only 30 percent. In defence of these decisions, Mr. Beauséjour explained that there were certain basic requirements that would have to be maintained to service the remaining personnel even if 61 percent of the personnel were eliminated. In effect, this approach treats the present organizational chart as inviolate. We question whether Tele-Direct would approach such a massive change on an "avoidable cost" basis.

484 The Director's principal challenge to this study relates to the method of dealing with the "cost of customer service" ("CCS"), the 40 percent of net sales revenue that is paid to Bell Canada. In all past studies of profitability, CCS was treated as a cost. It was also so treated throughout the many months when there were successive drafts and refinements of the 1995 study, almost until the moment that the study was entered in these proceedings. As a result of the penultimate amendment to the figure for CCS, the contribution to profit of the agents changed from being slightly less than the internal sales force to almost five percent *more* than the internal sales force. [202] Subsequent to that, Mr. Beauséjour decided that there was no reason to treat CCS as a cost since Tele-Direct and Bell were part of the same corporate entity and it makes little difference whether Tele-Direct made payments to Bell in the form of CCS or as dividends. Despite the apparently fortuitous timing of this realization, we accept that the point is valid. It is one thing for Bell to insist that CCS be included as a cost in order to impose market discipline on Tele-Direct but it is another matter when a study of the relative costs of using agents and internal staff is being performed. It then makes better sense to treat Bell and Tele-Direct on a consolidated basis. This in itself is not a methodological weakness.

485 However, the same reasoning means that the Tele-Direct study should have taken into account the benefits accruing to Tele-Direct/Bell from the fact that agents pay up-front for advertisements whereas customers of the internal sales force pay monthly. Mr. Beauséjour recognized this benefit in cross-examination but it does not appear in the study. As discussed earlier, the difference in timing of payment amounts to interest for about half a year, an appreciable difference of three to six percent per year.

(iii) Particular Examples of Problems Arising from the Difference in Products

486 The respondents advance this study as evidence which they say proves the different, and greater, "interface" costs that they incur when processing orders originating with external agents as compared to the costs of processing orders originating internally. As we indicated at the outset, it is extremely difficult, in conducting a study of this nature, to distinguish the genuine interface costs, costs that arise because Tele-Direct is dealing with agents rather than the internal sales force, from costs that arise from the nature of the advertising, and thus are not clearly related to the channel submitting the order and are not true interface costs. This problem permeates the study and, thus, it cannot prove relative interface costs in its present form as the respondents maintain it can.

487 That is not to say that we think the problems arising from the difference in the products, unlike the unrepresentative timing and methodological weaknesses already identified, consistently operate in the respondents' favour by lowering internal costs and raising agents' costs. As detailed below, this is sometimes the case; sometimes the reverse is true.

488 We turn to some examples. One relates to the interpretation and treatment of credits to customers as a result of Tele-Direct's errors. Customers using the internal sales force were reimbursed 1.3 percent of gross revenues as a result of errors made by sales representatives or during the publishing process. The rate of reimbursement to agents as a result of publishing error was 3.5 percent. This difference in the rate of Tele-Direct's errors is a factor in the overall lower contribution to profit of agents.

489 In the notes to the study it is stated that the difference is due to the fact that orders from agents are handled by more people, that is, CMR personnel and the national accounts publishing group of Tele-Direct. It is, however, irrelevant how many people in the CMR handle orders because only errors attributable *to Tele-Direct* are reimbursed. One possibility that may explain part of the difference in error rates is the greater knowledge and, perhaps, incentive that agents have to discover and complain about errors compared with the customers of the internal sales force. Mr. Beauséjour admitted this was a possibility. While this explanation would probably not change Tele-Direct's view that the higher reimbursement is a "cost", it would hardly be a reflection of lower efficiency in the use of agents compared to the internal sales force.

490 On the other hand, Ms. Rogers stated that the higher error rate in processing agents' orders was due to the larger, more complex advertising programmes submitted by agents. This suggests that the error rates are related to the nature of the advertising programmes rather than the channel through which they flow. To the extent that the principal reason for the difference is the difference in the type of accounts serviced by each channel, it cannot be concluded that the difference in error rate is a cost of dealing with agents.

491 The comparatively large error rate in dealing with agents' advertisements also shows up in other costs attributed to dealing with agents. A Tele-Direct employee checks the advertisements after the directories have been printed, a duplication of effort since the agents also verify their advertisements. In addition, there are the resources expended in error negotiations with the agents.

492 Apart from the difference in the size of advertising programmes mentioned by Ms. Rogers, we also know about one other respect in which there is a significant difference in the content of advertisements submitted by the internal sales force and agents. Approximately 80 percent of "trade-mark" advertisements are handled by agents. Three Tele-Direct clerks within the department which processes agents' orders are assigned to checking a proposed trade-mark advertisement to ensure it has been authorized by the owner of the trade-mark. This is a cost assigned totally to agents that depends on the nature of the advertisement rather than on the channel dealing with the advertisement.

493 In a related area, that of bad debts, the study may, in fact, underestimate the comparative cost of dealing with agents as opposed to the internal sales force. Over the years there is a regular, although fluctuating, percentage of unpaid bills to customers serviced internally. Until recently Tele-Direct has not had the same experience with agents. Mr. Beauséjour noted that Tele-Direct is currently owed money by an agent but no figure for non-collection from agents was included in the study. The area of "melt", bad debts along with discontinuance of phone service, which negatively affect the internal sales force contribution to profit, are probably due to the character of the clients served by the internal sales force rather than having anything to do with who is servicing them. This is consistent with the more "volatile" nature of smaller accounts commented on in internal Tele-Direct documents.

(d) Conclusion

494 The numerous points on which the various studies are subject to challenge confirm that they cannot be used for the purpose of comparing the relative efficiency of Tele-Direct's internal sales force and agents.

(6) Conclusion on Separate Products

495 The Director has alleged that tying is present over the entire demand spectrum, although counsel for the Director has, in effect, recognized that there may not be tying for "small" customers. [203] According to the respondents, there is no tying for any of their customers. The parties' positions represent the two extremes. The Director would have us order the respondents to offer space and services separately (whether by separate prices or expanded commission) to all their customers. The respondents would have us make no order, thus allowing them to offer the two separately only to those customers that they choose.

496 We are of the view that neither extreme is supported by the evidence. What we see is that customers or advertisers are not homogeneous in terms of their need for services, or demand, or in terms of the costs involved in servicing them, or efficiency considerations. On the contrary, they are very heterogeneous, ranging from an individual running a small business from home and spending a minimal amount on a simple advertisement in the Yellow Pages to large corporations advertising in a multitude of directories. Our view is that we cannot decide whether there is one product or two products for all these different customers in a blanket fashion. We must engage in an exercise of "line drawing".

497 We are of the view that the evidence on demand for separately supplied advertising services and the evidence and arguments relating to efficiency of supply indicate that advertising space and advertising services are separate products with respect to "large local" and regional advertisers. They are a single product for "small" advertisers. The difficulty is in knowing how reasonably or workably to distinguish regional and, more problematic "large local", advertisers from "small" advertisers,

whether in terms of number of markets (as in the eight-market rule) or dollars spent on Yellow Pages. In approaching this task we have been mindful that the Director bears a burden in this regard of justifying any remedy granted. To the extent that the evidence and argument have left the matter unresolved, it behooves us to be cautious in our conclusions.

498 We know that in the current commissionable market, including grandfathered accounts, where advertisers have a choice, they overwhelmingly choose agents. We have found that demand extends well below the 1993 "national" definition and below the eight-market definition of commissionability.

499 The differences in the constituents of demand between the relatively smaller advertisers that employ the services of a consultant and those of larger, multi-directory advertisers that use agents or would use them if their accounts were commissionable are notable. The needs of the latter are more complex. In addition to advice and creative services, most require help in administration and in assuring uniformity of message. We infer that the intensity of demand, as measured by their willingness to pay, year after year, for these services by way of extra advertising or issue billing, is greater for larger customers that have multi-dimensional needs.

500 We turn to cost considerations to focus further on the appropriate dividing line. We have concluded that agents' interest, presumably driven by their view of their comparative efficiency *vis-àvis* Tele-Direct, is primarily in customers with a minimum size ranging from $10,000 to $50,000 in annual expenditures on Yellow Pages advertising. This alone would dictate raising the bar for any unbundling of space and services to a minimum of $10,000.[204]

501 While the evidence that at least some independent publishers are willing to pay commission on any business brought in by agents could be interpreted to mean that it would be efficient to unbundle across the entire demand spectrum, we are not comfortable going that far. It is far from clear that these publishers are guided by the relative efficiency of agents and in-house staff in servicing customers since for the most part their market position requires them to rely heavily on in-house staff despite their liberal commission rules. Their policy on commission could as easily be reflective of their desire to attract additional demand as of the relative efficiency of agents and in-house staff.

502 The approach of the large American publishers associated with telcos is to bundle space and services for all accounts smaller than those classified as national accounts or, for those who use a "B" account definition, for accounts smaller than regional accounts. We are not satisfied, however, that the publishers in question operate in competitive markets and that their choice of a dividing line is necessarily efficiency driven. As a result, we conclude that while unbundling of national and "B" accounts by them is probably efficiency driven, we cannot say that bundling for the balance of their accounts is motivated by efficiency and is conclusive on the dividing line for one versus two products.

503 Tele-Direct's studies are not helpful in drawing conclusions with respect to relative efficiencies of agents and Tele-Direct's employees along the demand spectrum. What we do know is that the eight-market rule was created by Tele-Direct primarily to capture more accurately "national" accounts than did the original 1958 definition and, at the time, Tele-Direct apparently considered this rule to be in its interest. Further, it is also clear had no internal discussion of relative efficiencies when it further restricted commissionability in 1993. In doing so it ignored demand from existing eight-market customers (including those that were forced to buy unneeded advertising to qualify for eight-market status). Given that agents had served these types of customers over many years, that other publishers have "B" accounts, and that Tele-Direct at no time addressed the comparative efficiency of agents and the internal sales force for these accounts, there is no evidence of any efficiency offset which would lead us to conclude that space and services were not separate products for all the accounts within reach of the eight-market rule.

504 The eight-market rule was not specifically designed to deal with the needs of regional advertisers. This is obvious from the fact that there are seven markets in Ontario and six in Quebec. By almost any definition an advertiser covering all the markets in a province would be considered "regional" although such an advertiser would not be commissionable under the eight-market rule. Many of them likely managed to bring themselves within the rule with extra advertising. At a minimum, a firm that covers an entire province the size of Quebec or Ontario should qualify without more. We have no reason to doubt that the strong demand for advertising services from agents displayed by currently grandfathered eight-market accounts extends to advertisers

that cover six markets, which would mean, for example, the entire province of Quebec. It is difficult to see that the efficiency implications for separately supplied advertising services at the six-market level are significantly different than for eight markets.

505 There is a rough relationship between the number of markets served and the amounts spent on Yellow Pages advertising. According to Tele-Direct's internal studies, the average amount spent on Yellow Pages advertising among customers served by Tele-Direct representatives but that were in the commissionable category under the eight-market rule was $54,000.[205] The comparable figures for accounts that would qualify under a seven-market and six-market rule, respectively, are $44,000 and $26,000. While some agents might find six-market accounts below their threshold of interest, the evidence is that they are within the range that some agents are willing to service, perhaps in anticipation of future growth.

506 We are cognizant that looking only on the demand side a case might be made for unbundling well below the six-market level. The evidence with regard to efficiency, principally the agents' views on accounts that they would like to service, does not support this conclusion. The Director suggests that there is no harm in unbundling across the board -- the market can be allowed to decide. If agents are more efficient, they will end up servicing the accounts. If Tele-Direct's internal sales force is more efficient, especially for smaller accounts, it will end up servicing those accounts. This implies a simple solution to a complex problem. In large measure, Tele-Direct is "the market" since the pricing of advertising services is inevitably its responsibility, whether it chooses to set commission rates for various types of accounts or to charge separately for the services of its internal sales force. Given widespread unbundling, Tele-Direct might well decide to set several different prices (or commission rates) for advertising services depending on the relative costs of servicing various categories of accounts. As the study on relative profitability showed, this would likely be a difficult task. It is not one that should be imposed without some greater certainty that there will be a significant overall benefit from the change. Therefore, we find that space and services constitute two products down to the six-market level and a single product below that level.

Addendum on Tying

507 At the outset of our discussion on tying, we indicated that another theory of the tying case was possible and we address that now. While some of the respondents' arguments and evidence are related, they did not adopt the precise approach which we outline hereunder.

508 One interpretation of the evidence is that advertising space and services are not demanded nor provided separately even in the existing commissionable market. Rather, larger advertisers either wish to purchase the bundle of space and services from Tele-Direct or from agents, in either case they are purchasing bundled space and services. Tele-Direct insists that the agents it deals with be accredited. The Director acknowledges that the placing of advertising in telephone directories is complex and accepts accreditation of agents by Tele-Direct. Indeed we do not necessarily envision advertisers purchasing space from Tele-Direct and providing their own services (except perhaps in the case of advertisers with accredited in-house advertising departments).

509 Following from the fact that accreditation means that only accredited services providers (including Tele-Direct's internal sales force) can place orders for space and they do so along with providing other services, it could be concluded that space and services must be bundled to be sold and that, therefore, they constitute a single product. Another way of viewing the matter would be that advertising space and services could be considered a single finished product on the basis that the real complaint respecting tying is not that advertisers are precluded from purchasing space and services separately, but that Tele-Direct has simply refused to supply unbundled space (i.e., at a discount) to agents which prevents them from selling to advertisers the same bundle of advertising space and services that is sold by Tele-Direct.

510 The evidence does not support this interpretation for the following reasons. First, we are satisfied that agents are not resellers of Tele-Direct's advertising space such that advertisers are purchasing the space *from agents* along with services. Agents do not carry an inventory of advertising space which they purchase from Tele-Direct for resale to advertisers. They assume no risks with respect to advertising space. Rather, when the agent's customer decides to purchase Yellow Pages advertising, the agent submits an order to Tele-Direct together with all other necessary information and Tele-Direct processes the order. The fact that Tele-Direct contracts with and bills the agents for the space, and treats the agents as the "buyer" in that sense,

is not determinative of the relationship between the agent and the advertiser. We think that the fact that the agent does not have an inventory of space for resale is more consistent with the agent acting as an agent for the advertiser for the acquisition of space from Tele-Direct.[206] On this view of the evidence, the purchaser is not purchasing a bundle of space and services from the agent.

511 Second, the evidence does not indicate that advertisers wish to purchase advertising space from an agent as opposed to Tele-Direct. We think, all other things being equal, they are probably indifferent. However, there was evidence that they would prefer to pay Tele-Direct for space through monthly billing on their telephone bill rather than purchasing the space through agents on an issue billing basis. It is Tele-Direct that requires the latter arrangement, not the customer who demands it. This is not evidence that advertisers demand Yellow Pages space from agents as part of a service and space bundle. Nor have we been presented with evidence suggesting that efficiency would be adversely affected if Tele-Direct was to contract with and bill advertisers directly for space.

512 Finally, a purpose of the *Competition Act* is to encourage competition in order to provide consumers with competitive prices and product choice. There is evidence of demand for services from agents as opposed to Tele-Direct and efficiency considerations at the six-market level and above do not preclude facilitating such choice. For these reasons we have rejected this alternative interpretation of the evidence and have accepted that advertising space and advertising services constitute separate products.

E. Tying Condition

513 Having determined that there are separate products over at least part of the spectrum of Yellow Pages advertisers, we must now determine if those advertisers falling within that range were somehow "forced" to buy the products together rather than from separate sources. Since we have not found separate products below six markets, any references to the "local" market in this section refer only to that portion of the market from the current "national" definition down to six markets. In that range, where we have found separate products, we must establish that the two products were "tied" together as set out in subsection 77(1).

514 Paragraph 77(1)(a) provides one definition of tied selling. In essence, it is described as a practice whereby a supplier, as a "condition of" supplying the tying product to a customer, requires that customer to acquire another product from the supplier. Paragraph 77(1)(b) provides an alternative definition, the operative portion of which is that tied selling is a practice whereby a supplier "induces" a customer to meet the condition of acquiring another product from the supplier by offering to supply the tying product on more favourable terms and conditions if the customer agrees to acquire the second product.

515 The Director pleaded both the "requirement" or "condition" and the "inducement" in the application. The Director submits that, on non-commissionable accounts, the respondents require the customer to acquire their advertising services as a condition of supplying the space at a bundled price "and/or" the respondents induce customers to acquire their services by offering to supply space at no additional cost for the additional value if the customer also acquires their services.

516 It is undisputed that Tele-Direct does not segregate the charges for space and services in the non-commissionable market segment and that those "local" customers who get their services elsewhere than from Tele-Direct (for example, by using a consultant) or do not need any or some of the services, do not pay less or get a discount off the total price of their advertising. The Director submits that the effect of this is that "local" customers must buy space and services together from Tele-Direct; it is only economically viable to purchase services separately from an independent provider in the commissionable market. To do so in the non-commissionable market would require the customer to pay twice for services, once to Tele-Direct as part of the bundled price and once to the independent service provider that would actually provide the services. The Director argues that the effect of this is that it is either a "requirement" that both space and services be acquired from Tele-Direct or, perhaps the better fit on the facts, a compelling "inducement" to do so.

517 The Director points to evidence of the advertisers that recognize that if they use an independent service provider when commission is not available they will, in effect, be paying twice for services and this is why they stay with Tele-Direct despite dissatisfaction with the quality of service. Further, the Director emphasizes that Tele-Direct itself knew the value of this

economic inducement and used claims that its services were "free" or included in the cost of the space to convince customers to choose its services.

518 The respondents advance a number of arguments relevant to the question of whether space and services are indeed tied together on the facts of this case. They argue that there is no "condition" involved because there is no contractual obligation to purchase services from Tele-Direct as local customers are free to acquire services from a CMR; however, Tele-Direct will not pay a commission on the account. They rely on the case of *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.* [207] for the proposition that it is not an antitrust violation to sell components as a package where the same items can be purchased separately but at greater cost. They argue that there are no *more favourable* terms and conditions offered to customers that take Tele-Direct's services over those that do not because there is only one set of terms and conditions in the local market -- the bundle.

519 We see no reason to conclude that the references in the section to "conditions" or even "terms and conditions" require that these be embodied in an explicit contractual document. As we understand this requirement, it is to determine that customers are effectively forced or coerced to take the two products, which have been determined to be separate products, from the supplier of the tying product rather than acquiring only the tying product from that source and getting the tied product from someone else. This obviously can occur where there is an explicit contractual requirement to that effect. It may, however, also be equally present where there is a discount or other advantage that constitutes an inducement to acquire the two from the same source. The "conditions" or coercion referred to in the section mean more than contractual terms; they may be economic conditions which have the effect of precluding choice of supplier. Whether customers actually do have an effective choice or not is a question of fact to be determined on the evidence before us, not of the legal nature of the purchase arrangement.

520 The *Ortho* case is of no assistance to the respondents. The case involved an application for a preliminary injunction by Ortho to prevent the implementation of a contract between the Council of Community Blood Centers and Abbott for a number of blood tests. Ortho alleged both monopoly leveraging and tying based on the theory that Abbott's pricing of various "packages" of blood tests forced any rational buyer to purchase all five tests from Abbott rather than buying one or more tests from competing suppliers like Ortho. The preliminary injunction was denied on the basis that Ortho had shown no irreparable harm.

521 The passages quoted to us by the respondents were simply the Court's summary of Abbott's arguments and authorities on the monopoly leveraging point. [208] The Court stated that Abbott's arguments gave it "pause" but all that it concluded in the end was that Ortho had shown that there were sufficiently serious questions on the merits to warrant litigation. On the tying claim, the Court, in fact, noted:

> There is some case law to support the position that a tie does not have to be explicit but can instead be inferred from the pricing structure of two products and the market power which the party has....
>
> Absent an explicit condition in the contract, there is a question of fact for the fact-finder regarding the existence of the tie, and we are unable on this state of the record to determine if plaintiff is likely to prevail on the merits of the tying claims. What is evident however is that there are sufficiently serious questions going to the merits of the tying claim to make them a fair ground for litigation. [209]

522 Therefore, the relevant question for us is whether, on the facts before us, the customers of Tele-Direct were "forced" to acquire services from it or did they have the option of acquiring space alone from Tele-Direct. We conclude that the evidence of the advertiser witnesses and Tele-Direct's own behaviour amply support the position of the Director that the lack of commission in the "local" market operated as a powerful inducement to acquire both space and services from Tele-Direct.

F. Substantial Lessening of Competition

523 Has the extent of the exclusion resulting from Tele-Direct's limitation of commission to "national accounts" as defined in the 1993 rule resulted in, or is it likely to result in, a substantial lessening of competition? It is first necessary to establish the relevant comparator that should be employed in evaluating the magnitude of the lessening involved. There is no purpose

in comparing the six to eight-market accounts with all other accounts that are currently bundled and that we have decided may remain that way because demand characteristics and likely efficiency comparisons dictate a single product. The most relevant comparator is the size of the existing commissionable market under the 1993 definition because we are considering expanding that market. Eight-market accounts are currently commissionable but this could be discontinued at any moment without an order of the Tribunal so we include eight-market accounts as part of the tied portion of the market to evaluate substantiality. Further, grandfathering currently prevents accounts from "growing into" eight-market status.

524 In a word, it is clear that six to eight-market accounts constitute an appreciable volume of business that, without the tying practice, would be available for agents to service. The largest constituent is currently grandfathered eight-market accounts. In addition, there are the six and seven-market accounts now serviced exclusively by Tele-Direct. Based on the Tele-Direct documentation prepared in anticipation of the 1993 rule change and the evidence of Mr. Mitchell, both of which are far from being completely clear, we find that a fair approximation of the value of accounts which are now commissionable under the 1993 definition (thus, excluding grandfathered accounts and including "national" accounts serviced both by Tele-Direct and agents) is about $30 million. Our best estimate of the accounts which have been found to be tied, namely six, seven and eight-market accounts, and would be added to the commissionable market is about $19 million. Thus, the combined total of the accounts found to be tied adds up to well in excess of 50 percent of the current commissionable market. Both in relative and absolute dollar terms, the amount of revenue affected by the tie is undoubtedly sufficient to conclude that there is a substantial lessening of competition.

525 A final issue arises with respect to substantial lessening. The respondents advance in their written argument a "technical" argument based on the use of definite and indefinite articles in subsection 77(2). They submit that the substantial lessening of competition must be assessed in the market for the tying product, here the market for the supply of advertising space: has the tying of space and services impeded entry into or expansion of a firm or had any other exclusionary effect in the space market? This argument was not referred to orally.

526 While the definite and indefinite articles can be read in different ways, the section should be read in a way that makes sense. Since tying generally, and certainly in this case, involves "leveraging" from the tying product market to the tied product market, it is only sensible to assess the effects of the practice, or the substantial lessening of competition, in the target or tied product market.

G. Remedy

527 Section 77 of the Act provides that upon a finding by the Tribunal of tied selling by the supplier of the tying product (Tele-Direct), the Tribunal may make an order "prohibiting [the supplier] from continuing to engage in ... tied selling...."

528 Prohibiting Tele-Direct from continuing to engage in tied selling means that the tying product, advertising space, and the tied product, advertising services for six, seven and eight-market accounts, must be unbundled by Tele-Direct. The "unbundling" may take the form of separate prices: Tele-Direct could quote separate rates for space and services. It may also take the form of an expanded definition of commissionable accounts to allow six, seven and eight-market customers to use the services of an agent, who would earn commission at an appropriate rate.

529 While we do not rule out the possibility of advertisers acquiring space from Tele-Direct (at the separately quoted space price) and then paying a separate fee for services to Tele-Direct or to an agent, we think this scenario is unlikely. There are practical implications arising from Tele-Direct's predominance in the publishing market and the accreditation of agents that suggest that the marketplace in an "unbundled" environment after our order will work largely the same as it does today except that the commissionable market will be expanded to cover six, seven and eight-market accounts. Advertisers that wish to utilize Tele-Direct's services would continue to buy space and services from Tele-Direct at one price.

530 Because of the specialized nature of the Yellow Pages industry, the respondents regard accreditation as important and the Director and his witnesses, for example, Ms. McIlroy and Professor Slade, support it. Thus, Tele-Direct would be justified in requiring that services, including the placement of orders, be provided by accredited service providers only. Unbundling does

not require that advertisers be given the opportunity to interface directly with Tele-Direct to place their orders, if they do not wish to utilize Tele-Direct's services. Advertisers would either deal with Tele-Direct for space and services or with an agent for services and, through an agent, with Tele-Direct for space. This contributes to our view that in all likelihood, the structural arrangement that exists today would likely continue, changed only to permit agents to compete with Tele-Direct to provide services to six, seven and eight-market accounts.

531 The prohibition on tying, however, does not carry with it a requirement that Tele-Direct pay a specified commission to agents. It will be up to Tele-Direct to pay such commission as it chooses. Commission rates could be identical for all accounts or might be variable. However, the prohibition on tying implies that the price charged by Tele-Direct for its space and services together cannot, in relation to the price at which it offers space to customers using agents (i.e., its price for both space and services together less the commission to the agent) be an inducement to customers' using Tele-Direct's services rather than agents, thus continuing the tie. In other words, the price for space to customers of agents cannot be artificially inflated (or the commission paid to agents artificially reduced) so that space is not realistically available separately. Tele-Direct cannot make it economically non-viable for customers to purchase space from Tele-Direct and use an agent's services because in those circumstances the space effectively costs more than if the customer were to use Tele-Direct's services.

532 The intervenor agents (and the Director in the alternative) submit that the Tribunal should order Tele-Direct to pay a minimum 15 percent commission to agents. Although this proposition was advanced in the context of the Tribunal finding a tie across the entire market for Yellow Pages advertising in Tele-Direct's directories, in the context of our finding that there is only tying down to the six-market level, the minimum 15 percent commission would apply in respect of six, seven or eight-market customers serviced by agents. We have no difficulty with Tele-Direct voluntarily complying with our order prohibiting tying by paying a minimum 15 percent commission. A 15 percent commission rate has historical precedent and is well accepted in the advertising industry. It appears to be a workable "average" that would be simpler to administer than variable commission rates for each of the six, seven and eight-market accounts, should Tele-Direct choose to use it.

533 However, the setting of a commission rate by the Tribunal is not, in our opinion, envisioned in the powers given to it under section 77 of the Act regarding tying or in the general jurisdiction given to the Tribunal under section 8 of the *Competition Tribunal Act*.[210] The Tribunal is not a rate-setting body. The implication of rate-setting is an ongoing regulatory oversight which is the antithesis of the objectives of competition policy. To grant this remedy, the Tribunal would be required to hold itself open to revision to the 15 percent rate. We could not saddle Tele-Direct or the agents with a rate cast in stone forever and the alternative of ongoing rate regulation is, in our view, simply not part of the mandate of the Tribunal. It is true that the Tribunal issued the Consent Order providing for a 25 percent commission on national accounts, but that order was for a limited time and was on consent. It provides no justification for a gearing up of a general regulatory process implied by setting a rate for an indefinite period in this contested proceeding.

534 The Tribunal's order will therefore provide that Tele-Direct is prohibited from tying its advertising services to advertising space for six, seven and eight-market accounts. Should Tele-Direct choose to comply with the order by a commission arrangement with accredited agents at a minimum rate of 15 percent, the Tribunal would find such an arrangement acceptable compliance. Otherwise, Tele-Direct can price space and services separately or implement a commission arrangement for six, seven and eight-market accounts at an appropriate level or levels. The price Tele-Direct charges for its bundle of space and services, if it continues to offer them as a package, in relation to the price that it charges for space separately cannot be such that it continues to tie space to services by way of an inducement offered to customers that take Tele-Direct's services. The order will specify that the parties may apply to the Tribunal for interpretation of the order or directions if they consider it necessary to ensure compliance.

IX. Abuse of Dominant Position

A. Introduction

535 For ease of reference, we set out again subsection 79 (1) of the Act, which deals with abuse of dominant position:

Where, on application by the Director, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

536 Unlike previous abuse of dominance applications that have come before the Tribunal, where only one market was at issue, the Director here is putting forward two abuse of dominance cases, one involving the alleged market for the supply of advertising space and the second, the alleged market for the supply of advertising services.

537 One case is that the respondents have market power in the market for the supply of telephone directory advertising space, or publishing, and have engaged in a practice of anti-competitive acts which has resulted in a substantial lessening of competition in that market. This case involves the responses of the respondents to the instances of new entry by competing broadly-scoped publishers in local markets, most significantly the entry of White in the Niagara region and the entry of DSP in Sault Ste. Marie.

538 The second case is that the respondents have market power in the market for the supply of telephone directory advertising services or, in the alternative, that they are leveraging their market power in the space market into the services market, and have engaged in a practice of anti-competitive acts which have resulted in a substantial lessening of competition in the services market. Among the anti-competitive acts alleged to form a practice affecting this market are both acts directed at agents and acts directed at consultants. For example, one of the alleged anti-competitive acts is the bundling of space and services (restricted commissionability rules for agents) which forms the basis of the tying portion of the Director's application. Another is the alleged refusal by Tele-Direct to deal with consultants.

B. Approach to Section 79 Analysis

539 In dealing with the particular allegations in this case, the purpose of section 79 must be kept in mind. Neither party disputed that section 79 is not intended to condemn a firm merely for having market power. Instead, it is directed at ensuring that dominant firms compete with other firms on merit and not through abusing their market power. [211] Such abuse includes, as pointed out by the Director, entrenchment and extension of market power. [212] It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even "tough" competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task. [213]

540 The Tribunal established in *NutraSweet* that the list of anti-competitive acts set out in section 78 is not exhaustive. The Tribunal held that the common feature of the acts included in section 78 is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary." [214] The Tribunal's approach to assessing whether acts are anti-competitive was set out most recently in *D & B*:

... in evaluating whether allegedly anti-competitive acts fall within section 78, the Tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market". The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition. The decision in *Laidlaw* makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of a respondent. The respondent will be deemed to intend the effects of its actions. [215] (references omitted)

541 The Tribunal must determine the "purpose" of the act that is alleged to be anti-competitive. "Purpose" is used in this context in a broader sense than merely subjective intent on the part of the respondent. As counsel for the Director pointed out, it might be more apt to speak of the overall character of the act in question.

542 What the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, "exclusionary, predatory or disciplinary". Relevant factors include evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence. A "business justification" must be a "credible efficiency or pro-competitive" business justification for the act in issue. [216] Further, the business justification must be weighed "in light of any anti-competitive effects to establish the overriding purpose" [217] of the challenged act:

> ... The mere proof of *some* legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive. [218]

543 In their argument, the respondents advance several propositions regarding the nature of an anti-competitive act that they submit the Tribunal must determine as a matter of law in this case. One of these propositions is particularly relevant to the case relating to the publishing market. They state that certain acts constitute "competition on the merits" and cannot ever be anti-competitive acts. In another formulation, they state that objectively competitive conduct cannot constitute an anti-competitive act. They would define "objectively competitive" conduct as conduct which a non-dominant firm would have undertaken in similar circumstances. [219] Applying this argument to the specific case of the allegations involving the publishing market, the respondents say that the Director cannot allege, for example, that "zero price increases" are an anti-competitive act because competitive firms sometimes use zero price increases or even price decreases to compete.

544 We do not take issue with the proposition that section 79 is not intended to prevent dominant firms from competing on the merits. We do, however, doubt that it is possible to define, in the abstract, a list of acts that are "objectively competitive" and that could never, therefore, engage section 79. Competition on price is surely one of the hallmarks of a competitive market. Yet even the act of "price cutting" cannot be given absolute immunity from review under section 79 because of the possibility of predation. In our view, a case-by-case, factual analysis will always be necessary to determine if, in the particular circumstances, an act is anti-competitive. All the relevant factors must be weighed in deciding whether a particular act is, in the circumstances, competition on the merits or an anti-competitive act. That question cannot be answered as a matter of law in a vacuum.

C. Market for Advertising Space - Publishing

(1) Facts

545 The independent publishers DSP and White have already been discussed at various places in these reasons, largely in chapter "VII. Control: Market Power". We summarize here and add some further relevant facts.

546 Since 1993, DSP has produced a white pages and classified directory covering Sault Ste. Marie, Elliot Lake and Wawa in northwestern Ontario. Since January 1994, it has been a division of Southam Inc. but is still operated largely independently from the Southam newspapers in the area in question. Tele-Direct publishes three separate directories for the areas covered by the DSP directory.

547 The DSP Canadian directory is combined with a corresponding directory for the Sault Ste. Marie, Michigan area. The American portion is published by Noverr Publishing Inc. ("Noverr") which publishes several directories in the state of Michigan.

548 White publishes competing directories (Niagara Falls, St. Catharines and Fort Erie) to Tele-Direct's in the Niagara region in Canada. White also entered Canada in 1993. White is a wholly-owned subsidiary of the American company White Directory Publishers, Inc. which is a private company controlled by the Lewis family. The American company began operations in 1968 with a classified directory (yellow pages only) in the Buffalo area. A white pages directory was later added and then in the second half of the 1980s and early 1990s additional directories containing both classified and white pages were started in other areas of New York state and Pennsylvania. White's entry into Canada was followed by further expansion in the United States in 1994 and 1995, into Florida and North Carolina.

549 Both DSP and White first published "prototype" directories in Canada, DSP in January 1993 and White in November and December 1993. [220] DSP published its first revenue directory in November 1993. White began its canvass for its first revenue directory in late 1993 and continued in 1994. Its first revenue directory was published in late 1994.

550 In order to produce their directories, White and DSP had to generate subscriber listings for their white and yellow pages. As discussed earlier, despite the 1992 ruling of the CRTC, at the time of their entry DSP and White did not have commercially viable direct access to subscriber listings. They had to use the most recent Tele-Direct directories, re-key the data, verify and update each listing.

551 Included in the directories of White and DSP were features which were not present in the existing directories of Tele-Direct in either region, including audiotext, community pages, larger size print, three-column format, postal codes and additional colour plus a free smaller size copy in addition to the regular size directory (a "mini"). [221]

552 Less detail was provided on the other two competitive markets referred to by the Director. In October 1994, a competing directory was published in Joliette, Quebec by Les Pages Soleil, a joint venture involving the company which publishes the Locator directories in Ontario. Les Pages Soleil also feature enhancements like community pages, postal codes and only three columns per page.

553 In Newfoundland, a company called Unifone Files Inc. ("Unifone") intended to publish a province-wide directory called "The Big Phone Book", apparently some time in 1993 or 1994. Tele-Direct (Services) Inc. publishes seven directories in Newfoundland for Newfoundland Tel (St. John's, eastern Newfoundland (four), western Newfoundland and central Newfoundland). In addition to its broader scope, the Unifone directory was to feature larger print, community pages and a "mini" directory. As of February 1994, however, Unifone was no longer in existence and it never did publish a directory.

554 The two entrants for which we had evidence on this point (White and DSP) priced advertising in their directories 30 to 40 percent below Tele-Direct's rates.

555 Tele-Direct responded to these various entrants using a number of initiatives, including price freezes, advertiser incentive programs, advertising and promotional expenditures, and directory enhancements. Tele-Direct was also involved in litigation or threatened litigation against the entrants in Sault Ste. Marie and Niagara. Further details on these responses follow.

556 Tele-Direct adopted a zero percent price increase or price freeze in Sault Ste. Marie in 1993. Except for 1994, when there was a general price freeze across all of Tele-Direct's territory, prices were increased annually in the vast majority of Tele-Direct's directories outside of the competitive markets. [222] In 1995, there were zero price increases in Sault Ste. Marie, Joliette and the Niagara region. The information on the record regarding 1996 prices is that all markets were subject to a price increase, including the competitive markets.

557 Tele-Direct has offered advertiser incentive programs of various kinds throughout its territory at different times. The critical distinction between the programs offered in the competitive markets and those offered in other markets is that in the competitive markets the incentives were available to advertisers who *renewed or increased* their advertising whereas in the other markets only those advertisers who *increased* their level of spending were eligible.

558 The advertiser incentive program in Sault Ste. Marie was first offered in 1993. While originally intended as a one-year program it was extended to three years, ending in 1995.[223]. In Niagara, a program similar to the Sault Ste. Marie advertiser incentive program was offered in 1994 and 1995. As of the hearing, no decision had been taken about proceeding to offer the program in Niagara for a third year. In Joliette, a program was offered in 1995 which provided that advertisers renewing or purchasing advertising would receive the next largest size advertisement or colour if applicable. In Newfoundland, the same program was offered in four directories in 1994. Mr. Beauséjour, Tele-Direct's Vice-president of Finance, confirmed that the program was instituted in response to the presence of Unifone.[224]

559 In each competitive market, Tele-Direct added a number of features to its directories that were introduced first by the entrant. Most of these features tend to be fairly standard in many American markets. For example, the enhancements used by White in its Canadian prototype are almost all standard features for it in its American markets. The features added by Tele-Direct in response are not generally used by it in its directories in other markets.

560 We have limited information about the Joliette and Newfoundland situations in this respect. Tele-Direct did add a community pages section to its Joliette directory. Mr. Renwicke thought that postal codes had also been added. A memorandum dated October 1993 records a recommendation by Tele-Direct (Services) Inc. that the Newfoundland directories contain "some enhancements starting with the central Newfoundland 1994 directory."[225]

561 In Sault Ste. Marie, Tele-Direct added enhancements to its directories similar to those offered by DSP, including four-colour format, postal codes, community pages and its own audiotext system (Talking Yellow Pages or "TYP"). Likewise, in Niagara Tele-Direct reacted to the entrance of White by adding enhancements similar to those of White to the Tele-Direct directories in that area. Tele-Direct did not introduce all of the enhancements included by the entrants. For example, it did not adopt larger type or distribute "mini" directories.

562 Some further detail is required about the audiotext system or TYP in order to understand the allegations advanced by the Director in this respect. Audiotext is an electronic technology which allows consumers with Touch-Tone phones to obtain access to audio messages which are stored on a computer. The directory publisher provides in its directory codes which can be used by consumers to gain access to the messages on topics of interest to the consumer. The provision of an audiotext service is comprised of both hardware components, the computer and satellite dish, for example, and the information lines which are fed to the satellite dish from a supplier. Depending on the information being offered, the lines are updated at regular intervals during the day, on a daily basis or on a monthly basis.

563 Tele-Direct introduced its first TYP in Kitchener in 1988 followed by Toronto and Quebec City that same year. Unlike the audiotext involving the provision of general information on various topics to consumers, the Kitchener and Quebec City services involved advertiser-specific information. The code was provided in the advertisement; the interested consumer could call for more detailed information regarding that supplier, for example, prices. These services were later abandoned for lack of advertiser interest; the Toronto service, which is of the general information type, is still offered. Since it first offered TYP, Tele-Direct's supplier of the information lines required has been a company called Perception Electronic Publishing ("Perception").[226] As of November 1993, Perception is owned by Brite Voice Systems.

564 When it entered the Sault Ste. Marie market with its prototype directory in January 1993, DSP provided an audiotext service. This was the first time such a service was offered in Sault Ste. Marie. The information supplier for DSP was Perception. During the first two months that it was offered, the DSP audiotext service was heavily used.

565 Tele-Direct introduced its TYP in Sault Ste. Marie in April 1993 in advance of its June 1993 directory, some three months after DSP published its prototype directory, also using Perception for its information feed. Tele-Direct used flyers to distribute the relevant codes to consumers. It was roughly at the same time as the Tele-Direct TYP were introduced that DSP began to experience deterioration in its audiotext service because the information was no longer being updated in a timely manner. DSP was in constant contact with Perception in order to get the lines updated within an acceptable time frame, but with no success.

The quality of DSP information feed from Perception remained poor until November 1993, which was essentially the same time that Perception was acquired by Brite Voice Systems.

566 Tele-Direct also engaged in large advertising campaigns in Sault Ste. Marie and Niagara. No detailed information was provided in this respect regarding the other two competitive markets. Compared with pre-entry levels virtually all of the advertising and promotional expenditures were new. In Sault Ste. Marie, Tele-Direct spent only about $50,000 on advertising in 1992 as compared to $215,000 in 1993. By 1994, expenditures had dropped back to $22,000. In Niagara, Tele-Direct spent $43,000 in 1992, $71,000 in 1993 and $28,000 in 1994. [227] In 1993, advertising expenditures in Sault Ste. Marie constituted approximately 11 percent of published revenues for that city; in 1993 in the Niagara area, advertising expenses amounted to less than one percent of published revenues.

567 Another circumstance relevant to the Director's allegations respecting publishers is that Tele-Direct initiated a suit against DSP in May 1993 for infringing the "walking fingers" trade-mark and Tele-Direct's copyright in the advertisements in the Tele-Direct directory with its prototype directory. In the spring of 1995, Tele-Direct notified DSP that it would also be challenging the 1994 and 1995 DSP directories. At the time of the hearing, the lawsuit had reached the stage of discoveries. A representative for Tele-Direct had been discovered and the discovery of the representative for DSP was scheduled for November 1995.

568 Although no suit has been launched in relation to White, Tele-Direct made it abundantly clear to White early in 1993 that it would vigorously defend its trade-marks and its interpretation of its copyright interests arising from the advertisements in the Tele-Direct directories. In particular, Tele-Direct informed White that it could not make use of an advertiser's copy, layout or graphics as they existed in the current Tele-Direct directory in creating the first White directory.

(2) Control of a Class or Species of Business in Canada

569 The Tribunal has already found that the supply of telephone directory advertising constitutes a relevant product market and that the relevant geographic markets are local in nature. We have also found that Tele-Direct possesses market power in those markets. We are satisfied, therefore, that Tele-Direct has market power in the market for the supply of advertising space or the telephone directory publishing market and therefore controls the business in the relevant geographic markets.

(3) Practice of Anti-competitive Acts

(a) Allegations - Pleadings

570 The Director's application, as amended, says at paragraph 65 that the following acts together constitute a practice of anti-competitive acts affecting the market for advertising space, or the publishing market, which leads to a substantial lessening of competition in that market:

. . .

> (g) targeting price reductions and other discounts to those markets in which entry by competing publishers has occurred or is occurring; and
>
> (h) causing, directly or indirectly, advertising agencies to refuse to place advertising in telephone directories published by competing publishers or otherwise discriminating against or causing independent advertising agencies to discriminate against competing publishers; and
>
> (i) making disparaging statements in regard to new market entrants.

571 In argument, the Director did not refer to the act set out in (i). Under the heading in the written argument, "Otherwise Discriminating between Publishers", the Director gathers evidence relating to the respondents' policy of not allowing the directories of competing publishers to count towards the 20 directory requirement of Tele-Direct's national account definition. Under the heading in the written argument, "Targeting/Raising Rivals' Costs", the Director refers to various actions by the respondents in response to entry by competing publishers in the local markets of Joliette (Quebec), Newfoundland, Niagara

and Sault Ste. Marie which are alleged to constitute anti-competitive acts because of their targeted nature and intent and the degree or intensity of the response. The particular responses listed are zero price increases, incentive programs, advertising and promotional spending, directory enhancements, interfering with the DSP audiotext feed and litigation or threats of litigation.

572 The respondents say that the allegations involving directory enhancements, promotional spending and litigation or threats of litigation are not encompassed by the pleadings and cannot be relied on by the Director.

573 It is not in dispute that the evidence and the argument put forward by the Director on this issue must be supported by the pleadings, either by the specific words in the application or by reasonable inference therefrom. It is trite to say that the pleadings are intended to define the issues in dispute between the parties, to give fair notice to each party as to the case that it will have to meet and to assist the decision maker in considering and deciding the allegations that have been made. Where, as here, an argument about the scope of the application is only raised at the stage of final argument, we agree with the Director that regard may be had to interlocutory proceedings, discovery and the conduct of the hearing itself to determine what the *parties* considered were the issues raised by those pleadings. We need not restrict ourselves to the pleadings in a vacuum.

(i) Enhancements

574 Directory enhancements were not explicitly mentioned in the application. However, in its request for leave to intervene, White specified, in paragraph 9 of the request, those matters in issue which affected it. Item (e) reads:

> offering directory enhancements (community pages, an audio text system and postal codes) targeted to areas where competition or the threat of competition exists....

575 As stated in the reasons of the Tribunal for granting leave to intervene, the respondents did not oppose the intervention. The respondents only objected to White being given leave to make representations with respect to certain issues which, the respondents argued, were outside the scope of the Director's application. The respondents submitted that the representations of an intervenor must be relevant to the proceedings and that relevance is defined by the parties' pleadings. The Tribunal agreed. The issues in White's intervention challenged by the respondents as being outside the scope of the application did not include item (e) "enhancements" but rather focused on six other items. The Tribunal accepted that four of the disputed six items were not supported by the application and excluded them from the purview of White's intervention.

576 If the respondents were genuinely of the view that the question of directory enhancements was outside the scope of the application as defined by the pleadings, then they would have challenged that part of White's intervention request. The question of what was and what was not supported by the pleadings regarding the alleged anti-competitive acts in relation to independent publishers was squarely in issue at the intervention hearing. The clear implication of the respondents' failure to challenge item (e) is that they considered that enhancements were within the pleadings.

577 Nothing occurred after the intervention hearing that would have led to any other conclusion. The Director requested the production of documents and conducted discovery on the question of enhancements. Eventually the relevant documents were produced, without objection.[228] The Director submits that Tele-Direct has taken this "about face" on the question of enhancements in order to provide an after-the-fact explanation for its belated production of a boxful of relevant documents relating to its responses in competitive markets. The Director called evidence at the hearing on enhancements, without objection. The respondents themselves led evidence on the question of enhancements. Tele-Direct cannot now change a position that it took on an interlocutory proceeding and maintained throughout discovery, the hearing and up until the commencement of its final argument. The entire case has been conducted on the basis that directory enhancements are fairly in issue. Enhancements are properly before the Tribunal.

(ii) Advertising and Promotional Expenditures

578 Unlike directory enhancements, advertising and promotional expenditures were not specifically addressed at White's intervention hearing. If we looked only at the words of the pleadings, it might be arguable whether those words would support the allegation. Again, however, we have a course of conduct that sheds considerable light on whether the parties themselves

thought promotional expenditures were at issue as part of the allegation of anti-competitive acts. It is clear that they did. Oral and documentary discovery was conducted by the Director on this issue. Counsel for the Director referred to it in his opening address. The Director called evidence in chief on the issue and the respondents called responding evidence. Advertising and promotional expenditures are properly before the Tribunal.

(iii) Litigation and Threatened Litigation

579 Counsel for the respondents pointed out that the Director was not seeking any remedy specifically relating to litigation. Counsel for the Director did not address the respondents' argument that litigation or threatened litigation falls outside the pleadings. In argument on the merits, however, the Director took the position that litigation or threats of litigation contribute to the anti-competitive act of "targeting" or "raising rivals' costs".

580 The words of the pleadings do not obviously incorporate such a concept. The original application, at paragraph 65(h), contained a specific allegation of an anti-competitive act of "threatening or taking legal action to restrict competing suppliers of advertising space from gaining access to, or from utilizing, subscriber listing information". This allegation was later withdrawn. However, as with promotional expenditures, litigation was dealt with in the evidence and argument. In view of the specific withdrawal by the Director of the reference in the pleadings to litigation or threatened litigation, the respondents' position is somewhat stronger on this point than on the others. But, it is not necessary to decide the issue on procedural grounds. As will become apparent, we are not satisfied on the merits of the argument that litigation or threatened litigation constitute anti-competitive conduct in this case.

(b) Alleged Anti-competitive Acts

(i) Causing Agencies to Refuse to Place Advertising with Independents

581 The independent publishers' directories do not count towards the 20-directory requirement that forms part of the 1993 definition of a Tele-Direct commissionable account. The Director argues that the effect of the Tele-Direct policy in this regard is that CMRs do not recommend independent directories to advertisers when they would do so if those directories counted towards qualification as a commissionable account. Thus, it is submitted, this excludes independents from revenues that they would otherwise obtain.

582 The Director relies on the evidence of Mr. Lewis of White comparing the situation in Canada with respect to advertising placed in his directories by CMRs to that in the United States. In distinction to Tele-Direct's policy, in the United States publishers include the directory of any other YPPA member in determining whether an account qualifies for commission. White is a YPPA member and therefore its directories count towards the minimum directory requirement in the United States. Mr. Lewis testified that in that country eight percent of White's advertising revenues are placed by CMRs while in Canada less than one-half of one percent comes from CMRs.

583 The respondents respond that this testimony alone does not constitute proof of the requisite exclusionary effect. Because White has been operating in the United States for a lot longer, and is therefore more established than it is in Canada, they question the validity of the comparison being made. Further, they rely on the evidence of Stephanie Crammond of Media Nexus, a specialized Yellow Pages advertising agency, that if she had confidence in the distribution figures cited by the various independents, she would consider them. Likewise, Richard Clark of DAC stated that his position on independent directories was to "wait and see" if they were going to stay around and then base a decision on which directory had greater usage. He did point out that typically the telco directory has the greater usage and, therefore, if a competing directory is used, generally it is on a secondary basis, with the primary advertising dollars allocated to the telco directory.

584 On balance, we are not persuaded by the Director's argument. While we recognize that monetary incentives are bound to enter into an agency's recommendation to a client, the Director's argument implies that agencies are entirely driven by earning commission and will compromise the quality of the advice they give by omitting to recommend a good, independent directory merely because it would not help the account qualify for a Tele-Direct commission. The burden of the remainder of the Director's case, as it involves agencies, is that they are, among other things, independent suppliers of advice to advertisers and therefore

provide a valuable alternative to Tele-Direct's captive salesforce. For the Director to suggest now that agencies would not provide good advice seems to be somewhat inconsistent with that position. But apart from this, the independents, of course, pay their own commission on advertising placed in their directories.

585 There are factors at play other than Tele-Direct's criteria in agents' decisions when recommending directories to their clients. As Mr. Clark's testimony indicates, an important reason why independent publishers in Canada may not receive a high volume of business from agencies is that, because Tele-Direct is the established publisher, it is rarely a choice *between* Tele-Direct's directory and the independent directory for a particular area. Rather, the agency will generally recommend the Tele-Direct directory as the primary directory for advertising because of widespread usage and then, if additional money is available, recommend the independent *also*.

586 In summary, we do not accept that Tele-Direct's policy regarding the 20-directory requirement discourages agency recommendations of independent directories.

587 One final observation in this area arises from the respondents' written argument at paragraph 590, that as a matter of law "[i]t cannot be an anti-competitive act for a dominant firm to decline to assist or give aid to a competitor." We agree with the general proposition that a firm is not, and should not be, required to "assist" its competitors. The respondents, however, add an additional element to the proposition when they submit that:

> Each of the anti-competitive acts listed in section 78 require the dominant firm to *actively initiate* some action.... None of the listed acts are triggered simply by the dominant firm *not doing something or refusing to assist....*
>
> (emphasis added)

588 While the respondents did not advance this argument in relation to the specific allegation we are dealing with here (or, in fact, in relation to any specific allegation), it certainly seems relevant to the question of whether Tele-Direct should be obliged to recognize advertising in independent directories as counting towards Tele-Direct's commissionability requirement of a minimum of 20 directories. As stated above, as a general proposition, competitors should not be required to assist one another. But, this general proposition may be shown to be inapplicable in a given section 79 case by the Director proving that the "act" of the respondent meets the elements of that section and is an anti-competitive act leading to a substantial lessening of competition. Then, any order of the Tribunal which may issue is, by definition, not an order to "assist" a competitor but rather, in the case of subsection 79(1), an order to cease and desist from anti-competitive conduct.

589 It is, therefore, not sufficient, in circumstances such as these, to argue the general proposition. Nothing can be determined by simply labelling the alleged anti-competitive "act" as "doing something" (active) or "not doing something" (passive). The anti-competitive effect of the conduct of the respondents, whether "active" or "passive", must be weighed against any business justification in order to conclude whether there has or has not been a substantial lessening of competition. That can only be done by reference to the evidence. On this point, Tele-Direct only argued the general proposition.

(ii) Targeting/Raising Rivals' Costs

• Reaction of Tele-Direct

590 Before turning to the evidence it is necessary to consider what the Director means when he alleges that "targeting/raising rivals' costs" is an anti-competitive act. There is a growing body of literature dealing with "raising rivals' costs" ("RRC"). The theory was proposed as a similar but more credible route to market power than predatory pricing because it does not depend on short-term price cutting beyond what is profit-maximizing followed by later recoupment. With RRC, it is not necessary to cause the rivals to exit, no "deep pockets" are necessary and the additional profits are gained immediately. [229] Typically, an RRC strategy involves increasing rivals' costs by raising the price of some scarce input which in turn results in the rival reducing its output. [230] In other words, there is a relatively immediate output reduction in the market concerned. Only two elements of the act alleged by the Director seem to bear any resemblance to this conception of RRC -- the audiotext affair and litigation

and threats of litigation. As we shall see, the remaining actions of Tele-Direct relating to pricing, incentives and advertising did not result in output reduction in the markets in question. The considerations involved in RRC can provide little assistance in evaluating the allegations relating to those reactions of Tele-Direct in competitive markets or the "targeting" aspect of this act.

591 The Director has not attempted to explain what is meant by targeting in any detail, perhaps regarding the term as largely self-explanatory. It is, however, far from being a household word in competition law. While we have no reason to discourage novel approaches to discerning potentially anti-competitive conduct that might fall within section 79, we do see considerable difficulty in applying the targeting concept. It is always difficult to distinguish between anti-competitive practices and normal competition. The conduct in question may be generally benign and it is only in certain contexts that it is anti-competitive. The difficulty is even more pronounced in this case, given the actions on the part of Tele-Direct that the Director would have the Tribunal, if not prohibit completely, certainly restrict.

592 In argument counsel for the Director described the nature of targeting as follows:

> The reason that acts of predation or near-predation can be anti-competitive is because the firm is dominant in a larger market. The danger is that, rather than bringing the public the benefit of competition in a limited area, what is happening is that in the long-term analysis the dominant firm is leveraging its market power from its broadly-dominated market into specific targeted areas where competition enters, with a view to either eliminate that competition entirely or, as in the situation here where the expressed intent fell a bit short of that, to ensure that the competition didn't move into any other markets and to raise their costs so that those companies would know that it was not going to be a profitable enterprise to continue their expansion.
>
> What we are suggesting is that this is really a test of degree, that we have in at least one of the markets evidence which is very close to predation. What we have is such a tightly focused and overwhelming marshalling of the dominant resources of the company to these targeted areas that there is a need for a remedy.
>
> . . .
>
> ... While one may formulate various tests that would have different requirements in terms of the super-normal targeted response, this is probably the clearest case imaginable in terms of the absolutely overwhelmingly aggressive nature of the response to these targeted markets. [231]

Counsel clarified that "leveraging" in this context means the use of monopoly rents from other markets to subsidize near-predatory behaviour in the markets in question. [232]

593 One of the ordinary meanings of the word "target" is

> anything that is fired at or made an objective of warlike operations ... [233]

In one obvious sense, therefore, "targeting" simply refers to focused or aimed rather than general responses. The facts show that Tele-Direct behaved differently in the competitive markets. If the Director is arguing that the actions of Tele-Direct constitute the anti-competitive act of targeting merely because its actions in markets in which broadly-scoped entry was occurring were different from those in markets where no such entry had occurred, we do not accept the argument. Targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not. One competes where there is competition. Similarly there may be gradations of reaction depending on the nature of the competitive threats.

594 The earlier discussion regarding market power established that, whereas the broadly-scoped directories published by entrants in the "targeted" markets were considered by Tele-Direct as competition for its own directories, the same was not true of other publishers who sought market niches defined by geography or other specific characteristics of their intended audience (e.g., ethnic, religious, easy to read directories). Furthermore, both White and DSP introduced features into their directories

such as postal codes, information about cultural events, coupons, etc., that provide value to users that could affect whether the Tele-Direct directories would be retained by telephone subscribers in those markets if Tele-Direct did nothing.

595 If "targeting" does not depend solely on differentiated responses, how is it to be distinguished from competition on the merits? We do not take the Director to be proposing that an incumbent, even one with a dominant market position, is precluded from responding to entry. Entry would obviously be *encouraged* if the incumbent accommodated the entrant. It is, however, doubtful that anyone would suggest that this is a desirable competitive outcome. Anything short of accommodation is likely to make the post-entry prospects of an entrant less attractive than the pre-entry benefits enjoyed by the incumbent. It is, therefore, not enough for us to find that Tele-Direct's responses made entry less attractive.

596 Indeed, the Director's position seems to be that a firm is free to act to discourage entry but that there is a limit to what it may do. This is reflected in the Director's proposed remedy, which would allow Tele-Direct to use two out of three of price reductions or discounts, enhancements and an advertising campaign in individual markets.[234] Once the incumbent passes this critical threshold, it is submitted that it has moved into the realm of anti-competitive conduct. The reasoning behind this, as we understand it, is that while what has been done in the particular markets may not be particularly harmful, the long-term harm caused by discouraging future entry outweighs any immediate benefit. In other words, the response in the markets where entry occurs is part of an effort to discourage entry into other markets by behaving in a fashion which is nearly, but not necessarily, predatory in the strict sense in which that word is usually used.

597 In support of the position that Tele-Direct's response went beyond what is "normal", the Director relies on its expressions of corporate intent, the number, variety and degree of its responses and the intensity of those responses. As a standard for assessing how far Tele-Direct went the Director submits that we can look to the evidence that its response in Sault Ste. Marie caused Tele-Direct to incur losses, a comparison to the experience of independent entrants in American markets, and the difference between White's and DSP's expectations and their actual results and their future plans.

598 Counsel for the Director also suggests that Tele-Direct is using its monopoly rents from other markets to cross-subsidize its responses in competitive markets. This possible meaning of targeting would only apply, however, where the dominant firm is incurring losses in the targeted market. However, the Director does not appear to be suggesting that this is a necessary condition for the Tribunal to find that "targeting" is an anti-competitive act in this case.

599 First, we will examine the question whether what Tele-Direct did in the competitive markets was generally of benefit to consumers (advertisers) in those markets, largely neutral or, in fact, harmful. While Tele-Direct's actions clearly made it more expensive for the entrants than if it had accommodated them, seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the markets concerned are made better off. The Director has not attempted to argue that Tele-Direct's responses caused harm to advertisers in the particular markets in which entry occurred. The Director did, however, submit that at least some of Tele-Direct's actions were of negligible or temporary benefit to those advertisers.

600 With respect to the zero price increases, there is no question that advertisers benefitted from this initiative. The evidence indicates that the advertiser incentive program in competitive markets was carefully designed to absorb customers' directory advertising budgets so that little would be left for the new entrants when they canvassed for paid advertising. Yet, it is difficult to conclude that these programs did not benefit advertisers, particularly when rebates were involved. Making its directories more attractive by adding enhancements and increased advertising by Tele-Direct would both tend to increase usage of telephone directories and, thus, benefit advertisers in those markets. There was evidence that some of the enhancements to Tele-Direct's directories were viewed by the company as temporary expedients. For example, the postal code feature in Niagara was designed to be easily removable.[235] Nevertheless, as no evidence was brought to our attention indicating actual removal of the postal code section, we can only conclude it has been maintained by Tele-Direct. Further, although the Director argued that much of Tele-Direct's advertising was "negative" advertising which only disparaged its competitors, we do not have enough information on the advertising campaign to be in a position to identify which portions were "negative" and if the negative outweighed the

positive. Overall, the inescapable conclusion is that Tele-Direct's responses to entry resulted in an improvement for advertisers in the "targeted" markets.

601 What, then, about the likelihood of harm in Tele-Direct's territory as a whole because of the effect of these responses on future entry or expansion? There is evidence that Tele-Direct was not solely concerned with "meeting" competition in Sault Ste. Marie and Niagara. Tele-Direct also feared further entry into other areas, particularly from DSP which was associated with Southam and had the advantage of having local connections and organization through the publisher's newspapers. This is clear from the evidence of Ms. McIlroy, who was in a key position as Vice-president of Marketing at that time.

602 Ms. McIlroy testified that Tele-Direct designed its strategies first around the Sault Ste. Marie situation and then replicated them in Niagara when White appeared. She confirmed that one of her objectives in Sault Ste. Marie, as set out in document recording her notes for a presentation, was to "limit Southam motivation to continue Yellow Pages roll-out in Ontario".[236] She further explained that as a "counter-strategy", if Southam's intention to enter directory publishing was a long-term, well-funded strategy, then her second objective was to "make the cost of carrying on business against [Tele-Direct] market-by-market exceptionally high."[237]

603 But those were not the sole objectives. Ms. McIlroy also described Tele-Direct's strategy in the following terms:

> ... the basic premise was to make it expensive for the competitor to compete with us and to focus on doing everything and doing it right in the Sault, putting whatever investments or resources that was necessary to avoid unnecessary market share [loss] and to protect our interest in that market.[238]

Similarly, in a presentation that she made to her fellow officers she set out the following points as constituting Tele-Direct's "challenge":

- Protect usage and awareness - promotion
- Add value to advertiser - incentive
- Add value to user - product enhancements
  - size and colour
- Sustain leadership profile
- Compete on value vs. cost
- *Make competition an expensive proposition*{239} (emphasis added)

Notes: 239 Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133316.

Mr. Renwicke disputed whether the last point was ever accepted as corporate policy, but in matters of dispute between Ms. McIlroy and her fellow officers we accept her evidence. She left Tele-Direct on good terms and she has no discernible reason for colouring her evidence, particularly as she was the officer responsible for preparing tactics that the Director would have us label as anti-competitive.

604 It is only the reference to making competition "expensive" as part of Tele-Direct's strategy that raises any question of anti-competitive motivation. It is doubtful that Tele-Direct could make competition expensive without negatively affecting its own profitability. According to Ms. McIlroy the participants at the officers' meeting were taken aback at the cost to the company of making it expensive for the competition. They agreed to "spend what it took" with the proviso that the expenditures would be selective and the officers would be kept current on what was transpiring, even as frequently as on a weekly basis. The fact that Ms. McIlroy convinced her fellow officers to adopt a policy of making competition expensive even when doing

so would be detrimental to current profits provides some indication that Tele-Direct was trying to influence its competitors' future conduct to some extent.

605 There is as well another consideration. The documents relating to Tele-Direct's responses in Sault Ste. Marie and Niagara were not provided during documentary discovery within the time frame ordered. They did not make their appearance until after Tele-Direct apparently learned that the Director had contacted Ms. McIlroy and that she would appear as a witness in these proceedings for the Director. Counsel for Tele-Direct attempted to blame the delay in the production of these documents on inadvertence. He said that the relevant box of documents got lost but that no one seemed to know where or why. If the documents were lost, a detailed explanation is in order especially given the controversial issue to which they pertain and that the content of some of the documents is clearly adverse to Tele-Direct's position. A vague explanation carries little weight. The belated production and inadequate explanation cause the Tribunal to make an adverse inference with respect to Tele-Direct's intentions on this issue. Tele-Direct apparently considered that it might have "gone too far" in its responses in those markets. This, along with the statements of corporate policy, provides support for the view that Tele-Direct intended, in a subjective sense, to convey a warning about future entry as well as protecting its position in the individual markets subject to entry.

606 Nonetheless, the critical question is whether there is a reasonable likelihood that future entry will be discouraged by Tele-Direct's actions. If so, is that possible negative effect more compelling than the proven benefits in the individual markets from Tele-Direct's improving its product, freezing prices and increasing advertising expenditures, all of which contributed in some measure to increasing usage of telephone directories, which is generally seen as pro-competitive. A reasonable likelihood of significant long-run detriment must exist if these tactics are to be discouraged.

607 The Director relies to some extent on the evidence given by White and DSP, which will be canvassed below, regarding their intentions about future expansion, which he says shows that future entry and expansion *have been* deterred by Tele-Direct's behaviour. That evidence is, however, a small portion of the evidence put forward by the Director in support of his case. In effect, the Director asks us to *infer* from the "overwhelming intensity" of Tele-Direct's response in the markets where it faced entry that potential entry into other markets *will* be deterred.

608 Before we proceed to consider the more detailed arguments, we should indicate at the outset that we have serious reservations with respect to the overwhelming intensity approach adopted by the Director. The Director has not advanced any "objective" criteria by which the Tribunal is to assess whether Tele-Direct's responses in the competitive markets have the overall anti-competitive character or "purpose" required for section 79.

609 Although the Director is not arguing that Tele-Direct's conduct was predatory, predation is certainly the closest analogy to what is put forward here. The essence of an allegation of predatory pricing is that the firm foregoes short-run revenues by cutting prices, driving out rivals and thus providing itself with the opportunity to recoup more than its short-term losses through higher profits earned in the longer term in the absence of competition. A predatory pricing allegation is difficult because, at least in the short-run, consumers apparently benefit from lower prices. In addition, predation can only succeed if the predator has greater staying power than its rivals and a reasonable prospect of recouping its losses. In order to distinguish competitive pricing action from predation, therefore, the "Areeda-Turner test" for predatory pricing [239] was developed and has been adopted by the courts.

610 Our difficulty here is that, unlike the predatory pricing case, no "test" or criteria of any kind were even proposed by the Director or his experts. Indeed, we acknowledge that the likelihood of being able to establish objective criteria to distinguish between harmful and beneficial conduct of the type in issue is remote. In effect, because of the absence of any criteria, the Tribunal is being asked by the Director to place itself in the shoes of a potential entrant with a view to assessing the credibility of the alleged "threat" being issued by Tele-Direct by its responses to entry. The Tribunal must determine whether the response in the initial markets in which entry occurred was so "overwhelmingly intense" that an entrant would be intimidated and future entry or expansion deterred. [240] What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have

no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising).

611 While Tele-Direct certainly made very strong responses to entry in Niagara and Sault Ste. Marie, there is no certain way for the Tribunal to judge what magnitude of response Tele-Direct would have employed had it not been concerned, among other things, with discouraging further entry. To say that the response was greater than it otherwise would have been assumes that we can judge how much Tele-Direct would have done had it been acting competitively and that, therefore, we can determine, with reasonable assurance, to what degree the observed responses went beyond that and became anti-competitive. In trying to make this comparison urged upon us by the Director, it must be recognized that Tele-Direct was facing pretty stiff competition from the new entrants. The entrants' publications were initially superior with respect to features and they were priced up to 40 percent below Tele-Direct. While Tele-Direct's expenditures on advertising and promotion constituted a sea change from its previous expenditures, DSP spent more over the three years from 1992 to 1994 than Tele-Direct did, including large amounts in the local Southam newspaper.

612 The Director makes two broad arguments in support of the position that Tele-Direct's actions went beyond "normal" competition and, taken together, constitute anti-competitive acts. The first is that Tele-Direct's "bottom line" results in Sault Ste. Marie in 1993 reveal that Tele-Direct barely broke even in that market when the cost of introducing the improvements to the directory and the advertising and promotional expenditures are taken into account. This conclusion was not disputed by Mr. Beauséjour who agreed that the results shown were "very close to breakeven".

613 The analysis presented to the witness, however, included the payment to Bell Canada (CCS) as an "expense" deducted from revenue. When Bell and Tele-Direct are treated on an integrated basis, as we earlier found in the tying context to be appropriate when considering Tele-Direct's profitability study, it would be inaccurate to refer to Tele-Direct's results in Sault Ste. Marie as a "marginal profit" or "loss" situation. The pro-rated share of the payment to Bell would have to be added back to the Tele-Direct's results in Sault Ste. Marie. Given that the Bell payment is mostly contribution to profit and it is a substantial amount, this would move the Sault Ste. Marie results well above the breakeven point, even with the extra expenditures on enhancements and advertising. Indeed, it would appear that the payment to Bell constitutes the largest portion of the "profit" that attracts independent publishers to attempt to enter Tele-Direct's markets and which allows them to contemplate profitably pricing 30 or 40 percent below Tele-Direct. In the Niagara region, Tele-Direct earned a profit in 1993 even when the payment to Bell is treated as an expense.

614 The Director's second argument is that experience in the industry also demonstrates that Tele-Direct went beyond "normal" competitive responses. This includes the evidence regarding expectations of White and DSP versus their experience and their future intentions as well as evidence about how American telco publishers have responded to entry in their markets.

615 With respect to the experience of an American telco publisher responding to entry, Mr. Anderson, who was with NYNEX, testified in chief that when NYNEX perceived independent directory publishers as significant competition, it would make its sales force aware of their presence, possibly do more advertising, and consider the scoping of its directories and their features. He also pointed out that it had not been his experience that features would be introduced only in a competitive market. After a trial run, if the feature proved successful, it would be implemented "across the product line." In cross-examination, he admitted that NYNEX had never, at least to his knowledge, offered an incentive program similar to that used by Tele-Direct in its competitive markets in response to entry of a competing publisher. He gave the same response when asked about a specific market where, in response to entry, NYNEX might have frozen prices in specific markets in response to entry for two years, without rescoping. With respect to the remaining possibilities put to him by counsel for the Director, Mr. Anderson either had no knowledge (e.g., advertising as a separate budget item) or commented on the lack of applicability in the American context (e.g., telco publishers cannot offer audiotext, no trade-mark to protect through legal action). Without any knowledge about the marketplace in which NYNEX operates, we are unable to draw any conclusions about this evidence.

616 With respect to White, Mr. Lewis stated that his experience in entering markets in the United States had led him to believe that White would have larger sales in Niagara than turned out to be the case. In its first revenue year, White expected to capture between 30 and 40 percent of Tele-Direct's revenue. [241] In fact, White's revenue for its second directory (the first revenue-

generating directory), published in 1994, was 17 percent of Tele-Direct's revenue. Revenue for the third directory (the 1995 directory) represented a nine percent increase from the previous year for a total of about 19 percent of Tele-Direct's revenue.

617 Mr. Lewis stated that his initial plans for expansion beyond the Niagara region in Canada had been put on hold indefinitely due to Tele-Direct's conduct *and* the inability to obtain complete subscriber listing information. At the time of the hearing, this matter of subscriber listings was on appeal to the federal Cabinet. Mr. Lewis also said that upon a favourable Cabinet decision on the privacy issue, he would anticipate starting a number of additional directories in the Toronto and Niagara region. Any conclusion that White was deterred from future expansion by Tele-Direct's conduct and that, therefore, that conduct passes an anti-competitive threshold would be difficult in light of this evidence and the subsequent Cabinet decision overruling the CRTC decision that was to the effect that consumers should be able to opt out of having their listing information released to independent publishers.[242]

618 In formulating its entry strategy, DSP factored into its business plan both the risk of legal action by Tele-Direct and the possibility of a Tele-Direct competitive reaction. DSP, erroneously as it turns out, anticipated little response from Tele-Direct based on that company virtually ignoring the entry of the Locator directories in a large number of communities. As we have discussed, the Locator directories are simply not close substitutes for Tele-Direct's directories. DSP's expectation for its first revenue-generating directory was to capture about 50 percent of Tele-Direct's revenue. In developing this estimate, DSP reviewed the American experience and consulted extensively with its joint venture partner, Noverr. Instead, the directory generated about half of the expected revenue in dollar terms. The revenues for the second revenue-generating directory, published in 1994, were once again considerably lower than expected. It was, however, anticipated that the revenues for the 1995 directory would be higher and marginally profitable.

619 DSP has also decided not to expand in Ontario even though that was the original plan. While Tele-Direct's conduct was said to have been the reason for that decision, the evidence suggests that there were other reasons as well. In particular, it would appear that DSP's expectations were quite aggressive for a new business and, to some extent (in relying on the Locator experience), in error. The Director says that the Sault Ste. Marie, Michigan part of the DSP joint directory, which did not experience a response like Tele-Direct's, had been far more successful than its Ontario counterpart. However, that side of the publication also fell well short of what had been anticipated as a "normal" first year revenue, further suggesting that the DSP's expectations may not have been realistic.

620 We do not have enough evidence to arrive at any conclusion about the effect of Tele-Direct's actions on deterring entry or expansion in the Newfoundland and Joliette situations.

621 The remedy suggested by the Director changed from the application to final argument. In our view, the remedy, as currently formulated, illustrates the difficulty of dealing with "targeting" as an anti-competitive act. The notice of application, at paragraph 1(b)(xiii), requested that:

> the Respondents be prohibited from targeting price reductions and other discounts for advertising space to those markets in which entry by competing publishers has occurred or is occurring.

In oral argument, counsel for the Director explained that the remedy ultimately being requested by the Director would read as follows:

> that the respondents be prohibited for a period of five years from: (i) targeting a price, a price reduction, or other discount including any advertiser incentive program offering free colour, free size up, or a first time placement discount where there is no annual increase in advertiser spending; *and* (ii) targeting any directory enhancement, including audio-text service; *and* (iii) targeting any advertising campaign; to a market where entry by a competing directory publisher has occurred, is occurring, or is reasonably anticipated to occur unless such listed item is offered or applied uniformly and simultaneously by the respondents in the majority of their directory markets.

The "and" between the listed items is critical. The Director proposes that Tele-Direct be permitted to do any *one* or *two* of the three enumerated actions in any market where entry has occurred. However, if all three should be undertaken then they would have to be followed in a majority of Tele-Direct's local markets.

622 We recognize that the Director is likely attempting, by this compromise remedy, to recognize that Tele-Direct's responses are of benefit to consumers in the market in which they occur. This effectively highlights the difficulty of the "targeting" allegation. First, the number of competitive responses (one or two) that Tele-Direct is allowed is completely arbitrary. The Director has not provided the Tribunal with any rationale as to why one or two (but not three) responses would not be anti-competitive. Further, there is no suggestion that the Tribunal should limit the extent to which Tele-Direct could invoke the competitive responses to which it would be entitled. Yet, the Director alleges that Tele-Direct's responses in the competitive markets were anti-competitive in part *because of* their intensity and ferocity.

623 Considering the difficulty in circumscribing "targeting" so that it does not result in discouraging desirable competitive activity, we do not find that Tele-Direct's conduct with regard to pricing, promotion and changes to its directories in the competitive markets, in particular in the Sault Ste. Marie and Niagara areas, is anti-competitive.

• ***Litigation or Threatened Litigation***

624 Finally, we turn to the Director's argument that litigation or threatened litigation by Tele-Direct, when taken together with the other actions of Tele-Direct, contribute to targeting/raising rivals' costs.

625 The Director argues that Tele-Direct's use of litigation or threatened litigation "goes into the mix" to show intent and the excessive degree of the overall response to entry in the competitive markets. The Director does not rely on the nature of the litigation on its own. The Director does not argue, for instance, that the litigation was a "sham". "Sham" litigation, or litigation which the plaintiff knows is without foundation but uses to stifle or impair competition, can be a technique of predation.[243] In the words of Robert Bork: "As a technique for predation, sham litigation is theoretically one of the most promising."[244]

626 Since no argument is being made that the litigation started by Tele-Direct against DSP was "without foundation",[245] we need some other means to determine whether the litigation in question crossed the line to anti-competitive conduct. We do not consider that it is sufficient to look at the litigation only in combination with the other responses. There must be some evidence specific to the bringing or the conduct of the litigation itself that would lead us to conclude that the purpose was to contribute to the impairment of competition over the protection of property rights.

627 The Director points out that while Mr. Crawford, Tele-Direct's Corporate Secretary and legal counsel, originally testified that Tele-Direct defended any unauthorized use of its trade-marks and copyrights, it became apparent on cross-examination that this was not true. Tele-Direct overlooked unauthorized use on a number of occasions. Perhaps the difficulty with this witness's credibility on this issue and the fact that litigation seems only to be taken against specific competitors do lead to the view that Tele-Direct focused on those competitors. However, that alone is not enough if the litigation is not a sham.

628 On the facts of this case, we cannot conclude that Tele-Direct brought, conducted or gave warnings regarding otherwise apparently valid litigation in such a manner that its purpose was clearly to contribute to the impairment of competition in those markets where entry occurred rather than the protection of its intellectual property rights. There is no evidence, for instance, of undue delay. As of the date of the hearing, DSP had not yet been discovered but a major factor in this delay was the illness of Mr. McCarthy, the intended representative for DSP. Discovery of DSP was, however, scheduled for November 1995 with Mr. Campbell for DSP. Discoveries of Tele-Direct had been completed by the date of the hearing. There is no evidence that the litigation is following any other than the "normal" course. Unlike the *Laidlaw* case, there is no evidence of responding to an apparently minor matter in a "wildly overly aggressive manner" with multiple claims or of pointed threats to put a competitor "out of business" using, in part, the pursuit of legal action for which, as the Laidlaw representative informed the competitor, a large sum of money had been reserved.[246] While Tele-Direct did not proceed against White after its warning regarding possible litigation, it is certainly plausible that it did not do so because of the similarity of the issues to the DSP case. That litigation

would seem likely to settle at least the copyright question once and for all, by establishing a precedent for Tele-Direct's dealings with other publishers.

629 The Tribunal, therefore, cannot accept the Director's submission that litigation or threatened litigation in this case can contribute to a finding of anti-competitive acts by Tele-Direct.

• *Audiotext in Sault Ste. Marie*

630 The Director alleges that Tele-Direct used its power as a major buyer to influence the supplier of audiotext information in Sault Ste. Marie, Perception, resulting in a degradation of the feed to DSP. The respondents acknowledge in their written argument that the allegation could be an anti-competitive act, if proven, but dispute that it is supported by the evidence. The critical questions are whether Tele-Direct was merely asserting its contractual rights and what responsibility, if any, can be assigned to Tele-Direct for the quality of service delivered by Perception to DSP.

Did Tele-Direct have a contractual right to exclusivity?

631 The respondents state in their written argument, at paragraph 930, that "Perception recognized that Tele-Direct was entitled to the exclusive right to its only feed ...." This statement is not supported by the evidence. Up until January 1994, the only contract between Tele-Direct and Perception was for the Toronto area and it provided Tele-Direct with exclusive access to Perception's feed in the Toronto local calling area only. Perception had in fact refused to grant Tele-Direct exclusivity for other areas because of the limitation on its ability to market its service.

632 In the fall of 1992, when Tele-Direct became aware of the proposed entry into Sault Ste. Marie by DSP, including offering audiotext, Tele-Direct entered into negotiations with Perception to supply its TYP in that market. One of Tele-Direct's concerns was that the feed in Sault Ste. Marie be exclusive to it, that DSP not have access to the same feed. The evidence reveals that the parties did not, in fact, come to an agreement on exclusivity until much later. While exclusivity is mentioned in a letter in March 1993,[247] the draft contract sent by Perception to Tele-Direct in May 1993 is instructive. The letter enclosing the contract states that with "all the excitement of getting 'the Soo' up and talking" Perception had neglected to send Tele-Direct the contract for Sault Ste. Marie. The contract clearly states that it is a "non-exclusive" licence to receive and store information.[248]

633 The contract was never signed by Tele-Direct but nonetheless provides proof that Perception, at least, did not consider at that time that Tele-Direct had exclusive rights to its feed. They were certainly not *ad idem* in that respect. The final contract covering Sault Ste. Marie, which does provide for exclusivity, was not signed until January 1994.[249] A letter in September 1993 provides that upon acceptance of a new agreement by Tele-Direct, the "BDR Audio Network will be made available to only directory publishers in Canada and exclusively to Tele-Direct within Ontario and Quebec."[250] Peter Dolan, Director of Sales at Tele-Direct (Services) Inc., admitted, however, that Tele-Direct had to go "back and forth" with Perception a couple of times in order to get the wording regarding exclusivity re-inserted into the final contract. Tele-Direct does not appear to have had, until November 1993 at the earliest, a right to exclusivity with Perception and, therefore, had no right to insist or attempt to insist on exclusive service from Perception prior to that date.

Did Tele-Direct influence the delivery of service by Perception to DSP?

634 Upon becoming aware in late 1992 that Perception was supplying an information feed to DSP and that it had the same content as Tele-Direct's feed, Tele-Direct, through Mr. Dolan, expressed its displeasure to Perception. Perception agreed to remedy the situation prior to publication of the DSP directory. Mr. Dolan said that he thought Perception would acquire an alternate feed for DSP as a remedy. At the same time, Tele-Direct was pushing for exclusivity with Perception.

635 Tele-Direct's TYP were launched in mid-February 1993. Tele-Direct was not satisfied with Perception's response to its complaint regarding the feed to DSP, including an effort in early February whereby Perception started sending slightly re-arranged or reworded content to DSP. In cross-examination, Mr. Dolan indicated that Tele-Direct wanted a "superior feed" to that provided to DSP.[251]

636 A meeting was scheduled for February 23, 1993 with Perception. The agenda, which was provided to Perception, states that what Perception was doing with respect to the DSP feed was "not satisfactory" to Tele-Direct. Mr. Dolan explained that Perception was simply re-voicing the network and again stated that Tele-Direct was not satisfied because it wanted a "superior" feed. This concern was communicated to Perception at the meeting.

637 In re-examination, taking Mr. Dolan to clause 8 of the January 1994 contract with Perception which uses the word "superior", counsel for the respondents elicited a response that "superior" meant "of high quality" and that was the way in which Mr. Dolan had used the word in his cross-examination. Clause 8 of the contract reads:

> ... Brite does commit that the BDR Audio Network will continue to be of the same exceptional quality as the affiliate has enjoyed. BDR will continue to be of superior quality and utilize its own personnel for the creation and dissemination of information. [252]

Clause 11.6, which was later brought to the witness's attention, is instructive:

> ... Brite will continue to supply the superior level of programming that the Affiliate has come to expect. Other audio networks offered by Brite Voice Systems or any Brite subsidiary or related company, will not exceed the BDR Audio Network in measurable deliverables including, but not limited to, frequency of reports, quantity of content, program choice and diversity as well as voice quality. Brite will make every effort to avoid American colloquialism.... [253]

Even in the contract, therefore, it is apparent that the word "superior" is used in a comparative, rather than an absolute, sense. [254] When questioned by the panel about clause 11.6 of the contract, Mr. Dolan agreed that what the clause was meant to ensure was that nobody had anything *better* than Tele-Direct. We conclude, therefore, that, despite the later attempt at qualification, Mr. Dolan was using the word "superior" in its comparative sense throughout his testimony. Tele-Direct was pressing Perception for a better feed than Perception was giving DSP.

638 Of most significance, on January 25, 1993, Tele-Direct held out what can only be regarded as a major "carrot" to Perception. Mr. Dolan, on behalf of Tele-Direct, wrote asking Perception for its "advice and recommendations" on the most efficient way to provide a TYP service throughout Tele-Direct's territory. [255] There is evidence that by March of 1993, consequent upon a February 25, 1993 officers' meeting, these plans were scaled down dramatically. TYP installation was to begin only in markets currently or potentially threatened by a competitor, some ten markets. TYP were treated as a strategic tool against competition rather than a widespread innovation. In fact, after Sault Ste. Marie TYP were introduced only in Niagara Falls, in response to White, and in Windsor, where Tele-Direct was concerned both about potential entry by White and the fact that the Windsor Star is owned by Southam. It is difficult to escape the conclusion that Tele-Direct was using the promise of the roll-out of TYP service throughout its territory in order to gain the cooperation of Perception when it introduced its TYP service in Sault Ste. Marie in February 1993.

639 That the promised roll-out of the TYP service was a factor in the relationship between Tele-Direct and Perception is clear from the letter Perception wrote Tele-Direct on March 1, 1993, following the February meeting. In it Perception informed Tele-Direct that an "alternative audio source" for DSP would be provided by March 29, 1993. The letter concludes "... you are a very important client to us and we want to work with you as you roll out audiotex *(sic)* through out your territory." [256]

640 The deterioration to DSP feed was coincident with its first revenue canvass in the spring and summer of 1993. (Its first revenue directory was published in November 1993.) Because of the poor quality of the feed, the audiotext lines were not used to nearly the same extent as in the first two months of operation. Because of the reduced volume, DSP could not use the record of the number of calls to its audiotext service as evidence of widespread use of its directory by consumers. As a result, the audiotext service was not as positive a factor as it might have been in selling its directory to advertisers.

641 Mr. Campbell said that it would have been virtually impossible for DSP to change its information supplier when it experienced problems. Despite what Mr. Dolan said, there was little reason for Tele-Direct to think that Perception was able,

even if willing, to produce an alternative high quality feed for DSP. As matters turned out, the feed to DSP only became acceptable again once the merger of Perception and Brite resulted in another source of feed becoming available in about November 1993.

642 We are of the view that Tele-Direct used its bargaining power, stemming from its dominant position in the market for the supply of telephone directory advertising, to pressure Perception to, in effect, withhold supply from DSP for the purpose of frustrating or, at least, negatively impacting, the DSP attempt at entry in Sault Ste. Marie.[257] Unlike the other responses used by Tele-Direct in the competitive markets, the only perceptible effect on consumers and advertisers was a negative one. It would appear to us that the kind of conduct engaged in by Tele-Direct regarding audiotext in Sault Ste. Marie unequivocally falls within the class of anti-competitive acts against which sections 79 is meant to guard.

643 Did Tele-Direct engage in a practice of anti-competitive acts in relation to audiotext in Sault Ste. Marie? Based on the standard set out in *Nutrasweet*,[258] an "isolated act" does not constitute a practice. In the instant case the deterioration in the audiotext feed to DSP resulted from intensive and repeated efforts on the part of Tele-Direct that hardly qualify as an "isolated act". Nor do we find that the reasonably anticipated duration and seriousness of the consequences of the efforts by Tele-Direct suggest that they should be treated as "isolated" and thus outside the reach of section 79. We therefore consider that Tele-Direct's actions regarding the DSP feed for its audiotext service in Sault Ste. Marie constitute a practice of anti-competitive acts.

644 Further, we find no difficulty in concluding that the effects of the deterioration in the quality of the audiotext feed resulted in a substantial lessening of competition in the Sault Ste Marie market. In conducting its first revenue canvass, DSP was denied the anticipated marketing advantage of using its audiotext call volumes to prove usage of its directory to potential advertisers because the feed deteriorated just as the canvass started. Achieving credibility with advertisers is one of the biggest hurdles that an entrant publisher must overcome.[259] The audiotext problem was a serious setback for DSP in its initial effort to attract paid advertising. However, as the Director has not requested a remedy specific to the audiotext problem or, more generally, governing Tele-Direct's relationship with the suppliers, no remedy follows from this finding.

D. Market for Advertising Services

(1) Class or Species of Business in Canada (Relevant Market): Agents

645 The Director alleges a number of anti-competitive acts which form a practice resulting in a substantial prevention or lessening of competition in the market for the supply of advertising services. These alleged anti-competitive acts affect agents and consultants or, in some cases, one or the other. The Director takes the position that when determining whether there is a substantial prevention or lessening of competition the effects of all of the listed acts found to be anti-competitive should be combined because they all affect the advertising services market. Further, one of the alleged anti-competitive acts is the tying of the provision of advertising services to advertising space, the same allegation we have already dealt with in the tying portion of this decision. Another alleged anti-competitive act which bears a striking resemblance to an allegation of tying is also included under the heading "Squeezing", namely, "further restricting the availability of commission [to other service providers] over time".

646 The respondents submit that, to the extent a separate "services" market exists, consultants and agents are in different services markets and acts affecting more than one market cannot be combined to form a practice and, thus, to determine whether there has been a substantial prevention or lessening of competition. A prevention or lessening of competition must take place *in a market* in the words of section 79. They also argue that Tele-Direct does not have market power in either services market.

647 As we have found that there is an anti-competitive tie covering only part of the alleged advertising services market, we cannot agree with the Director that there is one advertising services market in which both agents and consultants operate that encompasses *all* of Tele-Direct's customers. Customers meeting the 1993 commissionability rule are evidently included in the services market. The customer segment that we have determined is anti-competitively tied under section 77 -- namely regional customers -- is also included. (We will return below to the question of whether the tying practice should also form part

of the section 79 case.) Agents are operating in this services market. And, Tele-Direct competes with the agents in providing services to those customers. Consultants do not.

648 It is difficult to see how acts taking place in different markets could be logically combined to determine if competition is substantially lessened or prevented in a particular market. Thus, only the acts affecting agents can be combined for the purpose of determining whether there has been a substantial lessening of competition in the services market.

649 Correspondingly, only acts affecting consultants can be combined to determine whether there has been a substantial lessening of competition in the relevant market in which they operate. It is a separate section 79 case. The details of the allegations against consultants will be dealt with below under the heading "Consultants".

650 Further, not all the alleged practices of anti-competitive acts respecting agents are of a sufficiently similar character so that they can be combined when assessing whether there has been a substantial prevention or lessening of competition in the services market. In particular, tying (and its restatement "restricting commission over time") differs significantly from the other alleged anti-competitive acts. The Director has brought the allegation of tying under both sections 77 and 79. The analysis and result are the same under both sections. Having found that tying results in a substantial lessening of competition by impeding entry of or expansion of agents into or excluding them from the part of the demand spectrum between six and eight markets, should this substantial lessening of competition be combined with the effects resulting from any other practice of anti-competitive acts that the Director succeeds in proving? If so, all anti-competitive acts so found would automatically lead to a finding of substantial prevention or lessening of competition by reason of our finding respecting tying.

651 In our view, it is not appropriate to combine the effects of tying with the effects of the practice of other anti-competitive acts. The other alleged anti-competitive acts (save for group advertising) relate to a specific historical market, the commissionable market including the eight-market grandfathered accounts. It is possible to evaluate the effects of the alleged anti-competitive acts in this well-defined context. The issue is whether there has been a substantial lessening of competition where agents have historically been competing. In the case of tying, the allegation is that the extent of the market itself has been limited.

652 In this case, there is a distinct difference between the nature and effect of tying and the other alleged anti-competitive acts, save for group advertising which we return to below. We note that this might not be true in other cases where there might be some interaction or a less distinct dividing line between the section 77 and section 79 claims. A finding that the respondents have engaged in tying does not act as a spring-board for a finding of substantial lessening in the market segment where the agents have been competing. Prohibiting tying should permit the agents to compete in the enlarged market as they have in the historically commissionable market. A finding of substantial lessening of competition in the historically commissionable market should therefore be based on a practice of acts with respect to that market.

653 Therefore, we need not deal with tying further under section 79. We will now turn to the allegations relating to the commissionable market and then the allegation regarding the prohibition on group advertising which is distinct.

(2) Control of the Existing Commissionable Market

654 It is evident that, despite the Director's submission to this effect, Tele-Direct does not have *direct* control or market power in the currently commissionable advertising services market. It has a modest market share of approximately 25 percent in that market. [260] The Director also advances an alternative position that is not based on direct control by Tele-Direct but rather on the hypothesis that it is leveraging its control in the publishing market into the services market. We have found that Tele-Direct has control in the telephone directory advertising market which gives it market power in the publishing of advertising space. The Director argues that Tele-Direct is using this market power as a lever to obtain market power in advertising services through its alleged anti-competitive acts. We agree that this is an arguable theory that could, if proven, fall within the parameters of section 79. Whether Tele-Direct has, in fact, leveraged its existing market power must now be determined.

(3) Analysis Respecting the Existing Commissionable Market

655 The alleged anti-competitive acts are set out in full at paragraph 65 of the application. We paraphrase them here (not necessarily in the order set out in paragraph 65) as they relate to agents and alleged abuse of dominance only:

(1) "squeezing" the return available to agents by transferring functions to, withholding services from and making terms of supply to agents more onerous;

(2) discriminating against agents by providing space to them on less favourable terms than available to Tele-Direct's internal sales force, including:

- *group advertising* - prohibiting advertisements containing the name of more than one local advertiser, e.g., franchisees;

- *issue billing* - requiring agents to pay for advertising on behalf of their clients at the time of issue as opposed to payment on a monthly basis which is the payment method employed when sales of advertising are made through Tele-Direct's own sales personnel;

- *closing dates* - requiring that agents submit advertising for publication earlier than the date applicable to Tele-Direct's sales personnel;

- *tear sheets, etc.* - refusing or delaying to provide tear sheets and other information and material to agents; and

- *promotional programs* - delaying to inform agents of or refusing to make certain promotional programs available to agents' clients, including:

    - a program whereby an advertiser using Tele-Direct's sales personnel could obtain a subsidy towards the cost of Yellow Pages advertising if Yellow Pages are mentioned in advertising in other media;

    - cooperative advertising programmes whereby a supplier contributes to the cost of advertising of its customer or distributor;

    - keyed advertising in which a new advertisement with a new telephone number is placed in the Yellow Pages and the calls to that number are monitored to assess the effectiveness of the advertisement; and

    - other trial and test programs.

656 The Director submits that these acts have had adverse effects on agents and that there is no business justification that would exempt the acts from being found to be anti-competitive. The Tribunal would observe that some of these acts appear to have created some difficulty for agents and, in some cases, there does not seem to be an acceptable business justification. However, it is not necessary to embark upon a detailed act-by-act analysis to weigh their effects on agents against their business justification because of our conclusion that the Director has not demonstrated that the acts have or are likely to prevent or lessen competition substantially in the relevant advertising services market.

657 Both parties referred us to the statement set out in the Tribunal's decision in *NutraSweet* that:

> [i]n essence, the question to be decided is whether the anti-competitive acts engaged in ... preserve or add to ... market power. [261]

The Director's operative theory is that Tele-Direct is extending its market power from the space market to the services market through the alleged practice of anti-competitive acts. This means that the Director must demonstrate that Tele-Direct has or is establishing, or is likely to achieve, market power in the services market.

658 In order to assess whether Tele-Direct now controls the services market, we first look to market shares in the currently commissionable market. There is disagreement between the Director and Tele-Direct on the respective market shares of Tele-

Direct and the agents. The parties rely on a variety of data that most supports their positions. Market share estimates range from 65 to 87 percent for agents and from 13 to 35 percent for Tele-Direct. We reject the extreme numbers put forward by the Director and Tele-Direct as not supportable on the evidence and, indeed, they were not seriously advanced by either side. While there are weaknesses in the data, we are satisfied that a market share of about 75 percent for agents and 25 percent for Tele-Direct is reasonably accurate. [262]

659 A high market share for agents and a correspondingly low market share for Tele-Direct would suggest that, even if Tele-Direct has engaged in anti-competitive acts, it has not been successful in obtaining market power in the advertising services market. Indeed, the fact that Tele-Direct's market share is as high as it is may well be attributable to factors unique to Tele-Direct but which are not anti-competitive, such as the desire of some advertisers to deal directly with the publisher. From the available data, it is apparent that, even on an individual basis, Tele-Direct does not have as high a market share as DAC/NDAP, which has about a 40 percent share. Based on all these considerations, we are satisfied that Tele-Direct's 25 percent share falls well short of a level that might be considered to indicate market power.

660 We must also consider whether there is any evidence of a trend towards a material increase in Tele-Direct's market share, which might indicate that it is in the process or is likely in the future to acquire market power as a result of the acts which the Director alleges to be anti-competitive. Certainly, there is anecdotal evidence of individual advertisers switching from an agent to Tele-Direct for some of the reasons which constitute acts which the Director submits are anti-competitive, for example, issue billing. We have no evidence, however, of any declining trend in market share for agents or increasing trend in market share for Tele-Direct over any period of time. Further, it would not seem that the agency business is unattractive or that agents are in any way systematically going out of business. On the contrary, we have had evidence of additional agents being accredited in recent years and others who are still seeking accreditation.

661 Is there any reason to believe that in the future the alleged anti-competitive acts will have any *greater* deleterious effect on the agents than they may have had in the past? We recognize that a new element has been added to the interactions in the marketplace by the relatively recent creation of Tele-Direct's CMR. Could it be that, in combination with Tele-Direct (Media) Inc. which provides an additional vehicle for Tele-Direct to use practices like the alleged anti-competitive acts, the alleged anti-competitive acts will likely cause competition to be prevented or lessened substantially in the future?

662 We are unable to arrive at such a conclusion. We have no evidence of the competitive impact of the advent of Tele-Direct's CMR into the market. It has been competing since 1994 but we were provided with no evidence whatsoever from which to infer that the combination of its presence and Tele-Direct's alleged anti-competitive acts have resulted or will result in a materially lower market share to agents and a correspondingly higher share for Tele-Direct. One would have expected that if this was an important factor, we would have seen some significant movement of accounts from the independent agents to Tele-Direct's CMR. There was no such evidence. It is true that Tele-Direct's CMR is in its early years and it may not be as effective now as it will be later. To be valid, however, inferences about the future must be based on evidence. Given the record before us, any conclusion about the future effect of Tele-Direct's CMR in combination with the alleged anti-competitive acts would be speculative.

663 The Director has the burden of proving a substantial lessening of competition. We conclude that while some of the disadvantages which form part of the Director's abuse of dominance case and were imposed on agents by Tele-Direct may have had some adverse effect on them, that effect could not have been and is not likely to be substantial or the agents would not hold 75 percent of the market or there would be evidence of a decline over time in the share held by agents.

(4) Group Advertising

664 Group advertising is display advertising consisting of the individual business names of a number of franchisees or distributors under a common logo or trade-mark. [263] This type of advertisement is now prohibited by Tele-Direct and to all intents and purposes is not sold by agents or Tele-Direct. [264] The revenues that might potentially be converted into

group advertising are currently non-commissionable and are serviced by the internal sales force as local or individual business accounts.

665 The effect of the alleged practice of anti-competitive acts regarding group advertising is to prevent competition by limiting the size of the commissionable market available to agents, rather than limiting their ability to compete for existing commissionable accounts. Because of the difference in the nature of the allegations, whether there is a likely substantial prevention of competition as a result of Tele-Direct's practice regarding group advertising must be evaluated separately from the alleged practices of anti-competitive acts respecting the existing commissionable market.

666 We believe that Tele-Direct's policy on group advertising is dictated by its concern with a net revenue loss should advertisers abandon or reduce individual advertising in favour of group advertising. The incidental effect is to deny a type of advertising that would primarily be of interest to larger advertisers, for example, franchisers, some of whose accounts are likely targets for agencies. Although we heard anecdotal evidence of how certain advertisers would prefer to participate in group advertising, we were not presented with evidence as to the magnitude of the effect of this restriction. In the circumstances relating to agents we are of the opinion that such information should have been provided. Without such evidence, we cannot conclude that the prohibition against group advertising constitutes a substantial prevention of competition.

(5) Conclusion

667 We are unable to conclude that the evidence demonstrates that the acts alleged to be anti-competitive in the existing commissionable market and in respect of group advertising have had, are having or are likely to have the effect of preventing or lessening competition substantially. As a result, the Tribunal is without jurisdiction to grant a remedy under section 79 of the Act. It is, therefore, not necessary to consider in detail whether the individual acts complained of are anti-competitive and whether separately or in combination they amount to a practice.

668 We are not unmindful that some of Tele-Direct's actions in respect of agents seemed wilful and senseless. However, the Competition Tribunal does not exist to regulate industry practices generally. Rather, it has jurisdiction only to remedy the substantial prevention or lessening of competition and where this has not been proved, no remedy can be ordered.

E. Consultants

(1) Introduction

669 At paragraph 65(b) of the application, the Director alleges that Tele-Direct engaged in anti-competitive acts by refusing to deal directly with consultants as agents for advertisers purchasing space from Tele-Direct. The paragraph continues:

> The Respondents have issued guidelines to their advertising space sales staff which provide that the customer must deal with the Respondent's salespersons and no consultant can deal with the salespersons as a customer's agent.

The following, more specific, aspects of refusing to deal directly with consultants were provided in the written argument at paragraph 297:

[I.]

(a) written instructions: refusal to act upon written instructions received from consultants on behalf of advertisers;

(b) oral instructions: refusal to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same;

(c) follow-up: refusal to deal with consultants on subsequent errors or problems.

670 In paragraph 65(c)(v) of the application, the Director alleges that Tele-Direct also engaged in anti-competitive acts by providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying

orders based on alleged errors or other problems which would not result in delay or rejection of orders from Tele-Direct's own sales representatives. As set out in paragraph 296 of the written argument, the specific aspects of these acts are:

[II.]

(a) delivery and processing problems: refusal to acknowledge or accept delivery of orders involving consultants or denial of delivery resulting in the delay or rejection of same, refusal to process such orders or the return of such orders to the advertiser or consultant;

(b) alleged errors: the identification of errors or problems in such orders which would not result in the delay or rejection of orders handled by the Respondents' own sales staff;

(c) oral instructions: refusal to meet with the advertiser to take instructions originating in advice from consultants;

(d) consequential acts: rejecting or delaying the processing of consultant orders, permitting or facilitating the following consequential actions:

(i) informing advertisers that their orders may or may not be processed if prepared by consultants or that consultants are "scam artists", have committed errors or similar threats or derogatory comments;

(ii) inducing breach of the contract between advertisers and consultants.

671 The final alleged anti-competitive acts of relevance to consultants are found at paragraph 65(e) of the application. The Director maintains that Tele-Direct is engaging in anti-competitive acts by refusing to supply specifications to consultants for the placing of advertisements in its directories.

672 We will deal with the alleged anti-competitive acts under the headings (a) refusal to deal directly with consultants, (b) discriminatory acts and (c) specifications, starting in "(5) Anti-competitive Acts", below.

(2) Allegations - Pleadings

673 The respondents argue that the "consequential acts" listed under II. (d) above do not fall within paragraph 65(c)(v) of the application and should not, therefore, be considered by the Tribunal. They also submit that one of the remedies requested by the Director, pertaining to copyright in advertisements, was not pleaded. The Director conceded that the case for including the remedy is not strong and we will not deal with it further.

674 On the question of the construction of the pleadings and what may be considered as fairly within them, once we have reached the stage of final argument we have indicated that what is determinative is what the parties considered to be in issue, looking at the proceeding as a whole. We will use the same general approach to the arguments here.

675 Counsel for the respondents admitted that aspects II.(a) and II.(b) were clearly in the application and II.(c) might be reasonably inferred from the application but II.(d) was outside the pleadings. The elements of (d) which were emphasized in oral argument by the respondents regarding their objection related to the question of inducing breach of contract and what was termed the "bad mouthing" claim or the making of disparaging remarks about consultants. In reply, counsel for the Director stated that the Director was not seeking a remedy with respect to the consequential acts and that there was little point in addressing whether they were part of the case. We have some difficulty with this position. The Director is clearly seeking a remedy for the alleged anti-competitive acts of providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged errors or other problems, of which II.(d)(i), at least, is a subset. The Director also accepted, however, and we agree that any issue of counselling breach of contract is a matter for the civil courts so we will not deal with it further. The remaining acts listed in II.(d) were addressed by *both* parties through evidence and argument. Based on their conduct of the proceedings, the respondents were aware that these acts were in issue and there is, therefore, no prejudice to them by the Tribunal dealing with them on the merits.

(3) Competition Between Consultants and Tele-Direct

676 For the Director to succeed in any of the allegations, it must first be shown that Tele-Direct and the consultants are competitors. The respondents submit that consultants do not "sell" anything; they merely "unsell". They describe consultants as being in the business of providing independent (or non-partisan) advice to disgruntled, local Yellow Pages advertisers. They say that Tele-Direct does not operate in this market since advertisers recognize that Tele-Direct's advice is partisan and not independent.

677 The Tribunal accepts that while the relationship between Tele-Direct and the consultants is not that seen in the more usual competitive context, they are nonetheless competitors. It is true that consultants exist by downselling, while it is highly unlikely that Tele-Direct representatives would offer the same type of advice. It is also true that consultants' advice is independent while Tele-Direct representatives are, by definition, partisan. Further, consultants normally do not have an ongoing relationship with an advertiser and their remuneration arrangement takes a different form than that for Tele-Direct. There may be other differences of detail.

678 At bottom, however, both consultants and Tele-Direct representatives provide services which a customer can use to achieve the final result of an advertisement in the Yellow Pages. As we have seen from the evidence put forward in this case, a customer may choose to use either a consultant or the Tele-Direct representative to obtain these services. In this sense, they are substitutes for one another and compete to serve the advertising customers. There was substantial evidence put before us that Tele-Direct, in fact, views consultants as significant competitors, monitors their progress and takes action to attempt to limit their inroads on its revenues.

679 This is not to say that consultants (and Tele-Direct) operate in the "separate" services market, an argument which we have already rejected. Both consultants and Tele-Direct are participants in the broad telephone directory advertising market. Tele-Direct controls that market, as set out in the chapter entitled "VII. Control: Market Power", above.

(4) Facts

(a) Consultants and their Method of Operation

680 Three directory advertising consultants testified before the Tribunal. Jim Harrison of Tel-Ad Advisors Ltd. ("Tel-Ad") has serviced the Ontario market from an office in the Toronto area since June 1984. Prior to that time, Mr. Harrison was an employee of Dominion Directory. Serge Brouillet, previously in sales and also training and promotion with Tele-Direct, started Ad-Vice Communications ("Ad-Vice") in mid-1989 in Sudbury to service northern Ontario. In the fall of 1990, he sold the northern Ontario operation to Charles Blais to be run as Ad-Vice North and moved into the Toronto market. Mr. Blais also appeared as a witness. Mr. Blais operated the Ad-Vice franchise in Sudbury from November 1990 to December 1992 when he sold it back to Mr. Brouillet who ran it in 1993.

681 A summary of the *modus operandi* of consultants in general will provide context for the relations between consultants and Tele-Direct and for the Director's allegations. Consultants operate on the basis that many Yellow Pages advertisers can reduce their Yellow Pages spending without reducing the effectiveness of the advertising. In other words, they target customers who are dissatisfied with the amount that they are spending with Tele-Direct and are willing to pay a fee to lower it. Consultants recruit customers by going through the Yellow Pages and identifying likely candidates for their services, those for whom they can save money. Two of the major factors are the size of the advertisement and the use of colour; number of headings and number of directories are also reviewed.

682 After contacting the client by telephone to determine interest, the consultant or an employee of the consultant meets with the client and makes a presentation showing the client various options for changing the advertising. The potential for conflict with Tele-Direct and its commissioned sales representatives is obvious from the outset. The consultants' income depends on reducing customers' expenditures on Yellow Pages. Thus, they attempt to convince the customer that the extra amount spent for options like larger size and colour is not worth paying. To do this, they might bring to the attention of the customer how much

more those options cost and question their effectiveness for the customer. Tele-Direct's representatives, of course, emphasize the value and effectiveness of colour, size and the like by drawing on arguments and evidence put together by Tele-Direct to show that they are worth the cost.

683 With respect to submitting customers' orders to Tele-Direct for processing, when it first commenced operations Tel-Ad sent orders to Tele-Direct on behalf of customers. These were rejected by Tele-Direct. Then Tel-Ad sent in the orders on a generic order form with no identifiers; these were also rejected and returned either to Tel-Ad or the customer. Attempts to submit orders with a letter of power of attorney from the customer also failed. Eventually, Tel-Ad simply left the orders with the customers to be submitted to Tele-Direct. In July 1984, Tel-Ad started legal action against Tele-Direct for refusing to accept advertising orders directly from Tel-Ad. Tel-Ad also sought an interlocutory injunction requiring Tele-Direct to accept orders submitted by Tel-Ad on behalf of advertisers. The injunction application was denied on the basis of no irreparable harm and the action was later abandoned. Tel-Ad's activities led to the first version of Tele-Direct's guidelines for dealing with consultants, drafted in 1986. Tele-Direct's guidelines are reviewed in some detail below.

(b) Tele-Direct Reaction - General

684 The existence and activity of consultants strike at the trustworthiness of advice provided by Tele-Direct's sales representatives and place highly profitable revenues in jeopardy. Tele-Direct does all within its power to eliminate any possibility of consultants gaining the ear of its customers. It has taken out advertisements warning customers to beware of consultants. The same message is conveyed by the representatives and by letters to customers telling them to call Tele-Direct if contacted by consultants.

685 According to the 1986 Tele-Direct guidelines for dealing with consultants, the "official" line on consultants to be conveyed by representatives is that their objective is to reduce Yellow Pages advertising which will reduce the effectiveness of the advertising and likely adversely affect the customer's business, based on studies conducted by Tele-Direct. Emphasis is placed on the fact that consultants are only paid if the customer reduces Yellow Pages spending, implying that consultants are likely to give biased advice, and that Tele-Direct will perform the "same" service as the consultant (advice and artwork) and "not charge a fee".[265] Tele-Direct also encouraged its representatives to point out to the customer that while Tele-Direct was concerned with the long-term, consultants do not have a continuing relationship with the customer and therefore have no incentive to take into account the possible negative repercussions on the customer's business if their advice is followed.

686 There is evidence that at least some sales representatives went considerably further in their efforts to discredit consultants, calling them "scam" artists and other epithets, saying they were unfamiliar with Tele-Direct's specifications and showing poor photocopies of artwork done by consultants to customers in an attempt to cast doubt on the ethics and professionalism of the consultants.

687 Tele-Direct has also taken other, positive steps to combat consultants by improving elements of its service to its customers. For example, Tele-Direct has attempted to create a better working relationship with customers through "consultative" selling and by assigning representatives to customers for up to three years rather than changing each year. While the changes made by Tele-Direct were not in response to consultants alone, they were rooted in customer dissatisfaction with Tele-Direct's service.

(c) Tele-Direct's Consultant Guidelines

688 The guidelines set out Tele-Direct's procedures and directives to its sales force for dealing with orders for advertising originating with consultants and for handling customer contact once involvement of a consultant has been detected or suspected. This stage of the relationship between consultants, customers and Tele-Direct forms the focus of the Director's allegations of anti-competitive conduct. While the application of the various guidelines has been somewhat erratic and interpretation of their terms varied, it is clear that Tele-Direct has at no time dealt directly with a consultant acting *on behalf of* or in a representative capacity for an advertiser. Tele-Direct has always insisted on visiting a customer suspected of using a consultant even after an order was received from the customer and obtaining the customer's signature on its own documents. The package provided by Mr. Brouillet of Ad-Vice to his clients, following futile attempts on his part to avert the visit of the Tele-Direct representative

by providing Tele-Direct's contract or a similar document to his clients himself,[266] advises the client that the Tele-Direct representative will be in contact to transfer the advertising program onto the Tele-Direct forms.

(i) 1986 Guidelines and Their Application

689 As general rules, the 1986 guidelines provided that:

> (c) Tele-Direct will not accept insertion orders directly from directory consultants who have not been granted accredited agency status by Tele-Direct.
>
> (d) Tele-Direct sales representatives should continue to contact their customers directly and request that the customers actually sign the Tele-Direct contracts and layout sheets so as to ensure the accuracy of the Yellow Pages advertising proposal prepared by a directory consultant.[267]

690 While the Tele-Direct policy of refusing to accept orders directly from consultants may have been followed in Tele-Direct's western region, it was not followed in the eastern region, in particular in Montreal, Sudbury and Ottawa. Letters sent in 1989 by Tele-Direct to Consultant en publicité annuaire et communication (CEPAC 2000) Inc. ("CEPAC 2000") in Montreal and Ad-Vice in Sudbury and in 1990 to Steven White of Tel-Ad in Ottawa[268] outlined for the consultants in question the procedure to follow in submitting orders to Tele-Direct.[269] The orders had to be delivered to named Tele-Direct managers in the relevant offices, accompanied by proper authorization by the advertiser on the advertiser's company letterhead.

691 Paul de Sève, Tele-Direct's Vice-president of Sales for the eastern region, confirmed that, although Tele-Direct's policy was not to deal directly with the consultant on the advertiser's behalf, in the eastern region at least, it was accepting orders from consultants. Orders were not automatically rejected and returned to the consultant even though Tele-Direct was aware of consultant involvement. The orders were taken as an indication that the customer wanted to change its advertising and a Tele-Direct representative would visit the advertiser and deal with him or her directly. In Tele-Direct's own words,

> ... Regardless of whether the "cut agent" or the customer was directing insertion/change/cancellation of Yellow Pages advertising through letter or order form, we would accept this information as notification that the customer wished to renegotiate his Yellow Pages advertising. The Tele-Direct representative would deal directly with our customer, using our forms and contracts in the setting up of Yellow Pages advertising.[270]

(ii) 1990 Policy and Application

692 Tele-Direct implemented new consultant guidelines in December 1990. The opening words of the revised guidelines state that:

> We changed our operating procedures on dealing with "cut agents" effective December, 1990, to further strengthen and reinforce our direct servicing philosophy with our customers.
>
> These changes were made to ensure that we did not act on "cut agent" instructions, for the insertion/change/cancellation of our customers' Yellow Pages advertising. Furthermore, these changes were intended to leave no doubt in the minds of our customers that we do not do business with "cut agents".[271]

The "general procedures" established by these guidelines were as follows:

> • we will always accept letters/packages sent or given to us by customers and act in accordance with their wishes.
>
> • to the best of our knowledge, we will not accept, nor act upon, information sent or given to us by "cut agents" on behalf of our customers, nor accept or act upon information sent or given to us by customers containing directives from "cut agents."

• Instead, our procedure will be to not accept packages from "cut agents" or from customers for "cut agents" and in the event that a package is accepted in error, its contents will be returned to the "cut agent" with a covering letter designed for this purpose. [272]

693 The guidelines then provide more detail on the procedure to be followed in particular situations. The gist is that if, upon external examination of a letter or package, it became apparent that it was from a consultant or from a customer working with a consultant, the letter or package would be returned to the consultant. If the letter or package was apparently from a customer, with no external indication of consultant involvement, the letter or package would be opened but if further examination of the contents revealed the involvement of or a directive from a consultant, the letter or package would be returned to the consultant. Even when the letter or package appeared to come from or was, in fact, dropped off by the customer, if it was rejected because of consultant involvement, the customer would not be informed that the order had been returned to the consultant.

694 Mr. de Sève admitted that the procedures set out above represented a dramatic change from the 1986 guidelines, at least with respect to how the Montreal, Sudbury and Ottawa offices had been operating. [273] It is also clear from his testimony that the principal reason for the change was that Tele-Direct was having second thoughts about having "legitimized" the consultants to the extent they had by writing the letters referred to above in 1989 and 1990. The 1990 strike by Tele-Direct's sales representatives meant that the consultants were particularly active in the fall of that year.

695 The 1990 guidelines were adhered to strictly in one respect. At no time did Tele-Direct accept orders that were not submitted on the customer's letterhead. Other aspects of the guidelines appear to have been unevenly applied. Despite the statement that Tele-Direct would *always* accept orders from its customers and "act in accordance with their wishes", there was evidently considerable uncertainty within Tele-Direct as to how the guidelines were to be applied with respect to rejecting customers' orders for consultant involvement. Some orders containing indications of consultant involvement or where a consultant was known to be involved were accepted without incident or accepted after an initial rejection. Yet, Mr. de Sève's evidence, which as Vice-president of Sales for the eastern region we take to be an "official" application of the guidelines, was that where there was doubt, it was *assumed* that the documents came from a consultant and they were returned to the consultant without advising the customer.

696 This is what happened in the summer of 1991 in the case of a package containing 23 orders under customers' signatures which were, in fact, prepared by Ad-Vice North (Mr. Blais). An internal Tele-Direct document dealing with how it should respond to a complaint by Mr. Blais about this incident indicates that packages were being returned to Ad-Vice North by the Sudbury office *even though* Ad-Vice North was not mentioned in any of the correspondence and *regardless of* the fact that the letter of direction was from the customer because the employees recognized the Ad-Vice "format". Mr. de Sève stated that consultant involvement was probably assumed because of the number of orders in one envelope.

697 Mr. de Sève also confirmed that in 1991 Tele-Direct adopted a further policy of not processing orders received at the closing date according to the customer's instructions if they originated with a consultant even though it would do so for orders coming from its own sales force. Tele-Direct would instead rely on its last year's contract with the customer or the latest contract signed by the customer.

(iii) 1992 Policy and Application

698 The difficulties with and the inconsistency in application of the 1990 guidelines led to the most recent Tele-Direct guidelines for dealing with consultants, dated February 1992. These guidelines are currently in force. The operating procedures in those guidelines state that they are designed to "formalize our existing policy of dealing directly with customers." Two important aspects of that policy are:

... Tele-Direct will not accept a customer's appointment of a consultant to act on his/her behalf in dealings with Tele-Direct; and, Tele-Direct will not knowingly take instructions from a consultant acting on behalf of a customer. [274]

699 The detailed procedures provide that when correspondence is received from a consultant, whether by mail, courier, delivery, etc., it is opened and the contents examined to determine what action (from a list of A to D) should be taken. According to the procedures, any correspondence from a customer appointing a consultant to act on his/her behalf is to be returned to the customer with a form letter indicating that Tele-Direct will only deal with its customers directly (B). Any "directive" from a consultant is to be returned to the consultant with a form letter which simply states that the material was received "in error" (C). A second form letter is to be sent to the customer explaining that the material has been returned to the consultant without being processed and stating Tele-Direct's policy of only dealing with the customer directly. The guidelines also state that any correspondence from a consultant regarding problems with or errors in published advertising are to be ignored altogether and the matter resolved directly with the customer (D).

700 Most importantly, if the correspondence contains instructions from a customer regarding his/her advertising, the procedures provide that the instructions should be accepted and handled "in the normal fashion, i.e., deal directly with the customer" (A). The evidence of Messrs. Renwicke and de Sève regarding when correspondence will be considered by Tele-Direct to contain instructions "from a customer" and will be accepted and handled in the "normal fashion" reveals that the guidelines are still open to interpretation. Mr. de Sève testified that even if the instructions are from the customer, on the customer's letterhead, if they include any reference to consultant involvement, the order will not be accepted. He was of the view that such a case fell within B or C set out above. Mr. Renwicke, on the other hand, first stated that such an order would be accepted. He then qualified this by saying that it depended on the "tonal quality" of the letter and of any references to a consultant. According to him, the defining criteria is whether it was perceived that the consultant "is going to be seen to or is actually playing a leadership role for that account". [275]

701 Assuming that the order is accepted, the guidelines also set out a "protocol" for customer contact by sales representatives when dealing "directly" with customers which reveals that little weight is given to the order already received from the customer. The representatives are to conduct themselves throughout in a "business-like and professional manner" but are expected to "only provide Yellow Pages selling services *directly to a customer*." While Tele-Direct's representatives are permitted (but not required) to meet with a customer when a consultant is present, they must decline to take *any* instructions from a consultant even if the customer insists. The protocol provides that all instructions must come directly from the customer. If the customer refuses to deal with the Tele-Direct representative directly, the representative is to review with the customer the customer's legal obligations under the existing Tele-Direct contract, i.e., that the previous year's advertising will simply be renewed. If this approach fails, the sales representatives are advised to try again later to re-convene the meeting but if the customer still refuses to deal directly, then advise the customer that the contract will remain in force in accordance with its terms.

702 Mr. de Sève admitted that under this protocol, where a customer handed the Tele-Direct representative a package containing instructions prepared by a consultant and asked the representative to follow them, that would lead to a termination of the interview and the instructions would not be followed. He also admitted that, in fact, Tele-Direct representatives would refuse to meet with the customer in the presence of the consultant because they would not be able to discuss with the client "one-on-one" the merits of the change in the advertising program.

(d) Specific Incidents

703 The Director relies on numerous specific incidents involving consultants and their customers as evidence in support of his allegations. The respondents dispute that some of those occurrences took place or if they took place, took place as related by the Director's witnesses.

704 We accept that there were times when Tele-Direct went beyond simply rejecting or returning orders from customers where consultant involvement was suspected and treated these in an extremely cavalier fashion. On one occasion in 1989, a package of customer orders prepared by Mr. Brouillet, including one from Ad-Vice's law firm, was left with a secretary who threw it out of the Tele-Direct office and into the hallway. The lawyer was able to confirm after a number of phone calls that his order had been retrieved and was processed. He inquired about the remaining orders but Tele-Direct refused to inform him of the fate of the other orders in the package.

705 On another occasion in 1990, when the manager designated to receive orders from Ad-Vice in Sudbury was not in the office, the process server left the package on the counter and the receptionist threw it in the garbage. Apparently the order was not processed in accordance with those instructions, according to the respondents, because the advice was delivered late. The only evidence brought to our attention on this point was a recently written note by the Tele-Direct representative that stated "delivered past deadline - did not use their material". [276] The affidavit of service sworn contemporaneously, however, indicates that the package was delivered on August 16, 1990. Mr. de Sève's evidence was that the closing date for Sudbury was in November. We therefore do not accept that the package was delivered late.

706 We accept the evidence of incidents in which orders from customers who had used a consultant were subject to "errors" in processing by Tele-Direct. In three cases Tele-Direct acknowledged to the customers that errors had been made and provided a credit. These included Todd Optical Ltd. (mistake in telephone number and location), Adler Moving Systems (advertisement in the Elliot Lake directory omitted), Forest Products and Builders (advertisement did not appear), all customers of Mr. Brouillet. The owner of Todd Optical Ltd. had written a letter of support for Ad-Vice. We note that these errors all had potentially serious adverse consequences for the businesses involved.

707 Another customer of Ad-Vice, Lockerby Taxi Inc., whose owner appeared as a witness, experienced an odd error when an unpaid "filler" advertisement was published featuring Lockerby's name with the query "Sales Down?" in the background. Mr. Flinn was never provided an explanation or apology for the error. His attempt to obtain compensation was denied by Tele-Direct because he could not prove damage to his business.

708 The Director also called evidence that Tele-Direct informed customers that advertising prepared by a consultant did not comply with its specifications on the slimmest of pretexts. [277] Several of the examples related to clients of Mr. Brouillet, who testified that to his knowledge the advertisements were in accordance with existing specifications. The respondents called no evidence that the advertising did not meet specifications. In one case, the respondents admitted that the advertisement prepared by CEPAC 2000 did, in fact, comply with specifications. [278] We conclude that Tele-Direct would not have objected to these advertisements had it not been for the involvement of a consultant in each case.

709 As noted above, Tele-Direct's admitted practice is not to act on a customer's order, where a consultant is believed to be involved, until the customer has been visited by a Tele-Direct representative. Instead, Tele-Direct treats the order from the customer merely as an "indication" that the customer wants to change his or her advertising. Thus, in every case of suspected consultant involvement, the customer will be visited by a Tele-Direct representative. At the point of a meeting between the Tele-Direct representative and the customer, usually the customer would have already signed a contract with the consultant approving the changes recommended by the consultant and agreeing to pay the consultant's fee. The respondents deny that there was any tendency within Tele-Direct to delay visiting a customer who was known or suspected to have used a consultant until the last minute and to use the visit as the occasion to make disparaging remarks implying that the customer had been "taken advantage of" by the consultant or to use other tactics to pressure the customer into changing his or her mind about the program recommended by the consultant.

710 We accept that these types of tactics were fairly widely used by Tele-Direct's representatives. Last minute contact resulting in pressure on the customer and some confusion as to what the customer had to do to ensure the advertising would run as originally ordered occurred in several examples put before us. Mr. Harrison recounted the example of Mr. Kantor of Tiremag Corp. Mr. Kantor's order was delivered by registered mail to Tele-Direct in April 1993. Mr. Kantor was contacted by the Tele-Direct representative six months later, close to the closing date for the Brampton directory, and informed that no order for that directory had been received and that unless something was done, his advertising for the previous year would have to be used. Mr. Kantor insisted that he had already given them his instructions but Tele-Direct never located the package. The previous year's advertisement was run, then Tele-Direct located the package and admitted it had made a mistake. Similar problems occurred for Pat's Party Rentals, a client of Mr. Brouillet. [279] Other examples are the Britannia Restaurant & Banquet Hall, again a client of Mr. Brouillet, and the Muskoka Riverside Inn, a client of Mr. Blais. [280]

711 Eric Beesley of Georgetown Quik-Lube Ltd., who appeared in person, testified that, having submitted his order much earlier, he was contacted by the Tele-Direct representative the day before the closing date to attempt to persuade him to stay with his existing program. Then on the final day, he was called again and advised that he had to attend at the Tele-Direct office in person to make the changes. Mr. Beesley, however, was aware of the contractual clause allowing him to make changes in writing by a certain date, pointed out that he had complied with it and the advertising was processed as he had ordered.

712 There is only one documented case in the evidence in which a Tele-Direct representative counselled a customer *outright* not to honour a contract with a consultant. [281] Tele-Direct's guidelines explicitly warn Tele-Direct representatives not to provide advice with respect to customers' legal obligations. There is, however, abundant evidence of instances where customers refused to pay consultants following a meeting with the Tele-Direct representative. If the customer refuses to pay, the consultant is obliged to take legal action to recover the fees owed. [282] In general, where the consultants have gone to court, they have been successful in having the contract honoured. While it might be argued that the persistent refusals to pay by customers indicates dissatisfaction with the consultants' services rather than reflecting any tactics employed by Tele-Direct's representatives, on the evidence we accept that there is a link between the visit by the representative and the instances of refusal to pay the consultants' fees.

713 The issue in many of these incidents is whether Tele-Direct made innocent errors, or whether the climate in Tele-Direct towards consultants resulted in what was, in effect, sabotage of the consultants and their customers. An important reason for concluding that there was more than innocent errors at work is the evidence that Tele-Direct was willing to sacrifice the interests of customers by putting them in the middle of Tele-Direct's struggle against consultants. There is more than a hint of malevolence in the formal and explicit decision in the 1990 guidelines not to inform customers when orders submitted on their behalf were being refused (although this was changed in the 1992 guidelines).

(5) Anti-competitive Acts

714 The Director alleges a number of anti-competitive acts by Tele-Direct involving consultants relating to Tele-Direct's refusal to deal directly with consultants on behalf of advertisers, its discriminatory treatment of customers and customers' orders originating with consultants and its refusal to supply specifications to consultants. None are specifically listed in section 78 of the Act. As the list is not exhaustive, there is no reason not to assess the actions characterized by the Director as anti-competitive acts by Tele-Direct to see if they have the requisite exclusionary, predatory or disciplinary purpose.

715 The respondents argue that the challenged conduct cannot be anti-competitive because it was generally in accordance with the Tele-Direct guidelines for dealing with consultants, which they say were not intended to and do not prevent the consultants from doing business but rather render Tele-Direct's dealings with consultants "fair and consistent". They further submit that they have valid business reasons for their policy. These "business justifications" will be dealt with in detail for each alleged anti-competitive act.

716 In a related argument, the respondents submit that, to the extent that the Director is able to prove that Tele-Direct engaged in any of the alleged acts, those acts ceased in 1992 with the implementation of the most recent guidelines for dealing with consultants which have been consistently applied, unlike prior versions. They submit that any practice cannot be caught by section 79 as more than three years have elapsed since it ceased. We do not see validity in the argument. The 1992 guidelines are obviously still in force. The Director has not alleged that it is only the failure to follow the guidelines that is anti-competitive but that certain actions of Tele-Direct, which may not be contrary to the guidelines (refusal to deal directly with consultants on behalf of advertisers) or are simply not dealt with in the guidelines (some discriminatory acts, refusal to supply specifications), are anti-competitive. To the extent that the guidelines sanction conduct that the Director is alleging is anti-competitive, then the Director is, in effect, challenging the guidelines and their application also. The guidelines certainly do not prohibit (and may actually encourage) the particular conduct by Tele-Direct that is the subject of the allegations.

(a) Refusal to Deal Directly with Consultants

717 The respondents here repeat the argument that we dealt with earlier under the section concerning the abuse of dominant position with respect to publishers and the 20-directory requirement. They argue that a refusal *cannot* be an anti-competitive act and that they are not required to assist their "detractors" by dealing with consultants as that would be akin to placing a positive duty to act on the respondents. As we stated in that section, semantic arguments about whether the act in question is active or passive do little to advance the real issues in dispute. We will therefore proceed to analyze the more substantive arguments without further comment.

718 The evidence is clear that Tele-Direct has engaged, since the advent of Mr. Harrison and Tel-Ad in 1984, in the specific aspects of refusing to deal directly with consultants on behalf of customers set out under I. in the introduction above. Tele-Direct has refused to act on written instructions received from consultants on behalf of advertisers; refused to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same; and refused to deal with consultants on subsequent errors or problems.

719 In the eastern region between 1986 and 1990, Tele-Direct acted in contravention of its own 1986 guidelines by *accepting* orders from, at least, CEPAC 2000, Ad-Vice and Tel-Ad, as evidenced by the letters. Even those letters, however, make it clear that the order must be accompanied by a letter *from the customer on the customer's letterhead.*

720 There is also evidence that Tele-Direct refuses to accept oral instructions from consultants. The 1992 guidelines are clear that the Tele-Direct representative must not accept instructions, even indirectly, from anyone other than the customer. While the current guidelines allow the representative to meet with the customer with the consultant present, the representative is not required to do so. The evidence was that most of the time the representative refuses to meet with the customer with the consultant present. Likewise, Tele-Direct would not deal with consultants on follow-up matters on behalf of customers.

721 We must weigh the anti-competitive effects of the acts against the business justifications put forward by the respondents. There is no doubt that Tele-Direct was trying to make life difficult for the consultants by refusing to deal with them directly on behalf of advertisers. Tele-Direct did not want the consultants to have any legitimacy in their dealings with its customers. The 1990 guidelines were brought in to eliminate the slight leniency that had developed under the 1986 guidelines, which had placed letters from Tele-Direct in the hands of various eastern region consultants confirming that orders coming from them would be accepted and processed by Tele-Direct.

722 There are two possible types of adverse effects that might arise from Tele-Direct's refusal to deal with consultants acting on behalf of customers. The first is the possible increase in costs to the consultants that would result from having to do business in a somewhat roundabout way, rather than submitting orders directly. The second, and more important, effect is the effect on the consultants' credibility with customers when they have to explain to customers that they are not permitted by Tele-Direct to submit orders directly on their behalf but must use an indirect procedure. This might put the consultants in a negative light in the eyes of the customer, particularly if the customer is already generally aware of the background of acrimonious relations between Tele-Direct and consultants. Against that backdrop, the indirect procedure that the consultants must use for submitting orders to Tele-Direct might appear as a form of subterfuge.

723 The evidence does not indicate that cost increases to consultants from Tele-Direct's refusal have been a real issue. The consultants' businesses have experienced ups and downs. While Mr. Harrison was unable to grow his business between 1986 and 1992, servicing an average of 60 new accounts a year, in the last few years he has expanded and is now handling 200 to 250 new accounts a year. Mr. Brouillet testified that Ad-Vice revenues from Yellow Pages consulting were at a high between 1992 and 1994 but dropped roughly to 50 percent of that amount in the last two years. He has also diversified into other businesses in recent years. Mr. Blais eventually gave up and left the business.

724 Although all three of the mentioned consultants testified at the hearing, none of them expressly linked whatever difficulties that they might have experienced to an *increase in costs*. Even Mr. Blais did not do so. Undoubtedly, the consultants would like to have the advantage of being able to deal directly with Tele-Direct on behalf of advertisers. We find it instructive that Mr. Harrison has been operating since the mid-1980's, and still operates, in spite of Tele-Direct's refusal to deal directly

with him in a representative capacity. Evidently, he, and other consultants no doubt, have managed to find an alternative to direct submission of orders that does not impose significant increased costs, or any increased costs at all, on their businesses. We cannot, therefore, identify any adverse cost effects on consultants resulting from Tele-Direct's refusal to deal with them acting on behalf of advertisers.

725 The question of possible negative reputational effects or damage to consultants' credibility arising from Tele-Direct's refusal to deal with them acting for customers is complex. To the extent that consultants lose reputation or credibility, customers will be less likely to demand their services. We do have evidence from the consultants that they have suffered negative reputational effects. For example, Mr. Brouillet testified that he could not keep sales help because of the negative environment; sales personnel felt they were regarded by advertisers as not legitimate, as "scam" or "con" artists.

726 Unfortunately, it is difficult to determine whether these effects result from the refusal by Tele-Direct to deal directly or from other actions of Tele-Direct that are not alleged to be anti-competitive. The Director has not challenged as anti-competitive Tele-Direct's general hostility towards consultants, as manifested by the placing of advertising warning customers about consultants, writing letters to customers and sending out its representatives to their premises with messages to the same effect. In our view, the negative reputational effects on consultants are due largely to the general environment created by Tele-Direct rather than the specific refusal to deal directly with consultants acting for advertisers. Any connection between the negative reputational effect or loss of credibility on the part of consultants and the refusal to deal directly is very weak.

727 We turn to Tele-Direct's business justifications for its consultant guidelines and, thus, for its refusal to accept written or oral instructions from consultants or deal with them on follow-up matters. The respondents' general position is that their refusal to deal with consultants "is clearly an efficient response to the damaging effect of the consultants on their business". They point out that the objective of the consultants is to decrease directory advertising which is exactly the opposite of the respondents' objective, which is, in their words, to sell directory advertising "in order to increase the usage of their directories and produce a more complete directory." Because the consultants generally serve customers on a one-time basis, the respondents take the position that consultants have a "perverse" incentive to "undersell", which detracts from the completeness of the directories.

728 We have already dealt with the "completeness" argument as part of the analysis of tied selling. As we concluded there, it is far from clear that all increases in advertising (especially size and colour which are targeted by consultants for reduction) contribute to completeness. Therefore, the "upselling" of size and colour by Tele-Direct representatives cannot be assumed to be socially beneficial, nor can the "downselling" of those attributes by consultants be assumed to be socially detrimental. The optimal situation is one in which both points of view are freely available to advertisers so that the advertisers themselves can make the choice.

729 At paragraph 840 of their written argument, the respondents have also provided the following more detailed justifications for issuing and following their consultant guidelines:

(i) the consultants do not accept responsibility for payment for the advertising;

(ii) to ensure that the customer is fully informed with respect to the advertising they are purchasing and their available options;

(iii) to ensure customers understand with whom they are dealing;

(iv) to prevent the conflicts that may occur if the Respondents' sales representatives were to take instructions directly from the consultants;

(v) to ensure that advertisers are aware of new programs and initiatives.

730 We need only deal with the first point. The Director has in effect admitted the validity of the respondents' first business justification, that consultants do not accept financial responsibility for the advertising, by the remedies he seeks. At paragraph 69(b)(iii) of the application, the proposed remedy was:

> ... that the Respondents accept orders for advertising space on behalf of any party that can satisfy the Respondents' reasonable requirements of evidence of authority to act on behalf of an advertiser and *capacity to pay for the space requested*.
>
> (emphasis added)

At paragraph 391 of the written argument, the following further remedy was added:

> ... that the Respondents be prohibited from requiring that customers who choose to utilize the services of a third party to place advertising be required to enter into a contract directly with the Respondents where the third party who has satisfied the Respondents' reasonable requirements of evidence of authority to act on behalf of the advertiser and *where the third party has guaranteed payment on behalf of the principal*.
>
> (emphasis added)

731 These proposed remedies imply that in the Director's view it is reasonable for Tele-Direct to insist on financial guarantees if Tele-Direct is to deal with consultants as representatives of the customer. The consultants do not currently accept any financial responsibility. What the Director has done is to suggest an alternative method of operations for Tele-Direct in its dealings with consultants. He is proposing, in effect, that Tele-Direct begin to deal directly with consultants acting for advertisers by creating a new third sales channel (in addition to the internal sales force and agents).

732 There is evidence that dealing directly with the consultants would require Tele-Direct to set up an additional interface to deal with them. As described by Mr. Logan of the YPPA, this was the experience of US West, which set up a group of specially trained employees to deal with consultants to avoid problems with its sales force when it dealt directly with consultants. Such direct dealing, therefore, would obviously entail an additional cost to Tele-Direct. Further, Tele-Direct does not currently deal with guarantees in the sense proposed by the Director. Agents, of course, simply pay up front. A system would have to be set up to accommodate this new procedure.

733 In the circumstances, we think that the additional costs that Tele-Direct would incur if it were forced to deal with consultants directly on behalf of advertisers is a valid justification for not doing so, given that no adverse cost effects on agents were proven and that any negative reputational effects that are attributable to the refusal to deal directly are, at best, weak. We conclude, therefore, that, overall, Tele-Direct is not engaging in anti-competitive acts by refusing to deal directly with consultants on behalf of advertisers and, in particular, by refusing to accept written or oral instructions from, or engage in follow-up communication with consultants acting on behalf of advertisers.

(b) Discriminatory Acts

734 The discriminatory acts involve Tele-Direct's actions after the customer has submitted an order based on a consultant's advice and the effects that flow therefrom. Notwithstanding Tele-Direct's stated policy, orders submitted by a customer are sometimes returned because Tele-Direct believes a consultant was involved in the preparation of the order. There is no justification for Tele-Direct precluding an advertiser from seeking the advice of a consultant if the advertiser so chooses. Indeed, that is what one part of Tele-Direct's written guidelines states. Yet, the guidelines, even the 1992 guidelines, also mandate the return of certain customer orders. The fact that Mr. De Sève, a senior executive of Tele-Direct, is aware, and apparently condones, the return of customer orders for suspicion of consultant involvement proves that these were not merely isolated instances or errors.

735 Further, the history of the 1990 guidelines underlines the fact that Tele-Direct was fully aware of and, in fact, sanctioned the foreseen negative consequences of those guidelines for its advertisers. The advertisers' interests were sacrificed in order to hamper the consultants. The effect of the 1990 guidelines, as Tele-Direct itself recognized when they were first drafted, was to place the advertiser in the middle of the battle between Tele-Direct and the consultants, to the detriment of the advertiser.

736 A document attached to the guidelines identifies "perceived weaknesses" in the guidelines which were to be reviewed with the legal advisors. The first related to the fact that Tele-Direct would be rejecting any package delivered by a consultant or bearing any external indication of consultant involvement even if delivered by the customer or also bearing customer information on its face. Packages would therefore be rejected even though they might contain instructions from the customer on the customer's letterhead. A second concern was whether it was a reasonable business approach not to notify customers that the letter/package delivered to Tele-Direct had been rejected and returned to the consultant. In spite of these misgivings, the new policy was put in place.

737 The internal document dealing with the incident where 23 orders prepared by Mr. Blais were rejected even though they were under customers' signatures states that legal counsel, in fact, recommended against the procedure in the guidelines which permitted this type of rejection. Counsel, as reported in the letter, was of the view that the customers had the right to deal with whomever they wished in designing their advertising and further had the right to send Tele-Direct their instructions on their letterhead and expect that they would be acted on as coming from them, provided that Tele-Direct was not required to deal directly with the consultant and the correspondence did not carry any consultant identification.

738 The respondents did not attempt to provide a business justification for rejecting or returning customer orders where there was no evidence of non-compliance with specifications or of late delivery. In the circumstances, we find that the rejection, return, denial of receipt or refusal to process customer orders involving consultants constitute anti-competitive acts.

739 As noted earlier, the Director is not of the view that Tele-Direct's insistence on visiting a customer after the customer has signed a contract with a consultant and submitted an order to Tele-Direct is by itself an anti-competitive act. He says that the issue relates to what the representative tells the customer and how the order received from the customer is treated. We agree that this is the crux of the difficulty. The anti-competitive acts are those that lead the customers to believe that they will be disadvantaged or that actually harm them because they have used a consultant. These include suspicious errors, last minute contact resulting in confusion for the advertiser about what must be done to have the new advertising run or resulting in missed deadlines, identifying errors or problems in the advertising that would not otherwise be a problem and informing customers that their orders might not be processed. We accept that such incidents occurred and that there is no assurance that they will not be repeated whenever consultants are seen as a threat.

740 The respondents argue that they were trying in all cases to ensure that their business operated efficiently by requiring consultants to meet deadlines and specifications. We have found that noncompliance with specifications and deadlines were largely pretexts for an attempt to pressure customers into changing their minds about a consultant's recommendations. Most of the incidents in evidence are more accurately characterized as highly disruptive because of the negative impact on customers rather than ensuring the smooth operation of Tele-Direct's business as argued. We have no hesitation in finding that statements or actions by Tele-Direct to discourage advertisers from dealing with consultants by expressly or implicitly indicating that advertisers will thereby be disadvantaged by Tele-Direct constitute anti-competitive acts.

741 The Director alleges that the respondents discriminate against consultants by refusing to meet with customers to take instructions originating in advice from consultants. On its face this looks very much like the allegation listed in I.(b) and forming part of the refusal by Tele-Direct to deal directly with consultants on behalf of advertisers. Presumably, the discriminatory act being alleged here is a refusal to accept oral instructions from customers using consultants while oral orders from customers not using consultants are accepted and acted on. As has already been noted, Tele-Direct requires that customers using consultants sign Tele-Direct's documents. In and of itself, this is not an anti-competitive act. It might, however, be a discriminatory act if customers not using consultants are not required to sign a contract in like circumstances.

742 However, the evidence of Mr. Giddings is that, by and large, all of Tele-Direct's customers sign its documents. In fact, Mr. Giddings testified that the only contracts which do not require signing are those contracts renewing advertising worth less than $100. Further, Mr. Giddings indicated that for those contracts which are not signed, if there is a conflict between the customer and the representative as to what advertising was actually ordered, which results in a "write-off", the representative is financially responsible for the write-off. This policy does not seem unreasonable on an operational basis. With respect to

orders which Tele-Direct will accept orally from customers dealing with its representatives (that is, those under $100), there is no evidence that consultants deal with or are interested in obtaining clients whose orders are so small. We do not find this allegation to constitute an anti-competitive act.

743 There is no doubt that those discriminatory acts of Tele-Direct which we have found to be anti-competitive constitute a practice. They are not "isolated acts".

(c) Specifications

744 The Director submits that Tele-Direct's refusal to supply specifications to consultants is an anti-competitive act. He argues that consultants cannot adequately advise the customers who choose to use their services without up-to-date access to basic technical information. The Director points to evidence of Tele-Direct using alleged non-compliance with specifications to delay orders or discredit consultants in customers' eyes.

(i) Majority View (Rothstein J. and C. Lloyd)

745 The majority of the Tribunal are unable to agree with the Director for the following reasons. We see the refusal by Tele-Direct to provide specifications to consultants as another manifestation of Tele-Direct's general aversion to having any relationship with consultants. Looking at the experience of consultants and Tele-Direct's refusal to supply specifications to them, the evidence is that this has not adversely affected their ability to compete. Consultants have been in business since 1984 and we have heard of no difficulty experienced by them because Tele-Direct refused to provide them with specifications. [283]. In one way or another, they were aware of what Tele-Direct's specifications required.

746 As to whether Tele-Direct not providing specifications to consultants would cause a problem in the future, Mr. Brouillet stated:

> ... If there were changes in their specifications and we were not informed about it, then obviously, there would be a problem. If there was really a problem, the client only had to call us within 24 hours, we could fix what was wrong and forward that to Tele-Direct. [284]

There is no evidence before us that suggests that Tele-Direct's specifications change frequently. If anything we are left with the contrary impression from the absence of evidence from consultants that frequent changes were a problem. Mr. Brouillet stated that once a problem is pointed out it can be quickly fixed. On the basis of this evidence, we are satisfied that any changes to specifications will become known by consultants quickly. We, therefore, have no basis upon which to infer that refusal to provide specifications to consultants will, in any material way, adversely affect their ability to compete in the future.

747 The respondents did not argue the business justification "that customers understand with whom they are dealing" to justify the refusal to supply specifications to consultants, although this was raised as a justification for other acts. However, we are of the view, based on the evidence, that this business justification is applicable here. There is evidence before us of a number of instances in which there was confusion on the part of advertisers as to the exact relationship of a consultant with Tele-Direct. [285]

748 We infer from the way in which some consultants operate that this confusion could be exacerbated if a consultant, on visiting a proposed customer, is armed with up-to-date specifications obtained from Tele-Direct. There are indications in the evidence that in their initial contact with advertisers, consultants do not go out of their way to distinguish themselves from Tele-Direct. In some cases, the evidence is that the customer remains confused as to the exact relationship between the consultant and Tele-Direct. [286] In other cases, it is apparent that while an advertiser may initially be confused, the fact that the consultant does not represent Tele-Direct eventually becomes apparent. It may become apparent in conversation between the advertiser and consultant or when the advertiser is requested to pay the consultant separate from Tele-Direct. In the case of Ad-Vice, a follow-up letter makes this clear. [287]

749 However, in our view, it is the initial confusion that creates the difficulty. We do not think consultants should be "getting their foot in the door" of advertisers because of such initial confusion. Being provided with specifications by Tele-Direct could be used by them as a form of "calling card" signifying a relationship with Tele-Direct that does not really exist. Notwithstanding that in many cases the confusion is eventually cleared up, we do think customers are best served when they know from the outset precisely with whom they are dealing and in this case, the relationship or lack of relationship between Tele-Direct and a consultant. We therefore think that Tele-Direct is justified in refusing to provide specifications to consultants and conclude that such refusal is not an anti-competitive act.

750 While we are not satisfied that the Director has made a case that the refusal to provide specifications to consultants is an anti-competitive act, we are not unmindful that ultimately it is the advertisers that might encounter difficulty if they retain the services of consultants who use incorrect specifications. It is for this reason that we have, in providing for a remedy for discriminatory acts against advertisers, required Tele-Direct, at its option, to take positive steps to revise a customer's order that is not submitted in compliance with its specifications so that the order complies or advise the customer what is wrong and how the customer may revise the order in accordance with its specifications.

(ii) Minority View (F. Roseman)

751 In my view, the refusal to supply specifications is an anti-competitive act. While differing from the majority in their conclusion, I accept that there is little evidence of past harm to consultants from the refusal. Nevertheless, consultants may suffer adverse effects in the future should Tele-Direct change its specifications. The consultants will eventually learn of the changes through trial and error but this leaves a considerable degree of uncertainty during an indeterminate transitional period. Therefore, there is the likelihood that the consultants will be significantly hampered so that the refusal to supply specifications should be considered an anti-competitive act given the complete absence of any sound business justification for the refusal.

752 The respondents have not advanced any valid business justification. They argue that the refusal is justified by the uniqueness and complexity of Tele-Direct's business and its desire to maintain the value and quality of its product. It is difficult to see how avoidable errors in orders prepared by consultants (and submitted by customers) contribute to quality.

753 I do not accept the majority's view that the evidence supports the conclusion that the availability of specifications to consultants would result in increased confusion on the part of customers as to the consultants' identity and purpose. I agree with the majority that it is impossible to identify the source of the confusion that apparently arose for some customers. [288] However, it is noteworthy that none of the incidents of confusion referred to by the majority was linked to Mr. Harrison [289] but only to Mr. Brouillet. Yet, it is Mr. Harrison who has been able to obtain ongoing access to Tele-Direct's specifications from YPPA through an affiliate in the United States. Because I am of the view that refusal to supply specifications will likely significantly hamper the consultants' ability to compete and that there is no valid business justification for the refusal, I conclude that the refusal constitutes an anti-competitive act.

(6) Substantial Lessening of Competition

754 The competitive effectiveness of consultants has been reduced as a result of Tele-Direct's practice of discriminatory acts. Consultants incur higher costs as a result of being forced to defend themselves before customers and by having to seek the aid of the courts in enforcing their contracts. These activities require time and expense that could otherwise be spent in attracting and serving customers.

755 In addition, the consultants' ability to attract new business is negatively affected when their customers are inconvenienced or harmed by Tele-Direct's discriminatory acts. Customers so affected are unlikely to be repeat customers or to recommend the services of consultants to other Yellow Pages advertisers.

756 Although consultants currently service a small portion of the total telephone directory advertising revenue, they are competitively significant. Tele-Direct was forced to respond positively to the presence of consultants by improving its servicing

of its customers. Thus, consultants have had and can continue to have a significant positive influence on Tele-Direct's level of service to its customers as Tele-Direct legitimately strives to offset the inroads that consultants make into its sale of Yellow Pages advertising.

757 It is difficult to arrive at a numerical determination of the effect on consultants of the practice of discriminatory acts we have found to be anti-competitive because the acts are intermingled with other forces that hamper consultants. What we know, however, is that the consultants' ability to compete is limited and fragile as compared to Tele-Direct's virtual monopoly through its control of publishing. Consultants, by the nature of their services, have little ongoing business and must convince advertisers to pay for their services when these advertisers could place advertising in directories without incurring such expense, i.e., the market for their services is necessarily a "thin" one.

758 Where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with.[290] In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial. Of course, in the future, in the absence of any order by the Tribunal, there would be no constraint on Tele-Direct intensifying discriminatory acts against consultants and exacerbating an already substantial effect on them. We have no difficulty concluding that Tele-Direct's proven practice of anti-competitive acts has had, is having or is likely to have the effect of lessening competition substantially in the market.

(7) Remedies

759 The Tribunal recognizes that consultants' interests are antithetical to Tele-Direct's and that Tele-Direct should not be forced to assist consultants. However, consultants must be able to compete with Tele-Direct to provide services to advertisers. Tele-Direct cannot use its market power to impede consultants' activities and to disadvantage customers who wish to retain the services of consultants. On the other hand, Tele-Direct must not be restrained from competing fairly with consultants.

760 We have concluded that Tele-Direct's refusal to deal with the consultants directly on behalf of advertisers is not an anti-competitive act. No remedy is provided in this respect. Nor is any remedy provided for Tele-Direct's refusal to provide specifications to consultants.

761 We have found that Tele-Direct engaged in a practice of discriminatory acts against consultants and customers who use consultants resulting in a substantial lessening of competition. While many of the acts in evidence occurred more than three years before the filing of the Director's application, the practice continues. The practice of these acts is prohibited. Customers using consultants must be treated by Tele-Direct no differently than customers who do not use consultants.

762 For greater certainty, we elaborate on this remedy. Where a customer uses a consultant and the customer submits an order for advertising in the Yellow Pages, Tele-Direct is prohibited from rejecting the order. Tele-Direct may accept the customer's order without revisiting or contacting the customer to attempt to change the customer's mind. It will be open to Tele-Direct to act on the documents submitted by the customer or, if it considers it necessary, require the customer to sign a Tele-Direct document. If Tele-Direct decides to accept the order as it is, Tele-Direct is prohibited from not processing it or unduly delaying its processing and from refusing to confirm to the customer that the order will be processed as submitted. If the order is accepted and it turns out there is noncompliance with Tele-Direct's specifications, then the order must be processed in accordance with a revision made by Tele-Direct that complies with the specifications or the customer must be advised promptly that the order does not comply with specifications and informed of the exact problem and how to rectify it.

763 Alternatively, Tele-Direct has the option of providing further advice to the customer to try to convince the customer to change the order submitted. It may do so, including visiting the customer, but it is prohibited from employing the techniques that we have condemned as anti-competitive when doing so. For example, Tele-Direct may not delay until close to the closing date for submitting orders for a directory to contact the customer about alleged problems in the order. Tele-Direct may not advise the customer who used a consultant that the order does not conform to Tele-Direct's specifications or is otherwise

unacceptable unless there is a material problem, in which case, Tele-Direct must provide the necessary information so the customer can cure the problem. Tele-Direct cannot use problems with the order in such a way as to leave the customer only with the option of reverting to the prior year's advertisement or having no advertisement appear. Nor may Tele-Direct delay until close to the closing date so that if the Tele-Direct's representative is able to convince the customer to change the order from that recommended by the consultant, that the customer does not have the opportunity of contacting the consultant if the customer wishes further advice from that source.

764 Subsequent efforts by Tele-Direct to resell the advertisers should be restricted to the merits of the advertising recommended by the consultant. Tele-Direct is prohibited from having its representatives discuss the role of or advisability of using a consultant at this time. We recognize that it may be difficult to distinguish between legitimate "puffing" of Tele-Direct's service and disparaging comments or inferences about the consultant's service. In view of the instances of disparaging comments by Tele-Direct that have occurred, we caution Tele-Direct to ensure that its instructions to its representatives are clear that in their follow-up meetings they are not to disparage consultants. What would be of concern would be evidence of systematic continuous representations that are untrue or that disparage consultants in these follow-up meetings.

765 For example, it is simply untrue that customers would receive the same advice from Tele-Direct for no cost as from a consultant who charges a fee because Tele-Direct representatives will rarely if ever recommend a reduction in advertising, which is the essence of the consultants' advice. The fact that consultants have a short-term relationship with a customer may be true but comments to this effect are disparaging if made with a view to causing a customer to lose confidence in a consultant's advice, not based on the merits of that advice. Tele-Direct should ensure that in these meetings its representatives restrict their selling effort to the merits of the advertising.

Observation by C. Lloyd and F. Roseman

766 We would have preferred to see a prohibition on attempted reselling by Tele-Direct's representative after an order was received from a customer. In our view, Tele-Direct has ample opportunity to establish a situation of trust and confidence between its customers and its representatives. If it fails to use its opportunities and customers choose to take the advice of a consultant because they perceive that they have not received quality service from Tele-Direct, then, ideally, that would be the end of the matter for that directory year. We have chosen, however, not to dispute the Director's concession that Tele-Direct should not be precluded from visiting advertisers after they have submitted an order.

X. Order

767 FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

Definitions

1. In this order,

(a) "market" shall mean a market as defined by Tele-Direct for purposes of its commissionability rules prior to the filing of the application in this matter, and, for greater certainty, there shall in future be no fewer than six markets in Quebec and seven markets in Ontario;

(b) "consultants" shall mean firms which advise telephone directory advertisers on how to increase the effectiveness of and reduce expenditures on telephone directory advertising, primarily in the Yellow Pages, and which assist advertisers in the placement of orders for telephone directory advertising, but does not include firms which are accredited advertising agencies.

Tied Selling

2. The respondents are prohibited from continuing to engage in tied selling, namely tying the supply of advertising space by them to the acquisition of advertising services from them, for customers advertising in six, seven and eight markets.

Abuse of Dominant Position

3. The respondents are prohibited from engaging in the practice of discriminatory acts relating to consultants and customers of consultants.

Remaining Allegations

4. The remainder of the application of the Director is dismissed.

Interpretation

5. The Director or the respondents may apply to the Tribunal for directions or an order interpreting any of the provisions of this order.

Confidentiality

6. As required by paragraph 11(1) of the Confidentiality (Protective) Order issued by the Tribunal on March 30, 1995, the panel determines that a "reasonable period" for the retention, in a secure and organized manner, by the respondents of those protected documents returned to them by the Director upon completion or final disposition of this proceeding and any appeals relating thereto, shall be five years.

Footnotes

1 R.S.C. 1985, c. C-34.

2 Others include the remaining portion of Bell Canada, Télébec, Maritime Tel & Tel, etc.

3 E.g., the Corporation of the City of Thunder Bay, Amtelecom Inc. (Aylmer, Straffordville and Port Burwell), the Corporation of the Town of Kenora.

4 Tying was a minor portion of the case in *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 C.P.R. (3d) 1, [1990] C.C.T.D. No. 17 (QL).

5 The words "Yellow Pages" and "Pages jaunes" are registered trade-marks of the respondents in Canada although they are considered generic or descriptive in the United States. Tele-Direct licenses its trade-marks to other telco directory publishers in Canada but not to non-telco directory publishers.

6 Approximately 10 percent of Tele-Direct (Publications) Inc. 1994 directory revenue came from expenditures in the white pages.

7 The very small and the very large accounts.

8 Under this rule, in very general terms, to qualify for commission, an account must involve advertising in at least 20 Yellow Pages directories within Tele-Direct's territory and at least 20 percent of the total value of the advertising must be placed in directories of another publisher outside Tele-Direct's territory.

9 R.S.C. 1985, c. C-50.

10 *Gustavson Drilling (1964) Limited v. M.N.R.* (1975), [1977] 1 S.C.R. 271 at 279.

11 P. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Quebec: Yvon Blais, 1991) at 118, 123.

12 *Driedger on the Construction of Statutes*, 3d ed. by R. Sullivan (Toronto: Butterworths, 1994) at 514-15.

13 *Supra* note 4.

14 *Ibid.* at 35.

15 [1988] 2 S.C.R. 595 at 625-26.

16 *Kibale v. Canada* (1990), 123 N.R. 153 (F.C.A.). See also rule 409 of the Federal Court Rules.

17 *Canada v. Maritime Group (Canada) Inc.*, [1993] 1 F.C. 131 (T.D.)

18 *Director of Investigation and Research v. AGT Directory Limited et al.*, CT-94/2.

19 *Director of Investigation and Research v. AGT Directory Limited* (18 November 1994), CT-94/2, Consent Order at para. 3, [1994] C.C.T.D. No. 24 (QL).

20 *Angle v. M.N.R.* (1974), [1975] 2 S.C.R. 248.

21 G. Spencer Bower & A.K. Turner, *The Doctrine of Res Judicata*, 2d ed. (London: Butterworths, 1969) at 37.

22 *Supra* note 20 at 255.

23 *Trade-marks Act*, R.S.C. 1985, c. T-13.

24 A "trade-mark" is defined in s. 2 of the *Trade-marks Act* as "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others...."

25 *Trade-marks Act*, s. 19.

26 S. 50(1) of the *Trade-marks Act*, as am. S.C. 1993, c. 15, s. 69, provides:

For the purposes of this Act, if an entity is licensed by or with the authority of the owner of the trade-mark to use the trade-mark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark in that country as or in a trade-mark, trade-name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trade-mark in that country by the owner.

27 E.g., comparative advertising or use of trade-mark in a merely descriptive sense, for example, does not constitute infringement: see *Clairol International Corp. v. Thomas Supply & Equipment Co.*, [1968] 2 Ex. C.R. 552 at 556; *Syntex Inc. v. Apotex Inc.* (1984), 1 C.P.R. (3d) 145 (F.C.A.).

28 483 F.Supp. 82 at 86-87 (1977).

29 (1995), 61 C.P.R. (3d) 12 (F.C.T.D.).

30 In fact, neither the Director nor the respondents directed the Tribunal to any cases where a party was ordered to license a trade-mark.

31 (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.).

32 Or surrogates such as service, quality, etc.

33 *NutraSweet, supra* note 4; *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (QL); *D & B, supra* note 31.

34 [1995] 3 F.C. 557 (C.A). An important issue in *Southam* was whether the two Pacific Press dailies and various community newspapers, all owned by Southam, were in the same product market. The Tribunal found that they were not; the Court of Appeal reversed on this point. An appeal to the Supreme Court is pending.

35 *Ibid.* at 632-33.

36 *Southam* was followed in *R. v. Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4th) 500 (Ont. Ct. (Gen. Div.)), (1995) 64 C.P.R. (3d) 289. While the Director referred to that decision, it was not argued in any detail nor, apparently, relied on by either side.

37 *Supra* note 34 at 633.

38 Confidential exhibit CJ-14 (blue vol. 5), tab 173; confidential exhibit CJ-19 (blue vol. 10), tab 285 (Newfoundland).

39 The participants were asked if they would shift their advertising from Tele-Direct to an independent *directory* in response to a 15 percent increase in Tele-Direct's prices.

40 Consumer and Corporate Affairs Canada, Director of Investigation and Research, *Merger Enforcement Guidelines*, Information Bulletin No. 5 (Supply and Services Canada, March 1991).

41 *Supra* note 34 at 635, 637-38.

42 *Ibid.* at 637.

43 *Ibid.* at 640.

44 *Ibid.* at 636-37.

45 Associate Professor of Economics and Business Administration at Simon Fraser University.

46 Professor of Economics and Public Affairs at Princeton University.

47 As opposed to "national" or "brand awareness" advertising which promotes a product wholly apart from *any* location.

48 [1968] 2 Ex. C.R. 275 at 305-306.

49 Respondents' Book of Authorities, vol. 6, tabs A,B.

50 Respondents' Book of Authorities, vol. 6, tabs C, D; vol. 3, tab 41.

51 Respondents' Book of Authorities, vol. 3, tabs 38, 47; Director's Book of Authorities in Reply, tabs 6, 7, 9.

52 This is, of course, co-extensive with their definition of local advertising.

53 Confidential exhibit CJ-16 (blue vol. 7), tab 215 at 118727.

54 *Ibid.* at 118801.

55 At the hearing, counsel for the respondents attempted to convince the Tribunal to attribute less weight to the letter than we otherwise might on the grounds that it was not prepared with the assistance of an economist and that it was produced in a compressed period of time. The letter was written by Tele-Direct's Vice-president of Marketing with the assistance of a number of lawyers from counsel's office. We have no information as to the extent of the economic background of any of those lawyers. It is signed by the President of Tele-Direct. During the discovery process the respondents resisted production of the letter on the grounds that it was protected by settlement negotiation privilege. The Tribunal ruled that the letter did not fall within that privilege and ordered it produced. We have no hesitation, for the purposes for which we refer to the letter, of attributing significant weight to it.

56 Exhibit J-5 (green vol. 3), tab 239 at 86008.

57 *Ibid.*

58 Apparently there is some experimentation in some American centres with allowing restaurants to run advertisements that include menus. In a relatively stable economic environment firms in such an industry might be willing to risk committing themselves to prices for as long as a year.

59 See, e.g., the testimony of Jack Forrester of HOJ Car and Truck Rentals, that he does not use Yellow Pages for specials or promotions: transcript at 5:778 (11 September 1995); the testimony of Jean-Yves Laberge of the Turpin Group of automobile sales and leasing businesses, that he puts prices and specials in his newspaper advertisement but not in the Yellow Pages: transcript at 13:2406-407 (3 October 1995); and the testimony of Steve Kantor of Tiremag Corp., who sells wheels and tires, that he cannot use Yellow Pages to advertise seasonal product offerings or prices: transcript at 17:3288-89 (11 October 1995).

60 Paragraph 24 of Professor Willig's rebuttal affidavit (exhibit R-181) reads:

... As a matter of economics, it is difficult to see how negative characteristics can contribute to a showing of dominance in a narrow relevant market. Instead, negative characteristics contribute to the willingness of buyers to substitute out of the product at issue, and so their recognition should, if anything, argue for a wider market to be relevant, not a narrower one.

61 It is commonplace economics that a firm with market power will set prices where the demand for its product is elastic; that is, at the point where a further increase in price would cause a reduction in revenue. Some of the reduction in revenue may result from consumers switching to other products which are the closest substitutes *at that price*, but which would not be considered by these consumers as substitutes if the firm with market power were pricing its product *at a competitive level*. This so-called "cellophane fallacy" (originating from criticism of the decision of the Supreme Court of the United States in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956)) can result in the mistaken conclusion that a firm does not have market power because of the presence of substitutes when in fact the reverse is true -- the substitution is occurring *because of* the exercise of market power. In principle markets should be defined at competitive prices.

62 Confidential exhibit CJ-28 (black vol. 7), tab 42 at 129284. Customers who disconnected their business telephone service are not included. There was no general price change between 1993 and 1994, although there were a number of incentive plans.

63 Confidential exhibit CJ-14 (blue vol. 5), tab 173.

64 Confidential exhibit CJ-87 (black vol. 14), tab 111 at 134805; confidential exhibit CJ-33 (black vol. 12), tab 85 at 132815.

65 "Non-believers", "inadequate response from advertising" and "don't need large recognition".

66 For example, individuals in professions prohibited from advertising, variety stores, construction sites.

67 Confidential exhibit CJ-18 (blue vol. 9), tab 249.

68 Contrary to Tele-Direct's habitual use of the term, the "non-advertisers" studied may have had a bold listing.

69 *Supra* note 67 at 107661, 107681 (emphasis added). One non-advertiser was just starting up his business and could not make the current edition deadline.

70 E.g., Elliott reports: confidential exhibit CJ-14 (blue vol. 5), tab 173 (January 1993) and confidential exhibit CJ-19 (blue vol. 10), tab 285 (February 1993 - Newfoundland); V.I.A. survey: confidential exhibit CJ-11 (blue vol. 2), tab 89; Yellow Pages Satisfaction Study (Omnifacts Research): confidential exhibit CJ-15 (blue vol. 6), tab 199.

71 The term "complement" has been used in this context primarily in its ordinary sense and not in its strict economic sense. No one has asserted that the different advertising vehicles are complements in the sense that a reduction in the price of one vehicle would lead to an increase in the price of the other. Rather the term has been used to indicate that Yellow Pages perform a different function than other vehicles and are thus needed to complete an advertising programme.

72 *Supra* note 70.

73 *Ibid.* New advertisers were generally very small companies; established customers were larger.

74 *Ibid.* at 116796.

75 *Ibid.* at 116811-12.

76 In terms of actual switching behaviour, the respondents referred to evidence of a locksmith who cut his Yellow Pages spending and bought brochures, on the advice of a Yellow Pages consultant, and of a photographer who was visited by a newspaper consultant who designed a smaller Yellow Pages advertisement for him. The implications of the existence and practices of the consultants for substitutability will be dealt with in the next section. Both newspaper and Yellow Pages consultants use a similar methodology, in that they attempt to convince an advertiser that a smaller, less expensive Yellow Pages advertisement will be equally effective *in the Yellow Pages*. The Director also provided numerous examples of "non-switching" where increases or decreases in spending on other media were unrelated to spending on Yellow Pages.

77 Newspaper advertisements were identified for establishments in the businesses represented by the top five Yellow Pages headings in the region's Tele-Direct directories. Then, those establishments with newspaper advertisements were sought in their local Tele-Direct Yellow Pages directories. Overall, the search found 542 newspaper advertisers in these categories. Of this group, 39% had display advertisements in both the searched newspaper and in the local Tele-Direct Yellow Pages directory, while 61% of the newspaper advertisers had no display advertisement in their local Tele-Direct Yellow Pages directory. (The 61% is comprised of 42% who had no Yellow Pages business phone number, and hence no listing in the Tele-Direct Yellow Pages of any kind. Another 12% did have lightface classified listings in the local Tele-Direct Yellow Pages directory, but no advertisement in that directory of any kind. Yet another 6% had a boldface listing in their local Tele-Direct Yellow Pages directory, but no display advertisement in that directory.)

78 Expert affidavit of R. Willig (17 August 1995): exhibit R-180 at paras. 20-22, appendix 2B.

79 Exhibit R-116. One of the three contained pricing information in the newspaper and not in the directory.

80 There is an important difference between Yellow Pages and non-classified advertising in other print media (or electronic media, for that matter) that results from the fact that media with editorial or entertainment content usually prefer to have minimum percentage of such content. The effect is to create an opportunity cost to having larger advertisements, because they absorb some of the available space for other content. This consideration is not present in the case of Yellow Pages and should not affect the pricing of larger advertisements.

81 Confidential exhibit CJ-15 (blue vol. 6), tab 199 at 116802.

82 See Competition Database Binder (1994): confidential exhibit CJ-15 (blue vol. 6), tab 205; 1994 Sensitive Market Report: confidential exhibit CJ-29 (black vol. 8), tab 51; Directory Publishers in Tele-Direct Operating Area: confidential exhibit CJ-32 (black vol. 11), tab 77 at 132125-45.

83 For further details, see the facts set out in the section entitled "C. Market for Advertising Space - Publishing" in chapter "IX. Abuse of Dominant Position", *infra*.

84 Mr. Giddings' testimony on this topic was confusing. He testified at various times that the course, or perhaps one module of it (which a discovery answer indicated had never been used for training purposes), was given to new representatives in about 1990 and that it, or some part of it, had been repeated for unknown numbers in 1993 and 1994. However, he also testified that no new premise sales representatives had been hired since 1992 casting doubt as to how many times and to how many persons the course was given.

85 The use of the average premise remuneration errs on the side of being too high. The other type of sales representative, a telephone sales representative, earns, on average, only about 60 percent of what a premise representative earns. Also, Mr. Giddings did say at one point that this course was given to *new* representatives, who would likely earn less than average in any case.

86 Exhibit J-2 (red vol. 2), tab 82 at 8833.

87 *Ibid.*, tab 81 at 8827.

88 Exhibit J-2 (red vol. 2), tab 116 at 13525.

89 Confidential exhibit CJ-10 (blue vol. 1), tab 17 at 106527-28.

90 Radio - 4%, television - 6%, other - 11%, newspapers - 19% and Yellow Pages - 60%: confidential exhibit CJ-18 (blue vol. 9), tab 243 at 107177ff.

91 Professor of Economics at the University of British Columbia.

92 While it is true that price comparisons with the newspapers are used, including different sizes of newspaper advertisements and advertisements with red, the message is that it is cheaper to use the Yellow Pages regardless of the size or colour of the advertisement.

93 The 1993 prices were revised in February 1992. The respondents rely heavily on this particular exercise; it is reviewed in detail below.

94 Consistency in cost per thousand of circulation across directories.

95 Ms. McIlroy explained that the "junked directories" are those that never enter into circulation. Tele-Direct used the volume of junked directories to forecast how many copies should be printed and to ensure that estimate was realistic. If many of the copies printed end up as junked directories, this over-inflates Tele-Direct's circulation figures.

96 The 1992 exercise (for 1994) is not included as prices were not increased.

97 Information on business papers and outdoor came from only one source.

98 Transcript at 44:9285-86, 9290 (22 November 1995).

99 Confidential exhibit CJ-12 (blue vol. 3), tab 115 at 109881.

100 Confidential exhibit CJ-32 (black vol. 11), tab 76 at 132008-9 (public) (with covering memorandum).

101 Transcript at 44:9283-84 (22 November 1995).

102 East Office Competition Analysis: confidential exhibit CJ-13 (blue vol. 4), tab 158 at 115094.

103 Transcript at 20:3827 (16 October 1995).

104 Transcript at 39:8077-78 (15 November 1995).

105 As already indicated, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns and improvements to its own directories.

106 Pricing Policy - CPI & Media Price Evolution (1984-1994): confidential exhibit CR-158 at 111314; Tele-Direct Price Up vs. Canada Inflation Rate and Other Media: confidential exhibit CJ-29 (black vol. 8), tab 48 at 129708.

107 *NutraSweet*, *supra* note 4; *Laidlaw*, *supra* note 33; *D & B*, *supra* note 31.

108 *Laidlaw*, *ibid.* at 325; *D & B*, *ibid.* at 254-55.

109 Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170; Tele-Direct (Publications) Inc. - Profitability Study for 1994: confidential exhibit CR-185. Tele-Direct's 1994 published revenues were the most recent available at the time of the hearing. Exhibit CR-170 was put forward by the respondents as their most up-to-date information on independents' revenues and so we will refer to it to the exclusion of the various other numbers and documents brought up during Mr. Renwicke's testimony. Exhibit CR-170 provides two different bottom line totals for number of independent directories and revenue. The difference is accounted for by cessation of publication by one publisher with ten directories and revenues of $1.5 million. The totals that have been used are those that include that publisher and its revenues.

110 Telephone Directory Competition in Ontario/Quebec: confidential exhibit CJ-13 (blue vol. 4), tab 164; testimony of D. Renwicke: transcript at 46:9679-80 (27 November 1995). This figure was calculated based on a research study conducted in the United States which determined that independents overall had 5.9 percent of telco directory revenues. The 1993 Simba/Communications Trends study places independents at under 7 percent of total national revenues: confidential exhibit CJ-14 (blue vol. 5), tab 174.

111 According to the respondents' map of other publishers (exhibit R-159), only DSP and Tele-Direct are in Sault Ste. Marie, Elliot Lake and Wawa; only White and Tele-Direct are in St. Catharines and Niagara Falls. There are the Locator and Easy to Read directories in Fort Erie but there is no local revenue information on the record. It cannot be very high based on averages taken from Overview of Other Publishers in Tele-Direct Markets (confidential exhibit CR-170). Niagara calculation: Tele-Direct 1994 published revenues for Niagara Falls, St. Catharines and Fort Erie taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128980); White's 1994 revenue was stated by Richard Lewis to be 17 percent of Tele-Direct's revenue (transcript at 22:4363-64 (18 October 1995)). Sault Ste. Marie calculation: Tele-Direct 1994 published revenues for the Sault Ste. Marie, Elliot Lake and Wawa taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128983); DSP 1994 (year 2) revenues taken from DSP - Sault Ste. Marie Directory - Gross Revenue from 1993 to 1995 (confidential exhibit CA-109).

112 Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170.

113 Tele-Direct's 1994 Corporate Post Canvass Analysis Report: confidential exhibit CJ-28 (black vol. 7), tab 42 at 128982.

114 Phone numbers that people could call to get anything from up-to-date news, weather and sports, to medical information and their daily horoscope.

115 *Director of Investigation and Research v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 at 281-82, [1992] C.C.T.D. No. 7 (QL).

116 The same point is made in P.S. Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990) at 435-37.

117 "Lessons of Yellow Pages Competition": confidential exhibit CJ-14 (blue vol. 5), tab 174 at 115924.

118 *Ibid.* at 115982.

119 *Ibid.* at 115984.

120 White's prices in 1994 were generally about 25 percent less than Tele-Direct's for in-column, about 40 percent less for display and about 55 less for red display: exhibit A-103. White first published in Niagara in 1993 with a prototype directory in which advertisers could advertise free of charge. The 1994 prices are for its first "revenue" directory in which advertisers paid for their advertising. Likewise, in Sault Ste. Marie, the DSP rates reflected substantial discounts off Tele-Direct's, with greater discounts for display and coloured display than for other types of advertisements: YPPA Rates and Data Information for the period 1992-95: exhibit A-111.

121 For example, area sports team schedules, seating diagrams for theatres and arenas, a listing of local golf courses, highway access information, historical sites, schedule of events, maps, senior citizens' services listings, human services' listings, "kid's pages", bus routes, customs and goods and services tax information.

122 For example, it is a "flip" directory with the Canadian cities on one side and the neighbouring American cities on the other. The book also includes a "reverse directory" -- listings by phone number first.

123 Confidential exhibit CJ-14 (blue vol. 5), tab 73 at 115416-18.

124 Expert rebuttal affidavit of R. Willig (30 August 1995): exhibit R-181 at 13, paras. 46-48.

125 Transcript at 56:11663, 11667-68 (23 January 1996).

126 Transcript at 32:6559-61 (3 November 1995).

127 Transcript at 41:8556-57 (17 November 1995).

128 All the work relating to contract verification and dealing with complaints is already done by Tele-Direct. What is performed by Bell Canada are simply the mechanical steps of bill preparation and mailing.

129 YPPA Rates and Data Information for the period 1992-95: exhibit A-111 at 9.

130 Leaving aside dynamic, innovation-driven industries, to which telephone directories do not belong.

131 In Sault Ste. Marie, DSP charges a premium for red ranging from 36 to 50 percent for full page, half page, double half column (1/4 page), double quarter column (1/8 page) and quarter column (1/16 page). For each doubling in size, however, DSP price increases are 56 percent to 76 percent, considerably lower than Tele-Direct's size premium. In Niagara Falls, White charges only between eight and nine percent premium for red, with one exception, a quarter column advertisement, which reflects a 28 percent increase. For each doubling in size, White charges from 74 to 91 percent more.

132 Each year 25 customers of each sales representatives are asked questions relating to the quality of the service provided by the representative.

133 1984-2 Trade Cas. (CCH) ¶ 66,080 at 66,024-25 (7th Cir. 1984).

134 *Ibid.* at 66,025.

135 Professor of Economics and Director of the Policy and Economic Analysis Program at the University of Toronto.

136 P.E. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law*, vol. 10 (Boston: Little, Brown, 1996) at 175.

137 466 U.S. 2.

138 The majority consisted of Stevens, Brennan, White, Marshall and Blackmun JJ. The minority included O'Connor, Powell, Rehnquist JJ. and Burger C.J.

139 *Supra* note 137 at 21-22.

140 *Ibid.* at 43.

141 *Ibid.* at 46.

142 *Ibid.* at 19 n. 30.

143 *Supra* note 136 at 269.

144 1987-1 Trade Cas. (CCH) ¶67,628 (9th Cir. 1987).

145 No. CV 77-3450-FW (Dist. Ct. C.D. Cal. 8 June 1981).

146 *Ibid.* at 17.

147 No. CV-93-3650 LGB (U.S. Dist. Ct. C.D. Cal. 2 August 1994), appeal pending.

148 Transcript at 66:13762-63 (26 February 1996).

149 57 F.3d 1317 (4th Cir. 1995).

150 1987-2 Trade Cas. (CCH) ¶ 67,683 (11th Cir. 1987).

151 *Ibid.* at 58,482.

152 *Ibid.* at 58,483.

153 *Ibid.*

154 *Ibid.* at 58,484.

155 Or these might have been provided by the advertiser's "advertising agency" and not the ASR.

156 *Supra* note 150 at 58,484.

157 Confidential exhibit CJ-16 (blue vol. 7), tab 214 (public), art. 10.

158 Exhibit J-5 (green vol. 3), tab 154 at 32277.

159 Exhibit J-4 (green vol. 2), tab 99 at 28021-22.

160 The evidence is that agents charged separately for artwork when the commission rate was 15 percent but do not do so at the 25 percent commission rate.

161 833 F.2d 606 (6th Cir. 1987).

162 1990-2 Trade Cas. (CCH) ¶ 69,154 (6th Cir. 1990).

163 *Ibid.* at 64,348.

164 P.E. Areeda, *Antitrust Law*, vol. 9 (Boston: Little, Brown, 1991) at 330-31.

165 *Ibid.* at 333.

166 *Ibid.* at 347.

167 The element of no separate charge, or separate billing, for services, which the respondents appear to allude to as part of this argument, is another issue which is dealt with in the next section.

168 1988-1 Trade Cas. (CCH) ¶ 67,971 (7th Cir. 1988).

169 *Supra* note 137 at 18.

170 *Ibid.* at 6 n. 4.

171 One advertiser (Turpin Group Inc.) participates in a trade-mark advertisement for General Motors dealers for which General Motors, a national advertiser, uses DAC. Turpin's own advertising is treated as local and it deals with Tele-Direct's internal sales force.

172 The evidence is that the agencies generally keep servicing existing clients and prospecting for new clients separate; adding new clients is usually the primary responsibility of one or more designated persons. Out of the five CMRs that testified, two pay commission for new clients; only one of those offers that incentive to all employees, the other has a vice-president who is responsible for new business.

173 Only two of the multi-directory (leaving aside the one who is in only two directories) advertisers were clients of consultants and only one of those talked about uniformity of advertisements and co-ordinating dates and deadlines.

174 E.g., the "Autopro" line of automobile parts is offered by licensed Autopro mechanics and service stations across the country; the franchisees of Location Pelletier offer short-term vehicle rentals under that banner but usually operate another business as well.

175 A similar conclusion was reached in the United Kingdom by the Office of Fair Trading ("OFT") in its 1984 report on the Yellow Pages industry: exhibit J-6 (green vol. 4), tab 282. When British Telecom withdrew all commission and internalized services through an exclusive sales contractor, the advertising agencies argued that they were placed at a disadvantage in competing to offer services to advertisers as the advertiser had to pay for the sales contractor's services, included in the rate card price, and then pay again to use the services of an agent. The OFT concluded that the "administration of the account" on the advertiser's behalf, by which they meant the day-to-day running of the account (negotiating claims, authorizations, proof-checking, paying bills) could not be carried out by the sales contractor and would either be done by the advertiser using its own resources or an agent. In respect of those services, therefore, the agencies were not competing with the sales contractor but rather with the advertiser's own resources.

176 Counsel for the respondents appeared to take the position that advertisers did not incur higher costs of using agents in those cases where the advertisers placed advertisements in a number of directories that were issued throughout the year. Although this argument has a superficial appeal because it appears that advertisers are paying on a periodic basis either way, it is not valid. Advertisers who use an agent must pay in advance for each directory as opposed to over a 12 month period if they use Tele-Direct.

177 Of the seven agency clients, five, to all appearances, would not meet the eight-market criteria; the sixth apparently does but does not meet the 20-directory requirement for the 1993 rule. The seventh may meet the 1993 definition but as a group advertisement which is problematic for other reasons (see chapter "IX. Abuse of Dominant Position" under "D. Market for Advertising Services", *infra*). The three advertisers who currently use Tele-Direct but would like to use an agent are similar: a franchiser, a large regional advertiser and a company with three offices in two provinces.

178 Among the agency clients, HOJ Car and Truck Rentals, for example, spends $125,000 annually and has 36 franchises, all located in southwestern Ontario. Location Pelletier spends $120,000 to $160,000 annually but its 60 licensees are all within the province of Quebec. Stephensons' Rent-all Inc., as Mr. Day of Day Advertising Group, Inc. testified, became non-commissionable when the eight-market rule came in and that was when it began to do the "extra" advertising. Stephensons has 38 retail outlets in southern Ontario and spends $140,000 on Yellow Pages advertising. Among the consultant clients, Canac-Marquis Grenier has 10 outlets across Quebec and spends $50,000 on its advertising; Tiremag Corp. spends $20,000 although it has only one outlet.

179 Professor of Law and Director of the Law and Economics Programme at the University of Toronto.

180 *Supra* note 175.

181 We note from Tele-Direct's 1994 Corporate Post Canvass Analysis Report that "new" advertisers, those using Yellow Pages for the first time or new businesses, are certainly among the smaller Tele-Direct advertisers. Selling effort is especially important with respect

to new advertisers. The average *annual* expenditure by a new advertiser is $839, less than half the average for all advertisers. Less than one-half of one percent of new advertisers spend $1,000 or more *per month* where the corresponding percentage among established advertisers is about 3.5 times greater. Apparently, the typical new Yellow Pages advertiser starts with a small advertisement, in which case it is the value of the medium and the "sales pitch" which are important and not other advertising services.

182 We should note here that while the Director refers to space and services, Professor Trebilcock refers to three elements: space, consulting advice (design, graphics, layout, etc.) and selling effort (or pure promotion of the value of the medium). He recognizes that selling effort is clearly variable in relation to space. That is the genesis of the principal-agent problem dealt with later in this section.

183 Expert rebuttal affidavit of M.E. Slade (28 August 1995): exhibit A-119 at 11.

184 Expert affidavit of M. Trebilcock (18 August 1995): exhibit R-174(b) at para. 27.

185 AGT Directory Limited only pays 25 percent on foreign numbers (as do all publishers) but pays 15 percent on *any other* advertising, including local accounts.

186 Except for Edmonton Tel: advertising in Calgary and Edmonton would qualify under its rule.

187 *Supra* note 184 at para. 27.

188 *Ibid.*

189 The evidence of Mr. Lewis of White was that White pays commission (in the United States and presumably also in Canada) on any account submitted by a CMR without restriction. The commission rate is 23 percent for established directories and 30 percent for newer directories. Likewise, DSP pays CMRs commission on any account.

190 E.g., for White: eight percent of revenues in U.S. placed by agents; in Canada, one-half of one percent of revenues placed by agents.

191 In circumstances where the dominant players are telco publishers and those publishers only pay commission on national and regional accounts, it follows that agents are active mainly in those sectors. They are not set up to service local accounts even if independents pay commission on those. Thus, because the dominant players do not want to use agents for local accounts, independents *cannot*, even if they wanted to, rely solely on agents but must use an internal sales force. Professor Slade is of the view that agents would tend to serve this market over time if the major publishers changed their policies and provided a broader market. Further, as the independent is usually the newcomer into a market dominated by the telco publisher, agents are reluctant to recommend a new directory, even for national and regional accounts where at least some of the major players pay commission, until it has proven itself.

192 *Supra* note 184 at para. 22.

193 Based on the evidence of the representatives of CMRs who testified; together those CMRs account for a large portion of commissionable sales.

194 Confidential exhibit CJ-32 (black vol. 11), tab 83 at 132667ff.

195 Exhibit J-1 (red vol. 1), tab 61.

196 Total salaries were allocated to CANYPS, agencies, NAMs and GSF.

197 To anticipate questions that might arise as a result of the discussion of Tele-Direct's latest contribution to profit study, the same percentage cost of customer service (the payment to Bell Canada) and "melt" is used for both agents and NAMs. There is some tipping of the scales in favour of agents with respect to the cost of customer service since it is applied net of commission in the case of agents. On the other hand, no account is taken of the fact that agents pay up-front and the customers of NAMs pay over a year.

198 Confidential exhibit CR-185.

199 Transcript at 34:7026 (7 November 1995).

200 Transcript at 36:7370 (9 November 1995).

201 Depreciation of the scanner (a common cost since it is caused neither by internal sales force or CMRs) is divided equally between internal sales force and agents based on relative volume of items by number scanned from these sources. Based on the revenue methodology otherwise employed most of the depreciation would be allocated to internal sales force.

202 The reason why CCS has such a large impact is that under Tele-Direct's contract with Bell Canada the revenue from agents who are billed by Tele-Direct rather than Bell are not subject to the payment of CCS. Thus the average payment of CCS is much lower in the case of agents than of internal sales force.

203 By proposing the further alternative remedy of reverting to the pre-1975 commission rule.

204 We are referring to monetary amounts here because that is the way the evidence came in. Other criteria, such as number of markets, are more informative and other evidence was presented in that form. We attempt to relate the two measures below.

205 While the document is not explicit, the data were gathered in 1993 so we infer these are 1993 figures: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131635.

206 Agents are agents for or "represent" advertisers in the sense that they place advertising on the advertisers' behalf but, as indicated earlier, agents have an independent interest and existence apart from advertisers in other aspects of service provision.

207 1993-1 Trade Cas. (CCH) ¶ 70,266 (S.D.N.Y. 1993).

208 *Ibid* at 70,333.

209 *Ibid.* at 70,334.

210 R.S.C. 1985 (2d Supp.), c. 19.

211 Consumer and Corporate Affairs Canada, *Competition Law Amendments: A Guide* (Supply and Services Canada, December 1985).

212 *NutraSweet*, *supra* note 4 at 47.

213 *Laidlaw*, *supra* note 33 at 333.

214 *NutraSweet*, *supra* note 4 at 34.

215 *D & B*, *supra* note 31 at 257.

216 *Ibid.* at 261.

217 *Ibid.* at 262.

218 *Ibid.* at 265.

219 They rely mainly on *Clear Communications Ltd. v. Telecom Corp. of New Zealand* (1994), 174 N.R. 266 (P.C.).

220 Advertising in a prototype directory is provided free to businesses. A prototype serves to lend credibility to a new publisher's claim that it will, in fact, produce a directory and affords the publisher an opportunity to prove to advertisers the value of advertising in its directory.

221 DSP also included a "reverse" directory -- listings by phone number first.

222 The exceptions for Tele-Direct's directories were the neighbourhood directories and areas subject to rescoping or splitting of directories. At the request of other telcos, like Newfoundland Tel and Northern Tel, prices were also frozen in those directories in 1995.

223 In the first year (1993), all existing advertisers renewing or purchasing advertising received the next size up or colour, if applicable, at no extra charge. In 1994, all advertisers who participated in the program in 1993 were offered the next size up free, free colour or a 15 percent rebate if they renewed or increased their advertising. Those who had not participated in 1993 and new advertisers were given a 15 percent rebate. In the third and final year, the program became even more complex with different choices available to 1994 participants who were renewing depending on which option they had chosen (rebate/free size up or colour) in 1994. Non-advertisers and non-participants were again offered a 15 percent rebate as were 1994 participants who were increasing their advertising.

224 In 1995, when Unifone was no longer present, advertisers were offered a 15 percent rebate if they increased their advertising but participants in the 1994 program could receive the rebate if they renewed their upsized or colour item.

225 Confidential exhibit CJ-87 (black vol. 14), tab 104 at 134481.

226 Formerly called BDR Audio Network.

227 Exhibit R-152.

228 For a more complete discussion of this issue, see *infra* in this section on abuse of dominance in publishing under "(b) Alleged Anti-competitive Acts", "(ii) Targeting/Raising Rivals' Costs".

229 T.G. Krattenmaker & S.C. Salop, "Competition and Cooperation in the Market for Exclusionary Rights" (1986) 76:2 Amer. Econ. Rev. 109.

230 D.T. Scheffman, "The Application of Raising Rivals' Costs Theory to Antitrust" (1992) 37 Antitrust Bulletin 187.

231 Transcript at 64:13167-68, 13170 (16 February 1996).

232 *Ibid.* at 13169.

233 *The Concise Oxford Dictionary*, 7th ed. (Oxford: Clarendon Press) at 1094.

234 Tele-Direct would be unrestricted in its responses if it implemented those responses throughout its territory.

235 Mr. Bourke wrote to Mr. Renwicke stating that postal codes should be left as a section rather than integrated as part of the listing (as White had done), otherwise "we'll [n]ever get rid of it": confidential exhibit CJ-86 (black vol. 13), tab 101 at 134297.

236 Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133221A.

237 Transcript at 21:4088-89 (17 October 1995).

238 Transcript at 20:3918-19 (16 October 1995).

239 In brief, the essence of the test is that a price below reasonably anticipated short-run marginal costs is predatory while a price above short-run marginal costs is not. Because marginal cost data are often unavailable, average variable cost is generally used as a proxy. For a summary of the conclusions of Areeda and Turner on this topic, see *Antitrust Law*, vol. 3 (Toronto: Little, Brown, 1978) at para. 711d.

240 There would evidently be little point in the incumbent pursuing an aggressive course of responses in every market subject to entry solely to make an impression or deliver a threat since that strategy would have already been defeated. If there was widespread response by the incumbent in all markets in which entry occurred or was threatened, consumers would benefit in the short-term with no discernible long-term negative effects.

241 Anticipated sales are expressed as a percentage of estimated revenue of the existing directory. This does not mean that all sales are drawn from the incumbent as the demand for directory advertising is expected to increase when a second publication is introduced.

242 For further explanation of this matter, see chapter "VII. Control: Market Power" under "A. Indirect Approach: Market Structure", "(2) Barriers to Entry", "(c) (i) Subscriber Listing Information", *supra.*

243 Sham litigation could include a claim with no reasonable cause of action which might be struck out at an early stage of proceedings or a claim based on facts that were untrue or otherwise not supportive of the claim, in which case, the litigation could be extensive.

244 R.H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978) at 347.

245 Some mention was made that the copyright claim might be a "broad" interpretation of the existing American law but that is hardly definitive.

246 *Laidlaw*, *supra* note 33 at 298.

247 Confidential exhibit CJ-86 (black vol. 13), tab 96 at 134118.

248 Draft contract and covering letter: confidential exhibit CJ-87 (black vol. 14), tab 114 at 134825-27.

249 Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131548-54.

250 *Ibid.* at 131555.

251 Transcript at 42:8856 (20 November 1995).

252 Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131550.

253 *Ibid.* at 131551.

254 The September 1993 letter also uses the word "superior" and essentially the same language about "measurable deliverables" (confidential exhibit CJ-31 (black vol. 10), tab 68 at 131555) as later appeared in the January 1994 contract.

255 Confidential exhibit CJ-86 (black vol. 13), tab 95 at 134080.

256 *Ibid.* at 134107.

257 Entry meaning the attempt by DSP to establish itself in the Sault Ste Marie market on an economic basis with a revenue directory; that is, not the publication of a prototype directory alone.

258 *Supra* note 4 at 34-35.

259 See further discussion, *supra* at 123.

260 See further discussion of market share below under "Analysis Respecting the Existing Commissionable Market".

261 *Supra* note 4 at 47.

262 Both sides agreed that the agents' market share in 1993 was about 80 percent: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131680. Adjusting to exclude sales into Tele-Direct's directories by agents based outside of Tele-Direct's territory, we arrive at approximately 75 percent for agents and 25 percent for Tele-Direct.

263 The difficulty here is that some franchisees or licensees carry on a number of businesses besides the licensed or franchised one and they do not operate their business under a "corporate" name. They wish to be listed in the advertisement under their own name, which often has high recognition value in their community, while still participating in the group advertising to promote the licence or franchise. An example is the Autopro dealers: the licensed Autopro garages or service stations do not carry the "Autopro" name. Tele-Direct does not permit them to be listed under their individual names.

264 There was evidence of an occasional advertisement that appears to be a group advertisement or something resembling a group advertisement but we are satisfied that it is Tele-Direct's policy not to permit group advertising.

265 These assertions ignore the fact that Tele-Direct representatives would rarely, if ever, give advice on how to reduce spending.

266 Tele-Direct threatened him with legal action, apparently for breach of copyright in its contractual terms and conditions.

267 Confidential exhibit CJ-10 (blue vol. 1), tab 5 (public).

268 Not affiliated with Mr. Harrison.

269 Initially, Tele-Direct refused to accept orders from Mr. Brouillet, until he obtained a copy of the letter sent to CEPAC 2000.

270 Operating procedures prior to December 1990: confidential exhibit CJ-11 (blue vol. 2), tab 58 at 107788 (public).

271 Operating procedures, December 1990: *ibid.* at 107792 (public).

272 *Ibid.*

273 There is some question as to whether the consultants affected were notified specifically of the change in policy or of the exact terms of the new policy. Messrs. Brouillet and Blais said that they were not.

274 Confidential exhibit CJ-12 (blue vol. 3), tab 105 at 109796 (public).

275 Testimony of P. de Sève: transcript at 44:9123-27 (22 November 1995); testimony of D. Renwicke: transcript at 46:9630-34 (27 November 1995).

276 Confidential exhibit CJ-27 (black vol. 6), tab 33 at 128522.

277 E.g., Postime Distributors (wrong paper, wrong size), Paul's Quality Woodcraft (non-compliance with specifications in general), M & L Service (wrong paper) and Canac-Marquis Grenier (borderless advertisement not allowed).

278 The advertisement was for Canac-Marquis Grenier.

279 The order was sent in under her signature on July 15, 1991. On September 30, 1991, the client received a form letter from Tele-Direct stating that the material had been returned to the consultant without processing. (As of that date, Ad-Vice had not received anything back.) The customer panicked, thinking her advertising would not appear. Mr. Brouillet was unable to obtain confirmation that the advertising would appear as ordered. The client ended up dealing directly with Tele-Direct and Mr. Brouillet had to sue to recover his fee.

280 The Britannia Restaurant & Banquet Hall order was sent in on August 2, 1991. On September 25, 1991, shortly before the closing date, Tele-Direct faxed the client its contract documents, which described the previous year's program. The client simply signed the documents, thinking they represented the new order. The old program appeared, the client protested, Tele-Direct insisted on full payment, the client refused to pay and was eventually barred from placing further advertising in Tele-Direct's directories. A Tele-Direct notation on a document relating to this customer indicates some concern even on its part about what transpired. The Muskoka Riverside Inn submitted its order prior to the deadline for making changes. The order was returned to the consultant and the client notified he had to send the order himself. The client missed the deadline for changing artwork and Tele-Direct ran the old advertising.

281 L.J. Sunshine Hardwood Flooring. Ad-Vice has sued the customer for breach of contract. In his defence, the customer claims that the Tele-Direct representative advised him that he had been "misrepresented" and should stop payment on his cheque.

282 Or, evidently, write off the account or accept a reduced fee in settlement, as Mr. Blais did on one occasion.

283 This is not to say that Tele-Direct did not reject some orders based on non-compliance with specifications. This may have been the fault of the consultant not to conform to the specifications of which he was aware or because Tele-Direct, without justification, wished to create difficulty for a consultant. But Tele-Direct's rejection of orders was not attributable to consultants not being aware of what Tele-Direct's specifications required.

284 Transcript at 15:2762 (6 October 1995).

285 Evidence of Mr. Lee of M & L Service, Mr. and Mrs. Jovandin of L.J. Sunshine Hardwood Flooring, Mr. Fox of Fox & Partners Limited, Mr. Harmic of Dominion Springs Corporation, Mr. McMaster of H.R. Home Renovations. Of course, the consultants blamed Tele-Direct for the confusion and Tele-Direct blamed the consultants. We cannot say for certain how the confusion about the relationship between Tele-Direct and consultants arose in each case but it does appear there was confusion in the minds of some customers.

286 E.g., Mr. Lee of M & L Service.

287 The package provided by Mr. Brouillet to his clients advises the client that the Tele-Direct representative will be in contact to transfer the advertising program to the Tele-Direct forms.

288 *Supra* note 287.

289 *Ibid.* All of the incidents cited related to clients of Ad-Vice except for Mr. Fox of Fox & Partners Limited, who was not linked to a specific consultant.

290 The approach we adopt is implicit in *Director of Investigation and Research v. Imperial Oil Ltd.* (26 January 1990), CT8903/390, Reasons and Decision at 16, [1990] C.C.T.D. No. 1 (QL) (Comp. Trib.) and in U.S. Dept. of Justice/Federal Trade Comm'n, *Horizontal Merger Guidelines*, (2 April 1992) at 1.51. Although dealing with a consent order, *Imperial* in effect addresses the issue of what constitutes a substantial lessening of competition when there are varying initial degrees of market power by evaluating what is required to cure the alleged substantial lessening of competition. Similarly, the Guidelines view any numerical increase in concentration more severely the higher the initial market share of the acquiring firm.

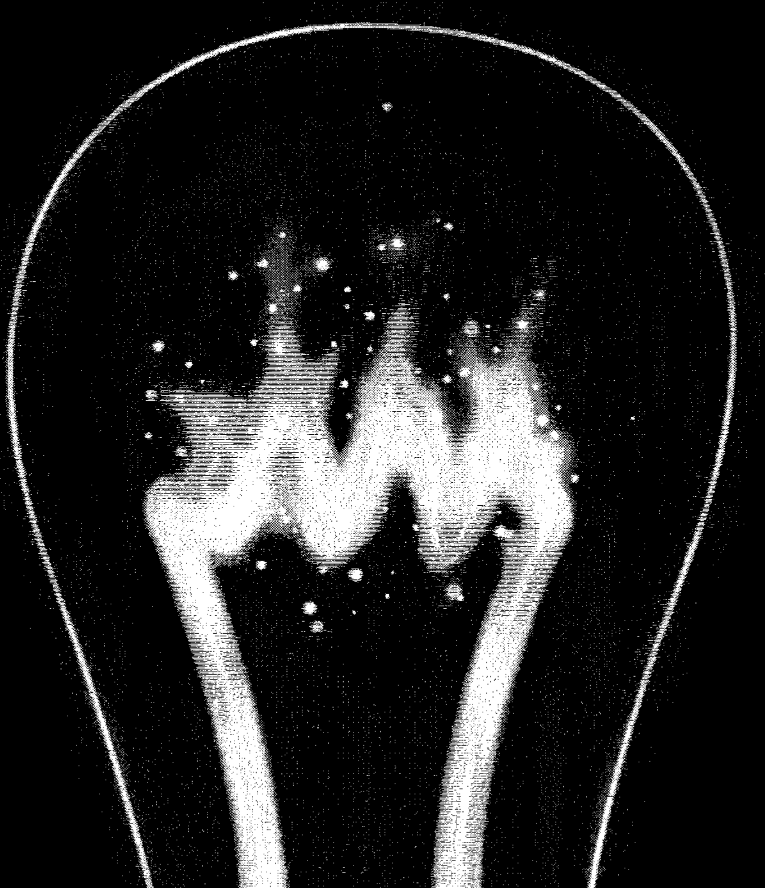
End of Document

TAB 9

Competition Bureau Canada | Bureau de la concurrence Canada

Enforcement Guidelines

Intellectual Property



Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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PREFACE

The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the "Act"), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau endeavours to be as transparent as possible in providing information to Canadians on the application of the laws under its jurisdiction. One of the ways it does so is by issuing enforcement guidelines, which describe the Bureau's general approach to enforcing specific provisions in the Act.

Intellectual property ("IP") and intellectual property rights are increasingly important in today's knowledge-based economy. In such an environment, there has been interest in how the Bureau will deal with competition issues involving IP. Accordingly, the Bureau has made it a priority to provide increased clarity on this subject.

These Guidelines articulate how the Bureau approaches the interface between competition policy and IP rights. They describe how the Bureau will determine whether conduct involving IP raises an issue under the Act. They also explain how the Bureau distinguishes between those circumstances that warrant a referral to the Attorney General under section 32 of the Act, and those that will be examined under the general provisions.

These Guidelines are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of each case. Final determination of the law is the responsibility of the Competition Tribunal (the "Tribunal') and the courts.

The Bureau may revisit certain aspects of these Guidelines in the future in light of experience, changing circumstances and decisions of the Tribunal and the courts.

John Pecman
Commissioner of Competition

TABLE OF CONTENTS

1. INTRODUCTION

Today's economy is increasingly based on knowledge and innovation and driven by rapid advancements in information and communications technologies. New technologies create economic, cultural, social and educational opportunities for people to put ideas to work in innovative ways that increase productivity and create employment and wealth. Adequate protection of IP plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge-based economy.[1] In this context, IP becomes a valuable asset for firms' profitability and growth. However, given the importance of IP, there is a risk that it may be used strategically to lessen or prevent competition.

Owners of IP, like owners of any other type of private property, profit from property laws that define and protect owners' rights to exclude others from using their private property. The special characteristics of IP have made it necessary in many instances for governments to develop laws that confer property rights to IP comparable to those for other kinds of private property.

IP laws and competition laws are two complementary instruments of government policy that promote an efficient economy. IP laws provide incentives for innovation and technological diffusion by establishing enforceable property rights for the creators of new and useful products, technologies and original works of expression. Competition laws may be invoked to protect these same incentives from anti-competitive conduct that creates, enhances or maintains market power or otherwise harms vigorous rivalry among firms. Given that competition law may result in limitations on the terms and conditions under which the owners of IP rights may transfer or license the use of such rights to others, and on the identity of those to whom the IP is transferred or licensed, these Guidelines seek to clarify the circumstances under which the Bureau would consider such intervention to be appropriate and also illustrate situations that would not call for intervention under the Act.

In the interest of transparency, the Bureau recognizes the importance of providing information on its treatment of IP under the Act. This document, the Intellectual Property Enforcement Guidelines, sets out how the Bureau views the interface between IP law and competition law. It also explains the analytical framework that the Bureau uses to assess conduct involving IP.

The Guidelines discuss the circumstances in which the Bureau, under the Act, would seek to restrain anti-competitive conduct associated with the exercise of IP rights to maintain competitive markets. The approach elaborated in this document is based on the premise that the Act generally applies to conduct involving IP as it applies to conduct involving other forms of property.

1 The Canadian Intellectual Property Office (CIPO) defines intellectual property and summarizes the role of IP rights as follows: "Intellectual Property (IP) refers to the creations of the mind, such as inventions, literacy and artistic works, as well as symbols, names, pictures, designs and models used in business. Patents, trade-marks, copyright, industrial designs, integrated circuit topographies and plant breeders' rights are referred to as "IP rights." Just as rights are acquired when a building or land is purchased, IP rights are "property" in the sense that they are based on the legal right to exclude others from using the property. Ownership of the rights can also be transferred." For more information, see the CIPO website: http://www.cipo.ic.gc.ca/.

The Bureau's overall approach to the application of the Act to IP is as follows:

- The circumstances in which the Bureau may apply the *Act* to conduct involving IP or IP rights fall into two broad categories: those involving something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The Bureau will use the general provisions of the *Act* to address the former circumstances and section 32 (special remedies) to address the latter.
- In either case, the Bureau does not presume the conduct violates the general provisions of the *Act* or should be remedied under section 32.
- The analytical framework that the Bureau uses to determine the presence of anti-competitive effects stemming from the exercise of rights to non-IP forms of property is sufficiently flexible to apply to conduct involving IP, even though IP has important characteristics that distinguish it from other forms of property.
- When conduct involving an IP right warrants a special remedy under section 32, the Bureau will act only in the very rare circumstances described in this document and when the conduct cannot be remedied by the relevant IP statute.

Circumstances will determine how the Bureau uses its enforcement discretion to respond to any alleged contravention of the *Act*. Therefore, individuals contemplating a business arrangement involving IP should either consult qualified legal counsel or contact the Bureau when evaluating the risk of the arrangement contravening the *Act*. The final interpretation of the law rests with the Tribunal and the courts.

When developing these Guidelines, the Bureau considered the current global economic and technological environment and, in particular, the rapid rate of technological changes occurring in many industries. The Bureau also took into account its past enforcement experience, Canadian case law, and the approaches taken in the Antitrust Guidelines for the Licensing of Intellectual Property issued by the U.S. Department of Justice and the Federal Trade Commission in 1995, and in other jurisdictions, including the European Union. The Bureau recognizes that the interface between competition and IP policy is a constantly evolving area. Accordingly, to ensure appropriate coordination between IP and competition policy, the Bureau has entered into a Memorandum of Understanding with CIPO that will serve to identify areas of mutual interest and facilitate discussions between the two agencies.

The remainder of this document is organized into six parts:

- Part 2 discusses the purpose of IP laws, lists the various statutes that deal with IP, reviews the purpose of competition law and lists the principal provisions of the *Act* that relate to IP;
- Part 3 discusses the interface between IP law and competition law;
- Part 4 outlines the principles underlying the application of the general provisions and section 32 of the *Act* to business conduct involving IP;
- Part 5 describes the Bureau's analytical framework, which is sensitive to the particular characteristics of IP;

- Part 6 discusses the Bureau's mandate to promote competition, which may include intervening in proceedings in which IP rights are being defined, strengthened or extended inappropriately; and
- Part 7 presents a series of hypothetical scenarios to illustrate how the Bureau would apply the *Act* to a wide variety of business conduct involving IP.

2. OVERVIEW OF IP LAW AND COMPETITION LAW

2.1 IP Law

IP laws create legally enforceable private rights that protect to varying degrees the form and/or content of information, expression and ideas. The primary purpose of these laws is to define the scope of these rights and determine under what circumstances they have been infringed upon or violated. While the nature and scope of protection provided by each respective IP Act are different, by protecting exclusive rights, the IP laws provide an incentive to pursue scientific, artistic and business endeavours, which might not otherwise be pursued.

In the Guidelines, IP rights include rights granted under the *Copyright Act*, the *Patent Act*, the *Trade-marks Act*,[2] the *Industrial Design Act*, the *Integrated Circuit Topography Act* and the *Plant Breeders' Rights Act*.

- The *Copyright Act* confers upon the creator of an original work, for a limited term, exclusive rights to reproduce or communicate that work.
- The *Patent Act* protects an inventor by granting, for a fixed term, the exclusive right to prevent others from making, selling or using an invention.
- The *Trade-marks Act* allows the registration of distinctive marks and confers upon the owner the exclusive right to use that mark.
- Upon registration of a design, the *Industrial Design Act* confers on the owner the right to limit the production and sale of articles that incorporate the design.
- The *Integrated Circuit Topography Act* confers similar rights for a topography, which is a design for the disposition of an integrated circuit product.
- The *Plant Breeders' Rights Act* grants the owner of a new plant variety the exclusive rights to produce, for sale and to sell, reproductive material of the variety.

The term IP rights also encompasses the protection afforded IP under common law and the Civil Code of Quebec, including that given to trade secrets and unregistered trademarks.

There are also remedies available under the IP statutes to protect against abuses. For example, as stipulated in section 65 of the *Patent Act*, three years after the grant of a patent, a party may apply to the Commissioner of Patents alleging abuse of the patent, such as unduly restrictive licensing conditions. If the Commissioner of Patents is satisfied that there has been abuse of conduct, there are a number of actions he/she may take, including ordering the grant to the applicant of a license on such terms as the Commissioner of Patents may think expedient, or ordering the patent to be revoked.

2 Although the same general competition law principles apply to trademarks as to other forms of IP, the Guidelines are generally concerned with technology transfer and innovation related issues. Consequently, when applying its enforcement approach to trademarks, the Bureau will additionally consider in its analysis the source and quality differentiation issues that arise in respect of trademarks.

2.2 Competition Law

The principle underlying competition law is that the public interest is best served by competitive markets, which are socially desirable because they lead to an efficient allocation of resources. Competition law seeks to prevent companies from inappropriately creating, enhancing or maintaining market power that undermines competition without offering offsetting economic benefits. Market power refers to the ability of firms to profitably cause one or more facets of competition, such as price, output, quality, variety, service, advertising or innovation, to significantly deviate from competitive levels for a sustainable period of time.[3] However, a firm would not contravene the Act if it attains its market power solely by possessing a superior product or process, by introducing an innovative business practice or by other reasons of exceptional performance.[4]

The provisions of the Act that set out when it may be necessary for the Bureau to intervene in business conduct, including conduct involving IP, fall into two categories: those that cover criminal offences and those that cover reviewable (civil) matters. Several civil provisions state that the Bureau must, before it intervenes, show that the conduct substantially lessens or prevents competition.[5]

Criminal offences include conspiracy (section 45), bid-rigging (section 47), and some forms of misleading advertising and related deceptive marketing practices (sections 52 to 55).[6]

The provisions on reviewable (civil) matters deal with conduct that is generally pro-competitive but that may, in certain economic circumstances, significantly constrain competition. Reviewable matters include abuse of dominant position (section 79), exclusive dealing, tied selling and market restriction (section 77), price maintenance (section 76), refusal to deal (section 75), agreements or arrangements between competitors (section 90.1), mergers (section 92), and misleading advertising and related deceptive marketing practices (sections 74.01 through 74.06).[7] In general, the Tribunal may order remedies under these provisions if the conduct is likely to substantially lessen or prevent competition.

When a court determines that a firm has contravened the criminal provisions of the Act, it can impose fines, imprisonment and prohibition orders.[8] In addition, parties may bring private

3 *R. v. Nova Scotia Pharmaceutical Society et al., (1992) 2 S.C.R. (606)*, defines market power as "...the ability to behave relatively independently of the market." *DIR v. The NutraSweet Co., (1990) 32 C.P.R. (3d) 1 (Comp. Trib.)*, defines it as the ability to maintain prices above competitive levels for a considerable period.

4 In the abuse of dominance provision of the Act, subsection 79(4) provides that superior competitive performance is a consideration in determining whether a practice has an anti-competitive effect in a market.

5 The refusal to deal provision (section 75) and the price maintenance provision (section 76) require proof that the refusal is having or is likely to have an adverse effect on competition in a market. Section 75 also requires that the person's inability to obtain adequate supply is the result of insufficient competition among suppliers. The deceptive marketing practices provisions (sections 74.01 through 74.06) do not require a competition effects test.

6 These provisions do not require proof of market power or anti-competitive effects.

7 Section 103.1 of the Act allows parties to apply to the Tribunal for leave to make an application under section 75, 76 or 77.

8 See the Bureau's *Conformity Continuum Bulletin*, June 18, 2000, for a detailed discussion of case resolution alternatives.

actions seeking damages.[9] With respect to reviewable (civil) matters, the Tribunal may issue a variety of remedial orders, some of which restrict private property rights. For example, the Tribunal has, in the past, ordered merging firms to divest themselves of assets, including IP, when it concluded that the proposed merger was likely to substantially lessen or prevent competition, thereby overriding the rights of property owners to acquire or dispose of their private property.[10] Similarly, remedies under the abuse of dominant position provision have involved orders affecting IP.[11]

Section 32, which is in the special remedies part of the Act, gives the Federal Court the power, when asked by the Attorney General, to make remedial orders if it finds that a company has used the exclusive rights and privileges conferred by a patent, trademark, copyright or registered integrated circuit topography to unduly restrain trade or lessen competition (see section 4.2 of this document for circumstances in which the Bureau may seek to have the Attorney General bring an application under section 32).

When the Federal Court determines that a special remedy is warranted under section 32, it may issue a remedial order declaring any agreement or licence relating to the anti-competitive use void, ordering licensing of the IP right (except in the case of trademarks), revoking the right or directing that other things be done to prevent anti-competitive use. This provision provides the Attorney General with the statutory authority to intervene in a broad range of circumstances to remedy an undue lessening or prevention of competition involving the exercise of statutory IP rights. In practice, the Attorney General likely would seek a remedial order under the Act only on the recommendation of the Commissioner.

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9 See section 36 of the Act.

10 See DIR v. Southam Inc. (1997), 71 C.P.R. (3d) 417 (S.C.C.), and (1995), 63 C.P.R. (3d) 67 (F.C.A.), aff'd (1992), 47 C.P.R. (3d) 240 (Comp. Trib.).

11 See DIR v. D&B Companies of Canada Ltd. (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) (hereafter referred to as *Nielsen*).

3. INTERFACE BETWEEN IP AND COMPETITION LAW

3.1 Property Rights

Private property rights are the foundation of a market economy. Property owners must be allowed to profit from the creation and use of their property by claiming the rewards flowing from it. In a market system, this is accomplished by granting owners the right to exclude others from using their property, and forcing those wishing to use it to negotiate or bargain in the marketplace for it, thereby rewarding the owner. This creates incentives to invest in developing, and leads to the exchange of, private property, thus contributing to the efficient operation of markets.

3.2 IP Law

IP has unique characteristics that make it difficult for owners to physically restrict access to it and, therefore, exercise their rights over it. The owner of physical property can protect against its unauthorized use by taking appropriate security measures, such as locking it away, but it is difficult, if not impossible, for the creator of a work of art to prevent his or her property from being copied once it has been shown or distributed. This is exacerbated because IP, while often expensive to develop, is often easy and inexpensive to copy. IP is also typically non-rivalrous — that is, two or more people can simultaneously use IP. The fact that a firm is using a novel production process does not prevent another firm from simultaneously using the same process. In contrast, the use of a physical property by one firm prevents concurrent use by another.[12]

Accordingly, IP laws confer on an IP owner the right to unilaterally exclude others from using that property. While each IP statute grants this right to varying degrees and the right may be subject to limitations that vary across statutes, it allows the owners of the IP to maximize its value through trade and exchange in the marketplace. This claim on the rewards flowing from IP enhances the incentive for investment and future innovation in IP as it does for other forms of private property. With the exception of the protections afforded unregistered trademarks and other common law rights, the legal protection of IP is a function of and does not exist outside the scope of IP statutory regimes.

3.3 Competition Law

Since the right to exclude, which is the basis of private property rights, is necessary for efficient, competitive markets, the enforcement of the Act rarely interferes with the exercise of this basic right. Enforcement action under the Act may be warranted when there are conspiracies, agreements or arrangements among competitors or potential competitors;

12 To enforce common law property rights, it must be possible to identify the property's owner and to clearly delineate the boundaries of the property. Both tasks can prove problematic in the case of IP. For other kinds of private property, possession can generally be seen as an indication of ownership. However, since many individuals can possess IP simultaneously, it may be difficult to establish the identity of the original creator and true owner of the IP. Furthermore, since IP is generally intangible, it is often difficult to clearly delineate the boundaries of the property. Without a legal delineation of these boundaries, IP owners may have difficulty showing that others have infringed on their property.

when anti-competitive conduct creates, enhances or maintains market power;[13] or when firms use deceptive marketing practices.

3.4 Interface

IP and competition laws are both necessary for the efficient operation of the marketplace. IP laws provide property rights comparable to those for other kinds of private property, thereby providing incentives for owners to invest in creating and developing IP and encouraging the efficient use and dissemination of the property within the marketplace. Applying the Act to conduct associated with IP may prevent anti-competitive conduct that impedes the efficient production and diffusion of goods and technologies and the creation of new products. The promotion of a competitive marketplace through the application of competition laws is consistent with the objectives underlying IP laws.

13 An example of conduct involving IP that could create market power is the assignment of patents. See *Apotex Inc. v. Eli Lilly and Co.* [2005] F.C.J. No. 1818 (Fed. C.A.).

4. APPLYING THE *ACT* TO CONDUCT INVOLVING IP

4.1 Overview

In general, the Bureau's analysis for determining whether competitive harm would result[14] from a particular type of business conduct comprises five steps:

- identifying the conduct;[15]
- defining the relevant market(s);
- determining if the firm(s) under scrutiny possess market power[16] by examining the level of concentration and entry conditions in the relevant market(s), as well as other factors;
- determining if the conduct would substantially lessen or prevent competition in the relevant market(s); and
- considering, when appropriate, any relevant efficiency rationales.

This analysis applies to all industries and all types of business conduct, and is sufficiently flexible to accommodate differences among the many forms of IP protection, as well as between IP and other types of property. For example, the Bureau takes differences among the various forms of IP protection into account when defining the relevant market and determining whether a firm has market power. In addition, although IP rights to a particular product or process are often created and protected by statute and are thus different from other forms of property rights, the right to exclude others from using the product or process does not necessarily grant the owner market power. It is only after it has defined the relevant market and examined factors, such as concentration, entry barriers and technological change, that the Bureau can conclude whether an owner of a valid IP right possesses market power. The existence of a variety of effective substitutes for the IP and/or a high probability of entry by other players into the market (by "innovating around" or "leap-frogging over" any apparently entrenched position) would likely cause the Bureau to conclude that the IP has not conferred market power on its owner.

While the criminal offence provisions of the Act do not require a finding of market power, under many civil provisions, an order can only be made if a firm has engaged in anti-competitive conduct that creates, enhances or maintains market power. Again, consistent with its approach with respect to all forms of property, the Bureau does not consider an owner of IP to have contravened the Act if it attained market power solely by possessing

14 For ease of discussion, and unless otherwise indicated, competitive harm is prospective. Note, however, that in many cases, competitive harm may be occurring at the time the Bureau is conducting an investigation or may have occurred sometime in the past.

15 Some examples of conduct that could involve IP include mergers, pooling of licences, setting standards for products, tied selling and exclusive dealing.

16 Matters pursued under the criminal provisions or the provisions concerning deceptive marketing practices do not require a finding of market power or an identification of competitive effects.

a superior quality product or process, introducing an innovative business practice or other reasons for exceptional performance.

Licensing is the usual method by which the owner of IP authorizes others to use it. In the vast majority of cases, licensing is pro-competitive because it facilitates the broader use of a valuable IP right by additional parties.[17] In assessing whether a particular licensing arrangement raises a competition issue, the Bureau examines whether the terms of the licence serve to create, enhance or maintain the market power of either the licensor or the licensee. The Bureau will not consider licensing agreements involving IP to be anti-competitive unless they reduce competition substantially relative to that which would have likely existed in the absence of the licence's potentially anti-competitive terms.

4.2 Enforcement Principles

Specific reference is made to IP rights in a number of provisions of the Act.[18] The circumstances in which the Bureau may apply the Act to anti-competitive conduct involving IP or IP rights fall into two broad categories: those involving anti-competitive conduct that is something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The general provisions of the Act address the former, while section 32 (special remedies) addresses the latter. The Bureau's approach is consistent with subsection 79(5), which acknowledges that the mere exercise of an IP right is not an anti-competitive act,[19] while acknowledging the possibility that under the very rare circumstances set out in section 32, the mere exercise of an IP right might raise a competition issue.[20]

4.2.1 General Provisions

The mere exercise of an IP right is not cause for concern under the general provisions of the Act. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use of the IP also as being the mere exercise of an IP right.

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them, and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.

17 Licensing is a means by which owners trade IP, and it signals the willingness of IP holders to participate in the marketplace. This ability of owners to exchange and transfer IP can enhance the IP's value and increase the incentive for its creation and use. Licensing arrangements also promote the efficient use of IP by facilitating its integration with other components of production, such as manufacturing and distribution.

18 Refer to sections 32, 76, 77, 79 and 86.

19 Subsection 79(5) reads: "For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act."

20 The remedies in section 32 are more extensive than those under the general provisions.

The Bureau applies the general provisions of the Act when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an arrangement and not just from the mere exercise of the IP right and nothing else.

Applying the Act in this way may limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the Act.[21] Part 7 of this document provides a series of hypothetical examples to illustrate how the Bureau would examine the licensing, transfer or sale of IP under the Act.

This approach is consistent with the Tribunal's decisions in both Tele-Direct[22] and Warner[23] in which the Tribunal held that the mere exercise of the IP right to refuse to license a complainant was not an anti-competitive act. In its decision in Tele-Direct, the Tribunal indicated that competitive harm must stem from something more than just the mere refusal to license.[24]

Underlying this enforcement approach is the view that market conditions and the differential advantages IP provides should largely determine commercial rewards flowing from the exploitation of an IP right in the market to which it relates. If a company uses IP protection to engage in conduct that creates, enhances or maintains market power as proscribed by the Act, then the Bureau may intervene.

When joint conduct of two or more firms lessens or prevents competition, the competitive harm clearly flows from something more than the mere exercise of the IP right to refuse. To the extent that conduct, such as joint abuse of dominance, market allocation agreements and mergers, restricts competition among firms actually or potentially producing substitute products or services, the presence of IP should not be a mitigating factor. Similarly, IP should not be an exception or immunity mitigating factor in matters involving criminal conduct, such as conspiracy[25] or bid-rigging. All these types of conduct would be subject to review under the appropriate general provision of the Act.

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21 This analysis would use the concept of a relevant market as discussed in section 5.1. For an example where an assignment of patent rights may create market power see *Apotex Inc. v. Eli Lilly and Co.*, *supra* note 13.

22 DIR v. Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (1997), 73 C.P.R. (3d) (hereafter *Tele-Direct*).

23 DIR v. Warner Music Canada Ltd. (1997), 78 C.P.R. (3d) 321.

24 In *Tele-Direct* the Competition Tribunal stated that, "The Tribunal is in agreement with the Director that there may be instances where a trademark may be misused. However in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trademark."

25 The *Copyright Act* provides that section 45 of the Act does not apply to any royalties or related terms and conditions arising under certain collective society agreements filed with the Copyright Board.

A transfer of IP rights that lessens or prevents competition is a further example of a situation in which competitive harm results from something more than the mere exercise of the IP right to refuse. Two examples of this are when a licensor ties a non-proprietary product to a product covered by its IP right, and when a firm effectively extends its market power beyond the term of its patent through an exclusive contract. In either case, if the conduct leads to the creation, enhancement or maintenance of market power so as to substantially lessen or prevent competition, the Bureau may intervene.

Sometimes upon examination, what appears to be just a refusal to license or to grant others access to a firm's IP rights turns out to have included conduct that goes beyond such a refusal. The conduct that goes beyond the unilateral refusal to grant access to the IP could warrant enforcement action under the general provisions of the Act. For instance, if a firm acquires market power by systematically purchasing a controlling collection of IP rights and then refuses to license the rights to others, thereby substantially lessening or preventing competition in markets associated with the IP rights, the Bureau could view the acquisition of such rights as anti-competitive. If the conduct met the definition of a merger as specified in section 91 of the Act, the Bureau would review the acquisitions under the merger provisions. If the conduct did not meet the definition of a merger, the Bureau would review the matter under either section 79 (abuse of dominance) or section 90.1 (civil agreements between competitors) of the Act.[26] Without the acquisitions, the owner's mere refusal to license the IP rights would have been unlikely to cause concern (see example 7).

4.2.2 Matters Outside the General Provisions – Section 32[27]

Only section 32, in the special remedies part of the Act, contemplates the possibility that the mere exercise of an IP right may cause concern and result in the Bureau seeking to have the Attorney General bring an application for a special remedy to the Federal Court.

The Bureau will seek a remedy for the unilateral exercise of the IP right to exclude under section 32 only if the circumstances specified in that section are met and the alleged competitive harm stems directly from the refusal and nothing else. Such circumstances require the Federal Court to balance the interests of the system of protection for IP (and the incentives created by it) against the public interest in greater competition in the particular market under consideration. Generally, the Bureau would recommend to the Attorney General that an application be made to the Federal Court under section 32 when, in the Bureau's view, no appropriate remedy is available under the relevant IP statute.

Enforcement under section 32 requires proof of undue restraint of trade or lessened competition. The Bureau expects such enforcement action would be required only in certain

26 The Competition Tribunal in DIR. v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) (hereafter *Laidlaw*), recognized that the abuse of dominance provision could apply to situations involving a series of acquisitions.

27 The special remedies provided for under section 32 include declaring any agreement or licence relating to the challenged right void, ordering licensing of the right (except in the case of trademarks), revoking a patent, expunging or amending a trademark, or directing that other such acts be done or omitted as deemed necessary to prevent the challenged use.

narrowly defined circumstances. The Bureau determines whether the exercise of an IP right meets this threshold by analyzing the situation in two steps.

In the first step, the Bureau establishes that the mere refusal (typically the refusal to license IP) has adversely affected competition to a degree that would be considered substantial in a relevant market that is different or significantly larger than the subject matter of the IP or the products or services that result directly from the exercise of the IP. This step is satisfied only by the combination of the following factors:

i) the holder of the IP is dominant in the relevant market; and

ii) the IP is an essential input or resource for firms participating in the relevant market — that is, the refusal to allow others to use the IP prevents other firms from effectively competing in the relevant market.

In the second step, the Bureau establishes that invoking a special remedy against the IP right holder would not adversely alter the incentives to invest in research and development in the economy. This step is satisfied if the refusal to license the IP is stifling further innovation.

If factors i) and ii) are present and if the refusal is stifling further innovation, then the Bureau would conclude that incentives to invest in research and development have been harmed by the refusal and a special remedy would help realign these incentives with the public interest in greater competition.

The Bureau recognizes that only in very rare circumstances would all three factors be satisfied. A case in which they could arise is in a network industry,[28] when the combination of IP protection and substantial positive effects associated with the size of the network could create or entrench substantial market dominance. In such a situation, IP rights and network externalities can interact to create de facto industry standards. Standardization means that the protected technology is necessary for a competitor's products to be viable alternatives. IP protection can effectively exclude others from entering and producing in the market.[29] However, the Bureau still would have to be satisfied that a refusal is stifling further innovation and not simply preventing the replication of existing products before seeking to recommend that the Attorney General bring an application for a special remedy to the Federal Court (see example 8).

28 A network industry is an industry that exhibits network effects. These effects exist when the value or benefit derived from using a product increases with the number of other users. For example, particular types of software can exhibit network effects because the value of exchanging computer files with other individuals clearly depends on whether these individuals use compatible software.

29 This does not suggest that markets subject to network effects will inevitably be monopolized. Often, firms form alliances and make a new technology "open" to gain acceptance and build an installed base. These activities tend to be pro-competitive if firms that participate in the standard-setting process freely compete with each other in the market.

4.2.3 Matters Possibly Resolved Outside the Act

An illegitimate extension of an IP right could include anti-competitive behaviour. This might involve a patent holder asserting its patent over products that are not within the scope of its patent or a distributor making false claims that it is an official licensee of a trademarked good. Alternatively, the Bureau may receive complaints that infringement of a legitimate IP right should be justified on competition grounds. In such disputes, the Bureau will use its enforcement discretion and may choose to leave the matter to be resolved by the appropriate IP authority under the appropriate IP statute (see example 1).

As outlined in section 4.1 above, the Bureau's analytical approach is sufficiently flexible to accommodate the specific characteristics of IP and the differences in the scope and length of protection extended to different IP rights. The following information highlights how the Bureau takes these factors into account when analyzing business conduct involving IP.

5. THE ANALYTICAL FRAMEWORK IN THE CONTEXT OF IP

5.1 Relevant Markets

Relevant markets provide a practical tool for assessing market power.[30] When the anti-competitive concern is prospective (that is, the conduct is likely to have a future anti-competitive effect),[31] relevant markets are normally defined using the hypothetical monopolist test.[32]

When the anti-competitive concern is retrospective[33] (that is, the conduct has already had an anti-competitive effect), applying the hypothetical monopolist test could lead to erroneous conclusions about the availability of substitutes and the presence of market power. Accordingly, the Bureau takes into account the impact of any alleged anti-competitive conduct that may have preceded the investigation when determining the relevant market. In this context, the Bureau analyzes market definition and competitive effects concurrently.

For conduct involving IP, the Bureau is likely to define the relevant market based on one of the following: the intangible knowledge or know-how that constitutes the IP, processes that are based on the IP rights, or the final or intermediate goods resulting from, or incorporating, the IP.

Defining a market around intangible knowledge or know-how is likely to be important when IP rights are separate from any technology or product in which the knowledge or know-how is used. For example, consider a merger between two firms that individually license similar patents to various independent firms that, in turn, use them to develop their own process technologies. Such a merger may reduce competition in the relevant market for the patented know-how: if the two versions of that know-how are close substitutes for each other: if there are no (or very few) alternatives that are close substitutes for the know-how: and if there are barriers that would effectively deter the development of conceptual approaches that could replace the know-how of the merging firms. This last condition may hold if the scope of the patents protecting the merging firms' know-how is sufficiently broad to prevent others from "innovating around" the patented technologies, or if the development of such know-how requires specialized knowledge or assets that potential competitors would be unlikely to develop or obtain in a timely manner sufficient to constrain a material price increase in the relevant market.

In cases involving the licensing of IP, the Bureau generally treats the licence as the terms of trade under which the licensee is entitled to use the IP. The Bureau does not define a relevant market around a licence, but rather focuses on what the legal rights granted to the licensee actually protect (i.e., intangible knowledge or know-how, processes, or final or intermediate goods).

30 The market definition exercise focuses on demand substitution factors (i.e., possible consumer responses). The Bureau considers the potential constraining influence of firms that can participate in the market through a supply response (i.e., a possible production response) after it has defined the relevant market.

31 This is generally the case with mergers.

32 See paragraphs 4.3, 4.4 and 4.5 of the Competition Bureau's *Merger Enforcement Guidelines*.

33 This is generally the case with alleged abuse of dominant position.

The Bureau does not define markets based on research and development activity or innovation efforts alone. The Bureau usually concentrates on price or output effects. Conduct that directly reduces the innovation effort of the firms under scrutiny or restricts or prevents the innovation efforts of others may be anti-competitive. The appropriate relevant market definition or definitions will depend specifically on the knowledge or know-how, process, or final or intermediate good toward which the innovation effort is directed.

5.2 Market Power

Whether conduct involving IP results in an increase in market power in the relevant market depends on a number of factors, including the level of concentration, entry conditions, the rate of technological change, the ability of firms to "leap-frog over" seemingly entrenched positions and the horizontal effects, if any, on the market.[34] The order in which the Bureau assesses these factors may vary depending on the section of the Act under which the Bureau is examining the conduct and on the circumstances of the relevant market.

5.2.1 Market Concentration

The Bureau examines the degree of market concentration to get a preliminary indication of the competitiveness of the relevant market. In general, the more firms there are in the relevant market, the less likely it is that any one firm acting unilaterally, or any group of firms acting cooperatively, could enhance or maintain market power through the conduct being examined. However, a high degree of concentration is not enough to justify the conclusion that the conduct will create, enhance or maintain market power. This is particularly true of industries with low barriers to entry, a high rate of technological change and a pattern of firms "innovating around" or "leap-frogging over" technologies that had previously controlled a dominant share of a market.

To measure concentration in markets for intermediate or final goods, the Bureau typically calculates the market shares of the firms identified as actual participants in the relevant market. These include the firms identified as currently offering products that are demand substitutes as well as those that represent potential supply sources of these products (i.e., firms that are likely to respond to a price increase in the relevant market with minimal investment).[35] Firms that are unable to respond quickly to a price increase or whose entry requires significant investment are not considered to be participants within the relevant market for purposes of assessing market concentration. That said, the potential competitive influence of such firms will be considered as part of the assessment of whether the conduct in question is likely to lessen or prevent competition substantially.

34 The *Merger Enforcement Guidelines* discuss other factors the Bureau considers when it assesses market power. These include foreign competition, business failure and exit, the availability of acceptable substitutes, effective remaining competition, removal of a vigorous and effective competitor, and change and innovation.

35 The following factors are relevant to determining when a firm will rapidly divert sales in response to a price increase: the cost of substituting production in the relevant market for current production (i.e., switching costs), the extent to which the firm is committed to producing other products or services, and the profitability of switching from current production.

The Bureau generally does not challenge the conduct of a firm that possesses less than a 35 percent market share.[36] (Market shares of more than 35 percent indicate circumstances that may warrant further review.) Market share may be calculated based on the firms' entire actual output, total sales (dollars or units) or total capacity (used and unused).[37, 38] However, some of these factors may be difficult to assess in cases involving IP. Accordingly, the Bureau's assessment of market power is likely to focus on qualitative factors such as conditions of entry into the relevant market, whether IP development is resulting in a rapid pace of technological change, the views of buyers and market participants, and industry and technology experts.

5.2.2 Ease of Entry

The Bureau also examines how easily firms can enter the relevant market to determine whether new entrants have the ability to restrain any creation, enhancement or maintenance of market power that may result from conduct involving IP. When assessing effects in markets involving IP, conditions of entry are often more important than market concentration. For instance, evidence of a rapid pace of technological change and of the prospect of firms being able to "innovate around" or "leap-frog over" an apparently entrenched position is an important consideration that may, in many cases, fully address potential competition law concerns.

The Bureau also considers the extent to which the conduct itself erects or has erected barriers to entry or, alternatively, induces or has induced competitors to exit the market (see examples 3.2 and 4).[39] Entry into markets in which IP is important may be difficult because of the sunk costs associated with developing assets that comprise specialized knowledge. Additionally, IP rights can serve to increase barriers to entry independent of any conduct.[40]

5.2.3 Horizontal Effects

In evaluating the competitive effects of conduct that involves an IP right, whether it is a merger transaction, licensing arrangement or other form of contractual arrangement, the Bureau focuses on whether the conduct will result in horizontal anti-competitive effects — consequences for firms producing substitutes or firms potentially producing substitutes (see examples 3.1 and 3.2).

Even though an arrangement may be vertical, such as the acquisition of a retail shoe outlet by a shoe manufacturer or the licensing of the right to use a particular food additive to a food producer, it can still have horizontal effects in a relevant market (see example 4). If an

36 The Bureau generally does not challenge the conduct of a group of firms alleged to be jointly dominant that possess a combined market share of less than 65 percent.

37 If the actual participants in the market include firms that represent potential sources of supply for the market, then market shares, even in terms of production capacities, may be difficult to accurately estimate. Accordingly, it must be recognized that the market shares attributed to firms whose products are actually sold within the relevant market will overstate the relative market position of these firms in such circumstances.

38 The Competition Tribunal stated in *Laidlaw*, that market share calculations based on sales may overstate market power when the market is characterized by excess capacity.

39 The fact that anti-competitive conduct can create barriers to entry was recognized by the Tribunal in *Laidlaw*.

40 Of course, the purpose of providing innovators with IP rights is to foster the development of new products. In this sense, IP rights may encourage firms to participate in environments in which technology changes very rapidly.

arrangement is vertical, the Bureau considers whether it is likely to result in horizontal effects among either sellers or buyers.

5.3 Anti-competitive Effects

Conduct must create horizontal effects for the Bureau to conclude that it is anti-competitive. In this regard, the Bureau analyzes whether conduct facilitates a firm's ability to exercise market power, either unilaterally or in a coordinated manner, in areas such as pricing and output.[41]

Anti-competitive horizontal effects may arise if the conduct increases competitors' costs. For example, a transaction can prevent, or raise the cost of, competitors' access to important inputs. IP licensing arrangements that involve one firm selling the right to use IP to another are inherently vertical, but can have horizontal effects, particularly if the licensor and licensee would have been actual competitors in the absence of the licensing arrangement. In addition, conduct that reduces innovation activity could be anti-competitive if it prevents future competition in a prospective product or process market.

5.4 Efficiency Considerations

A fundamental objective of competition law is to ensure the efficient use of resources through vigorous competition. However, there may be instances in which restrictions on competition can lead to a more efficient use of resources. This may be particularly true of agreements, arrangements and transactions involving IP that are inherently vertical and combine complementary factors. Moreover, there may be instances when creating or increasing market power is justified because of the efficiencies created. Indeed, this principle is consistent with the protection afforded by IP laws, which foster dynamic efficiency and competition by facilitating the creation of valuable works or processes that result in long-term increases in product selection, quality, output and productivity. In providing incentives for investment, IP laws grant exclusivity to the protected works that may result in temporary market power. Consequently, the Bureau considers both the short-term and long-term efficiency implications of conduct when analyzing efficiencies in cases involving IP. Efficiencies are explicitly recognized in sections 90.1 and 96 of the Act in the context of agreements or arrangements among competitors[42] and mergers.[43] In addition, under the abuse of dominant position provision (sections 78 and 79), business justifications may be relevant to determining whether conduct is, on balance, anti-competitive.[44]

41 The term 'pricing' refers to all aspects of firms' actions that affect the interest of buyers. These include a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.

42 Section 90.1 also applies to agreements between parties that are potential competitors.

43 Section 95 provides a specific exemption under the merger provision to research and development joint ventures that satisfy certain criteria outlined in the provision.

44 In *Tele-Direct*, the Competition Tribunal stated that, "(w)hat the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, 'exclusionary, predatory or disciplinary'. Relevant factors include evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence. A 'business justification' must be a 'credible efficiency or pro-competitive' business justification for the act in issue. Further, the business justification must be weighed 'in light of any anti-competitive effects to establish the overriding purpose' of the challenged act..."

If the Bureau concludes that conduct is likely to substantially lessen or prevent competition in a relevant market, it will, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, make an assessment of whether the efficiency gains brought about or likely to be brought about by the conduct are greater than and offset the anti-competitive effects arising from the conduct. Part 12 of the *Merger Enforcement Guidelines* more fully describes the Bureau's approach to the analysis of efficiencies.

In assessing whether conduct involving IP is for an anti-competitive purpose under the abuse of dominant position provisions, the Bureau considers any pro-competitive effects (business justifications) generated by or associated with the conduct. For example, a licensing arrangement between an IP owner and a distributor may restrict intra-brand competition, but at the same time further inter-brand competition. A licensing arrangement between two potential competitors may result in a new product being developed that would not otherwise have been developed. In each case, the level of competition in the market may be enhanced.[45]

The Bureau also considers whether the firms could have used commercially reasonable means to achieve efficiencies that are or were less harmful to competition. If such alternatives exist, the Bureau would compare the anti-competitive effect of the conduct to such alternatives. In making this comparison, the Bureau does not attempt to uncover all of the theoretically possible alternatives for achieving the efficiencies. It considers only those means that are commercially reasonable and consistent with the firm's IP rights. The Bureau also considers the impact that using an alternative would have on the firm's ability to exercise its IP rights.

45 In *Nielsen*, the Competition Tribunal held that even if there is some justification for the alleged anti-competitive conduct, this must be weighed against any anti-competitive effects.

6. COMPETITION POLICY ADVOCACY

The Bureau may use its mandate to promote competition and the efficient allocation of resources to intervene in policy discussions and debates regarding the appropriate scope, definition, breadth and length of IP rights.[46] The Bureau may also seek leave to intervene in Federal Court and Superior Court cases when it believes it is important to bring a competition perspective to proceedings that will not be brought by the parties. In other proceedings, when the Bureau believes that IP rights could potentially be defined, strengthened or extended inappropriately, the Bureau may seek leave to intervene to make representations concerning the scope of the protection that should be accorded IP rights.

An example of Bureau advocacy occurred when it applied for and was granted leave to intervene by the Federal Court of Appeal (FCA) in *Apotex Inc. v. Eli Lilly and Co.*[47] In this case, the Bureau argued that the assignment of a patent could constitute an agreement or arrangement to lessen competition contrary to section 45 of the Act. This position meant that section 50 of the *Patent Act*, which gives patentees the right to assign their patents, does not preclude application of the Act to patent assignments. The Bureau's intervention served the purpose of protecting its ability to administer the Act in respect of patent rights. The FCA agreed with the Bureau's position and noted that, "...this interpretation is consistent with the Competition Bureau's *Intellectual Property Enforcement Guidelines*. [citation omitted]"

Part 7 of this document sets out hypothetical situations to illustrate the Bureau's enforcement approach.

46 Section 125 of the Act provides that the Commissioner may make representations to and call evidence before any federal board, commission or other tribunal in respect of competition. Section 126 of the Act provides that the Commissioner may do the same for any provincial board, commission or other tribunal as long as the board, commission or tribunal consents.

47 *Supra* note 13.

7. APPLICATION OF COMPETITION LAW TO IP: HYPOTHETICAL EXAMPLES

Example 1: Alleged Infringement of an IP Right

TAX is a software company that produces and distributes a sophisticated and complex tax management program to help households with their tax planning. As is customary in the software industry, TAX assigns a serial number to each copy of the program that it distributes. A customer may register with TAX by providing the serial number listed on the packaging along with certain personal information. TAX offers upgrades to its software from time to time to respond to changes in the tax code and technological advances, and users need to be registered to receive these upgrades at low prices. If TAX finds that a serial number has been used more than once, it knows that its software has been illegally reproduced. TAX realizes that serial numbers do not prevent duplication but do provide a mechanism for detection, thus weakening incentives to copy. TAX has been selling its product for a number of years and is now widely recognized as a leading producer of tax management software.

More than two years ago, a key member of TAX's software engineering team left the company to start her own software business, called UPSTART. Recently, UPSTART began to market its own tax management program to be used in conjunction with TAX's product. UPSTART designed its program to operate as a graphical user interface to TAX's software. Furthermore, relatively minor changes in the tax code can be incorporated into UPSTART's product. As a consequence, for users who already own TAX's product, there is no longer a need to get upgrades from TAX. Instead, they can purchase UPSTART's product for a much lower price and can continue to buy upgrades from UPSTART.

TAX has publicly alleged that UPSTART must have infringed TAX's copyright because it would have been impossible for UPSTART to have created its program without having copied TAX's source code. Despite its claims, TAX has not filed a suit against UPSTART. Instead, TAX has made a formal complaint to the Bureau that UPSTART's conduct is predatory since it has undermined TAX's serial number policy by making it less valuable for users to become registered with TAX. TAX claims that since UPSTART's product came on the market, there has been widespread piracy of TAX's program and, consequently, the market for its product has evaporated.

Analysis

The Bureau would likely conclude that the underlying issue in this case is the possibility that UPSTART infringed TAX's copyright. Therefore, the Bureau would inform TAX that it does not view the matter as raising any issues under the Act and would suggest that TAX seek legal advice on other remedies, if any, that might be available.

Example 2: Price-fixing

Three firms, each of which have developed and own a patented technique, offer competing cosmetic surgical procedures to treat a particular condition. All three procedures involve several visits to a private clinic over six months, produce no side effects and have approximately equal success rates. The only existing alternative to the three procedures is an expensive medication that causes undesirable side effects in some patients. Each of the three firms has developed a business plan to market its procedure and industry analysts widely agree that competition among the procedures will be the most important factor limiting shareholder returns. Rather than proceed with their business plans in anticipated competition with one another, the three firms agree on a minimum price at which each will perform the procedure as well as a minimum fee to license each procedure to third parties.

Analysis

The Bureau would likely examine this agreement under the conspiracy provision in section 45 of the Act given that it involves fixing prices for the supply of a product. The Bureau would likely take the view that the three participants in the agreement are competitors based on the views of industry analysts and given the fact that each of them supplies treatments that are functionally interchangeable and comparable to one another. For example, the duration, the success rate and the risk of side effects are approximately the same for each procedure. Moreover, section 45 applies to agreements between parties that are potential competitors. Accordingly, even if the parties had not been in competition when the agreement was concluded or during the term of the agreement, the parties would still be deemed to be competitors for purposes of section 45.

Given that the price-fixing agreement is not ancillary to a broader or separate agreement or arrangement, which itself does not offend section 45, the Bureau would refer the matter to the Public Prosecution Service of Canada (the "PPSC") for criminal prosecution.

Example 3.1: Exclusive Licensing

SHIFT recently developed a new gear system for mountain bikes. Two other firms manufacture systems that compete with SHIFT's. All three of these firms manufacture several varieties of bicycle gear systems and are engaged in research and development to improve gear system technology. SHIFT grants licences for the use of its patented gear system technology to manufacturers of mountain bikes as it does not have the ability to manufacture mountain bikes itself. Three large firms account for 80 percent of the sales of mountain bikes with the balance being supplied by six smaller firms. SHIFT has just granted ADVENTURE, the largest mountain bike manufacturer (accounting for 30 percent of sales), an exclusive licence to use its new patented gear system technology on its mountain bikes. ADVENTURE does not own or have the ability to develop gear system technology. Although SHIFT's new gear system offers a number of features not available on other current products, the demand for mountain bikes with these new features is uncertain. In addition, ADVENTURE expects to incur significant expense developing and promoting mountain bikes that use SHIFT's new gear system technology. SHIFT has refused requests from other mountain bike manufacturers for a licence for this technology. As a result of ongoing research and development, alternative gear system technologies are likely to become available in the future.

Analysis

The Bureau is likely to examine the conduct of both firms under the abuse of dominant position provision (section 79) of the Act.

SHIFT and ADVENTURE relate as supplier and customer, and are neither actual nor potential competitors in the markets for gear systems or mountain bikes. Since the firms do not compete, the exclusive licence would likely not lessen competition between the two firms. The Bureau would nonetheless examine the markets for gear systems and mountain bikes to determine if the exclusive licence lessened or prevented competition substantially in either or both of those markets.

Even though SHIFT's technology is not available to ADVENTURE's two principal rivals and the markets for gear systems and mountain bikes are concentrated, SHIFT's rivals in the gear system market may still sell to ADVENTURE. Furthermore, the other mountain bike manufacturers have access to other gear systems from SHIFT and to gear systems from other suppliers. The exclusive licence may have been granted in consideration for ADVENTURE's agreement to incur significant expense in the development and promotion of mountain bikes that use SHIFT's technology.

In the course of its assessment, the Bureau would consider the competitiveness of the mountain bike market before and after the exclusive licence. Since SHIFT is not a mountain bike manufacturer and has no obligation to license its gear system to a mountain bike manufacturer, a licence agreement in this case would enhance competition. The technology licence mandated the development and promotion of mountain bikes using the technology, thereby enhancing competition without in any way limiting the ability of other mountain bike manufacturers to access or use competing technologies. Consequently, the Bureau would conclude, given the facts of this case, that the exclusive licence arrangement did not raise any competition issues.

Example 3.2: Foreclosure by Purchaser

Consider a variation on the situation described in example 3.1, in which ADVENTURE's business has grown to represent approximately 70 percent of mountain bike sales. ADVENTURE has taken advantage of its increasing sales share to independently negotiate long-term exclusive licences and supply arrangements with the three competing suppliers of mountain bike gear systems. The inability of the competing manufacturers to obtain suitable gear system technology has put a number of them out of business and has substantially cut into the sales of the remaining firms. ADVENTURE has raised the prices of its mountain bikes by 25 percent. Although alternative gear system technologies are under development, it appears unlikely that a viable technology will be tested and in production in less than 36 months.

Analysis

The Bureau is likely to examine ADVENTURE's conduct under the abuse of dominant position provision (section 79) of the Act.

The Bureau would initially determine whether mountain bikes comprised a relevant market and assess whether ADVENTURE substantially or completely controlled the supply of product within that relevant market. The Bureau would likely view the apparent lack of good substitutes and ADVENTURE's high sales share and ability to successfully impose a 25 percent price increase as evidence that ADVENTURE substantially controlled the mountain bike business and that mountain bikes comprise a relevant market.

The Bureau would then consider whether ADVENTURE's exclusive licence agreements, through which it precluded its competitors from obtaining an adequate supply of gear systems, constituted anti-competitive conduct. While an exclusive licence arrangement may enhance competition, as was apparent in Example 3.1, the use of an exclusive licence arrangement to effectively control the supply of a competitively essential input may be anti-competitive. In the absence of a compelling business justification, the Bureau would likely view the systematic manner in which ADVENTURE prevented its competitors from obtaining access to this vital input (gear systems) through the execution of long-term exclusive licences with each supplier as a practice of anti-competitive acts.

The Bureau would then assess the impact of the exclusive licences on competition. It would likely conclude that the adverse impact on the ability of other mountain bike manufacturers to compete that resulted from ADVENTURE preventing them from gaining access to proven gear system technology and the manner in which ADVENTURE successfully imposed substantial price increases constituted evidence that ADVENTURE substantially lessened or prevented competition. Accordingly, the Bureau would likely seek to have the exclusive licences voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms of the licences.

Example 4: Exclusive Contracts

SPICE, by virtue of its international patents, is the sole supplier of Megasalt, a unique food additive that has effectively replaced salt in certain prepared foods in most countries. SPICE's Canadian patent recently expired; however, SPICE still has valid patent protection throughout much of the rest of the world. Shortly before its Canadian patent expired, SPICE signed five-year contracts, which included exclusive supply rights, with its two principal Canadian buyers. These contracts prevent the two buyers, which use Megasalt in specially prepared foods for hospitals and other health care institutions, from combining Megasalt with any other salt substitute on the same product line. SPICE does not have long-term exclusive supply contracts with other buyers of Megasalt in Canada or elsewhere. Recently, NUsalt, a firm that has developed a potential alternative to Megasalt, filed a complaint with the Bureau alleging that SPICE's contracts are preventing NUsalt from manufacturing and marketing its product in Canada. NUsalt claims that SPICE's contracts have "locked up" a substantial part of the market, thereby precluding NUsalt from profitably entering Canada.

Analysis

The NUsalt allegations suggest that SPICE, as a result of its contracts with its two largest buyers, is currently exploiting market power within the market for salt substitutes. The Bureau would likely investigate these allegations under the abuse of dominance provision (section 79) of the Act.[48]

The Bureau would initially determine whether salt substitutes comprise a relevant market. This would entail determining whether salt substitutes are subject to effective competition from other substances (for example, salt) or whether salt substitutes have specific properties

48 The Bureau may also choose to review the conduct under the exclusive dealing, tied selling and market restriction (section 77) of the Act.

and functional characteristics that make salt ineffective as a substitute. The Bureau would then seek to determine whether SPICE substantially controlled the market in which its salt substitute competed, and then assess SPICE's share of sales and barriers to entry to this market. Among others, the Bureau would consider all of the factors currently preventing alternative suppliers from offering their products to customers in Canada, including the effect of the exclusive supply contracts on the ability of alternative suppliers to obtain sales from a critical mass of customers. Assuming that the Bureau had determined that salt substitutes constitute a relevant market, it would likely conclude that SPICE substantially controlled that market.

The Bureau would then consider whether the exclusive supply contracts, through which SPICE had precluded its principal customers from obtaining salt substitutes from alternative suppliers, constituted a practice of anti-competitive acts. To make this assessment, the Bureau would examine the circumstances surrounding their negotiation and settlement, and the extent to which they were exclusionary and intended to erect barriers to effective competition in the relevant market. As part of this analysis, the Bureau would consider whether there are compelling business justifications for SPICE's exclusive contracts. For example, SPICE may have signed these contracts to ensure that it would have sufficient sales to justify investing in enough productive capacity to realize economies of scale. Also, the restriction preventing buyers from combining Megasalt with other salt substitutes could have a safety or quality rationale. If the Bureau found that the contracts in this case were intended to hold back a sufficient amount of market demand from potential entrants so that the remaining demand would provide an insufficient volume of sales to cover the cost of effective entry and future operating costs in Canada, then the Bureau would likely view the execution of the long-term exclusive licences as anti-competitive.

The Bureau would then assess the impact of the exclusive contracts on competition. In this regard, the adverse impact on the ability of other suppliers of salt substitutes to compete in Canada would be assessed to determine whether the contracts had substantially lessened or prevented competition. If the relevant market is narrowly defined as salt substitutes and SPICE's contracts are preventing the entry of potential salt substitute producers, the Bureau may conclude that the exclusive contracts have substantially lessened or prevented competition. By deterring firms from attempting to supply alternative salt substitutes in Canada, the exclusive contracts may cause other buyers in Canada not under contract with SPICE to pay higher prices than they would if SPICE faced effective competition.

The magnitude of the decrease in competition would depend on the extent to which the contracts prevent entry and the expected degree of substitution that would exist between Megasalt and alternative salt substitutes, such as NUsalt, in the absence of the exclusive terms in the contracts. In general, if the contracts are determined to be the principal barrier to new entry and the new entrants' products are likely to be close substitutes for Megasalt, then the Bureau is likely to conclude that the contracts have substantially lessened or prevented competition and would likely seek to have SPICE's exclusive contracts voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms in the contracts.

However, if the Bureau determines that, notwithstanding the contracts, there is still sufficient demand in Canada or the rest of the world to support effective competitive entry in Canada, then SPICE's exclusive contracts would not be considered to have substantially lessened or prevented competition. In this case the Bureau would close its inquiry without seeking remedial measures. Throughout its investigation the Bureau would work collaboratively with competition agencies in other jurisdictions as necessary to determine facts and their analytical approach relevant to the resolution of the matter.

Example 5: Output Royalties

MEMEX currently holds a patent for the design of a memory component it manufactures for use in personal home computers. MEMEX does not manufacture personal computers, but instead sells its memory components and licenses the use of its technology to computer manufacturers. Historically, MEMEX's licensing contracts required that the licensee pay a fee for each MEMEX memory component it installed in a computer. Because of its patent, MEMEX currently faces no competition from other memory component producers wishing to use a similar design; however, MEMEX's patent is to expire within a year and there is speculation that once it expires, other firms will begin manufacturing and selling memory components based on MEMEX's design. MEMEX has recently introduced a new licence agreement. Under the new agreement, MEMEX grants non-exclusive licences for the use of its technology and memory components to all personal computer manufacturers for a royalty on every computer shipped, regardless if any MEMEX memory components are installed. MEMEX claims that the previous licensing policy had the unintentional effect of encouraging computer manufacturers to install too few MEMEX memory components, which detracted from computer performance. MEMEX claims that the new licensing practice provides manufacturers an incentive to install a more appropriate quantity of memory in computers.

Analysis

The Bureau would likely investigate this case under the abuse of dominance provision (section 79) of the Act.

The Bureau would first determine whether memory components that employ MEMEX's technology comprise a relevant market and then assess whether MEMEX substantially or completely controls the supply of product within that market. In view of the rapid rate of technological development and intense competition in the production of integrated circuit devices, the Bureau may conclude that the MEMEX technology competes with other memory technologies, that barriers to entry are sufficiently low that the scope of the relevant market extends beyond the MEMEX technology, or that MEMEX is unable to substantially control the supply of products within the specified relevant market. If the Bureau determines that MEMEX faces substantial, effective competition from other suppliers of memory components then it would likely conclude that further investigation is not warranted. If, on the other hand, the Bureau concluded that the memory components supplied by the alternative suppliers are not considered good substitutes and would not allow computer manufacturers to build computers that could compete with those using MEMEX's memory component, the Bureau might determine that further inquiry was warranted.

Assuming that the Bureau determined that the MEMEX technology defines the relevant market and MEMEX substantially controls that market, the Bureau would then consider whether MEMEX's use of its new licensing arrangements constituted a practice of anti-competitive acts. This determination would depend on the specific terms of the contracts and the likely effect they would have on competition in the relevant market. While MEMEX's licensing contracts do not expressly prohibit computer manufacturers from using memory components based on technology other than MEMEX's, they effectively impose a tax on computer manufacturers who use memory components from another supplier.[49] The imposition by a dominant supplier of long-term licensing contracts containing such provisions could preclude competition and maintain the supplier's market power. Accordingly, the Bureau would determine whether these contracts are in widespread use and their duration, and consider MEMEX's business justification for charging the per computer royalty. It would also consider whether the per computer royalty is sufficient to deter computer manufacturers from buying memory components from alternative suppliers.

If the Bureau determined the relevant market to be memory components based on the MEMEX technology, MEMEX had market power, and the licensing contracts were a practice of anti-competitive acts, the Bureau would then assess the likely impact of MEMEX's new licensing practice on competition and the price of memory components. If the Bureau determines that this practice would permit MEMEX to exercise a significantly greater measure of market power than would otherwise have been the case, the Bureau would likely seek to have the new licensing practice voluntarily terminated. Failing that, it would likely bring an application before the Tribunal seeking to terminate this practice.

Example 6: A Patent Pooling Arrangement

Five firms hold patents on technologies required by producers to develop widgets that conform to an international standard. To facilitate the licensing of their patents, the five firms hire an independent expert to review the patents of each firm and determine those that are essential for implementing the standard based on the underlying technical characteristics of the technologies. Upon completion of the review, the five firms create a patent pool and each of them licenses its essential patents on a non-exclusive basis to the pool. The pool is organized as a separate corporate entity whose role is to grant a non-exclusive sub-licence to all the patents in the pool on a non-discriminatory basis to any party requesting one. The patent pool administrator collects royalties from licensees and re-distributes the revenue to pool members according to a formula that is partly based on the number of patents that each member has contributed to the pool. Each of the five members of the pool retains its right to license its own essential patents outside the pool to third parties to make widgets that conform to the standard or widgets that may compete with those that conform to the standard.

The patent pool agreement specifies that if a final court judgment declares a patent in the pool to be invalid, that patent will immediately be excluded from the pool. In addition, the agreement requires that an independent expert re-assesses the patents in the pool every four years to ensure that they are essential to developing widgets conforming to the international

49 A manufacturer who wishes to use alternative memory products must pay twice, once for the alternative component and a second time for the per computer royalty payable to MEMEX.

standard. Licensees also have the ability to hire an independent expert to review any patent that they feel is not essential for developing widgets conforming to the standard. If, in either case, the expert concludes that one or more patents are not essential to developing widgets that conform to the standard, those patents are excluded from the pool. The decisions of experts are final and are binding upon the pool members.

The patent pool agreement also includes provisions allowing each pool member to audit the books of the pool administrator, and provisions allowing the pool administrator to audit the books of each licensee to verify royalty amounts. In each case, provisions are put in place to guard against confidential business information being divulged to either pool members or licensees.

Analysis

The Bureau recognizes that patent pools can often serve a pro-competitive purpose by, among other things, integrating complementary technologies, reducing transaction costs and clearing blocking patents. Where patent pools may represent an agreement between competitors or potential competitors, the Bureau is likely to review them under section 90.1 of the Act rather than section 45 unless the Bureau has evidence that the patent pool was simply a sham used as a means to facilitate an agreement prohibited under subsection 45(1).

Despite their potential benefits, patent pools may also raise competition concerns. If the patented technologies inside the pool are substitutes then the pool can be a mechanism for the pool members to restrict competition between themselves and increase royalty rates above levels that would have existed in a competitive market. Alternatively, if a patented technology inside the pool is a substitute for a technology outside the pool, the pool could be used as a bundling mechanism to effectively foreclose the outside technology. Other potential competition concerns are that a pool's members may discriminate among licensees or use the pool to share confidential business information so as to reduce competition in a downstream market.

To evaluate whether a patent pool would likely cause a competition issue, the Bureau would first seek to determine whether each patent placed inside the pool is essential for developing the product or service that is the basis behind the formation of the pool. In the case at hand, if each patent inside the pool is required to implement the widget standard, then the members of the pool cannot be viewed as horizontal competitors; a firm looking to buy technologies to develop widgets conforming to the standard would need permission to use each patented technology in the pool. A pool comprised of only essential patents would not have the potential to harm competition among suppliers of technology either inside or outside the pool.

In this example, the Bureau would look positively on the fact that pool members engaged an independent expert to determine which of their patents are essential to the widget standard. However, the Bureau would evaluate whether the expert is qualified to provide such an opinion, and whether he/she was provided with incentive to work independently, without influence from pool members. The Bureau would take additional assurance from the fact that an expert would continue to periodically review the patents to ensure they are essential, as well as from the ability of licensees to challenge patents by requiring a separate independent review. The fact that any patents found to be invalid would also be removed from the pool would also contribute to the Bureau's assurance that the pool has taken adequate measures to only include essential patents.

Given that the pool administrator issues licences on a non-discriminatory basis to all interested parties, the Bureau would likely conclude that the technologies inside the pool were not being used to distort competition in a downstream widget market. The fact that pool members remain free to license their patents independently to other widget producers provides more evidence that competition in the downstream widget market would not be distorted by the pool.

As a final step, the Bureau would review the pool agreement's provisions relating to the sharing of confidential information and ensure that such provisions provide adequate safeguards against the pool being used to facilitate coordination among pool members or licensees.

Absent any evidence that the patent pool is used as a sham to facilitate an agreement to restrict competition, based on the analysis above, the Bureau would likely conclude that the patent pool does not raise any issues under the Act.

Example 7: Agreement to Foreclose Complementary Products

There are five major record labels. The largest two, ROCKCO and POPCO, which together account for more than 65 percent of total sales and 70 percent of all major label artists, have formed a joint venture (DISCO) to develop, produce and market a new generation of digital playback devices. The DISCO technology provides a level of sound quality and other features far superior to those offered by existing technologies. DATCO has also developed a digital sound technology with similar high-fidelity qualities, but which is also portable and allows users to record. The costs of the two technologies are similar, but the technologies themselves are incompatible: music digitally encoded in DISCO format must be re-encoded for playback on DATCO's player. Under the terms of their joint venture agreement, ROCKCO and POPCO agree to not release, or license any other person to release, their copyrighted recordings in a digital format other than the DISCO format. Consistent with that agreement, ROCKCO and POPCO have declined DATCO's request for a licence to convert and release ROCKCO and POPCO recordings in the DATCO format. The other three record labels predict — correctly — that consumers will be reluctant to purchase the DATCO technology if they are unable to obtain music from either ROCKCO or POPCO in that format. The other record companies are willing to release their recordings in the DATCO format, but find that there is no market for it and are compelled by popular demand to license the DISCO technology to release their recordings in the DISCO format. As a result of the foregoing, DATCO's digital sound technology, which reviewers have generally viewed as superior to the DISCO technology, is being withdrawn and DISCO is substantially increasing both the price of the playback equipment that it sells and the royalties charged to the other record companies for the use of the DISCO technology to release recordings in the DISCO format. The Bureau has concluded that the joint venture would not meet the definition of a merger as specified in section 91 of the Act.

Analysis

The Bureau would examine this case under the agreements and arrangements provision (section 90.1) and/or the abuse of dominance provision (section 79) of the Act.

The matter would not be considered under section 45 because it is not an agreement between competitors to fix prices, allocate markets or customers nor is it an agreement to restrict output. Even if the refusal to release recordings in another format or grant a licence are considered output restrictions, the ancillary restraints defence would likely apply because they are ancillary and directly related to the broader joint venture agreement to develop the DISCO technology. As well, these restraints appear reasonably necessary to attract a sufficient number of customers to the DISCO technology to make the joint venture viable.

As a first step, the Bureau would consider whether the alleged anti-competitive conduct, namely the refusal of ROCKCO and POPCO to license the reproduction of their copyrighted recordings in the DATCO format, was a mere exercise of their IP rights or involved something more. In this case, the Bureau would likely determine that the terms of the DISCO joint venture agreement and the refusal to license constituted joint conduct and hence would be considered conduct that was beyond the mere exercise of an IP right.

The Bureau may elect to review the agreement under section 90.1 of the Act if ROCKCO and POPCO could be considered competitors in a relevant market. In this example, the important consideration in determining if the firms are competitors is determining if ROCKCO and POPCO would have likely developed the DISCO, or similar technology, independently in the absence of the agreement. If the Bureau were to determine that this would be the case, then ROCKCO and POPCO could have been expected to compete in the market for digital playback devices in the absence of their joint venture and the agreement would be reviewed under section 90.1.

If, on the other hand, ROCKCO and POPCO were determined not to be competitors, the Bureau would elect to review the joint venture agreement under the abuse of dominance provision, on the basis that the joint venture agreement established and provided for the joint abuse of a dominant position. The review would be carried out in accordance with the framework and criteria for abuse of dominance outlined in the previous examples. Whichever provision of the Act would apply, the Bureau would have to establish the affected relevant market or markets, consider barriers to entry and evidence of market power or dominance, demonstrate a substantial lessening or prevention of competition and assess any business justifications.

If the Bureau were to proceed under sections 79 or 90.1, it would have to establish that the DISCO joint venture has substantial market power in either the market for digital sound technology or digital playback equipment. In addition, it would have to find that the DISCO joint venture had engaged in anti-competitive conduct that substantially lessens or prevents competition. The anti-competitive acts in this case would relate to the acquisition and foreclosure by the DISCO joint venture of access by its competitors to the music in the ROCKCO and POPCO music libraries. Foreclosure of access to these materials is apparently preventing alternative sound recording technologies from acquiring the critical mass of desirable music content required for them to achieve viability. It appears that this conduct may be substantially preventing or lessening competition and leading to the monopolization or the creation of dominance in the markets for digital sound technology and/or digital playback equipment sound reproduction. The foreclosure of other technologies creates market power for DISCO in these markets and is inefficient, as it reduces consumer choice, leads to increases in the royalties paid by the record companies to use this type of technology and increases the price of playback devices. The Bureau would likely seek an order requiring that ROCKCO and POPCO divest themselves of DISCO or that ROCKCO and POPCO license their works for release in alternative formats.

Example 8: Refusal to License a Standard

ABACUS and two other firms were the first to market a spreadsheet for personal computers. Electronic spreadsheet software was one of the applications that established personal computers as an essential tool for business. In the first five years, ABACUS out-sold its nearest competitor nearly two to one and its installed base (cumulative sales) grew to 50 percent. In the next two years, its annual market share grew to more than 75 percent and one of the other original firms left the market. At about the same time and after three years of programming, CALCULATOR introduced spreadsheet software that had a number of innovative features not found in ABACUS. However, CALCULATOR soon ran into financial difficulties despite the innovative features and a lower price. CALCULATOR approached ABACUS and requested a licence to copy the words and layout of its menu command hierarchy (for the purpose of this example, assume that permission was required since ABACUS had valid IP rights in these works). With permission, CALCULATOR could have relaunched its product with minor changes, which would have given CALCULATOR the ability to read ABACUS files and ensured compatibility between the two products. ABACUS refused to grant a licence and publicly announced that it would enforce its IP rights against CALCULATOR if it copied the ABACUS hierarchy. In light of this, several other prominent software makers announced that they were discontinuing their spreadsheet development programs.

An important characteristic of spreadsheets that determines their benefits to a purchaser is network effects. Network effects exist if the value of a product increases with the number of others who purchase compatible spreadsheets. Network effects for spreadsheets arise since the greater the size of the network (the installed base of compatible spreadsheets), the greater the number of individuals with whom files can be shared, the greater the variety of complementary products (utilities, software enhancements and macros), the more prevalent consulting and training services, and the greater the number of compatible data files.

Analysis

Given the circumstances surrounding this case, ABACUS's refusal to license its IP would constitute a "mere exercise" of its IP rights and would, therefore, be subject to review only under section 32 of the Act.

To establish whether ABACUS's refusal created an undue restraint of trade or unduly lessened competition, the Bureau would determine whether the refusal adversely affected competition in a relevant market that was different or significantly larger than the subject matter of ABACUS's IP rights or the products or services that result directly from the exercise of such IP rights. In this case, competitive harm is alleged in the market for ABACUS-compatible spreadsheets.

Whether the relevant market is determined to be ABACUS-compatible spreadsheets depends on the extent and importance of network effects and switching costs. If network effects are important, consumers that have never purchased a spreadsheet may still purchase the more expensive ABACUS product. Consumers who are already on the ABACUS network may be locked in by the switching costs of joining a new spreadsheet network (for example, their sunk investments in training, files and complementary products) and the loss in network benefits. If network effects and switching costs are material, then existing consumers are likely to stay and new consumers to choose ABACUS even if it is priced above competitive levels.

If the relevant market is determined to be ABACUS-compatible spreadsheets, then ABACUS would be the only producer and thus have 100 percent control of this market. If, in addition, entry barriers were found to be high, which is likely in an industry experiencing network effects, the Bureau would conclude that ABACUS is dominant. In determining whether the installed base of ABACUS contributes materially to entry barriers, the Bureau would consider the pace of innovation and the potential for a new technology to "leap-frog over" ABACUS despite its advantages (that is, its installed base and the switching costs). The Bureau would also endeavour to determine whether there are other efficient avenues for creating compatibility that would not infringe on the IP rights of ABACUS.

If the relevant market is determined to be ABACUS-compatible spreadsheets and the Bureau concluded that the relevant market was significantly larger than the subject matter of ABACUS's IP, and the products that result directly from the exercise of such IP rights, then the Bureau would likely conclude that ABACUS is dominant in the relevant market and that the IP is an essential input for firms participating in the relevant market. On this basis, ABACUS's refusal satisfies the first step of the Bureau's two-step analysis to determine whether it would seek to have an application brought under section 32.

In the second step, the Bureau determines whether ABACUS's refusal to license its IP would adversely alter firms' incentives to invest in research and development in the economy. In this case, the facts suggest that it is possible that ABACUS's ability to impose incompatibility may have a chilling effect on the development of more advanced spreadsheets. In addition, the choice by ABACUS of the words and layout of its menu hierarchy was likely arbitrary and likely involved little innovative effort and had little value relative to other substitutes. In the absence of an installed base and switching costs, ABACUS's terms and menu hierarchy would be no better or worse than CALCULATOR's (or any other). It is only after consumers make sunk investments and adoption creates an installed base that ABACUS spreadsheets become the market or standard and that its choice of words and menu interface required for compatibility with the ABACUS network creates unintended and unwarranted market power, a situation that can be corrected through enforcement action under section 32. On this basis, the Bureau would likely conclude that a special remedy invoked under section 32 would restore incentives for other firms to engage in research and the development of competing compatible spreadsheet programs.

If the facts of the case suggest potential enforcement under section 32, the Bureau would seek a special remedy that would allow other spreadsheet firms to gain access to the words and layout of ABACUS's menu hierarchy.

Example 9: Product Switching

BRAND sells innovative pharmaceutical drugs. One of its top sellers in terms of revenue, Product A, has been sold in Canada for many years, and continues to be sold, but will lose patent protection in six months. Two years ago BRAND introduced another product, Product B, which has a different chemical composition but alleviates the same affliction as that treated by Product A. The number of prescriptions for Product B remains low. Product B will remain under patent protection for the next 10 years.

GENERIC is set to launch a generic version of Product A ("Generic A") as soon as Product A's patent protection expires. Before its patent expires, BRAND withdraws Product A from the market by ceasing to manufacture it and by buying back inventories from wholesalers and pharmacies. BRAND notifies health care professionals that Product A is no longer available. In response to this development, physicians prescribe Product B to patients in place of Product A and a large number of prescriptions for Product A are replaced by prescriptions for Product B. Because Product A is the reference product for (or bioequivalent to) Generic A, pharmacies are prohibited from automatically substituting Generic A for the prescribed Product B. As a result, the success of GENERIC's entry becomes uncertain and drug payers (both patients and drug plan providers) must continue to buy Product B at high prices rather than have the option of buying Generic A at low prices.

Analysis

Because BRAND's conduct could be for the purpose of excluding entry by GENERIC and Generic A, the Bureau would not view the withdrawal of Product A by BRAND as a mere exercise of its patent right and thereby conduct exempt under section 79(5). Accordingly, the Bureau is likely to examine the conduct of BRAND under the abuse of dominant position provision (section 79) of the Act.

The Bureau would first seek to define a relevant market around Product A. Given that Generic A is bioequivalent to Product A and that empirical evidence from past generic entry events show that a generic drug largely supplants the brand when it becomes available; the Bureau would likely conclude that both drugs are in the same relevant market. The Bureau would also consider whether other drugs are sufficiently close substitutes to Product A to be considered in the relevant market. Important evidence as to what drugs may be in the relevant market would come from the evidence of physician/patient switching behaviour when BRAND withdrew Product A from the marketplace.

If the Bureau determined that BRAND was dominant in a relevant market that included Generic A, it would then proceed to determine whether BRAND's conduct, including that of withdrawing Product A from the marketplace, constituted a practice of anti-competitive acts. In making this determination, the Bureau would examine the likely effect of BRAND's conduct on the ability of GENERIC to enter and compete in the relevant market. For example, the Bureau would examine the possibility of GENERIC marketing Generic A directly to physicians. Ultimately, the Bureau would seek to determine whether BRAND's conduct would either foreclose the entry of GENERIC or delay that entry for a significant period.

The Bureau would also examine whether the purpose of BRAND's conduct was to delay or foreclose the supply of Generic A by GENERIC, or whether there was some other compelling business justification. In assessing any business justification, the Bureau would examine the evidence of physician prescribing behaviour for Product B when Product A was available as an alternative (i.e., before Product A's withdrawal). The Bureau would also consult with persons with relevant expert medical knowledge concerning the products at issue. If the Bureau determined that physicians viewed Product B as providing no substantive medical benefit over Product A, it would doubt any argument advanced that Product B is superior to Product A and the purpose of the withdrawal of Product A was to transition patients to a higher quality treatment.

If the Bureau concluded that BRAND was dominant in a relevant market and that it had engaged in a practice of anti-competitive acts, it would also assess whether BRAND's conduct had caused a substantial lessening or prevention of competition. As part of this analysis, the Bureau would likely examine the difference between the price of Product B and the price at which Generic A would have been expected to be sold if it had not been delayed or foreclosed by BRAND's conduct. As other evidence of harm resulting from BRAND's conduct, the Bureau would likely cite the negative effect of Product A's withdrawal on limiting physician/patient choice for prescription drugs.

If the Bureau concluded that the constituent elements of 79(1) were met, it would likely seek to negotiate a remedy with BRAND and failing that, bring an application before the Tribunal.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

www.competitionbureau.gc.ca

Address

Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone

Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844

Facsimile

819-997-0324

TAB 10

Most Negative Treatment: Distinguished
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Apotex Inc., Appellant (Plaintiff by Counterclaim) and Eli Lilly and Company and Eli Lilly Canada Inc., Respondents (Defendants by Counterclaim)

Shionogi & Co. Ltd., Respondent (Defendant by Counterclaim) and Commissioner of Competition, Intervener

Desjardins J.A., Evans J.A., Sharlow J.A.

Heard: September 27, 2005
Judgment: November 2, 2005
Docket: A-579-04

Proceedings: reversing *Eli Lilly & Co. v. Apotex Inc.* (2004), [2005] 2 F.C.R. 225, 262 F.T.R. 154, 35 C.P.R. (4th) 155, 2004 CF 1445, 2004 CarswellNat 5255, 2004 FC 1445, 2004 CarswellNat 3733 (F.C.)

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A. David Morrow, Colin B. Ingram, for Respondent, Shionogi
Randall Hofley, for Intervener

Subject: Criminal; Intellectual Property; Corporate and Commercial; Civil Practice and Procedure; Torts

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s. 36(4) — considered

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s. 45 — considered

s. 45(1) — referred to

s. 45(1)(a) — considered

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s. 50(1) — referred to

APPEAL by defendant from judgment reported at *Eli Lilly & Co. v. Apotex Inc.* (2004), [2005] 2 F.C.R. 225, 262 F.T.R. 154, 35 C.P.R. (4th) 155, 2004 CF 1445, 2004 CarswellNat 5255, 2004 FC 1445, 2004 CarswellNat 3733 (F.C.), granting motions by plaintiff and defendant by counterclaim for summary judgment in action for patent infringement, and striking paragraphs from defendant's defence and counterclaim.

***Evans J.A.*:**

A. Introduction

1 This is an appeal by Apotex Inc. from a decision of the Federal Court granting motions brought by the respondents, Eli Lilly and Company, Elli Lilly Canada Inc. ("Lilly") and Shionogi & Co. Ltd.. The Judge granted motions for summary judgment by Lilly and Shionogi, and struck paragraphs from Apotex' defence and counterclaim to an action by Lilly for patent infringement. The Judge's decision is reported as *Eli Lilly & Co. v. Apotex Inc.* (2004), [2005] 2 F.C.R. 225, 2004 FC 1445 (F.C.) .

2 The appeal raises an important question of law arising at the intersection of patent law and competition law. It is this. As a matter of law, can an assignment of a patent constitute an agreement or arrangement to lessen competition *unduly*, contrary to section 45 of the *Competition Act*, if it results in an increase to the assignee's market power greater than that inherent in the patents assigned?

3 Lilly and Shionogi say that it cannot. They rely on section 50 of the *Patent Act*, which authorizes a patentee to assign a patent. They argue that, by their nature, patents create monopolies. Since the right to assign is one of the rights conferred on patentees by Parliament, any lessening of competition following the exercise of the right to assign cannot be undue. Lilly and Shionogi say that there is binding authority to this effect, *Kimberly-Clark of Canada Ltd. v. Procter & Gamble Inc.* (1991), 36 C.P.R. (3d) 493 (Fed. C.A.). However, they concede that it is different if, in addition to the assignment, the assignor and assignee enter into some other competition-restricting arrangement.

4 Apotex, on the other hand, submits that section 50 of the *Patent Act* and section 45 of the *Competition Act* can be read harmoniously: section 50 enables patents to be assigned, but does not purport to exempt assignments from the need to comply with other laws, including section 45 of the *Competition Act*. Hence, it is argued, when the effect of an assignment is to increase the assignee's market power by more than that inherent in the rights assigned, section 50 does not preclude the possibility, as a matter of law, that the assignment *unduly* lessened competition.

5 Apotex says that *Molnlycke* is distinguishable on the ground that the Court in that case was not considering a situation in which the assignment created in the assignee market power greater than that inherent in the patents assigned. In contrast, such power was conferred in the present case because of the assignee's existing ownership of related patents.

6 The Commissioner of Competition was given leave to intervene to assist the Court on whether section 50 of the *Patent Act* precludes the application of section 45 of the *Competition Act* from the assignment of patents, and whether the Judge erred in concluding that his view on this issue was consistent with the *Intellectual Property Enforcement Guidelines*, 2000 (Hull: Industry Canada) issued by the Commissioner.

B. Background and Judicial History

7 The essential background to this appeal has already been described by Rothstein J.A. in the previous round of the present litigation, reported as *Apotex Inc. v. Eli Lilly & Co.*, 2004 FCA 232 (F.C.A.) :

> [2] On June 18, 1997, Eli Lilly and Company and Eli Lilly Canada Inc. ("Lilly") commenced an action against Apotex Inc. ("Apotex") for infringement of seven patents which relate to processes that can be used in the making of the antibiotic cefaclor, to intermediates that can be formed using those processes, and to a compound used in the processes. On January 11, 2001, Lilly amended its statement of claim to add an eighth patent which it claimed had been infringed.
>
> [3] By amendments to its Statement of Defence and by Counterclaim made in 2001, Apotex alleged that certain conduct of Lilly violated section 45 of the *Competition Act*, R.S.C. 1985, c. C-34, thereby entitling Apotex to damages under section 36 of that Act. In 2002, Apotex further amended its Statement of Defence and Counterclaim to add Shionogi & Co. Ltd. ("Shionogi") as a defendant by counterclaim in the proceedings as part of its claim for damages under the *Competition Act*.
>
> [4] Of the eight patents Lilly claimed were infringed by Apotex, four had been assigned to Lilly by Shionogi in 1995. Apotex says that these assignments constituted an agreement that resulted in an undue lessening of competition contrary to section 45 of the *Competition Act*.
>
> [5] Subsection 45(1) of the *Competition Act* makes it unlawful for parties to enter into agreements which lessen competition unduly:

8 I would only add that the patent for cefaclor expired in 1994 and the last Shionogi process patent expired in 2000, shortly before the last of Lilly's process patents. Finally, contemporaneously with the assignment, Lilly granted a non-exclusive licence to Shionogi with respect to the patents which Shionogi assigned to Lilly.

9 In the first round of these proceedings, the Judge granted three motions. In the first, Lilly was awarded summary judgment striking the paragraphs of Apotex' defence and counterclaim that rested on section 45, and dismissing the counterclaim. In the

second, Shionogi was awarded summary judgment on the counterclaim and, in the third, the Judge allowed Shionogi's appeal from a decision of a Prothonotary refusing to strike Apotex' counterclaim against it.

10 The Judge held that, since any lessening of competition arose from Shionogi's assignment of the patents to Lilly, it could not be undue because it was authorized by section 50 of the *Patent Act*. He regarded *Molnlycke* as binding authority to this effect. The Judge's decision is reported as *Eli Lilly & Co. v. Apotex Inc.* (2003), 28 C.P.R. (4th) 37, 2003 FC 1171 (F.C.).

11 Apotex appealed to this Court, which allowed the appeal and remitted the matter to the Judge, on the ground that *Molnlycke* only applied when the lessening of competition resulted from the assignment *alone*. If there was "evidence of *something more* than the mere exercise of patent rights" (at para. 15), the *Competition Act* was not necessarily excluded. Accordingly, the Court referred the matter back to the Judge, requesting him (at para. 22) to address the following questions "at a minimum":

> ... (1) whether subsection 45(1) can ever apply to an agreement involving the exercise of patent rights; and (2) if it can, whether the facts of this case are sufficient to prove that Lilly and/or Shionogi engaged in conduct that was contrary to section 45. Finally, even if Apotex can establish that section 45 applies and that Lilly and/or Shionogi's conduct was contrary to section 45, the motions judge will still have to determine if any of the other arguments raised by Lilly and Shionogi, which he did not originally consider, prevent Apotex from recovering damages under section 36 of the *Competition Act*.

The citation for the Court of Appeal's decision was set out at paragraph 7 of these reasons.

12 When the matter went back to the Judge, he asked himself whether there was some agreement or term, in addition to the assignment of the patents, which could constitute the "something more" to which the Court of Appeal had alluded. Finding that there was not, he again granted the motions. He said (at para. 9):

> [W]here an agreement deals only with patent rights and is itself specifically authorized by the *Patent Act*, any lessening of competition resulting therefrom, being authorized by Parliament, is not "undue" and is not an offence contrary to section 45.

In the Judge's view, therefore, since any lessening of competition resulted from the assignments alone, *Molnlycke* applied.

13 Accordingly, the Judge (at para. 26) answered Yes to the first question, but No to the second, because

> [t]he agreement which constitutes the conspiracy alleged by Apotex, however, is solely and exclusively the assignment of the Shionogi patents and there is no other agreement alleged or shown by the evidence which could be the basis of a section 45 offence.

As for the third question, the Judge said that, while it did not arise, "it too would receive a negative answer".

14 For the reasons which follow, I have concluded that the assignment of a patent may, as a matter of law, unduly lessen competition. I would allow Apotex' appeal from the Judge's decision, dismiss the motions, restore the paragraphs struck from the defence and counterclaim, and allow the matter to proceed to trial on all other issues, except whether there was a lessening of competition as a result of the assignment.

C. Statutory Framework

Patent Act, R.S.C. 1985, c. P-4

50. (1) <u>Every patent issued for an invention is assignable in law</u>, either as to the whole interest or as to any part thereof, <u>by an instrument in writing</u>. ...	50. (1) <u>Tout brevet délivré pour une invention est cessible en droit</u>, soit pour la totalité, soit pour une partie de l'intérêt, <u>au moyen d'un acte par écrit</u>. [...]

Competition Act, R.S.C. 1985, c. C-34

32. (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to
(*a*) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,

(*b*) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,

(*c*) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or

(*d*) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,
the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.

36. (1) Any person who has suffered loss or damage as a result of
(*a*) conduct that is contrary to any provision of Part VI, or
(*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

32. (1) Chaque fois qu'il a été fait usage des droits et privilèges exclusifs conférés par un ou plusieurs brevets d'invention, par une ou plusieurs marques de commerce, par un droit d'auteur ou par une topographie de circuit intégré enregistrée pour_:
a) soit limiter indûment les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un article ou d'une denrée pouvant faire l'objet d'un échange ou d'un commerce,
b) soit restreindre indûment l'échange ou le commerce à l'égard d'un tel article ou d'une telle denrée ou lui causer un préjudice indu,
c) soit empêcher, limiter ou réduire indûment la fabrication ou la production d'un tel article ou d'une telle denrée, ou en augmenter déraisonnablement le prix,
d) soit empêcher ou réduire indûment la concurrence dans la production, la fabrication, l'achat, l'échange, la vente, le transport ou la fourniture d'un tel article ou d'une telle denrée,
la Cour fédérale peut rendre une ou plusieurs des ordonnances visées au paragraphe (2) dans les circonstances qui y sont décrites.

36. (1) Toute personne qui a subi une perte ou des dommages par suite_ :
(*a*) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

(2) Dans toute action intentée contre une personne en vertu du paragraphe (1), les procès-verbaux relatifs aux procédures engagées devant tout tribunal qui a déclaré cette personne coupable d'une infraction visée à la partie VI ou l'a déclarée coupable du défaut d'obtempérer à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, ou qui l'a punie pour ce défaut, constituent, sauf preuve contraire, la preuve que la personne contre laquelle l'action est intentée a eu un comportement allant à l'encontre d'une disposition de la partie VI ou n'a pas obtempéré à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, selon le cas, et toute preuve fournie lors de ces procédures quant à l'effet de ces actes ou omissions

	sur la personne qui intente l'action constitue une preuve de cet effet dans l'action.
(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.	(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).
(4) No action may be brought under subsection (1),	(4) Les actions visées au paragraphe (1) se prescrivent_:
(*a*) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from	(*a*) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes_:(i) soit la date du comportement en question,
(i) a day on which the conduct was engaged in, or	
(ii) the day on which any criminal proceedings relating thereto were finally disposed of,	(ii) soit la date où il est statué de façon définitive sur la poursuite;
whichever is the later; and	
(*b*) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from	*b*) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes_:
(i) a day on which the order of the Tribunal or court was contravened, or	(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,
(ii) the day on which any criminal proceedings relating thereto were finally disposed of,	(ii) soit la date où il est statué de façon définitive sur la poursuite.
whichever is the later.	
45. (1) Every one who conspires, combines, agrees or arranges with another person	45. (1) Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne_:
(*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,	*a*) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;
...	[...]
(*d*) to otherwise restrain or injure competition unduly,	*d*) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.
is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.	
(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:	(3) Sous réserve du paragraphe (4), dans des poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable si le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à l'un ou plusieurs des actes suivants_:
(*a*) the exchange of statistics;	*a*) l'échange de données statistiques;
(*b*) the defining of product standards;	*b*) la définition de normes de produits;
(*c*) the exchange of credit information;	*c*) l'échange de renseignements sur le crédit;
(*d*) the definition of terminology used in a trade, industry or profession;	*d*) la définition de termes utilisés dans un commerce, une industrie ou une profession;
(*e*) cooperation in research and development;	*e*) la collaboration en matière de recherches et de mise en valeur;
(*f*) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;	*f*) la restriction de la réclame ou de la promotion, à l'exclusion d'une restriction discriminatoire visant un représentant des médias;

(*g*) the sizes or shapes of the containers in which an article is packaged;	*g*) la taille ou la forme des emballages d'un article;
(*h*) the adoption of the metric system of weights and measures; or	*h*) l'adoption du système métrique pour les poids et mesures;
(*i*) measures to protect the environment.	*i*) les mesures visant à protéger l'environnement.
(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public	(7) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable s'il conclut que le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à un service et à des normes de compétence et des critères d'intégrité raisonnablement nécessaires à la protection du public_:
(*a*) in the practice of a trade or profession relating to the service; or	*a*) soit dans l'exercice d'un métier ou d'une profession rattachés à ce service;
(*b*) in the collection and dissemination of information relating to the service.	*b*) soit dans la collecte et la diffusion de l'information se rapportant à ce service.
(7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1).	(7.1) Le paragraphe (1) ne s'applique pas à un accord ou à un arrangement visé au paragraphe 49(1) lorsque cet accord ou arrangement a lieu entre des institutions financières fédérales.
79. (1) Where, on application by the Commissioner, the Tribunal finds that	79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante_:
...	[...]
the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.	le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.
...	[...]
(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.	(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de *la Loi sur les brevets, de la Loi sur les dessins industriels, de la Loi sur le droit d'auteur, de la Loi sur les marques de commerce, de la Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

D. Issues and Analysis

Issue 1: As a matter of law, may an assignment of a patent unduly lessen competition by virtue of the assignee's ownership of related patents?

(i) Molnlycke AB v. Novopharm Kimberly-Clarke of Canada Ltd.

15 Lilly and Shionogi rely heavily on the decision in *Molnlycke*. They argue that, in the first round of this litigation (see paragraph 7 of these reasons), this Court held that *Molnlycke* is good law and should be followed. Consequently, they submit, as far as the present parties are concerned, the soundness of *Molnlycke* is *res judicata*. For present purposes, I accept this. However, the more important question is to define the scope of the proposition for which this Court affirmed *Molnlycke*.

16 In my view, this Court's opinion of the scope of *Molnlycke* is clear from the reasons it gave when allowing the appeal from the first decision of the Judge. If, as Lilly and Shionogi argue, Apotex is bound by the Court's conclusion that *Molnlycke* should be followed, Lilly and Shionogi, in my opinion, are equally bound by the Court's view of the ratio of *Molnlycke*. This is what Rothstein J.A. said about *Molnlycke*:

> [14] In the case of *Molnlycke*, there was a single supplier lawfully entitled to sell the subject of the patent prior to the patent being assigned. The assignment merely transferred the patent to another company. The only effect of the assignment was that a different company could sue the defendant for infringement. There was no change in the number of patent-holders before and after the assignment. The defendant appears to have claimed that an agreement to assign a patent and thereby allow the assignee to enforce the patent monopoly, with nothing more, could itself be an agreement that unduly lessened competition under subsection 45(1).
>
> [15] *Molnlycke* held that, in order to provide scope for the statutory monopolies granted by the *Patent Act* to operate, Parliament must have intended that "undue impairment of competition cannot be inferred from evidence of the exercise of [patent] rights alone" [emphasis added]. Where, however, there is evidence of something more than the mere exercise of patent rights that may affect competition in the relevant market, *Molnlycke* does not purport to completely preclude application of the *Competition Act*. [Emphasis added]

17 Distinguishing *Molnlycke*, the Court said:

> [17] In the present case, Apotex does not allege that it is the mere assignment of patent rights or the enforcement of those patent rights by Lilly that gave it a cause of action. Rather, Apotex says that the assignment in this case resulted in one company, Lilly, acquiring patent rights that allow it to control all of the commercially viable processes for making cefaclor where, before the agreement, those processes were controlled by two companies, Shionogi and Lilly. Apotex argues that this consolidation was something more than the mere exercise of patent rights. Therefore, it says, the assignment agreement gave rise to an undue lessening of competition which engaged subsection 45(1) of the *Competition Act*.

18 Since the Court did not refer to any other basis on which Apotex sought to distinguish *Molnlycke*, the Court's reference to "something more" must mean, in this case, the anti-competitive effects of the assignment, namely, the increased power of Lilly in the market for bulk cefaclor, as a result of its existing ownership of the patents for the other known, commercially-viable processes for manufacturing the medicine.

19 Hence, *Molnlycke* must be distinguished on the basis that it was dealing with a situation where the only market power created by the assignment was that inherent in the patent assigned. To the extent that there is broader language in *Molnlycke*, it must be understood to have been read down.

20 In my respectful opinion, therefore, the Judge erred in confining his consideration to whether the parties entered into some agreement or other arrangement, in addition to the assignment itself.

(ii) Interpreting sections 45 and 50

21 My conclusion that, in the previous round of this litigation, this Court held that *Molnlyke* was not determinative of this case would be sufficient to allow the appeal. Nonetheless, because the merits were fully argued, and in case the matter should go further, I shall explain why I agree with the interpretation of the relevant legislation implicit in the conclusion of this Court in the previous round of this litigation: namely, section 50 of the *Patent Act* does not immunize an agreement to assign a patent from section 45 of the *Competition Act* when the assignment increases the assignees's market power in excess of that inherent in the patent rights assigned.

22 First, this interpretation of section 50 of the *Patent Act* enables it and section 45 of the *Competition Act* to operate harmoniously in accordance with the ordinary meaning of the statutory language of the provisions. It avoids the need to imply limiting words into section 45 exempting the assignment of patents from its scope. Nor does it render section 50 otiose, because the provision clarified what otherwise would have been, at best, uncertain: namely, that a patentee's rights include the right to assign the statutory rights conferred under the *Patent Act* on the grantee of a patent.

23 Since section 50 neither compels nor expressly authorizes what section 45 forbids, there is no true conflict between these two provisions of statutes which have different purposes: see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th edn. (Markham, Ontario: Butterworths, 2002), 262-66; see also *R. v. Smith*, [1960] S.C.R. 776 (S.C.C.), at 800; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at 191.

24 Further, it is possible that an assignment pursuant to section 50 of the *Patent Act* which unduly lessens competition, and thereby potentially gives rise to criminal proceedings under section 45 and a claim for damages under section 36, may still be valid as between the assignor and assignee, even though section 45 may prevent the assignee from enforcing the rights assigned against certain third parties. However, this is not an issue that falls for decision here.

25 To subject the right to assign patents to section 45 in the circumstances under consideration in this case is also consistent with the scheme of the *Competition Act*.

26 For example, subsections 45(3), (7) and (7.1) provide specific exceptions and defences to the offences created by subsection 45(1). None deals with intellectual property rights. Moreover, it is clear that Parliament considered the interface of the *Competition Act* and intellectual property rights. For example, while subsection 79(1) prohibits the abuse of market dominance, subsection 79(5) provides that, for the purpose of section 79, "an act engaged in pursuant only to the exercise of any right ... derived under the ... *Patent Act* ... is not an anti-competitive act." Section 45 contains no analogous exemption for the exercise of rights under the *Patent Act*, including assignments pursuant to section 50.

27 In light of the above, the presumption of statutory interpretation, *expressiò unius est exclusio alterius*, supports an interpretation of section 45 that does not impliedly exclude an assignment of patents which lessens competition by increasing the market power of the assignee beyond that inherent in the rights assigned.

28 Further, section 32 provides that the Federal Court may make certain orders where use is made of the exclusive rights conferred by a patent so as to unduly restrain trade or lessen competition in an article. It is clear from this that Parliament did not intend to exclude the exercise of patent rights from the reach of the *Competition Act* altogether. In order to achieve consistency with section 32, section 45 should be interpreted as applicable to an assignment of a patent which unduly lessens competition.

29 Lilly and Shionogi argue that, if a person had applied for and been granted patents for all the known processes for making a product, the person would have a monopoly over the manufacture of that product. This would not be contrary to the *Competition Act*, unless the patentee abused its market power in breach of section 79. Why should it make a difference if the patentee acquired some or all of the patents as a result of an assignment?

30 In my view, the answer is that the right to exclude others is an essential part of the bargain: the monopoly granted to the patentee is the recompense for ingenuity and the public disclosure of the invention. Moreover, as a unilateral act, the issue of a patent cannot be a conspiracy or agreement for the purpose of section 45.

31 The right to assign a patent is also valuable, and Parliament has authorized patent holders to assign their patents. No doubt, a patent holder may expect to obtain a higher price from a purchaser who already owns patents that would give the assignee a monopoly in a relevant market. However, to deter a patentee from obtaining the full potential value of the patent in these circumstances in order to maintain competition in a market is not incompatible with the essential bargain between the patentee and the state.

32 Second, an interpretation of section 50 which does not immunize the assignment of patents from section 45 when it lessens competition is consistent with the purpose of the *Competition Act*, which is stated in section 1.1 to be "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy". The importance of the Act and, within it, of section 45, was emphasized in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at 648, where Gonthier J. described the Act as being "central to Canadian public policy in the economic sector" and said that "s. 32 [now section 45] is itself one of the pillars of the Act." It would be inconsistent with this view of the *Competition*

Act, and of the place of section 45 within it, to reduce the scope of section 45 by reading in words that exclude an assignment of patents which lessens competition in the relevant market.

33 Third, this interpretation is consistent with the Competition Bureau's *Intellectual Property Enforcement Guidelines*. Like other administrative interpretations, the *Guidelines* are not, and do not purport to be, legally binding nor determinative of the meaning of the Competition Act: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185, 2001 FCA 104 (Fed. C.A.) at para. 124. Nonetheless, they may be considered by the Court as an aid to the Act's interpretation (*Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at 37 (Revenue Canada Interpretation Bulletin)), especially since the *Guidelines* are promulgated after an extensive consultative process.

34 The following paragraph of the Guidelines is particularly relevant.

> 4.2.1 General Provisions
> The mere exercise of an IP right is not cause for concern under the general provisions of the *Competition Act*. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use or non-use of the IP also as being the mere exercise of an IP right.
>
> The unilateral exercise of the IP right to exclude does not violate the general provisions of the *Competition Act* no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.
>
> The Bureau applies the general provisions of the *Competition Act* when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an arrangement and not just from the mere exercise of the IP right and nothing else.

> 4.2.1 Dispositions générales
> Selon les dispositions générales de la *Loi sur la concurrence*, le simple exercice d'un droit de PI ne constitue pas un motif de préoccupation. Le Bureau définit le simple exercice d'un droit de PI comme l'exercice du droit du titulaire d'empêcher unilatéralement d'autres personnes d'utiliser la PI. Le Bureau considère également l'utilisation ou la non-utilisation d'une PI par un titulaire comme le simple exercice d'un droit de PI.
> L'exercice restrictif du droit d'exclusion de la PI ne contrevient pas aux dispositions générales de la *Loi sur la concurrence*, peu importe jusqu'à quel point la concurrence est affectée. Soutenir le contraire pourrait en fait annuler les droits de PI et faire perdre ou compromettre les avantages économiques, culturels, sociaux et éducatifs qu'ils ont produits ainsi qu'entrer en contradiction avec l'opinion fondamentale du Bureau, qui veut que les lois sur la PI et sur la concurrence soient généralement complémentaires.
> Le Bureau applique les dispositions générales de la *Loi sur la concurrence* lorsque les droits de PI constituent le fondement des arrangements conclus entre des entités indépendantes, que ce soit sous forme de transfert, d'accord de licence ou d'entente visant l'utilisation ou l'application des droits de PI, et quand le prétendu préjudice est le résultat de tels arrangements plutôt que du simple exercice du droit de PI, sans plus.Appliquer la *Loi sur la concurrence* de cette façon peut imposer des limites au propriétaire d'une PI quant à la manière dont il peut octroyer une licence, transférer ou vendre la PI et à qui il peut le faire, mais cela ne remet pas en question les droits fondamentaux d'un propriétaire de PI de le faire. Si un titulaire de PI octroie une licence, transfère ou vend la PI à une entreprise ou à un groupe d'entreprises qui, n'eût été de cette entente, aurait représenté un concurrent réel ou potentiel, et si cet accord crée, maintient ou renforce la puissance commerciale, le Bureau peut tenter de contester cet arrangement en vertu de l'article applicable de la *Loi sur la concurrence*. La partie 7 du présent document contient une série de cas hypothétiques qui illustrent la manière dont le Bureau examine l'octroi de licences,

> Applying the *Competition Act* in this way may limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the *Competition Act*. Part 7 of this document provides a series of hypothetical examples to illustrate how the Bureau would examine the licensing, transfer or sale of IP under the *Competition Act*.

> le transfert ou la vente de PI en vertu de la *Loi sur la concurrence*.

35 It should be noted, however, that none of the hypothetical examples provided in Part 7 of the *Guidelines* deals with the facts of the present case.

36 To conclude, in my respectful opinion, the Judge erred in law by holding that the assignment of patents is exempt from section 45 when, by reason of the assignee's existing ownership of other patents, the assignment transfers more market power than that inherent in the patents assigned. He also erred in regarding *Molnlycke* as authority for the proposition that, in these circumstances, any lessening of competition could not be undue for the purpose of section 45.

Issue 2: Did the assignment of the patents by Shionogi to Lilly lessen competition?

37 The alternative argument of Lilly and Shionogi is that the evidence does not establish that the assignment of Shionogi's patents to Lilly in 1995 lessened competition. Lilly says that this is because, as a result of the 1995 assignment and Lilly's grant of a non-exclusive licence back to Shionogi of the assigned patents, there were two sources, namely, Shionogi and Lilly, from which a competitor could purchase, or seek a licence to manufacture, cefaclor. Previously, only Lilly could utilize the Shionogi cefaclor patents in Canada because, in 1975, Shionogi had granted Lilly an exclusive licence with respect to these patents.

38 Whether there was a lessening of competition after the 1995 assignment is a question of fact, on which the Judge made an express finding. After quoting a passage from the Court of Appeal's decision in the previous round of this litigation, the Judge said:

> [13] To avoid any possible doubt, what was stated by the Court of Appeal in the quoted passage to be an allegation of Apotex is a fact amply demonstrated by the evidence and not seriously contested by either Lilly or Shionogi.
>
> [14] So, *there is and never has been any doubt that the result of the assignment of Shionogi's patents to Lilly was to increase the latter's monopoly power*. Where [page232] formerly it had held four process patents useful in the production of cefaclor, it now held eight and no one else held any. In a word, *it had a monopoly of the known production processes*. It may well have been in a position of market dominance. [emphasis added]

To put his view beyond any doubt, he added (at para. 22) that the agreement between Lilly and Shionogi "had the effect of lessening competition".

39 In the absence of a palpable and overriding error, this Court cannot disturb the Judge's conclusion that the effect of the assignment was a lessening of competition because of Lilly's existing ownership of other patents. The question for trial is whether the lessening of competition resulting from the assignment is sufficiently significant as to be *undue*: see *Canada v. Pharmaceutical Society (Nova Scotia)* , supra at 646 and following.

40 Lilly argues that, since Shionogi was not in the Canadian market for cefaclor and, in 1975, had granted an exclusive licence to Lilly, Lilly held a monopoly in Canada prior to the assignment. After 1995, as a result of both the assignment, and Lilly's grant to Shionogi of a non-exclusive licence with respect to cefaclor, there were two potential sources from which Apotex could have sought either to purchase, or to obtain a licence to manufacture, bulk cefaclor. Thus, it was argued, the assignment merely enabled Lilly, rather than Shionogi, to sue for infringement of the assigned patents, and actually increased competition.

41 Moreover, Lilly and Shionogi say, since Apotex had not sought a licence from Lilly or Shionogi, before or after the assignment, it was in no position to say that the effect of the assignment was to shut it out of the cefaclor market. Indeed, Apotex had obtained bulk cefaclor from another source which, Apotex alleged, was manufactured by a process that did not infringe the Shionogi or Lilly patents.

42 Although the Judge made his finding of fact on the lessening of competition without referring to the grant of the licence back to Shionogi in 1995, he based his decision on the same arguments and record as were before us, including those relating to the grant of the licence back to Shionogi. The fact that Lilly granted a non-exclusive licence to Shionogi at the time of the 1995 assignment does not mean that it thereby lost control of the patents. For example, the licence prevented Shionogi from granting a sub-licence "without the written prior approval of, and at the sole discretion of, Lilly."

43 Affidavits filed by Apotex from experts in various fields, including competition policy, provided significant evidence of a lessening of competitionin the market for bulk cefaclor. In contrast, Lilly served only one, relatively short, affidavit, by an employee, in support of its position. Shionogi filed none.

44 As for the assertion that Shionogi had licensed its cefaclor process patents to Lilly in 1975, the evidence before the Judge about the pre-1995 relationship between Shionogi and Lilly with respect to those patents does not establish that the Judge's finding that the 1995 assignment lessened competition was vitiated by palpable and overriding error.

45 Nor do I regard the Judge's reference in paragraph 14 of his reasons to the possibility that the assignment may have put Lilly in a position of "market dominance" as an indication that, in making a finding respecting a lessening of competition, he had in mind section 79, not section 45.

46 On the basis of the evidence in the record, I would not disturb the Judge's finding that the assignment lessened competition.

Issue 3: Are Apotex' counterclaims statute-barred?

47 Apotex' counterclaims against Lilly and Shionogi under section 36 of the *Competition Act* are for damages for loss or damage sustained as a result of conduct proscribed in section 45. As applied to this case, subsection 36(4) provides that no claim for damages may be made after two years from "a day on which the conduct was engaged in".

48 In response to Lilly's infringement action, Apotex issued a counterclaim against Lilly in March 2001 and against Shionogi in November 2002. In order to maintain these claims, they had to have been made within two years of the start of the limitation period. The question, therefore, is to determine when the limitation period commenced.

49 The Judge concluded as follows (at para. 25) with respect to the issues of prescription, and the research and development:

> there is sufficient conflict and lack of clarity in the evidence on the questions of foreseeability and the reach of the 1975 research and development agreement between Lilly and Shionogi that those questions are not suitable for summary judgment and should only be resolved after a full trial.

50 Lilly and Shionogi say that, on the basis of the evidence before him, the Judge's conclusion on the issue of prescription was vitiated by palpable and overriding error.

51 First, they argue that the assignment of Shionogi's patents was the conspiracy ("the conduct ... engaged in" for the purpose of subsection 36(4)) and this occurred in 1995, six and seven years respectively before the counterclaims were issued

against Shionogi and Lilly. Moreover, the assignment was registered with the Commissioner of Patents in 1995, a copy of the registration was given to Apotex' counsel in 1999, and Apotex had knowledge of the assignment in 1997 when Lilly issued its statement of claim for infringement. Each of these possible starting dates for the running of time under subsection 36(4) is more than two years before Apotex issued its counterclaim against Shionogi. Only Apotex' receipt of a copy of the registration occurred less than two years before Apotex issued its counterclaim against Lilly.

52 In my view, the problem with this argument is that it assumes that, for the purpose of subsection 36(4), the conspiracy is the assignment, considered in the abstract as a single act. However, Apotex' case is that the assignment must be seen in its context: its enhancement of Lilly's market power, that is, Lilly's additional ability to act independently of the market by virtue of its ownership of the patents for all known, commercially-viable processes for manufacturing cefaclor. On this view, the conspiracy continued as long as the assignment had competition-lessening effect. Because of the evidential questions to be resolved, this is not the kind of issue on which it would be appropriate to grant summary judgment.

53 Second, Shionogi argues that the last of the process patents that it assigned to Lilly expired in April 2000, two years and seven months before Apotex issued its statement of claim against Shionogi. The argument here is that, if Apotex' counterclaim is based on the assignment and its anti-competitive effects, these effects must have ended on the expiry of the last of the assigned Shionogi patents.

54 I do not find this argument compelling either. The expiry of the last of Shionogi's process patents in 2000, more than two years before Apotex issued its counterclaim against Shionogi, is only relevant if it is not arguable that, after that date, there could be no competition-lessening effects as a result of the assignment.

55 However, the expiry of the Shionogi patents will not necessarily mark the start of the limitation. On the assumption that the discoverability principle applies to claims under section 36, if Apotex did not discover, and could not reasonably have been expected to discover, details of the 1975 and 1995 agreements between Lilly and Shionogi, more than two years before it issued its counterclaim, the counterclaim was not time-barred. Apotex says that it did not discover important details about the agreements until November 2001.

56 I am not persuaded that the evidence pertaining to both how much Apotex knew about the relevant facts (including details of the agreements), and when it acquired its knowledge, is so clear as to warrant this Court's interfering with the Judge's conclusion that this issue should be resolved on the basis of a trial. It will generally be inappropriate to decide by summary judgment a matter in which the application of the discoverability rule is likely to be important: *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (Ont. C.A.)at para. 36.

57 Apotex also says that Lilly's pursuit of the infringement action against it is a continuing competition-lessening effect. I would not be prepared to decide the correctness of this submission on a summary motion.

Issue 4: Did Apotex sustain any damage as a result of the conspiracy?

58 In order to claim damages under section 36(1), a claimant must prove that the proscribed conduct caused it loss or damage. Lilly and Shionogi argued before us, as they had done before the Judge, that Apotex had suffered no loss or damage as a result of the assignment of the patents because there was no evidence that the assignment had delayed Apotex' entry into the cefaclor market. Apotex' reply is that any amount that it may be required to pay to Lilly by way of damages as a result of Lilly's infringement action constitutes "loss or damage" for the purpose of subsection 36(1).

59 I can do no better than adopt the Judge's conclusion on this issue (at para. 24):

> While that appears to me to be a rather strange proposition in law, it is not clear that it cannot succeed and if Apotex were otherwise successful on its section 36 claim, I would not be prepared to dismiss it on that basis at the summary judgment stage.

E. Conclusions

60 For these reasons, I would allow the appeal with costs here and below, set aside the order of the Judge, and dismiss the motions for summary judgment and for striking Apotex' counterclaims and certain paragraphs from its defence to Lilly's action for infringement.

***Alice Desjardins J.A.*:**

I concur.

***K. Sharlow J.A.*:**

I agree.

Appeal allowed.

End of Document

TAB 11

2006 CarswellNat 6422
Competition Tribunal

B-Filer Inc. v. Bank of Nova Scotia

2006 CarswellNat 6422

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the Competition Act

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc., (applicants) and The Bank of Nova Scotia, (respondent)

Dawson J., L. Bolton Member, L. Csorgo Member

Heard: August 28 - October 6, 2006
Judgment: December 20, 2006
Docket: CT-2005-006

Proceedings: additional reasons at *B-Filer Inc. v. Bank of Nova Scotia* (2007), 2007 Comp. Trib. 26, 2007 CarswellNat 5893 (Competition Trib.); additional reasons at *B-Filer Inc. v. Bank of Nova Scotia* (2007), 2007 Comp. Trib. 29, 2007 CarswellNat 5892 (Competition Trib.)

Counsel: Michael Osborne, Sharon Dalton, Jennifer Cantwell, for Applicants, B-Filer Inc., B-Filer Inc. doing business as GPAY Guaranteed Payment and NPay Inc.
Paul Morrison, Lisa Constantine, Ben Mills, Tanya Pagliaroli, for Respondent, Bank of Nova Scotia

Subject: Corporate and Commercial; Evidence; Civil Practice and Procedure

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Words and phrases considered

substitutes

For the purposes of 75(1)(*a*) [of the *Competition Act*, R.S.C. 1985, c. C-34], products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

substantially

In regard to the meaning of "substantially" as used in paragraph 75(1)(*a*) [of the *Competition Act*, R.S.C. 1985, c. C-34], as noted by the Tribunal in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), affirmed 38 C.P.R. (3d) 25, [1991] F.C.J. No. 943 (Fed. C.A.)] at page 23, "[t]he Tribunal agrees that 'substantial' should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

trade terms

The applicants argue, correctly, that the expression "trade terms" is defined precisely and restrictively for the purposes of section 75 in subsection 75(3) [of the *Competition Act*, R.S.C. 1985, c. C-34.] For ease of reference that subsection provides:

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

. . .

The definition of trade terms is restricted and provides that the phrase "trade terms" "means", as opposed to "includes", the three things articulated in the definition.

competitiveness

The "competitiveness" of a market under both the abuse and merger provisions of the [*Competition Act*, R.S.C. 1985, c. C-34] refers to the degree of market power that prevails in that market.

adverse

. . . paragraph 75(1)(*e*) [of the *Competition Act*, R.S.C. 1985, c. C-34] does not differ from what is contemplated in paragraph 79(1)(*c*), section 92 (merger provision) and other sections of the Act. The difference lies in the degree of the effect. Under section 75, the effect [of the refusal to deal] must be adverse, while under other provisions the effect must be substantial.

From the plain meaning of the words used by Parliament, we find that "adverse" is a lower threshold than "substantial".

likely

As for the requirement [under s. 75(1)(e) of the *Competition Act*, R.S.C. 1985, c. C-34] that the refusal to deal "is likely to have" [an adverse effect on competition in a market], at paragraphs 37 and 38 in *Air Canada v. Canada (Commissioner of Competition)*, [2000] C.C.T.D. No. 24 (Competition Trib.); affirmed [2002] F.C.J. No. 424 (Fed. C.A.), the Tribunal found that a relatively high standard of proof is required to establish the "likely" occurrence of a future event. The Tribunal found that the terms "likely" and "probable" were synonymous. On the basis of the plain meaning of the word "likely", and on the basis of the Tribunal's reasoning in *Air Canada*, we find the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable" and not merely possible.

Decision of the Board:

I. Introduction and Summary of Conclusions

1 The applicants assert that their former banker, The Bank of Nova Scotia, engaged in reviewable conduct by terminating its banking relationship with the applicants, and thus refusing to deal with them. This conduct is said to entitle the applicants to an order pursuant to subsection 75(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (Act). The applicants therefore request that

the Competition Tribunal issue an order requiring The Bank of Nova Scotia to supply them with two specific banking services, bill payee services and bank accounts for deposit of e-mail money transfers, that the Bank formerly supplied to the applicants, and which it continues to supply to other banking customers.

2 In the reasons that follow, the Competition Tribunal finds that: [1]

(1) The applicants have failed to establish that they were substantially affected in their business, or precluded from carrying on business, due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

(2) The applicants have failed to establish that they were unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;

(3) The applicants have failed to establish that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market; and,

(4) Even if the applicants succeeded in establishing all of the constituent elements of subsection 75(1) of the Act, in any event this would not be a proper case for the granting of discretionary relief to the applicants because they are unable to comply with the contractual terms and conditions pursuant to which the banking services they seek are provided to customers of The Bank of Nova Scotia.

3 It follows that the application will be dismissed.

4 The issue of costs will be reserved. If the parties are unable to agree on costs, written submissions are to be filed with respect to costs. The parties are also to file submissions with respect to any required redactions in these reasons for the purpose of publishing forthwith a public version, all as described in more detail later in these reasons.

5 These issues arise in the following factual context. Unless otherwise noted, the following facts are not in dispute.

II. Background Facts

A. The Parties

6 The corporate applicants, B-Filer Inc. (B-Filer) and NPAY Inc. (NPAY), are federally incorporated and carry on business in Sherwood Park, Alberta. Their president and controlling shareholder is Raymond Grace. B-Filer carries on business under the name GPAY GuaranteedPayment (GPAY).

7 Effective December 10, 2002, NPAY entered into a joint venture agreement with UseMyBank Services, Inc. (UMB). The president, chief executive officer and founder of UMB is Joseph Iuso. The profits of the joint venture are split equally between the joint venture partners.

8 The Bank of Nova Scotia (sometimes Bank or Scotiabank) is one of the five major chartered banks in Canada.

B. The Nature of the Applicants' Business

9 The applicants describe their business as providing an Internet bank card debit payment service that allows customers to make purchases from participating Internet merchants with payments made directly from the customer's existing bank account (GPAY Services). The principal business of the applicants is the provision of the GPAY Services. The applicants receive all of their significant revenue from the joint venture.

10 Some of the services needed to provide the GPAY Services are provided by the joint venture partner, UMB. Together, the service provided by the joint venture is referred to as the UseMyBank Service. The joint venture agreement, Exhibit CA-2, delineates the responsibilities of the joint venture partners in the following way. UMB is to: provide facilitation services using existing banking payment systems; provide the front-end interface utilizing components from the NPAY website; direct buyers

and sellers to the existing NPAY terms and conditions of use; and, bring on and direct all buyers and sellers who wish to use manual bill payment services to NPAY. NPAY (and through it B-Filer) is to: provide the processing, settlement and reconciliation of all payments processed by UMB; and, bring on and direct all sellers and buyers who wish to use automated bill payment services to UMB.

11 Mr. Iuso explained that UMB handles the marketing of the UseMyBank Service and the processing of the transactions through the banks. NPAY, and through it B-Filer, handles everything to do with the money, more specifically, the interface with the banks and the settlement with the merchants.

12 During the applicants' opening statement, through their counsel, they acknowledged, for the first time, that they operate a money services business, as that term is defined in regulations enacted pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (PCMLTF Act).

C. How the Use My Bank Service Works

13 The UseMyBank Service operates as follows:

(i) Online merchants that offer this payment mechanism display the UseMyBank icon on their websites.

(ii) A customer wishing to use the service selects UseMyBank as his or her payment option, and is then transferred to the UseMyBank website.

(iii) There, the customer selects his or her bank from a list of banks.

(iv) To continue, the customer must indicate that he or she has reviewed and agreed to the terms and conditions of use imposed by UseMyBank (whether or not the customer has read those terms and conditions).

(v) The customer then designates the bank account that he or she wishes to debit and enters the user identification and password they have previously established with their bank (together referred to as the customer's electronic signature). All of this is done on the UseMyBank website, which is protected through encryption.

(vi) UMB then uses the customer's electronic signature in order to enter into an online banking session on the customer's bank's website. In order for a bank to learn that its own customer is not conducting the banking session, the bank would have to look at the DP address of the communicating party. If it did this, the bank would see that the transaction comes from UMB. UMB states that the customer's electronic signature is not stored on its server, and the electronic signature never resides on the online merchant's server. While the electronic signature is on the UMB server, it is not encrypted.

(vii) During the course of the online banking session, UMB selects, based on the customer's instructions, which of the customer's bank accounts is to be debited and then directs the payment to GPAY. Where GPAY has bill payee status at the customer's bank (described in more detail below), GPAY is selected as a bill payee and the customer's payment is directed to GPAY as a bill payment. Where GPAY does not have bill payee status, UMB directs an e-mail money transfer (EMT) from the customer's account to one of GPAY's accounts. During the banking session, the UMB server also gathers information from the bank (such as the customer's name, address and telephone number), which GPAY uses for purposes that include the detection of fraudulent transactions.

(viii) Whether by EMT or bill payment, the money is immediately taken out of the customer's account by their bank, and the funds are placed in an internal bank suspense account.

(ix) UMB then notifies the merchant that there is a confirmation of payment. Later, GPAY receives the funds from the bank. Subsequently, GPAY pays the money to its merchant, deducting its fee.

14 Mr. Iuso stated that this type of transaction is "meant to be [a] real-time payment processing, like [a] credit card". He agreed that the joint venture can only offer what it describes as a real-time money transfer because UMB itself effects the

transaction on behalf of GPAY using the bank customer's electronic signature. The joint venture cannot operate this money transfer business unless bank customers disclose their online banking password and bank identification number to it.

15 Of the transactions processed by the UseMyBank Service, 98% involve payments to "payment processor gateways" that have online gambling casinos for clients. Put more simply, the vast majority of the joint venture's business, 98% of it, is to transfer monies in order to fund online gaming accounts at casinos located outside of Canada.

D. The Banking Relationship Between the Applicants and The Bank of Nova Scotia

16 In August of 1999, Mr. Grace attended at the Sherwood Park branch of The Bank of Nova Scotia and opened a single, small business account in the name of B-Filer Inc. carrying on business as GPAY Guaranteed Payment. The Application for Business Banking Services form signed by Mr. Grace described GPAY's business to be one of "financial collection" and estimated the annual sales of the business to be $240,000 per year, with a total monthly deposit balance of $10,000. At that time, Mr. Grace signed and was given a copy of the Bank's Financial Services Agreement. This document set out the terms and conditions related to the operation of the business account.

17 Exhibits A-33 and A-34 reflect that Mr. Grace also applied in August of 1999 for biller status at The Bank of Nova Scotia. Once accepted, GPAY was listed by The Bank of Nova Scotia as a biller so that the Bank's customers could make online bill payments from their bank accounts to GPAY. Bill payee status is specific to each bank in the sense that, for example, Scotiabank deposit customers can only make online bill payments from their Scotiabank accounts to entities that have obtained biller status from The Bank of Nova Scotia. Similarly, for example, customers of the Royal Bank of Canada (RBC) can only make such payments to entities that have obtained biller status from RBC.

18 It is agreed that, in 1998 and 1999, GPAY obtained status as a bill payee from each of Canada's five largest chartered banks, as well as from the Alberta Treasury Branches (ATB) and the Fédération des caisses Desjardins du Québec. When the UseMyBank joint venture was launched in December 2002, GPAY used these bill payee facilities to operate the UseMyBank Service as described above. It is also agreed that, at all material times, the applicants maintained business accounts at RBC. The significance of those accounts is that The Bank of Nova Scotia and RBC are the only two banks that permit EMTs to be deposited into small business accounts. The Bank of Nova Scotia does not permit EMT deposits into commercial accounts of entities that are not small businesses. EMT deposits are allowed into personal accounts.

19 In August of 2003, the Canadian Bankers Association forwarded to a number of banks an Internet alert with respect to the UseMyBank website. The alert originated from the Canadian Imperial Bank of Commerce (CIBC). The concern expressed was the potential for fraud that existed as a result of the disclosure of a bank customer's electronic signature. As a result of this notice, the Bank's security group initiated an investigation. While concern was expressed by representatives of the Bank about the risk posed by the disclosure of a customer's electronic signature, the Bank's response to the investigation was to contact all of its customers who had used the UseMyBank Service in order to warn them that they should not be disclosing their electronic signatures. This response was said by the Bank to reflect the low transaction volumes and low number of customers that were involved.

20 In December of 2003, GPAY lost the biller status that it held at the Toronto-Dominion Bank (TD), CIBC and ATB. As a result, thereafter, when UMB entered into banking sessions on TD and CIBC websites on behalf of a customer, instead of directing payment to GPAY through a bill payment, UMB would instruct that payment be made to GPAY by way of an EMT. These EMT payments were then deposited into the applicants' business accounts either at The Bank of Nova Scotia or RBC (because, as noted above, these were the only banks which permitted EMT deposits into business accounts).

21 Both RBC and Scotiabank impose limits on the sending and receipt of funds by EMT. For a send transaction, the limit is $1,000 per day and $7,000 over a 30-day rolling period. A recipient is limited to receiving $10,000 per day and $300,000 over a 30-day rolling period. The rolling limits are set by Acxsys Corporation. Acxsys Corporation, an incorporated for-profit division of the Interac Association, developed the e-mail money transfer service.

22 On April 15, 2004, Mr. Grace opened a second account at the Bank in GPAY's name. This account was a Money Master for Business (Money Master) account. Mr. Grace testified that this second account differed from the existing original account in that there was no bank charge levied for depositing EMTs. There was also no charge for transferring money from the Money Master account to the current account, so long as the transfer was done online. A fee of $0.65 per transaction was applied to EMT deposits made into GPAY's original current account.

23 Beginning sometime in 2004, the Bank's Sherwood Park branch began receiving notices that some transactions could not be posted into the applicants' account(s).

24 Mr. Woodrow, the Sherwood Park branch account manager for small business accounts, testified that, as a result of activity in the applicants' accounts, the branch learned in 2004 that, after 100 transactions occurred in a Money Master account, any remaining debits or credits were put into an unpostable suspense account. Mr. Woodrow further recalled that, through the latter part of 2004, unpostable reports showed that the applicants were exceeding the transaction limits on virtually a daily basis.

25 Mr. Grace agreed that transactions became unpostable after approximately 100 transactions, and agreed that the applicants encountered significant difficulty with this in 2004.

26 The reason for this increase in unpostable transactions was that, following the loss of biller status at CIBC and TD, for customers of those banks, payments to GPAY were effected by way of EMTs deposited into the applicants' accounts with The Bank of Nova Scotia.

27 As a result of the unpostable transactions, a number of new accounts were opened by the applicants at The Bank of Nova Scotia during the second half of 2004. Some accounts were opened by Mr. Grace personally at the Sherwood Park branch, while some were opened as a result of telephone calls Mr. Grace placed to the Scotiabank call centre. Exhibit A-35 summarizes the account openings, detailing the date an account was opened, the name of the account holder, whether the account was opened through the branch or the call centre, and the number of accounts opened each day. Exhibit A-35 is reproduced, verbatim, here:

SUMMARY OF ACCOUNT OPENINGS

Date	Plaintiff	Branch	Call Centre	# of Accounts
August 6, 1999	B-Filer as GPay	[check]		1
April 15, 2004	GPay	[check]		1
June 11, 2004	GPay	[check]		6
October 7, 2004	B-Filer	[check]		5
November 15, 2004	NPay	[check]		15
February 25, 2005	B-Filer		[check]	30
March 1, 2005	NPay		[check]	1
March 3, 2005	NPay		[check]	22
March 8, 2005	GPay		[check]	10
March 9, 2005	GPay		[check]	17

28 Thus, it can be seen that, from April 2004 to March 2005, Mr. Grace caused 107 accounts to be opened at the Bank in the names of various applicants. Of the 107 accounts, 80 were opened in the period from February 25, 2005 to March 9, 2005.

29 Exhibit CA-69 shows the number of deposits the applicants made into accounts at The Bank of Nova Scotia in each month during the period from September 2003 to July 2006. Exhibit CA-62 depicts the amount of the deposits to Scotiabank accounts made each month from September 2003 to July 2006. In their Statement of Grounds and Material Facts, at paragraph 10, the applicants state that, from June 1, 2004 to May 31, 2005, they deposited approximately $9,929,881.17 into business bank accounts they held at The Bank of Nova Scotia.

E. The Termination of the Banking Relationship

30 As a result of being notified of the 15 new accounts opened in the name of NPAY on November 15, 2004, Ms. Parsons, manager of the Sherwood Park branch, became concerned about the number of accounts the applicants were opening. At a meeting with Ms. Gibson-Nault, manager of customer service at Sherwood Park, and Mr. Woodrow, she instructed Mr. Woodrow to find out from Mr. Grace why so many accounts were needed and why there were so many unpostable transactions. She also directed that no new accounts were to be opened for the applicants.

31 In February 2005, the branch became aware that Mr. Grace was opening accounts through the Scotiabank call centre. As a result, Ms. Gibson-Nault spoke to her contact person at the Bank's Shared Services operation who in turn referred her to the Bank's Security and Investigation division in Calgary. As a result of a conversation with a representative of that department, Ms. Gibson-Nault prepared and forwarded an Unusual Transaction Report. The Unusual Transaction Report referenced the number of accounts opened for GPAY, NPAY and B-Filer, the number of EMTs that exceeded the transaction limits so as to trigger unpostable transactions, and the aggregation and transfer of funds.

32 Also during February and March of 2005, the Bank received six complaints of fraudulent transactions concerning the applicants' accounts. Mr. Grace explained to Mr. Woodrow that these fraudulent transactions occurred because of one of two possible scenarios. In the first, a customer's account might be compromised by a rogue who would then conduct the transaction. In the second, a person, a spouse for example, would see a transaction on a bank statement and question it. The husband or wife who made the transaction would not wish to admit to it and so would deny the transaction (rather than admit to, for example, Internet gambling). In that instance, the transaction would be reported as fraudulent.

33 Receipt of the Unusual Transaction Report triggered an internal investigation at the Bank. Further information was sought from the branch by Bank officials in Toronto.

34 In a two-page memorandum dated March 29, 2005, which reviewed the chronology of events, Ms. Parsons and Ms. Gibson-Nault recommended termination of the banking relationship between the Bank and the applicants. The Bank says that, as a result of its internal investigation, it decided to accept the recommendation and to terminate its banking relationship with the applicants.

35 By a number of letters dated May 11, 2005, The Bank of Nova Scotia gave written notice to the applicants terminating the banking relationship, effective June 15, 2005. Each letter made reference to clause 12.2 of the Financial Services Agreement which provides that the Bank "may cancel any service to you without a reason by giving you thirty days' written notice". The termination was, in fact, delayed as result of proceedings the applicants brought in the Alberta Court of Queen's bench. After their request for an interim injunction was dismissed by that Court, the applicants' banking services were terminated by the Bank, and their accounts closed on September 28, 2005.

F. Interac Online

36 On or about May 5, 2005, the Interac Association announced the launch of Interac Online. The service was commenced in June 2005.

37 Interac Online is a service that also allows customers to purchase products or services through the Internet. If a customer, when on a participating merchant's website, selects Interac Online as the payment option, the customer is directed to an access page which displays the financial institutions that participate in Interac Online. Currently there are three: Scotiabank, RBC and TD. The customer then selects his or her financial institution and is directed to the online banking sign-on page of that financial institution. There, the customer inputs his or her electronic signature. The customer is then directed to a page where he or she selects the account to be debited and confirms the transaction.

38 Since June 2005, 32 merchants have accepted Interac Online as a payment mechanism.

G. History of this Proceeding and the Relief Sought

39 This proceeding is brought pursuant to the Tribunal's order of November 4, 2005, which granted the applicants leave to apply for relief under section 75 of the Act. The applicants seek an order requiring Scotiabank to supply them with Scotiabank "Biller Services" and "EMT Business Deposit Accounts". This is the first private application brought before the Tribunal as a result of the amendments to the Act made in 2002, which permitted such private proceedings.

40 On December 14, 2005, the Tribunal dismissed the applicants' request for interim relief.

III. Applicable Legislation

41 Subsection 75(1) of the Act contains the refusal to deal provision which is at issue. Subsection 75(1) provides:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph *(a)* is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph *(a)* is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa *a)* est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa *a)* accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

42 Subsection 75(1) was amended in June 2002 to allow private access to the Tribunal when leave is granted under section 103.1 of the Act. The amendment made in 2002 also added paragraph (e) to the Act. This is the first case brought before the Tribunal since paragraph (e) was added to subsection 75(1).

43 For the purpose of this application, subsections (3) and (4) of section 75 are also relevant. Subsection (3) defines the phrase "trade terms", found in subsection 75(1), to mean "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". Subsection (4) precludes the Tribunal from drawing any inference from the fact that the Commissioner has, or has not, taken any action in respect of the matter raised by the application. This provision has some relevance because, in January 2004, the Commissioner closed her investigation into the applicants' allegation that the refusal of CIBC, TD and ATB to allow GPAY to receive bill payments from their customers contravened sections 75 and 79 of the Act. The Tribunal has given no weight to the fact that the Commissioner's investigation was discontinued. The Commissioner did note that private access to the Tribunal might be available to the applicants.

44 Section 75 of the Act is set out in its entirety in Schedule A to these reasons.

IV. Onus and Standard of Proof

45 It is common ground among the parties that the applicants bear the onus of establishing each constituent element contained in paragraphs (a) through (e) of subsection 75(1) of the Act.

46 The standard of proof to be applied is the civil standard: proof on a balance of probabilities.

V. The Witnesses Presented by Each Party

47 Before turning to the substance of the analysis of subsection 75(1) of the Act and its constituent elements, it is helpful to identify the witnesses called by each party. A description of the general nature of the testimony they presented in chief is contained in Schedule B to these reasons.

A. The Expert Witnesses

48 Six individuals testified as experts before the Tribunal, two on behalf of the applicants and four on behalf of the Bank. The applicants' experts were Mr. Jack Bensimon and Dr. Lawrence Schwartz. The Bank's experts were Mr. Christopher Mathers, Dr. James Dingle, Mr. David Stewart and Dr. Frank Mathewson.

(1) The Applicants' Experts

49 With the parties' agreement, the Tribunal accepted Jack Bensimon as an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies.

50 With the parties' agreement, Dr. Lawrence Schwartz was qualified as an "expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

(2) The Bank's Experts

51 Christopher Mathers was tendered as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. His qualification to provide such opinions was accepted by the applicants.

52 Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was tendered and accepted as an expert "in

respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking" as set out in his report.

53 David Stewart is an attorney practicing in Washington, D.C. He was tendered, and accepted by the applicants, as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualifications to opine on matters relating to state law were put in issue by the applicants, but, after hearing examination and cross-examination on his qualifications, his expertise in this area was accepted by the Tribunal.

54 Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. His qualifications were conceded as an expert economist, with expertise in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

B. The Lay Witnesses

55 Twelve other individuals testified before the Tribunal.

56 The applicants called Mr. Joseph Iuso, Mr. Raymond Grace, Mr. Ryan Woodrow, and Mr. Darren Morgenstern. The Bank called Ms. Margaret Parsons, Ms. Sharon Gibson-Nault, Ms. Susan Graham-Parker, Mr. Colin Cook, Mr. Douglas Monteath, Mr. Robert Rosatelli, Mr. Ronald King, and Mr. David Jones.

(1) The Applicants' Lay Witnesses

57 Joseph Iuso is the President, Chief Executive Officer, and founder of UMB.

58 Raymond Grace is the President of both GPAY and NPAY.

59 Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts.

60 Darren Morgenstern is the owner of the Ashley Madison Agency, an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options".

(2) The Bank's Lay Witnesses

61 Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia.

62 Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch.

63 Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia.

64 Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia.

65 Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank.

66 Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia.

67 Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies.

68 David Jones is Director of Web Business at WestJet.

VI. The Elements of Section 75 and the Issues to Be Determined

69 Having set forth the necessary background facts, discussed the applicable legislation, the onus and standard of proof, and identified the witnesses tendered by the applicants and the Bank, we turn to the analysis of whether the applicants have met

their onus to establish all of the required elements contained in subsection 75(1). Each element has been put in dispute by the parties. We deal first with paragraph 75(1)(*a*) of the Act.

A. Have the applicants established that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms?

70 There is no suggestion that the applicants have been precluded from carrying on their business. Thus, it is only necessary to consider whether they have been substantially affected in their business. At die outset, we must determine what test the Tribunal should apply in order to define the relevant product market under paragraph 75(1)(*a*). Before doing so, we note that both the applicants and the Bank addressed the issue of "usual trade terms" under paragraph 75(1)(*c*) rather than under 75(1)(*a*). We also address usual trade terms when we consider paragraph 75(1)(*c*).

(1) The Test to Define the Product Market

71 The parties disagree on the proper approach for defining the product market under paragraph 75(1)(*a*). In Dr. Schwartz's opinion, the correct approach is the hypothetical monopolist test. Dr. Schwartz stated that he favours this test because it generally avoids the problem of defining markets overly broadly. Dr. Mathewson defines the market based upon the approach adopted by the Tribunal in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), aff'd 38 C.P.R. (3d) 25, [1991] F.C.J. No. 943 (Fed. C.A.). In Dr. Mathewson's view, "the operative principle is that other products are substitutes if the purchaser's business is not substantially affected by switching to these other services." Dr. Mathewson testified that he prefers this test because "[i]n refusal to deal cases, and the abuse cases events have already occurred. And so we do have evidence about how the market has responded. We don't have to be hypothetical. It seems to me if we're hypothetical, we're ignoring information; information that's at our fingertips, through the evidence of how the market has actually functioned. And thus the words, functional interchange in terms of substitution, are the operative words in my view."

72 We find that the proper test is that identified by the Tribunal in *Chrysler* and applied by Dr. Mathewson. We so conclude because this approach is consistent with precedent, and, in our view, is better suited to address the concerns of paragraph 75(1)(*a*) than the hypothetical monopolist test. Our reasons for these conclusions follow.

(a) Precedent

73 As the Tribunal noted at page 103 in *Canada (Director of Investigation & Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Competition Trib.), "[w]hile the process of product market definition is clearly founded on economic analysis, the question of the 'relevant' market for the purposes of section 75 depends largely on the construction of section 75 and the identification of its objectives within the context of the *Competition Act* as a whole."

74 The Tribunal had previously considered the proper approach to the definition of product market in the context of paragraph 75(1)(*a*) in *Chrysler*. There, the Tribunal wrote, at page 10, that:

> Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. <u>In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies</u>.
>
> [underlining added]

75 The Tribunal expressly rejected the expert evidence that market definition should be determined from the position of whether Chrysler, the respondent, had substantial market power. Indeed, the Tribunal found that a broad consideration of Chrysler's market power was not required when looking at any specific element of section 75 of the Act.

76 In *Xerox*, the Tribunal again found, at page 116, that the respondent's market power is not an element that need be established to obtain a section 75 order.

77 Since the Tribunal's decisions in *Chrysler* and *Xerox*, subsection 75(1) has been amended to include paragraph 75(1)(*e*), which requires a determination of whether the refusal to deal is having, or is likely to have, an adverse effect on competition in a market. Given this amendment, it is necessary to consider whether the addition of paragraph 75(1)(*e*) has changed the context and purpose of section 75 such that the test for markets articulated in *Chrysler* is no longer appropriate for the purposes of 75(1)(*a*).

78 In our view, while the addition of paragraph 75(1)(*e*) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(1)(*a*). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(1)(*e*) need not be the market of concern in paragraphs 75(1)(*a*) and 75(1)(*b*), the market that best suits the particular context and purpose of 75(1)(*e*) can be separately considered when considering that paragraph of the Act. [2]

79 For purposes of clarity, we articulate the "*Chrysler* test" as follows: For the purposes of 75(1)(*a*), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

80 In regard to the meaning of "substantially" as used in paragraph 75(1)(*a*), as noted by the Tribunal in *Chrysler* at page 23, "[t]he Tribunal agrees that 'substantial' should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

(b) The Appropriateness of the Chrysler Test

81 In our view, the *Chrysler* test is better suited than the hypothetical monopolist test to address the concerns of 75(1)(*a*) for two reasons. First, the *Chrysler* test deals directly with the particular person and the business at issue. Second, the *Chrysler* test deals with the effects of a refusal to deal on the affected business rather than the possible effects of a hypothetical price increase in the refused product. Contrary to Dr. Schwartz's opinion, in our respectful view, there is little risk of defining the market overly broadly because the test does not allow for the inclusion of substitutes that have a substantial effect on the business.

82 Both of these points are elaborated upon below.

(i) Particular Person and the Business at Issue

83 Dr. Schwartz testified that he relies on the hypothetical monopolist approach to market definition contained in the merger guidelines of the enforcement agencies in Canada and the United States. The *Merger Enforcement Guidelines* of the Canadian Competition Bureau (Bureau) indicate that "a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area in which a sole profit-maximizing seller (a hypothetical monopolist) would impose and sustain a significant and non-transitory price increase above levels that would likely exist in the absence of the merger" (Canada, Competition Bureau, 2004, at paragraph 3.4). The *Merger Enforcement Guidelines* state, at paragraph 3.1, that "[t]he overall objective of market definition in merger analysis is to identify a set of buyers that could potentially face increased market power due to the merger."

84 However, for the purposes of paragraph 75(1)(*a*), what is of concern is not a set of buyers but a particular buyer. [3] The hypothetical monopolist test is capable of dealing with a particular buyer but doing so requires markets to be defined with reference to the characteristics of that buyer or to the particular locations of that buyer (see *Merger Enforcement Guidelines* at

paragraph 3.9). In the case of 75(1)(*a*), since the only buyer of concern is the one that has been refused supply, in this case B-Filer, there is no need to define a relevant market with reference to the possible particular characteristics of that buyer. In our opinion, it is more appropriate to focus directly and immediately on the buyer that has been refused supply.

(ii) Effects of a Refusal to Deal

85 The hypothetical monopolist test is ultimately concerned with exercises in market power. To determine the set of products and geographic areas over which a hypothetical monopolist would have market power, a system of determining which products and geographic areas have price constraining effects on each other is carried out. The mechanism is to ask whether a hypothetical monopolist over a postulated candidate market would be able to impose a significant and non-transitory price increase. If yes, the postulated market is not considered the relevant market, and the exercise is repeated with an expanded candidate market. According to the *Merger Enforcement Guidelines*, at paragraph 3.4, "[i]n most cases, the Bureau considers a five per cent price increase to be significant and a one-year period to be non-transitory."

86 Dr. Schwartz notes that a refusal to supply is akin to an infinite price increase. He is of the further view that defining markets based on switching observed in response to a refusal to deal, or an infinite price increase, is inappropriate because it can lead to overly broad markets because it can include products that were not good substitutes prior to termination. However, not only is the refusal to supply and the effect of the refusal on the business the concern of 75(1)(*a*), rather than the effect of a significant and non-transitory price increase, but the test used in *Chrysler*, as described above, does not run the risk of finding overly broad markets.

87 In Dr. Schwartz's view, "when the current product or service is withdrawn completely and no longer available for choice, it is not surprising or helpful to market definition to observe that the buyer chose another alternative." However, this is not the whole of the test. The use of alternatives by the refused business is insufficient to conclude that these alternatives are in the same product market as the refused product. The *Chrysler* test properly applied requires that the use of these alternatives not substantially affect the business at issue. If their use does in fact result in a substantial effect, and they are nonetheless included in the relevant market for purposes of 75(1)(*a*), the market would be overly broad. The correct application of the test does not allow for this possibility.

88 Consequently, for the above reasons, we conclude that the correct test for defining markets for the purposes of 75(1)(*a*) is the *Chrysler* test as we have articulated it at paragraph 79.

(2) The Relevant Product Market

89 Having determined the appropriate test for the determination of the product market, in our view, application of that test to the evidence before us leads to the conclusion that the relevant product market is comprised of biller status at the Bank and deposit accounts *[CONFIDENTIAL]* that allow for the deposit of EMTs. Our reasons for this conclusion follow.

90 The starting point of market definition for the purposes of 75(1)(*a*) is to determine a set of candidate substitutes for the products that have been refused. In this case, the two products that have been refused (and which the applicants seek) are biller status at the Bank and EMT deposit accounts at the Bank. Having determined the set of candidate substitutes, one then determines whether the use of the substitutes by the applicants results in a substantial effect on the applicants' business. If yes, the candidate substitute is not included in the product market.

91 The set of candidate substitutes raised by the applicants in regard to biller status at the Bank are (i) biller services at other financial institutions, and (ii) EMTs into deposit accounts (other than Scotiabank deposit accounts since these are unavailable to the applicants), without distinguishing between *[CONFIDENTIAL]* deposit accounts. The applicants argue that neither of these candidate substitutes is acceptable.

92 The Bank counters that "the relevant product market is at least as broad as the "Biller Services" of the five major chartered banks (it also includes the Biller Services of Alberta Treasury Branches and the Fédération des caisses Desjardins du Québec)

and, in addition, includes EMT payments." Its expert, Dr. Mathewson, concludes that "Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT *[CONFIDENTIAL]* deposit accounts."

93 We note that Dr. Mathewson did not opine or testify that biller services at other banks are part of the relevant market. Rather, he appears to conclude that it remains an open question due to a lack of evidence. We also note that Dr. Mathewson clarifies that EMT deposit accounts include *[CONFIDENTIAL]*.

94 For the purpose of our analysis we consider each of the following candidate substitutes for biller status at the Bank: [4]

(i) Biller status at financial institutions other than Scotiabank;

(ii) EMT business deposit accounts at RBC; and,

(iii) *[CONFIDENTIAL]*.

95 In our analysis, we include a candidate substitute in the relevant product market if, and only if, in our opinion its use does not substantially affect the applicants' business. Both parties consider "substantially affected" in regard to the entirety of the applicants' business.

(a) Biller Status at Financial Institutions Other Than Scotiabank

96 The applicants contend that biller status at "banks that continue to provide that status to B-Filler is not a good substitute for biller status at Scotiabank. Biller status at those other banks allows B-Filer to process payments for those banks' depositors but does not allow it to process payments for Scotiabank depositors." Put more succinctly, the applicants argue that "[t]he fact that GPay has Biller Services from Royal Bank does not assist it in processing bill payments for customers of Scotiabank."

97 The applicants' argument is essentially that biller status at other financial institutions is not functionally interchangeable for biller status at Scotiabank. We accept this; however, it is hypothetically possible that the Bank's depositors could make use of existing bank accounts or open new bank accounts at other financial institutions where the applicants have biller status and use those accounts, such that the applicants are not substantially affected in their business. [5]

98 In Dr. Schwartz's view, this type of "shift is unlikely" due to additional inconvenience, additional record-keeping, and increased bank fees. As such, he states that "[i]t is more likely than not that the Scotiabank depositor would choose to bear the price increase that Scotiabank imposes on GPAY Service debit transactions than maintain dual accounts at separate financial institutions." Similarly, he finds it highly unlikely that Scotiabank depositors would close their Scotiabank accounts and switch to another financial institution.

99 In response, Dr. Mathewson finds that there is no hard evidence of any potential response by consumers: "As any consumer response to a price hike remains an open and unanswered empirical matter, a categorical conclusion which removes all other financial institutions from the market seems unwarranted."

100 We agree with Dr. Mathewson that consumer response is an open and unanswered question. Consequently, contrary to the Bank's position, due to this lack of information, we find that the relevant product market does not include biller status at other financial institutions. We now turn to the next potential substitute.

(b) EMT [Confidential] Deposit Accounts

101 In our analysis, we consider EMT business accounts at RBC *[CONFIDENTIAL]*.

102 Dr. Schwartz concludes that, in regard to the relevant market "in relation to the means of providing online debit payment to Scotiabank depositors", the market includes Scotiabank biller status but excludes business accounts that accept deposits by EMTs. He concludes this on the basis of the hypothetical monopolist test in that "it appears that if Scotiabank had raised the price of biller status to B-Filer by a small but significant amount, B-Filer would have borne this increase rather than switch

to processing by way of EMTs because of the costs and disadvantages thereof in comparison to biller processing." While we find that the *Chrysler* test rather than the hypothetical monopolist test is the right one, costs and disadvantages of a candidate substitute are still relevant as these might result in a substantial effect on the business. Consequently, we consider the costs and disadvantages noted by the applicants.

103 The costs and disadvantages are said by the applicants to be:

(i) Scotiabank charges $1.50 to its depositors per EMT;

(ii) There is a maximum EMT transaction amount of $1,000 and a further aggregate limit of $1,000 per day per depositor;

(iii) There is a 30-minute holding period following an EMT during which a depositor may cancel the EMT;

(iv) Large volumes of EMTs can cause processing problems. There were processing problems with the Scotiabank accounts that the applicants used for processing EMTs; and,

(v) Receipt of EMTs is highly constrained in that only Scotiabank and RBC small business accounts can receive them, and there are daily, monthly, and annual limits on EMT deposits. The daily limit is $10,000.

104 In contrast, Dr. Mathewson concludes that "Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT *[CONFIDENTIAL]* deposit accounts." He acknowledges that there are differences between processing payments via Scotiabank biller services and EMTs, the primary differences being the $1.50 fee associated with EMTs, and the $1,000 per day limit on sending EMTs versus the $49,999 payment limit applicable to the Bank's bill payee service. He finds, however, that the effects of the use of EMTs *[CONFIDENTIAL]* by the applicants cannot be said to be substantial.

105 We agree with both Dr. Schwartz and Dr. Mathewson that there are differences between Scotiabank biller services and EMTs. The costs and disadvantages asserted by the applicants above are largely not in dispute, with the exception of the asserted disadvantage of the effective degree of constraint on the receipt of EMTs (item v above). With respect to the allegation that large volumes of EMTs can cause processing problems (item iv above), we find that there is no evidence to support this statement other than the evidence of the processing problems that the applicants experienced at Scotiabank. We find that the applicants did experience EMT processing problems in regard to the Money Master accounts that they held at Scotiabank but, on the totality of the evidence, the applicants failed to establish that large volumes of EMTs can cause processing problems more generally.

106 As noted above, the applicants claim that the receipt of EMTs is highly constrained. It is common ground that there are daily, monthly, and annual limits on the value of EMT deposits that can be received. Those limits are: $10,000 per day; $70,000 per seven day period; and $300,000 per thirty day period. Mr. Grace acknowledged that, since the Scotiabank termination, the applicants have been receiving EMTs, as at June/July 2006, into *[CONFIDENTIAL]*. Mr. Grace agreed on cross-examination that the use of these *[CONFIDENTIAL]* accounts has associated with it a capacity to receive EMT deposits of *[CONFIDENTIAL]* annually, replacing the *[CONFIDENTIAL]* in capacity the applicants had at the Bank prior to termination. Not only does this represent a *[CONFIDENTIAL]* increase in deposit capacity, there is some evidence to suggest that this capacity may be greater. Mr. Grace testified that since June/July 2006 he has opened "a few more accounts". Dr. Mathewson also indicated in his report that "[t]here is no evidence on the record that indicates that there are any limits to the number of profiles under GPay's control for receipt of EMT transfers. GPay can increase its capacity to accept EMTs *[CONFIDENTIAL]*." This evidence was not disputed. Consequently, we do not find that "the receipt of EMTs is highly constrained" because of the receiving limits.

107 Of the differences asserted by the applicants between biller services and EMTs, listed at paragraph 103 above, we find these to be significant only if, as a result of the use of EMTs, the applicants' business is substantially affected. We turn now to the analysis of that issue.

108 The applicants claim that their business has been substantially affected in two ways. They say they have reduced growth in their revenues and they say there has been a fundamental change in their growth opportunities.

(i) Reduced Growth in Revenues

109 In regard to the claim of reduced growth in revenues, the applicants note that in the month following the Bank's termination, the applicants experienced a 48% (or $350,000) decrease in the dollar value of the transactions they processed as compared to the month in which the termination took place, i.e., September 2005. The applicants argue that since termination the monthly transaction value for Scotiabank has risen but not surpassed the level in September 2005. By comparison, the applicants assert that the value of transactions from the other five financial institutions have increased markedly since September 2005. In particular, the applicants argue that Bank of Montreal (BMO) dollar value transactions grew at roughly the same rate as those of the Bank prior to the Bank's termination. Since the time of the Scotiabank termination, the transaction values from BMO are said to have grown by 118% relative to September 2005, and by 169% relative to August 2005. By contrast, transaction values from Scotiabank are said to have fallen by 18% as compared to September 2005, and risen by only 13% relative to August 2005.

110 In his analysis of these same data, Dr. Mathewson notes that the value of Scotiabank transactions in September 2005 was anomalous. He finds, comparing the applicants' average monthly Scotiabank payments from the three month period June-August 2005 to the three month period April-June 2006, that GPAY's Scotiabank payments have now fully recovered their pre-termination levels.

111 In order to analyse these conflicting submissions, we first consider whether the use of EMT deposit accounts *[CONFIDENTIAL]* to effect transactions by Scotiabank depositors affected the applicants' business by reducing growth in the dollar value of the applicants' transactions. We then consider whether such use substantially affected the business.

112 For the reasons that follow, we conclude that, post-termination, the applicants did experience an initial decrease in the total dollar value of their Scotiabank transactions. We find this to have been the case regardless of whether the basis for comparison is September 2005, the month in which the termination took place, or some combination of the months immediately before the termination. Since the dollar value of transactions exhibit volatility from month to month (see Exhibits CA-62 and CA-69), absent further analysis it cannot be known what portion of the observed decline can be attributed to the Scotiabank termination. We find that it is possible that some portion of the observed decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions. This, however, might not fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions. We find, however, that, since the overall decline appears to be limited, and given the aforementioned data volatility, we are unable, on the evidence before us, to conclude what portion of the observed decline is attributable to the Scotiabank termination.

(1) The Applicants experienced an initial decrease in the total dollar value of their Scotiabank transactions post-termination

113 If September 2005 is used as the base for comparing subsequent monthly dollar values of Scotiabank transactions, then, as at July 2006, the applicants were yet to achieve similar transaction values.

114 However, we accept Dr. Mathewson's evidence that September 2005 was an anomalous month. The value of transactions in that month was 15.1% higher than the highest previous month (July 2005), or 29.8% higher than the average of the three previous months (June-August 2005). Month-over-month increases of this size are observed in the data: for example, the payment values of RBC transactions increased by 37.8% from July to August 2005, and the payment values of BMO's transactions increased 23.7% from August to September 2005. However, there is the evidence that one Scotiabank customer accounted for $141,159, or 20.7%, of the total value of September 2005 Scotiabank transactions. This individual's set of transactions also accounted for 63.4% of the total value of Scotiabank transactions that were over $1,000 in September 2005. The evidence is that in no previous month for which data are available (June 2004 to September 2005) were Scotiabank transactions for all individuals carrying out transactions over $1,000 even close to the value of transactions carried out by this one individual in September 2005. The closest monthly transaction total for all individuals who carried out transactions over $1,000 was $71,317.57 in August 2005. This is about half the value of the transactions carried out by this one individual in September

2005. Consequently, the evidence establishes in our view that the value of transactions carried out by this one individual in September 2005 was unusual. Since the individual accounted for 20.7% of total transactions in September 2005, we find the total Scotiabank transactions in September to be anomalously high.

115 Even if we had not found the Scotiabank September transactions to be anomalously high, we would consider comparisons to more than this one month to be informative.

116 If August 2005 is used as the base for comparing subsequent monthly dollar value of Scotiabank transactions, post-termination, the applicants had lower Scotiabank transaction values each month until and including January 2006. The percentage decline in transaction values comparing October 2005 (the month following termination) to August 2005 is 29.4%. If the three month average transaction value prior to September 2005 is the base for comparison, as was done by Dr. Mathewson, the applicants had lower Scotiabank transaction values each month until and including February 2006. The percentage decline in transaction values comparing October 2005 to the three month average of June-August 2005 is 32.9%.

(2) Since the dollar value of transactions exhibit volatility from month to month, it cannot be known absent further analysis what portion of the observed decline can be attributed to the Scotiabank termination

117 The business of the applicants is nascent with an established track record that only dates back to September 2003. While the business has exhibited steady, overall growth since that time, the value of transactions at individual financial institutions exhibit significant volatility including significant decreases in dollar value of transactions. For example, transaction values at RBC decreased 29.4% between October and November 2005. Scotiabank itself experienced a 15.7% decrease in the month-over-month value of transactions in the month prior to termination (July to August 2005).

118 We, thus, find that it is possible that some portion of the observed decline in Scotiabank transactions after September 2005 was attributable to causes other than Scotiabank's termination of the applicants' banking services.

(3) It is possible that some portion of this decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions

119 Mr. Grace testified on cross-examination (without giving the exact number) that as many as half of the Scotiabank customers who transferred more than $1,000 in September 2005 had accounts at more than one bank, and that there was one Scotiabank customer who used the applicants' service who opened a new account after September 2005 at a bank other than Scotiabank.

120 A table containing information on the applicants' top 20 customers by total paid in May 2006 indicates that one of these customers had bank accounts at Scotiabank and RBC. This customer had $65,815 in transactions at RBC and one $1,000 transaction at Scotiabank in that month.

121 While there is no direct evidence that any of the Scotiabank depositors who use the applicants' service availed themselves of other bank accounts in response to the Scotiabank termination, we infer from the above evidence that there was a possibility of such action for some unknown portion of Scotiabank depositors. Consequently, we agree with Dr. Mathewson that there is evidence to suggest that "[s]ome customers with an account at both a 'biller services bank' and an 'EMT bank' make GPay payments from both accounts, suggesting that the EMT limits on GPay payments at EMT banks need not have a large negative effect on the total value of GPay payments."

(4) It is possible that Scotiabank depositors availing themselves of other bank accounts might not fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions over the relevant period

122 Using September 2005 as the basis for comparison, we find that the applicants experienced a decline in the total dollar value of their transactions, that is, a decline in the total value of transactions processed through all financial institutions, up to

December 2005. After that, for each month for which we have data, the total dollar value of the transactions was greater than the total dollar value of transactions in September 2005.

123 While we have found that September 2005 was an anomalous month in regard to Scotiabank transactions, there is no evidence to suggest this month was anomalous in regard to the applicants' total transactions, and no party suggested any such anomaly. Even though September 2005 was not generally anomalous, it is informative to compare total monthly values post-Scotiabank termination to periods in addition to September 2005. If the comparison is made to August 2005, the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005. If the comparison is made to the three month average of July-September 2005, it remains the case that the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005.

(5) Since the overall decline appears to be limited and given that the data exhibit volatility, we cannot conclude what portion of the observed decline is attributable to the Scotiabank termination

124 We cannot distinguish between decreases in the dollar value of Scotiabank transactions that are attributable to the Scotiabank termination and those that are attributable to other causes, including fluctuations for which there are no apparent explanations. Nor can we determine the portion of the decrease in Scotiabank transactions that might have been compensated for by Scotiabank depositors availing themselves of accounts at other banks.

125 As noted above, the applicants' business is a nascent one with little track record and with volatility in growth across financial institutions. In such situations, more analysis is generally required in order to help determine the effect of an inability to obtain supplies of a product.

126 Analyses that may have shed light on the above were not carried out by the applicants. Such analyses need not be restricted to regression analysis. In this regard, we note that Mr. Grace had the ability to specifically identify and name customers and identify whether they had accounts at more than one financial institution. However, no such evidence was submitted. We agree with Dr. Mathewson that such information would have been valuable. Information that might have proven helpful to the Tribunal includes information on the use of accounts at other banks by Scotiabank depositors to carry out GPAY transactions, any information on regular users who may have stopped using the applicants' services post-termination either permanently or for a significant period of time, or who may have decreased the size of their transactions post- termination. In this regard, information on the average size and distribution of transactions of Scotiabank depositors pre- and post-transactions may have been informative.

127 For the reasons described in the preceding paragraphs, we find that the applicants' business may not have been affected in regard to reduced growth in the dollar value of transactions due to their inability to obtain Scotiabank biller services and EMT business deposit accounts at Scotiabank. If they were affected, we find that the decline in the dollar value of transactions was temporary. The total dollar value of transactions processed on a monthly basis was as high as pre-termination (i.e., September 2005) by at least January 2006.

128 It is possible that the observed decline has had longer term ramifications in that the total value of transactions would have been higher even after December 2005 but for the Scotiabank termination. However, we find that there is insufficient evidence on this point. To indicate that, since Scotiabank termination, transaction values have grown at more rapid rates at other financial institutions, with particular comparison made to BMO, is insufficient to make this point because, as noted above, it is possible that Scotiabank depositors availed themselves of accounts at other banks to make their transactions. Moreover, we agree with Dr. Mathewson's analysis that growth in the applicants' transaction values at bill payee banks is not a good predictor of the growth rates from Scotiabank accounts. Dr. Mathewson compares the monthly growth rate of payments from Scotiabank accounts from January 2004 to August 2005 to that from BMO accounts over the same period. He carries out this comparison through the use of a simple linear regression. We are persuaded by his finding that the estimated coefficient on BMO accounts is statistically insignificant, which implies that growth in transaction values from BMO accounts are associated with zero changes in transaction values from Scotiabank accounts. We also note Mr. Grace's testimony on cross-examination that the applicants did not turn away any transactions post-termination, except in the first two days after termination. Despite this, it is possible

that Scotiabank account holders wishing to carry out transactions with the applicants in amounts greater than $1,000 did not do so. We do not, however, have any evidence of this.

129 In considering whether the applicants were substantially affected in their business due to reduced growth, assuming that there was at least some initial impact, the evidence that the applicants turned away no transactions other than those over a two-day period is relevant. Moreover, the applicants have, without doubt, experienced considerable growth in their transactions since termination. On this last point, Mr. Grace testified on cross-examination that for the 2006 calendar year, he expected that the applicants would process more than $60 million in transactions. This expectation is an increase of about $28 million over the $32.2 million in transactions the applicants processed in 2005. The basis for Mr. Grace's projection is that, as of June 30, 2006, the applicants had already processed transactions ($29.4 million) almost equal to the value of the transactions they processed in all of 2005.

130 We also note that even if the applicants had experienced a temporary decrease in transactions, Mr. Grace testified that the joint venture earns about 6% on these in revenue, when earnings are calculated to include both foreign exchange and merchant fee revenues. If only merchant fee revenues are included, Mr. Grace testified that the joint venture's revenues are about 3% of the value of transactions. Once expenses are deducted, the remaining profit is split equally between the joint venture partners. The applicants adduced no evidence concerning the likely impact of any temporary reduction in growth in transactions on profit once all of the above calculations are taken into account.

131 For the reasons expressed above, we conclude that, on a balance of probabilities, the applicants have not been substantially affected in their business through reduced growth in revenues. We examine next whether they were substantially affected as a result of a fundamental change in growth opportunities.

(ii) Changes in Growth Opportunities

132 The applicants claim that the termination of their banking services by The Bank of Nova Scotia has substantially affected their business by fundamentally changing their growth opportunities. The applicants argue that they are substantially affected in their growth opportunities because of the $1,000 limit on EMT transfers from Scotiabank (as well as TD and CIBC). The applicants claim that this limitation prevents them from being a viable payment processor for major online merchants, effectively confining them to their present merchant customer base. The applicants concede that, to date, they have been unsuccessful in signing up any significant number of merchants, apart from online casinos and, to a lesser extent, online dating sites. They attribute their initial lack of success to being a new business. They attribute their subsequent lack of success, at least in part, to the TD and CIBC terminations in December 2003, and also the subsequent Scotiabank termination in September 2005 that is the subject of this application.

133 Mr. Iuso testified that, prior to the termination of biller services by TD and CIBC in December of 2003 (and so prior to the imposition of the $1,000 transaction limit), UMB made marketing approaches to Grocery Gateway, 407 ETR, Air Transat, Red Seal Vacations, Soft Voyage, Rogers, Air Canada, WestJet, Hudson's Bay Company, Sears, Canadian Tire, Fido and LavaLife. None signed up for the UseMyBank Service. On the evidence before us, we find that the applicants' lack of success in gaining "major" online merchants prior to the termination of banking services by CIBC and TD in December 2003 is likely attributable to a variety of reasons. One reason may well be a lack of a track record as a new business. In this regard, we rely upon the evidence of Mr. Jones that his company, WestJet, would consider the length of time a potential supplier had been in business when considering alternate suppliers. At least one potential merchant client, the Government of Canada, advised that it would not use a payment mechanism that required a payor to disclose his or her confidential electronic signature to the payment service provider. The TD and CIBC terminations may have also played a role after December 2003. Again, we rely upon the evidence of Mr. Jones on this point. Mr. Jones' evidence is that WestJet would wish a payment processor to "handle all transactions", suggesting that once the applicants were limited in processing payments over $1,000 at even one bank, their services would become unattractive to a major merchant such as WestJet. This evidence is consistent with that of Mr. Iuso. He testified that, after the TD and CIBC terminations, the Use My Bank Service became less attractive to merchants that sold products or services valued at more than $1,000. The applicants adduced no evidence as to how the Scotiabank termination worsened this

situation. Consequently, it is not clear how the Scotiabank termination exacerbated this pre-existing situation such that there was a "fundamental change" in the applicants' growth opportunities caused by the Bank's termination of banking services.

134 The applicants rely upon the Federal Court of Appeal decision in *Chrysler* to argue that the fact that other factors may have prevented the applicants from attracting major merchants initially does not mean that the applicants' forced reliance on EMTs after the Bank's termination has not substantially affected their business. In this regard, the Federal Court of Appeal wrote, at page 29, that:

> It is not a requirement of the provision that the refusal to trade and the resulting inability to obtain adequate supplies be the only factor substantially affecting the business: it is sufficient that it have a substantial effect whatever the impact of other factors.

135 We, of course, accept this to be a binding statement of legal principle. We take from this, that for the purposes of paragraph 75(1)(*a*), the factor of concern is an inability to obtain adequate supplies, and whether this has had a substantial effect on the business.

136 In the present case, we find that there is no evidence to suggest that the inability to obtain adequate supplies of Scotiabank biller services has substantially affected the applicants' business by fundamentally changing their growth opportunities.

(iii) Conclusion Regarding the Substitutability of EMTs [CONFIDENTIAL]

137 To summarize, we find that the use of EMTs *[CONFIDENTIAL]* by the applicants did not substantially affect the applicants in their business either in terms of revenue growth or growth opportunities. Consequently, we agree with Dr. Mathewson that, by application of the test established in *Chrysler*, deposit accounts *[CONFIDENTIAL]* that allow for the deposit of EMTs are in the same product market as Scotiabank biller services. *[CONFIDENTIAL]*.

138 *[CONFIDENTIAL]*. A substantial increase in the risk to a business can result in a substantial effect on that business.

139 *[CONFIDENTIAL]*.

140 *[CONFIDENTIAL]*.

141 *[CONFIDENTIAL]*.

(3) Conclusion in Regard to 75(1)(a)

142 In sum, in regard to 75(1)(*a*), we conclude that the appropriate test for defining markets is that found by the Tribunal in *Chrysler*. In this matter, we find, as a fact, that the relevant product market is biller status at the Bank and deposit accounts *[CONFIDENTIAL]* that allow for the deposit of EMTs. Upon termination of banking services by the Bank, the applicants replaced these services with EMTs into *[CONFIDENTIAL]* deposit accounts at other banks, such that, we find, they were not substantially affected in their business either from the perspective of reduced growth in revenues or a change in growth opportunities. It follows that they failed to demonstrate that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms as paragraph 75(1)(*a*) of the Act requires.

143 As noted above, the applicants are required to establish that they meet each requirement of subsection 75(1). Thus, the finding that the applicants were not substantially affected in their business as a result of the Bank's termination of banking services is fatal to the applicants' claim.

144 However, the parties adduced evidence relevant to the other requirements and made submissions with respect to the remaining requirements. In light of that, and in the event we are wrong in our conclusions with respect to paragraph (a), we continue with our analysis.

B. Have the applicants met the onus to establish that they were unable to obtain adequate supplies of the product because of insufficient competition?

145 As a matter of law, paragraph 75(1)(*b*) of the Act contains two requirements. First, there must be insufficient competition among suppliers of the product at issue. Second, the inability of the refused party to obtain adequate supplies of the product must result from that insufficient competition. In the present case, the material consideration is, in our view, whether the refusal of the Bank to provide the applicants with bill payee status and accounts to receive EMTs was because of insufficient competition.

146 This causal requirement was considered by the Tribunal in *Xerox*, cited above. There, the Tribunal concluded, at page 116, that insufficient competition must be the "overriding reason" for the refusal to deal. The Tribunal also considered that the "conduct of the complainant or the administrative burden or other costs placed upon a supplier" might well lead it to conclude that the inability to obtain the refused product did not result from insufficient competition, but "rather for objectively justifiable business reasons".

147 We agree that, as a matter of law, any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason.

148 Turning to the evidence before us, for the reasons that follow, we are satisfied, and find as a fact, that the Bank's decision to terminate the applicants' banking services was motivated by objectively justifiable business reasons. Those reasons were:

> (i) The use of the UseMyBank Service required the Bank's depositors to violate their Cardholder Agreements. Irrespective of this, the disclosure of a customer's electronic signature exposed the Bank to legal and reputational risks;
>
> (ii) The applicants at all material times failed to meet all of the obligations imposed upon them as a money services business by the PCMLTF Act and associated regulations. This put the Bank at regulatory and reputational risk; and,
>
> (iii) The provision of accounts for EMT deposits to the applicants would likely result in the Bank violating Rule E2 of the Canadian Payments Association. This again posed regulatory and reputational risk to the Bank.

149 Each reason is considered in turn.

(1) The applicants require disclosure of each customer's electronic signature

150 As noted above, the applicants require disclosure of each customer's electronic signature. Mr. Iuso agreed on cross-examination that such disclosure gave UMB access to all of the banking services that are accessible online to that customer. This could include access to lines of credit, credit cards and all of the customer's bank accounts. Where, for example, the customer had not identified GPAY as a bill payee, UMB would do so on the customer's behalf.

151 The ScotiaCard Cardholder Agreement provides:

> You are responsible for the care and safety of the card and your electronic signature. <u>You will keep your electronic signature confidential: secure from all persons without exception</u> and apart from the card at all times. You are liable for all card transactions incurred using your electronic signature.
>
> [underlining added]

152 Advice provided to cardholders on Scotiabank's website, on a page dealing with the Bank's online security, is as follows:

> Your Scotia OnLine password is confidential and must never be shared with any outside person or company, including:
>
> . . .

• Services that collect your card number and password, or any other confidential information, to perform transactions on your behalf or to collect payment from you.

. . .

In divulging your password, you contravene the terms of your ScotiaCard Cardholder Agreement and you will be fully liable for any unauthorized access to your accounts and all associated losses arising from these disclosures.

153 These provisions, and other steps the Bank takes, as described in more detail by Mr. Rosatelli, reflect the importance to the Bank of keeping a customer's electronic signature confidential. We accept without reservation Mr. Rosatelli's evidence that:

(i) In the absence of face-to-face transactions and a signature, the password used in conjunction with the ScotiaCard number acts as the authentication of a customer.

(ii) This method of customer authentication is fundamental to the electronic banking system because it is what ensures the security of customer accounts.

(iii) If passwords are compromised, there would be a decrease in customer confidence in the electronic payment system.

(iv) The Canadian Payments Association reports that 20 million electronic payments are processed daily in Canada. Those payments account for approximately $164 billion being exchanged daily through the electronic network.

154 Confirmatory evidence of the importance of keeping electronic signatures secure was given by Ms. Graham-Parker and by the applicants' expert Mr. Bensimon. On cross-examination Mr. Bensimon agreed that a breach of confidentiality in respect of banking card customer passwords would result in a significant reputational and legal risk for the Bank.

155 The applicants argue that the evidence does not support the Bank's assertion that it is a breach of the Cardholder Agreement for a customer to voluntarily disclose his or her electronic signature because:

(i) The Cardholder Agreement "acknowledges and permits that there may be authorized uses of the cardholder's electronic signature by others".

(ii) The Bank became aware in 2003 that electronic signatures were being used in the UseMyBank Service, yet it continued to supply banking services to the applicants.

(iii) The Bank has not barred RBC from receiving bill payments from Scotiabank customers, despite the fact that RBC's account aggregation service, CashEdge, also requires disclosure of a customer's electronic signature.

156 We deal with each submission in turn. In our view, as a matter of law, the Cardholder Agreement, properly interpreted, does not authorize disclosure of a customer's electronic signature. In arguing the contrary, the applicants rely upon the portion of the Cardholder Agreement that deals with the cardholder's responsibility for account activity. That portion provides, in material part:

You are liable for all debts, withdrawals and account activity resulting from:

• Authorized use of the card by persons to whom you have made the card and/or electronic signature available.

• Unauthorized use of the card and/or electronic signature, where you have made available for use the card and electronic signature by keeping them together or in such a manner as to make them available for use, until we have received notice of loss, theft or unauthorized use.

You will not be liable for losses in circumstances beyond your control. Such circumstances include:

- Technical problems and other system malfunctions.
- Unauthorized use of a card and PIN
    - after the card has been reported lost or stolen;
    - the card is cancelled or expired or
    - you have reported the PIN is known to another person.

> You will be considered as contributing to the unauthorized use of the card and/or electronic signature and will be fully liable for all debts, withdrawals and account activity where:
>
> - The electronic signature you have selected is the same as or similar to an obvious number combination such as your date of birth, bank account numbers or telephone numbers.
> - You write your electronic signature down or keep a poorly disguised written record of your electronic signature, such that it is available for use with your card, or
> - You otherwise reveal your electronic signature, resulting in the subsequent unauthorized use of your card and electronic signature together.

157 In our view, this wording is insufficient to contradict the express admonition to keep the electronic signature confidential and secure from "all persons without exception". What the provision does is to make it clear that where the cardholder acts contrary to that obligation, the cardholder will be liable for all resulting transactions, whether specifically authorized or not.

158 Whether or not, as a matter of law, cardholders indeed breached the terms of the Cardholder Agreement when authorizing UMB to access their online accounts, the Tribunal, relying upon the evidence of Mr. Rosatelli, Ms. Graham-Parker, and Mr. Bensimon, concludes that the Bank viewed such conduct to pose a material risk to the security of its electronic banking system. The evidence of these witnesses is consistent with the alert issued by the Canadian Bankers Association, referred to above at paragraph 19.

159 Further support for the view that the Bank had objective and *bona fide* concerns with the applicants' mode of doing business is also found in the potential for fraud in the applicants' accounts. Mr. Grace acknowledged that one potential source of fraud in the applicants' accounts arises when an individual compromises a customer's confidential banking identification and then uses that information to perpetuate frauds through the applicants' accounts.

160 The legitimacy of the Bank's concern with respect to the potential for fraud is supported by a policy statement of the Canadian Payments Association, approved on December 1, 2004. There, the association noted:

> Fraud perpetrated in the on-line environment has the potential to profoundly impact consumers' financial well-being, create lasting negative public opinion of financial institutions and the payments system overall and to ultimately subject the payment system and its participants to possible legal challenges.

161 The Tribunal accepts the evidence of Messrs. Monteath, Rosatelli and King that the risk the Bank was exposed to as a result of the disclosure of its customers' electronic signatures (including the risk of fraud) constituted an objectively justifiable business reason that led the Bank to terminate the applicants' banking services.

162 As to the fact that the Bank learned in 2003 that some customers were using the UseMyBank Service and thus compromising their electronic signatures, we accept Mr. Rosatelli's explanation (which was not significantly impugned on cross-examination) that due to the relatively small number of customers and transactions, the Bank chose at that time to deal with the matter by communicating directly with each customer. Such a response does not, in our view, diminish the genuine and serious nature of the Bank's concern.

163 We acknowledge that the Bank's witnesses agreed that the Bank had not barred RBC from being a bill payee, notwithstanding the Bank's knowledge that RBC's CashEdge service requires disclosure of a customer's banking number and password. However, the evidence is unchallenged that the Bank has written three cease and desist letters to RBC with respect to the use of electronic signature, and that the Bank is searching for a technical solution so as to block the ability of Scotiabank customers to access their Scotiabank accounts through CashEdge. In those circumstances, we find that the Bank's knowledge of how CashEdge works is an insufficient evidentiary basis upon which to conclude that the Bank was not motivated by objectively justifiable business reasons when it relied upon the disclosure of confidential customer information as one reason for terminating the applicants' banking services.

(2) Ability to Meet Legislative and Regulatory Obligations

164 It is not in dispute that, in regard to money laundering and terrorist financing, the following legislation is applicable to the Bank and the applicants:

(i) The PCMLTF Act (legislation that is primarily concerned with the disguising of illegitimate funds for use in criminal or terrorist financing);

(ii) The PCMLTF Regulations, SOR/2002-184;

(iii) Financial Transactions and Reports Analysis Centre (FINTRAC) interpretative guidelines as they relate to the PCMLTF Act, which, among other things, set out the reporting and record-keeping requirements of financial institutions and money services businesses;

(iv) Office of the Superintendent of Financial Institutions (OSFI) guidelines, which, among other things, identify some of the steps that federally regulated financial institutions should take to assist their compliance with the various legal requirements related to deterring and detecting money laundering and terrorist financing.

165 The Bank argues that doing business with the applicants would result in the violation of the following regulations:

(i) The third party determination rule as contained at section 5.1 of FINTRAC Guideline 6G: this rule provides that when a bank determines its account holders are acting on behalf of a third party, the bank must keep a record that sets out the third party's name, address and the nature of the principal business or occupation of the third party. The Bank contends that its consequent record-keeping obligations would be beyond the scope and ability of its existing systems. In particular, the Bank contends that it would be obliged to keep the name, address, and principal occupation for all customers transferring funds to the applicants through the bill payment system, all of the banking customers sending EMTs to the applicants, and all the merchant clients to whom funds are directed. In regard to this last alleged obligation, the Bank argues that it would be impossible for it to do so since the applicants themselves do not have this information.

(ii) The PCMLTF Regulations and the Guidelines as they relate to money services businesses, in particular FINTRAC Guideline 6C which sets out the recordkeeping and client identification requirements of a money services business: the Bank argues that the applicants, who admitted to being a money service business only at the commencement of this hearing, are unaware of their consequent reporting and record-keeping obligations. The Bank also argues that the reports the applicants currently make to FINTRAC do not come close to meeting their obligations. In particular, the Bank argues that the applicants are non-compliant because they do not identify banking customers by reviewing an original piece of identification, do not keep a large transaction record when someone is transferring — either receiving or sending — $10,000 or more using the applicants' services, and do not meet their third party record-keeping obligations. The Bank argues that any failure of the applicants to meet their record-keeping obligations would prevent the Bank from complying with its own record-keeping obligations.

166 We begin consideration of the above and related issues by reviewing the evidence of the applicants' anti-money laundering expert. Mr. Bensimon provided his opinion that:

(i) The applicants' business is a money services business as defined in the regulations to the PCMLTF Act.

(ii) As a money services business, the FINTRAC rules require the applicants to conduct reasonable due diligence in verifying customer identity, to have appropriate compliance policies and procedures, and to develop, implement and maintain an effective anti-money laundering program.

(iii) The applicants had several anti-money laundering regulatory compliance gaps relating to the following: the lack of a designated compliance officer; the need for enhanced compliance policies and procedures; the need for independent testing of those policies and procedures; and, the need for an ongoing compliance training program.

(iv) The risks that the Bank is exposed to if it does business with the applicants include: deploying resources to regularly monitor the account for suspicious activity; ensuring the applicants have strong internal compliance controls to mitigate the risk of its employees abusing their access to customer bank card numbers and passwords; and taking reasonable steps to ensure the applicants are complying with FINTRAC requirements as a money services business.

(v) On balance, "the MSB [money services business] account of the Applicant represents a low inherent risk for the bank as far as AML [anti-money laundering] risk exposure is concerned."

167 Mr. Bensimon's opinion was, however, in our view, substantially modified on cross-examination. There he agreed that:

(i) In addition to complying with the PCMLTF Act and regulations, the applicants were obliged to follow other applicable guidelines as they relate to money services businesses.

(ii) Pursuant to Guideline 6C, the applicants had record-keeping and client identification obligations. (We note that Mr. Grace had acknowledged in cross-examination that he was not aware of what the reporting and record-keeping obligations of a money services business were.)

(iii) When the applicants transfer $10,000 or more to one of their merchant customers they are obliged to keep a large cash transaction record, identify the recipient and make a third party determination. (We note that there was no evidence that they do so.)

(iv) Mr. Bensimon had seen no evidence that the applicants complied with their obligation as to proper identification of an individual as articulated in section 4.4 of Guideline 6C.

(v) When the applicants send $10,000 or more out of Canada to a merchant customer, they are required to make a report to FINTRAC. (We note that Mr. Grace testified that such an obligation was only imposed upon the bank that transmitted the funds.)

(vi) For money that is being sent by the applicants to payment processors (which accounts for 98% of the applicants' transactions), the applicants are obliged to record the third party's name, address and principal business or occupation (i.e., to record information with respect to the party to whom the applicants' merchant customer is ultimately transmitting the funds). Mr. Bensimon saw no evidence that the applicants were compliant with this requirement. (We note that Mr. Grace acknowledged on cross-examination that he did not know where the money is sent after it is received by the overseas payment processors.)

(vii) A money services business should have general familiarity with the watch list of non-cooperative countries and territories published by the Financial Action Task Force on Money Laundering, particularly where the business is transmitting millions of dollars offshore. (We note that on discovery, Mr. Grace had testified that it did not matter to the joint venture in which jurisdiction a merchant management company was incorporated, and that he had never been provided with a copy of the watch list.)

(viii) The gaps he identified with respect to the applicants' anti-money laundering regime were consistent with a company or companies that really do not understand or take responsibility for their anti-money laundering obligations.

(ix) If a customer of the Bank did not accept that it was a money services business, and if the customer did not comply with its own anti-money laundering obligations, the Bank could not comply with its own record-keeping and reporting obligations.

(x) With respect to his opinion that the applicants posed a low risk to the Bank if it continued providing services to the applicants, Mr. Bensimon admitted that:

- In preparing his opinion, he had proceeded on the basis that the average transaction processed by GPAY was $82. He was unaware that RBC customers could transfer up to $100,000 at a time. This was a material consideration to his opinion.

- He was unaware that U.S. residents with Canadian bank accounts could use the applicants' service. This was a relevant factor he had not considered. The relevance was that the applicants would also have to contend with the U.S. anti-money laundering regime.

- He was not aware that, until his report was received, the applicants had denied that they carried on a money services business. This elevated the risk to the Bank.

- He was unaware that the applicants had not initially responded to the Bank's request for a copy of the joint venture agreement. Not having the joint venture agreement created an elevated risk exposure to the Bank.

- He was unaware that at times Mr. Grace had been unwilling to disclose the identity of the applicants' merchant customers to the Bank, and instead took the position that the Bank's interest should only be with what happens to the money flowing from the Scotiabank accounts. Mr. Bensimon agreed that Mr. Grace's position was contrary to the Bank's legislated obligation to have a verifiable audit trail.

- He did not know that the applicants had refused to produce to the Bank the contracts with their merchant clients. This provided an elevated risk exposure to the Bank.

- He was unaware that Mr. Grace had no idea where the money went after it was sent by the applicants to their merchant customers. This too provided an elevated risk exposure and cause for concern for the Bank.

- He was unaware that the applicants did not know who owned the payment processing companies to which the applicants sent funds, and did not know the actual business of the payment processors. This was a material gap in the applicants' anti-money laundering plan and it too elevated the risk to the Bank.

168 In our view, Mr. Bensimon's initial view that the applicants' business represented an overall low risk to the Bank was substantially discredited by the admissions he made during his cross-examination. As well, in our view, he confirmed the veracity of the Bank's concerns in regard to FINTRAC Guidelines 6C and 6G. We give particular weight to his admission that if a Bank's customer does not comply with its own anti-money laundering obligations, the Bank cannot comply with its record-keeping and reporting obligations.

169 The evidence of the Bank's anti-money laundering expert, Mr. Mathers, also confirmed the legitimacy and *bona fides* of the Bank's stated concerns. We found Mr. Mathers to be a knowledgeable witness. His opinion was cogent, consistent with the regulatory scheme, and was not significantly impugned on cross-examination.

170 We accept Mr. Mather's opinion that:

(i) Mr. Grace had provided false information to the Bank when he answered the money laundering question in the course of an account opening. When asked "And will this account be used to conduct business on behalf of someone other than the named account holder?" Mr. Grace had responded "No". (We note that on cross-examination Mr. Bensimon also agreed that this answer was incorrect.) This answer prevented the Bank from meeting its own obligations under the PCMLTF Act and Regulations.

(ii) The products and services of online gaming websites that offer casino gaming and sports wagering can be, and frequently are, used by criminals to launder the proceeds of crime.

(iii) The applicants' business model allows customers to transfer funds to unknown entities and, in part, entities that have not been vetted by the Bank. If the Bank allows such transactions to take place, it may be allowing inappropriate or illegal transactions in violation of the PCMLTF Act.

(iv) Because the applicants' merchant customers are not required to disclose sufficient information to comply with the PCMLTF Act requirements, and because no steps are taken to verify the accuracy of the information provided, the applicants and UMB are at risk of assisting money laundering.

(v) If the applicants operated accounts at the Bank, both UMB and its customers who used the service to transfer funds, would fall within the definition of a third party in the applicable legislation. As a result, the Bank would be obliged to comply with sections 9 and 10 of the regulations to the PCMLTF Act relating to client identification, third party determination and record-keeping (all as described in FINTRAC Guidelines 6C and 6G as discussed above). In order to comply with those provisions, the Bank would be obliged to obtain information and keep records about all of the applicants' customers, including: the banking customers' name, address, occupation (or the nature of their principal business); and, the nature of the relationship between the banking customer and the applicants.

(vi) The applicants are a very high risk banking client for any Canadian Schedule 1 Chartered Bank.

171 Mr. Ronald King, the Chief Anti-Money Laundering Officer for the Scotiabank group of companies also testified in regard to regulatory and legislative issues. His evidence was supported by the contents of the Bank's Anti-Money Laundering Handbook, the PCMLTF Regulations, and FINTRAC and OSFI Guidelines. The Anti-Money Laundering Handbook confirms, in our view, that the Bank takes its regulatory obligations seriously and demonstrates that the Bank has developed a standard approach to all businesses that seek its services. As much of Mr. King's evidence was grounded in the Handbook and the regulatory scheme, we accept it as being cogent and credible. As well, we were impressed by Mr. King's obvious knowledge of the regulatory environment, his professionalism, and the balance or fairness he showed in his evidence. His evidence was not significantly modified on cross-examination and we accept his evidence that:

(i) The design of the applicants' business model facilitates anonymity in that the applicants remit bulk payments to a third party which often is a money services business. Because the applicants do not transmit funds to the ultimate beneficiary, the audit trail is severed.

(ii) The Bank's Anti-Money Laundering and Anti-Terrorist Financing Handbook sets out the standards the Bank is expected to apply.

(iii) Even where a potential customer is a high risk customer, and not a restricted or prohibited customer, the Handbook requires that the Bank not enter into a banking relationship where the legitimacy of the source or ultimate destination of funds passing through an account cannot be determined.

(iv) There were a number of factors that caused the Bank concern about continuing a relationship with the applicants. In his words:

> They involve such things as the nature of the business model, that it involved offshore payments; the nature of the business model and that it seemed to have a high percentage of Internet gambling payments that were of grave concern

to us. It was also a concern that their process afforded anonymity to the remitter of the funds which would make it attractive and potentially something that could be abused by the money laundering — a person wishing to launder money. We were also concerned that the seeming weakness in compliance structure within UseMyBank would make it very difficult for them to effectively manage their risks or meet their compliance obligations.

[underlining added]

(v) In the course of the 2005 investigation the Bank conducted in connection with the applicants' business, it was the recommendation of the anti-money-laundering group that the Bank terminate its relationship with the applicants.

172 From all of this evidence, we take the following: the applicants were not compliant with their anti-money laundering obligations when the Bank decided to terminate the banking relationship; in consequence, the Bank probably could not, and it believed it could not, discharge its own legislated and regulated compliance obligations. We, thus, find that the Bank was motivated by an objectively justifiable business reason, namely a concern that it would not be able to meet its regulatory obligations when it decided to terminate the applicants' banking services.

(3) Rule E2 of the Canadian Payments Association

173 Dr. James Dingle, a former Deputy Chairman of the Board of Directors of the Canadian Payments Association, testified in connection with Rule E2 of the Canadian Payments Association. His evidence was objectively grounded in the contents of Rule E2 and other Canadian Payments Association documentation, and was presented cogently and with consistency. Because of that, and his significant experience, the Tribunal found him to be a knowledgeable, credible and reliable witness. His evidence was not, in our view, diminished in any significant way on cross-examination. We accept his expert testimony that:

(i) Pursuant to the *Canadian Payments Act*, R.S.C. 1985, c. C-21, the Bank must be a member of the Canadian Payments Association and must adhere to its rules. Those rules govern the exchange, clearing and settlement of various types of payment items.

(ii) Rule E2 of the Canadian Payments Association, implemented February 3, 2005, deals with the exchange, clearing and settlement of electronic online payment items, including EMTs. Section 5(a) of the Rule states:

> In all matters relating to the Exchange, Clearing and Settlement of Online Payment Items for the purposes of Clearing and Settlement, each Member shall respect the privacy and confidentiality of the Payor and Payee personal and financial information in accordance with applicable Canadian provincial and federal legislation governing the treatment of personal and financial information.
>
> [...]
>
> For greater clarity, the Payor's [i.e. the banking customer's] personal banking information, such as but not limited to the authentication information (e.g., user identification and password) and account balance, shall not be made available at any time to the Acquirer and/or Payee [i.e. the applicants] during the On-line Payment Transaction session

(iii) If the Bank were required to continue to offer banking services to the applicants, the Bank either would have to clear the EMTs received from other members of the Canadian Payments Association in breach of Rule E2, or not clear any of the EMTs transferred into the applicants' accounts at the Bank.

(iv) Breach of Rule E2 would expose the Bank to both regulatory and reputational risk, including the risk of compliance proceedings for breach of Rule E2.

(v) The Canadian Payments Association has defined a reputational risk as follows:

> Reputational Risk is the risk of significant negative public opinion that results in a critical loss of funding or customers. This risk may involve actions that create a lasting negative public image of, or loss of public confidence in, the overall operations of a Financial Institution or the payments system...

174 The applicants do not appear to challenge this evidence. In closing argument they simply observe, correctly, that this rule, while applying to EMTs, does not apply to bill payments that are processed within the Bank. That is bill payments that move from the Bank's customer to the Bank's bill payee, without entering the Canadian Payments Association's Inter Member Network.

175 Messrs. Monteath, Rosatelli and King testified that the fact the applicants' business requires disclosure of customers' ScotiaCard number and password was one of the reasons the Bank decided to terminate the applicants' banking services. As set out above, we have accepted that evidence and found that to have been the case. Further, Dr. Dingle's opinion provides objective, independent confirmation of the importance to the Bank of the protection of the confidentiality of its customers' electronic signature. His evidence supports the *bona fides* of the Bank's concern about the disclosure of its customers' private banking information and it goes to establishing to our satisfaction that the decision to terminate the applicants' banking services was based upon an objectively justifiable business reason.

(4) Other Business Justifications Raised by the Bank

176 The Bank also argues that the following objectively justifiable business reasons existed for terminating the applicants' banking services: the applicants' business is likely in breach of section 202 of the *Criminal Code*, R.S.C. 1985, c. C-46 (relating to illegal gambling) and it is probable that the Bank would in turn be in breach of the *Criminal Code* if it is required to provide accounts and services to the applicants; online gambling is prohibited by the laws of the United States and this too exposes the Bank to the risk of prosecution; and, the Bank is exposed to reputational risk and potential class actions because the applicants receive a profit on foreign exchange that they do not disclose to either the bank customers for whom they are agents, nor the payment processor companies for whom they are trustees.

177 We deal with the issue of U.S. law below in the context of the discretionary nature of the relief sought.

178 With respect to the effect of the *Criminal Code* and foreign exchange profit, we do not find the Bank's arguments to be as cogent as those discussed above. However, we do not find it necessary to reach any final conclusion with respect to these two arguments.

(5) Conclusion with Respect to Paragraph 75(1)(b)

179 In our view, the impact, or potential impact, upon the Bank caused by the disclosure of its customers' confidential banking information, and the related potential for fraudulent transactions in the applicants' accounts, the regulatory concerns we have found to exist, and the impact of Rule E2 are such that we are satisfied that the Bank's refusal to supply any services and accounts to the applicants was not due to insufficient competition among suppliers in the market. Rather, the termination of banking services was the result of objectively justifiable business reasons.

180 In concluding our analysis of this issue, we observe that we have been mindful throughout of the timing of the termination of the applicants' services in light of the launch of Interac Online. Aside from the coincidence of timing, we have found no evidence that would enable us to conclude that the existence or pending status of Interac Online was at all a relevant consideration when the decision was made to terminate the applicants' banking services. Rather, we find as a fact that the termination was done for valid business reasons.

C. Have the applicants established that they are able to meet the usual trade terms?

181 The Bank argues that the applicants are not able to meet the usual trade terms on which EMT accounts and/or bill payee services are offered. Specifically, the Bank argues that:

(i) EMT accounts are only offered by Scotiabank to small businesses, and the applicants are not now, and at the time of termination were not, a small business.

(ii) The applicants cannot comply with the terms of the Bank's Bill Payment Agreement.

182 The applicants argue, correctly, that the expression "trade terms" is defined precisely and restrictively for the purposes of section 75 in subsection 75(3). For ease of reference that subsection provides:

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

183 In response, the Bank argues that restricting EMTs to small businesses, and the terms found in its Bill Payment Agreement are "reasonable technical and servicing requirements".

184 There are, in our view, two significant difficulties with this submission. First, it is a principle of statutory interpretation that bilingual legislation may be construed by determining the meaning shared by the two versions of a provision. Once a common meaning is found, one must then confirm that such meaning is consistent with the purpose and scheme of the Act. (See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at pages 324, 326-329; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pages 80-81.)

185 Dictionaries generally define the word "entretien" as "maintenance" or "upkeep". See, for example:

- *Le Robert & Collins Dictionnaire Français-Anglais — English-French* defines entretien as:

  (a) (*conservation*) [*jardin, maison*] upkeep; *[route]* maintenance, upkeep; *[machine]* maintenance [...]

  (b) (*aide à la subsistance*) *[famille, étudiant]* keep, support; *[armée, corps de ballet]* maintenance, keep [...]

  (c) *(discussion privée)* discussion, conversation [...]" [4th ed., s.v. "entretien"].

- The *Larousse French English/ English French Dictionary* sets out the following definitions:

  "servicing" *n.* 1. [of heating, car] entretien *m. 2* [by transport] desserte *f.*

  "entretien" *nm.* 1. [maintenance] maintenance, upkeep [...] 2. [discussion-entre employeur et candidat] interview — [colloque] discussion [...] [2003 ed, s.v. "entretien" and "servicing"].

186 Thus, adopting the shared meaning principle of statutory interpretation, one could reasonably conclude that the terms "servicing" and "entretien" refer to the upkeep or maintenance requirements that a supplier imposes on a purchaser so as to ensure that proper services are available to the ultimate purchaser with respect to the product purchased. We find nothing in that interpretation that is *per se* inconsistent with the scheme or purpose of the Act.

187 However, that more restrictive interpretation would not, in our view, be broad enough to include the contractual type limitations that the Bank imposes upon its customers by, for example, restricting EMTs to small businesses.

188 Second, the more restrictive interpretation argued by the applicants appears to be consistent with the legislative history of the provision. We note, parenthetically, that the legislative history, Parliamentary debates, and similar material may properly be considered when interpreting a statute, so long as the history is relevant, reliable and not assigned undue weight. (See Reference re: *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783 (S.C.C.) at paragraph 17; and *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paragraph 35.)

189 We find the following comments of the then Ministers of Consumer and Corporate Affairs to be relevant:

• On April 30, 1974, Herb Gray, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs with respect to Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl., 1974). The following was said with respect to "usual trade terms":

> Mr. Atkey: Another concern is with the term "usual trade terms", which appears in proposed Section 31.2(b) on page 16. You made reference in an earlier section to the fact that the "usual trade terms" demanded by a distributor or a manufacturer might not only include aspects of price, it might also involve aspects of technical services as a requirement.
>
> Mr. Gray: That is right.
>
> Mr. Atkey: You say that that would be a reasonable interpretation of the term "usual trade terms". Would you be willing to consider an amendment to specifically provide that that is what it means, because I would suggest there have been some concerns expressed that where distributors or manufacturers are concerned about selling their product or making it available to various retail outlets that service, the extent and the quality of service that is provided in respect to the sale of that product is sometimes as important, or more important, than the actual price, and there is a great fear abroad right now that the phrase "usual trade terms" only refers to price and if there was a broader definition I think it might allay some of those fears, so that the service element which I would suggest to you is of equal concern to the consumer today would be taken into account by the RTPC by virtue of statutory directives.
>
> Mr. Gray: Frankly, I think the type of thing you are talking about is covered in the present wording of proposed Section 31.2(b):
>
> > (b) ...<u>is willing and able to meet the usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise...</u>
>
> [underlining added]
>
> However, I would be happy to receive suggestions from the Committee if it is felt that this could be further clarified.
>
> I think one would have to be careful not to insert words that might be considered to be unduly remedying and would prevent the Commission from taking into account what might otherwise be considered to be acceptable definitions of the term "usual trade terms" but would not be covered by it. After all, one of the benefits that I think comes from using a form of civil jurisdiction is that there is the potential for flexibility in looking at the vast range of situations that can arise in an economy as complex as our own. But, as I say, I would be happy to have the views or the suggestions of the Committee on this.
>
> [...]
>
> Mr. Jarvis: [...] Can I go on, for a minute, to usual trade terms? Again, I will relate it to the furniture industry; I think it is a good example because it is a highly competitive industry and generally composed of small businesses even at the manufacturing level:
>
> > Often a requirement of a furniture manufacturer is not only usual trade terms in respect of payment units of purchase.

> I do not know what "and otherwise" might mean, but it may mean the training of that retailer salesman by the manufacturer's marketing staff; it may mean an undertaking by the retailer to supply so many square feet of display room; it may also mean his undertaking to warehouse a certain number of units in various colours. My question is: in the opinion of the Minister and his officials, do the words "and otherwise" as purportedly they modify usual trade terms cover that type of conditions of sale, which is a vital thing in many consumer products?

Mr. Gray: In my view they could cover the type of things you mentioned provided, of course, that on the facts they are usual in that market, strictly as a matter of fact.

Mr. Jarvis: My question is dictated, Mr. Minister, because remembering the interpretation of many of these clauses at law, the words "and otherwise" are often taken — I forget the Latin maxim for this — *ejusdem generis.* I have not heard that since law school, *ejusdum generis.* In other words, the words "and otherwise" can only be taken within the context of respect of payment and units of purchase. You cannot go beyond that in a legal interpretation of those words. That is what I am afraid we might be faced with in so far as the Commission is concerned with the words "and otherwise" here.

Mr. Gray: I raised this with our legal draftsmen and they have told me this is not the case. As far as I am concerned, this is an area I am examining for possible clarifying amendment because I personally do not intend the clause to be interpreted in the *ejusdem generis* sense.

[Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 9, April 30, 1974, 2nd Sess., 29th Parl., p. 9:24-25, 9:31-32.]

• When André Ouellet, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs on December 3, 1974, he stated as follows with respect to the refusal to deal clause found in Bill C-2 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 1st Sess., 30th Parl., 1974):

> I should like also to remind you that many representations have been made to the effect that a manufacturer may legitimately claim the right to refuse to supply a customer if the latter is not in a position to distribute the product adequately from all points of view. We have therefore made an amendment to recognize this right. The commission will not be able to force a supplier to supply a customer if the latter does not satisfy all professional and other requirements that usually govern the marketing of the article concerned.
>
> [...]
>
> [Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 15, December 3, 1974, 1st Sess., 30th Parl., p. 15:12.]

190 The proposed provision underlined above was ultimately not enacted. This shows an intent to strictly limit what was meant by trade terms. The definition of trade terms is restricted and provides that the phrase "trade terms" "means", as opposed to "includes", the three things articulated in the definition.

191 We take from the debates set out above that the parliamentarians' attention appears to have been focused upon the situation prevailing between manufacturers and dealers. However, in subsection 2(1) of the Act, "product" is defined to include an article and a service. In our view, the case may be made that the restrictive definition of "trade terms" in subsection 75(3) of the Act is not appropriate where the product at issue is a service. For example, having regard to the use of the word "entretien" in the French version, it is at least arguable that in the context of the provision of services such as banking services the concept of "units of purchase" and "technical and servicing requirements" have little obvious application. Put another way, in the context of

the provision of services, it may be unrealistic and not commercially sound to restrict "trade terms" to those relating to payment, units of purchase and the services that surround those units of purchase.

192 It may be that this is an issue that should be considered if amendments to the Act are contemplated in the future. For our purpose, in view of our findings with respect to paragraphs 75(1)(*a*) and (*b*), it is not necessary to reach a final decision on this point.

193 All of this is not to say that a failure by a person to meet other usual contractual terms that do not fall within the definition of trade terms is irrelevant. Such a failure may establish that the inability to obtain a product is not a result of "insufficient competition" within the meaning of paragraph 75(1)(*b*). It may also be relevant to the discretionary nature of the relief available under section 75. In the present case, we deal below with the Bank's restrictions upon EMT accounts and bill payee status when we discuss the exercise of discretion.

194 It is not necessary for us to consider, and we do not, whether the services are in ample supply as required by paragraph 75(1)(*d*). We do however wish to turn to the final required element found at paragraph 75(1)(*e*).

D. Have the applicants established that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market?

195 We address this requirement first by considering what is meant by "an adverse effect on competition in a market". We then consider whether the applicants have established that the Bank's refusal to provide them with bill payee status and EMT deposit accounts is having, or is likely to have, an adverse effect on competition in a market.

(1) The Meaning of an Adverse Effect on Competition in a Market

196 Because paragraph 75(1)(*e*) is new, we find it of assistance in interpreting the phrase "competition in a market" as used in paragraph 75(1)(*e*) to consider how paragraph 79(1)(*c*) of the abuse provisions of the Act has been interpreted. Paragraph 79(1)(*c*) requires consideration of whether the impugned conduct "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market". This provision was considered by the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (F.C.A.), leave to appeal to the Supreme Court of Canada requested. There, at paragraph 36, the Federal Court of Appeal wrote:

> [t]wo aspects of the scope of paragraph 79(1)(c) are immediately evident from the wording. First, the effect on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future. Second, the effect on competition which must be proven to ground an order prohibiting an abuse of dominance is one of substantial preventing or lessening. The requisite assessment is thus a relative one [...].

197 The similar wording in 75(1)(*e*) in regard to time frames, albeit limited to two rather than three time frames, and the concern with the effect on competition also suggest, in our view, that the paragraph demands a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal.

198 Comparative analysis in regard to competition in a market requires consideration of relative competitiveness: "... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice ..." (See *Canada Pipe*, cited above, at paragraph 37). This relative comparative assessment was, as noted by the Federal Court of Appeal at paragraph 43, also articulated by the Tribunal in *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Trib.); *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.) and *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Competition Trib.) (Nielsen).

199 The *Laidlaw* decision is particularly clear on this point. At page 346, the Tribunal wrote: "[...] the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its

competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence."

200 Thus, we conclude that paragraph 75(1)(*e*) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal. This raises the question of what is meant by "competitiveness".

201 The "competitiveness" of a market under both the abuse and merger provisions of the Act refers to the degree of market power that prevails in that market. In *NutraSweet*, cited above, the Tribunal wrote, in the context of a section 79 matter, (at page 47) that: "[t]he factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that [Nutrasweet] has market power. In essence, the question to be decided is whether the anti-competitive acts engaged in by [Nutrasweet] preserve or add to [Nutrasweet's] market power."

202 In *Nielsen*, cited above, the Tribunal similarly noted, at pages 266 and 267, that: "to paraphrase the words of the Tribunal in *NutraSweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen preserve or add to Nielsen's market power."

203 In regard to mergers, the Tribunal indicated in *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.), at page 314, that:

> [i]n assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

204 This approach was confirmed in other merger decisions including *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Competition Trib.), rev'd 2001 FCA 104 (Fed. C.A.), leave to appeal to S.C.C. refused, [2001] 2 S.C.R. xiii (S.C.C.). There, however, at paragraph 302, the Tribunal took issue with whether a merger that merely preserved market power lessened competition.

205 Aside from the jurisprudence cited above, which indicates that a relative assessment of market competitiveness has to do with an assessment of market power, and how it may have changed, this is also suggested by the very nature of the various means by which firms compete.

206 Adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers. The question to be answered is whether any of these or other competitive factors can be adversely affected absent an exercise of market power.

207 Product variety (including variety in terms of differing geographic locations in which the product is sold) in a market characterized by differentiated products is the most obvious potential factor that might be adversely affected in the absence of an exercise of market power. A business' product can be eliminated or made less commonly available through a refusal to deal without the remaining market participants exercising market power. However, in a market that remains competitive subsequent to a refusal to deal, the effect of the disappearance of one firm's product on consumers is negligible. This is the very nature of competitive markets: no single seller has any influence over price or any other factor of competition, including variety. In such a market, one less firm selling a product in a relevant market will either go unnoticed or will allow for a profitable opportunity for entry.

208 This is similarly the case in regard to the impact of a refusal to deal on price, product quality, and any other factor of competition. Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

209 We also note that both Dr. Mathewson and Dr. Schwartz assess the effect on competition as a result of the Scotiabank termination in terms of market power. Dr. Mathewson opined that "[i]n analyzing the potential effect on competition of Scotiabank's terminating GPay's banking services, consideration was given to the possible impact of termination on any hypothetical market power accruing to Scotiabank, in particular to its Interac Online Service." Dr. Schwartz meanwhile noted that the effect of the termination will be insufficient competition and, thus, likely higher merchant fees.

210 Thus, paragraph 75(1)(*e*) does not differ from what is contemplated in paragraph 79(1)(*c*), section 92 (merger provision) and other sections of the Act. The difference lies in the degree of the effect. Under section 75, the effect must be adverse, while under other provisions the effect must be substantial.

211 From the plain meaning of the words used by Parliament, we find that "adverse" is a lower threshold than "substantial". As for the requirement that the refusal to deal "is likely to have" such adverse effect, at paragraphs 37 and 38 in *Air Canada v. Canada (Commissioner of Competition)*, [2000] C.C.T.D. No. 24 (Competition Trib.); affd [2002] F.C.J. No. 424 (Fed. C.A.), the Tribunal found that a relatively high standard of proof is required to establish the "likely" occurrence of a future event. The Tribunal found that the terms "likely" and "probable" were synonymous. On the basis of the plain meaning of the word "likely", and on the basis of the Tribunal's reasoning in *Air Canada*, we find the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable" and not merely possible.

212 However, as noted by the Tribunal in *Hillsdown*, at page 314, one cannot consider the degree of any likely increase in market power without reference to the particular facts of a case (including consideration of any facts that may be relevant under section 1.1 of the Act). We now turn to that.

(2) The Effect of Scotiabank's Refusal to Deal

213 At the outset we observe that for the purpose of paragraph 75(1)(*e*), the market at issue need not be, and, in this case, is not the market of concern in paragraphs 75(1)(*a*) and (*b*). The market of concern under 75(1)(*e*) is the market in which the applicants participate. That said, we are satisfied that, in this case, that market need not be defined. We need first only decide whether Scotiabank's online debit product, Interac Online, and the UseMyBank Service are currently in the same market and/ or are likely to be in the same market for future transactions. Absent such actual or expected competition, it is impossible for the refusal to deal to have an adverse effect on competition.

214 As we stated above, an adverse effect on competition requires that Interac Online's market power be created, enhanced or preserved. If the two services do not compete, and are unlikely to compete, any market power Interac Online may have will be unaffected by any impact a refusal to deal has on the UseMyBank Service. In this regard, we agree with Dr. Mathewson that "[f]or Scotiabank to enhance its market power (with respect to Interac Online) by weakening GPay, GPay must be an effective competitor to begin with, and it must be a more effective competitor than other suppliers of substitute services, such as credit cards. If these two things do not hold, then Scotiabank's refusal cannot increase any hypothetical market power."

215 We first address the issue of current competition and then turn to potential future competition.

(a) Current Competition

216 While the applicants concede that a difference between the two services is their respective merchant bases, they contend for the following reasons that Interac Online and GPAY compete:

(i) The UseMyBank Service and Interac Online are functionally nearly identical; and,

(ii) There is no technical or operational characteristic pertaining to the UseMyBank Service that would limit its use to online gaming.

217 In response to the applicants' submissions on functional substitutability, we note that while functional substitutability is often, if not almost always, a characteristic of products that are in the same product market, functional substitutability alone is

not sufficient to support a finding that products compete in the same market. That said, we agree that the UseMyBank Service and Interac Online have at least the potential to compete for at least some subset of merchants. These merchants would have to be Canadian based because, as Mr. Rosatelli testified, Interac Online is only available to such merchants. As to whether Interac Online and the UseMyBank Service currently compete in the same market, both expert economists agree that they do not. We accept that conclusion.

218 In Dr. Schwartz's view, as set out in his first report, "[t]he major effect on competition arising from Scotiabank's terminations relates to the future market for online debit payment service". In his second report, Dr. Schwartz notes that he agrees "with Professor Mathewson that the GPAY Service and Interac Online are not close "substitutes" currently (although Interac Online's merchants could switch because GPAY is functionally similar) because of the lack of overlap in their respective merchant bases." We agree that Interac Online and the UseMyBank Service do not currently compete and so are not in the same market.

(b) Future Competition

219 The only competition at issue is future competition. Further, it appears from the applicants' submissions that only a portion of that future competition is at stake: that is competition for merchants whose transactions include transactions that are over $1,000 (hereafter referred to as "high-value transaction merchants").

220 The applicants argued in their closing submissions that a major effect on competition "relates to the future market for online debit payment services. The various limitations that using EMTs impose on GPAY constrain its ability to participate in the growing online marketplace. The $1,000 cap that Scotiabank's termination imposes on payments processed by GPAY makes it unlikely to be adopted by major online merchants such as airlines. The limitations on EMT deposits will ultimately prevent GPAY from increasing its processing capacity."

221 Not all merchants are likely to find the $1,000 limit to be a constraint; for example, the applicants' witness, Mr. Morgenstern of the Ashley Madison Agency, testified that the agency's average ticket sale was $77 and the lifetime revenue per paid member was $147. Moreover, the applicants did not argue that they are constrained as a result of the Scotiabank termination in their ability to pursue merchants who are unlikely to find the $1,000 EMT limit to be a constraint. Consequently, in this decision, we limit ourselves to addressing the potential competition between the UseMyBank Service and Interac Online for high-value transaction merchants.

222 The applicants assert that the consequence of the $1,000 limit and the associated prevention of competition is likely higher merchant fees.

223 In response, the Bank argues that "[t]here is no evidence that the payment transfer limit of $1,000 per day for EMT transfers has had any impact on the Applicants' ability to attract main stream merchants. Rather, the evidence is that many merchant prospects declined to subscribe to the Applicants' service because of concerns about the fact that the Applicants' business is premised on disclosure of a banking customer's confidential Internet password and card number. Merchants do not wish to be affiliated with a payment processing service that operates in that manner." Consequently, the Bank contends that it is unlikely that Interac Online and the UseMyBank Service will ever compete, and so it is unlikely the refusal to deal will have an adverse effect on competition.

224 We find there is no evidence to suggest that the applicants are prevented from competing with Interac Online for high-value transaction merchants as a result of the refusal to deal. As such, the refusal to deal is not likely to have an adverse effect on competition.

225 In regard to this lack of evidence, Dr. Schwartz noted that "it is not important whether GPAY turns out to be successful or not; competition in the marketplace will decide its future success. The relevant question is whether Scotiabank's termination has an adverse effect on that competition." The applicants further argue that "the purpose of the *Competition Act* is to foster the competitive process, not to pick winners or losers. It may well be that GPAY will not succeed in attracting major merchants

even if the cap is removed. But it is clear that with the cap in place, it is very unlikely that GPAY would be attractive to any merchant that regularly has transactions worth over $1,000."

226 We agree that the purpose of the Act is not to pick winners and losers, and, in particular, that the purpose of paragraph 75(1)(*e*) is not to determine whether one party has been wronged by way of a refusal to deal, but rather to determine whether as a consequence of that refusal there is or is likely to be an adverse effect on competition. While evidence on the likelihood of success of a particular participant in a market may not always be necessary for such a determination, we do find that evidence on the likelihood of participation is necessary. It is not sufficient merely to assert an intent to so participate.

227 We find that there is no evidence to suggest that the applicants are actively seeking new Canadian based merchants whose transactions would likely include transactions valued at more than $1,000. Nor is there evidence to suggest that the applicants would be actively seeking such merchants but for the Scotiabank termination. We take from Mr. Iuso's cross-examination that there is evidence to suggest that the applicants were seeking such merchants prior to the termination of biller services by TD and CIBC in December 2003. If the Scotiabank termination made a critical difference to whether such merchants continued to be sought, one would expect the applicants to have continued to pursue, at least to some extent, such merchants after the TD and CIBC terminations but not after the Scotiabank termination. As stated earlier in this decision at paragraph 133, there is nothing to suggest that the Scotiabank termination has in any way exacerbated a pre-existing situation.

228 *[CONFIDENTIAL]*.

229 To the extent that our finding may be incorrect and Interac Online and the UseMyBank Service would in fact likely compete for large-value transactions but for the refusal to deal, it remains to be shown that they are close competitors in that an important price constraining effect on Interac Online would come from the UseMyBank Service. Out of the possible set of competitors, including credit cards and electronic wallets (such as PayPal), Interac Online and the UseMyBank Service are arguably functionally the most similar but for the important caveat that the UseMyBank Service system requires the disclosure of confidential information. As noted above, not only is functional similarity insufficient to conclude that two products constrain each others' prices, an important functional difference could prove critical to a finding that they do not. We further note Dr. Mathewson's observation that virtually all Interac Online participating merchants accept credit cards. In this context, we observe that the questionable viability of Interac Online suggests the possibility that Canadian Internet merchants are satisfied with these payment means and that these means compete with Interac Online.

(3) Conclusion in Regard to 75(1)(e)

230 In sum, we find that since Interac Online and the UseMyBank Service are not currently in the same market and they are not, on a balance of probabilities, likely to be in the same market in the future in regard to large-value transaction merchants, the refusal to deal is not likely to have an effect on competition. Since the refusal is not likely to have an effect, it is not likely to have an adverse effect.

E. The Discretionary Nature of the Relief Sought

231 We have determined that the applicants failed to establish that they are substantially affected in their business due to their inability to obtain adequate supplies of a product. They also failed to establish that any such inability was because of insufficient competition among suppliers of the product, and, that the refusal to deal is having, or is likely to have, an adverse effect on competition. It follows that the application should be dismissed.

232 However, even if the applicants had succeeded in establishing all of the elements contained in subsection 75(1), we are satisfied that this is not a proper case for the granting of discretionary relief.

233 The discretionary nature of relief under section 75 was considered by the Tribunal in *Chrysler*, where the Tribunal identified a number of factors relevant to the exercise of that discretion. One factor identified by the Tribunal was the reasons for the supplier's decision to discontinue dealing. In our view, this is the most relevant factor to the proper exercise of discretion in this case.

234 We have previously found that the Bank's refusal to deal was based upon the legal or reputational risks posed by the disclosure of the Bank's customers' electronic signature, the consequent likelihood of Rule E2 of the Canadian Payments Association being breached, and other regulatory concerns.

235 In our view, the above risks are legitimate and continue. It would neither be commercially reasonable nor consistent with the purpose of the Act to require the Bank to provide banking services to the applicants when to do so would expose it to such risks.

236 Further, while the applicants seek biller status and EMT deposit accounts, we are satisfied that they do not comply with the reasonable terms that the Bank imposes upon all of its customers as a condition for receipt of those services. In that circumstance, it would be unreasonable to require the Bank to deliver services other than on the commercially reasonable terms it generally imposes.

237 In respect of biller status, the conditions found in the Scotiabank Electronic Bill Payment Service Agreement include the following:

(i) The bill payee shall not require Bank customers to divulge their ScotiaCard number and/or personal identification number, and/or electronic signature.

(ii) The services provided cannot be used, directly or indirectly, to conduct or act on behalf of a money services business.

238 The applicants have conceded that they cannot operate their business without bank customers disclosing their confidential banking password and bank card number, that they operate a money services business, and that they act on behalf of other money services businesses. They cannot, therefore, comply with the terms of the Bill Payment Service Agreement.

239 We acknowledge that the terms of this agreement have been significantly amended since the applicants first received biller status at the Bank. However, we find that the Bank's amendment of this agreement was not done in any way to target the applicants. We reach this conclusion because we accept as truthful Mr. Rosatelli's evidence that: the agreement was redrafted in order to allow the Bank to comply with the regulations and additional reporting requirements associated with the new anti-money laundering regulations; the drafting of the new agreement began in late 2003 or early 2004 (significantly before the termination of the applicants' banking services); a number of existing bill payee companies have since been terminated by the Bank because they are not in compliance with the new agreement; and, a number of potential bill payee companies have been declined as a result of being unable to meet the terms of the new agreement.

240 With respect to EMT deposit accounts, the Bank's evidence that such accounts are only offered to businesses that meet its definition of a small business was not challenged. That definition is a business that does not exceed $5 million in annual deposits or $400,000 in monthly deposits, and does not exceed more than 150 transactions through its accounts in a month.

241 The reason for these limits was explained by Ms. Graham-Parker, who testified on cross-examination that commercial clients are larger than small businesses, are more complex, with more transactions and larger transaction amounts. EMTs in those circumstances are much harder to control, especially with "the number of employees that would need access". The existence of difficulty in allowing businesses to receive and send EMTs even into small business accounts is supported by the fact that RBC is the only other bank to allow this.

242 Mr. Grace admitted on cross-examination that the applicants are no longer a small business. They cannot, therefore, qualify for the accounts they seek on the terms the Bank generally imposes.

243 There is a final factor that militates against the exercise of any discretion in the applicants' favour, and that flows from the fact that about 50,000 Bank customers are residents of the United States. Mr. Iuso agreed that U.S. residents with Canadian bank accounts can and do use the UseMyBank Service, and the Bank has affiliated entities with assets in the U.S. These facts make relevant Mr. Stewart's opinion that:

(i) Online gambling violates both U.S. federal law and the laws of each of the 50 States.

(ii) The U.S. Justice Department had, in July 2006, arrested a British national and executive of an offshore online sports book when the executive made a stopover at a U.S. airport. The executive has since been indicted for violation of U.S. law by accepting bets from Americans.

(iii) Any business that knowingly permits its services to be used for the purposes of online betting by residents of the U.S. is at risk of being charged with illegally aiding and abetting Internet gambling.

(iv) If the Bank were to receive funds into its accounts held in the name of the applicants from American residents to be used for the purpose of online gambling, the Bank would be committing an offense in the U.S. and would be exposed to the possibility of prosecution.

244 Mr. Stewart's evidence was not diminished on cross-examination and we accept that requiring the Bank to provide banking services to the applicants would put the Bank at some risk for aiding and abetting acts that are in violation of U.S. law.

245 As a final observation on this point, during final argument the applicants tendered an extensive two-page undertaking to the Tribunal. The undertaking is attached as Schedule C to these reasons. In it, the applicants undertake, among other things:

(i) To comply with all applicable anti-money laundering legislation in Canada.

(ii) To submit to periodic audits (not more than annually) upon the request of the Bank, such audits to be conducted by a mutually acceptable anti-money laundering expert. They would remedy any differences found on the audit.

(iii) To remedy any deficiencies in their computer security procedures identified by any periodic computer security audit requested by the Bank.

(iv) Not to have biller status with respect to Bank customers not resident in Canada.

(v) To block payments to online casinos or their management companies where the applicants are able to determine that the account holder is resident in the U.S.

246 As the undertaking was presented only in final argument, there was no evidence with respect to, for example, the feasibility of not having bill payee status with respect to the Bank's U.S. resident account holders, or to the feasibility of blocking certain online payments. Further, the timing of the presentation of the undertaking does, at least, suggest that the undertaking implicitly recognizes the legitimacy of the Bank's concerns about these matters.

247 Given the timing of the presentation of the undertaking, and the lack of an evidentiary underpinning for it, we are not inclined to give any weight to it. Our view in this regard also recognizes some degree of prior recalcitrance on the part of the applicants that, in our view, casts at least some doubt on whether the undertaking would be effective. We refer here to the applicants' refusal until their opening statement before us to acknowledge that they are a money services business, and the position they took in this litigation with respect to the relevance of Bank inquiries that were relevant to money laundering and other regulatory concerns.

248 In sum, the undertaking does nothing to change our view that this is not an appropriate case for the granting of discretionary relief.

249 We now turn to the reasons for two evidentiary rulings that were dealt with in writing and to certain procedural and closing remarks.

VII. The Ruling in Respect of the Proposed Evidence of Stanley Sadinsky

250 Rule 47(1) of the *Competition Tribunal Rules*, SOR/94-290 (Rules) requires every party who intends to introduce expert evidence to serve an affidavit of each proposed expert on the other party at least 30 days before the commencement of the hearing. Pursuant to this rule, and the Tribunal's scheduling order, the Bank served the affidavit of Professor Stanley Sadinsky upon the applicants.

251 In response, the applicants filed a notice of motion, in advance of the commencement of the hearing, in which they sought an order declaring Professor Sadinsky's affidavit to be inadmissible, and awarding them costs. By the agreement of the parties, the motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the Tribunal's final reasons, providing that the affidavit would not be admitted in evidence as the evidence of an expert witness. The issue of costs was reserved until the Tribunal generally addresses costs. What follows are the reasons for that ruling.

252 After setting out his qualifications, the documentation he had reviewed and the facts that were relevant to his opinion, Professor Sadinsky swore that:

> 14. In the balance of the Affidavit, I provide my expert opinion with respect to the following overarching issue, namely, whether Scotiabank would be in breach of the *Criminal Code* if it were required to provide banking services to the Applicants. In considering this opinion, it is first necessary for me to consider two preliminary issues:
>
> (a) Is it illegal for Canadians located in Canada to place bets with off-shore internet gambling sites?
>
> (b) Is the activity being conducted by the Applicants and their joint venture partner, UseMyBank, in breach of the provisions of the *Criminal Code*?

253 It was the position of the applicants that this opinion was inadmissible because opinion evidence concerning the interpretation and application of domestic law is inadmissible in Canadian courts on the ground that it fails to meet the requirement that, to be admissible, expert evidence must be necessary to assist the trier of fact (see *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) at page 20).

254 In response, the Bank argued that the applicants had failed to cite any authority to support the assertion that the principles articulated in *Mohan* apply to Tribunal proceedings. The Bank submitted that the rules of evidence that apply in court proceedings do not apply in proceedings before an administrative tribunal unless expressly prescribed. The Bank asserted that, for administrative tribunals, relevant expert evidence is admissible, subject to considerations of weight. Further, the Bank argued that, by failing to object to Professor Sadinsky's affidavit when it was filed and considered on the application for interim relief (and by instead producing at that time its own competing expert affidavit), the applicants had waived their right to object. Finally, the Bank argued that the exclusionary rule in *Mohan*, if applicable, did not apply to exclude Professor Sadinsky's affidavit because the Tribunal will admit expert evidence on matters of law when it is logically probative, helpful and will not cause prejudice. Professor Sadinsky's affidavit was said to be helpful because it serves to demonstrate the impact of pertinent provisions of the *Criminal Code* upon the Bank.

255 Each submission made by the Bank was considered.

256 As to the applicability of the rules of evidence with respect to the admissibility of expert evidence, the legislative history of the Tribunal reflects an intention to judicialize to a substantial degree the processes of the Tribunal. This is reflected in the Tribunal's establishment as a "court of record" by virtue of subsection 9(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. C-19 (2nd Supp.), the requirement that a judicial member preside over the Tribunal's hearings, and the presence of appeal rights to the Federal Court of Appeal as if a decision of the Tribunal was a judgment of the Federal Court. See, in this regard, the discussion of the Tribunal in *Canada (Director of Investigation & Research) v. Air Canada* (1988), 32 Admin. L.R. 157 (Competition Trib.) rev'd on other grounds (1988), [1989] 2 F.C. 88 (Fed. C.A.); aff'd [1989] 1 S.C.R. 236 (S.C.C.). In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1990), 111 N.R. 368 (Fed. C.A.); rev'd [1992] 2 S.C.R. 394 (S.C.C.) both the Federal Court of Appeal and the Supreme Court of Canada confirmed the Tribunal to be an inferior court of record.

257 Thus, in a number of decisions the Tribunal has applied the principles articulated by the Supreme Court in *Mohan* when considering the admissibility of expert evidence. For example, in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2003), 28 C.P.R. (4th) 335 (Competition Trib.) at paragraph 36, the Tribunal rejected expert evidence that consisted essentially of legal argument on the ground that the evidence was not necessary as required by the *Mohan* test. See also the rulings of the Tribunal on March 28, 2006 in *United Grain Growers Limited v. The Commissioner of Competition* and on May 9, 10, and 11, 2006 in *Canada (Commissioner of Competition) v. Gestion Lebski Inc.* [2006 CarswellNat 6420 (Competition Trib.)]

258 The Tribunal therefore rejected the Bank's assertion that, as an administrative tribunal, the Competition Tribunal is precluded from applying the principles of evidence that would apply to court proceedings. Such submission is inconsistent with the judicialized nature of this tribunal, and inconsistent with prior jurisprudence of the Tribunal dealing with the receipt of expert evidence. The fact that the Tribunal is directed in the *Competition Tribunal Act* to deal with proceedings before it "as informally and expeditiously as the circumstances and considerations of fairness permit" is, by itself, insufficient to preclude application of rules of evidence that have evolved, at least in part, so as to ensure fairness. This direction is, rather, consistent with the fact that the Tribunal is not precluded from departing from a strict rule of evidence when it considers that to be appropriate.

259 Having regard to Professor Sadinsky's characterization of the overarching issue and the two preliminary issues, as quoted above at paragraph 252, the Tribunal was satisfied that the opinion was in substance an opinion with respect to a matter of domestic law. Thus, the Tribunal was not satisfied that the opinion was necessary, as required by the *Mohan* test. The interpretation of domestic law is within the competence of the Tribunal's judicial members.

260 Alternatively, even if a more relaxed standard of admissibility was applied, the Tribunal was not satisfied that the evidence contained in the affidavit would be helpful. There is, apparently, no relevant jurisprudence on the points opined upon by Professor Sadinsky. He therefore couched his opinions in terms that "in my opinion, there is a very strong argument that...". Such views would not be sufficiently probative or helpful to warrant their admission into evidence.

261 With respect to the Bank's submission that the applicants had waived any right to object to the admissibility of the opinion, the Bank cited no authority to support the view that a failure to object to evidence on an interlocutory motion operates to preclude any objection at trial. Such a result is inconsistent with the fact that the admissibility of evidence is always a matter to be determined by the presiding judicial officer who may raise, on his or her own motion, concerns with respect to the admissibility of evidence.

262 For these reasons, the evidence of Professor Sadinsky was not received by the Tribunal.

VIII. The Motion by the Bank to Amend Its Response to the Amended Notice of Application

263 Prior to the commencement of the hearing, the Bank served the expert affidavit of David Stewart upon the applicants. In this affidavit Mr. Stewart opined that "off-shore on-line gambling violates both federal and state laws in the United States" and that "any business that knowingly permits its services to be used for the purposes of online betting by residents of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling."

264 In response, also prior to commencement of the hearing, the applicants sought an order declaring the affidavit to be inadmissible on the basis that it was not relevant to an issue pleaded by the Bank in its response. The Bank took the position that the affidavit was admissible, but it also filed a notice of motion in which it sought leave to amend its response to the applicants' amended application in two respects. The first was to amend paragraph 19 of the Bank's response to read as follows:

> 19. Scotiabank has serious and valid concerns about the legality of the activities of the "vast majority" of the users of the service provided by the Applicants. It is not willing to allow its facilities to be used for activities that could be illegal in Canada, or in any other jurisdiction, in particular the U.S.A., where Scotiabank has a business presence and/or where residents of that jurisdiction have Scotiabank accounts that can be used to transfers *[sic]* funds using the Applicants' services. The association of the Scotiabank brand with the activities of the Applicants could be interpreted by Scotiabank customers as an endorsement of the Applicants' service or suggest legitimization offshore on-line gambling.

265 The second, but unrelated, amendment sought (foreign exchange profit amendment) was to add as paragraph 21 to the Bank's response the following:

> 21. The Applicants state that they act as agent for the banking customer for the transfer from the banking customer's account to the Applicants' account through either the Bill Payment System or through EMT. The Applicants state they are a trustee of the monies received into their accounts for the merchant customers, who are the beneficiaries of these funds. The Applicants derive a profit on the conversion from Canada funds into U.S. funds of the monies transferred from the bank accounts of Canadian banking customers. The Applicants do not disclose the fact that they make a profit on the conversion of Canadian funds into U.S. Funds to either their banking customer principals or their merchant customer beneficiaries. Scotiabank cannot continue to offer banking services to the Applicants knowing that the Applicants are making an undisclosed profit in these circumstances.

266 The parties filed written submissions and advised that they did not wish to make oral submissions. Accordingly, the Bank's motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the final reasons, granting leave to the Bank to amend its response as requested. Thus the evidence of Mr. Stewart would be relevant to the amended pleading and admissible. The issue of costs was reserved until the Tribunal generally addresses costs. These are the written reasons for that ruling.

267 In approaching the issues raised by the parties, the Tribunal assumed, without deciding, that the evidence of Mr. Stewart was not admissible in the absence of the requested amendment to paragraph 19. The issue then became whether the amendments should be allowed.

268 All parties agreed that the applicable legal principle was that articulated by the Federal Court of Appeal in *Canderel Ltd. v. R.* (1993), [1994] 1 F.C. 3 (Fed. C.A.) at pages 9 and 10. There, the Court wrote:

> [...] while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

269 With respect to the requested amendment to paragraph 19 to expressly plead a breach of American law, the Bank submitted that the amendment did not alter the nature of its defence but rather better particularized its pleading. The applicants responded that the amendment expanded the Bank's defence and that non-compensable prejudice would result if the Bank was allowed to amend its response.

270 The applicants filed no affidavit evidence establishing prejudice.

271 Paragraph 19 of the Bank's response, as originally filed, set forth its concerns with respect to potential illegality generally. Evidence filed by the Bank on the motion to amend established that the Bank's concern with respect to American legislation was not new, and ought not to take the applicants by surprise. This is seen from the fact that in response to the applicants' request for leave to bring this proceeding, Mr. Rosatelli had sworn an affidavit that stated that the Bank had branches and employees worldwide, that its securities traded on United States securities exchanges, and so the Bank was subject to a wide variety of American legislation.

272 Mr. Stewart's affidavit was served on the applicants in accordance with the timetable agreed to by counsel. When the applicants raised their concerns with respect to the relevance of the affidavit, the Bank offered the applicants an extension of three weeks in order to allow the applicants to obtain and file a responding affidavit.

273 Applying the principle that amendments should be allowed at any stage for the purpose of deciding the real questions and controversies, provided that the amendment does not result in non-compensable prejudice and would serve the interests

of justice, it was the view of the Tribunal that the amendment would facilitate the admission of relevant evidence. Given that the applicants sought an order requiring the Bank to provide services to them, the interests of justice would not be served if the Tribunal considered making such an order without knowing whether the order would expose the Bank to criminal liability in the United States.

274 There was no evidence of non-compensable prejudice to the applicants and an adjournment could have been sought by the applicants to allow them to obtain any responding evidence.

275 In those circumstances, the Tribunal concluded that the interests of justice required that leave be granted to amend paragraph 19 of the Bank's response.

276 With respect to the foreign exchange profit amendment, the Bank again argued that the amendment simply particularized its defence. The applicants again argued that the Bank had known of the issue since June 22, 2006 so that the requested amendment was sought too late.

277 The Bank's evidence established that on June 22, 2006 the applicants delivered to it a supplementary affidavit of documents that disclosed the 2004 financial statements for NPAY and GPAY, that they were reviewed by counsel on June 24, 2006, after the Bank filed its response to the amended application on June 22, 2006, that Mr. Grace was examined on these documents on June 27 and 28 of 2006, and that, prior to the hearing, the Bank advised the applicants of the Bank's intent to assert at the hearing that the applicants could not make an undisclosed profit in their capacity as agent of the Bank's customers and trustee to the applicants' own merchant customers.

278 The amendment raised an issue that was seen to be relevant by the Tribunal and there was no evidence or proper articulation as to what prejudice would flow to the applicants if the amendment was permitted. The amendment was, therefore, allowed.

IX. The Chess Clock Procedure

279 This is the first proceeding in which the chess clock procedure with respect to hearing time management was employed by the Tribunal.

280 The process takes its name from the manner in which the length of play is timed in certain games of chess. Generally, parties are allocated a fixed amount of time in order to present their case and are then timed to ensure that they do not exceed their allotted time. A significant benefit that flows from this type of time management is that hearings will conclude in the time allotted. This better allows the parties to know in advance the cost of the hearing, and avoids the delay and additional expense caused by the extension of hearings beyond their original end dates.

281 In the present case, as part of the case management process, the parties agreed that each side would be given 45 hours in which to present their case. Specifically, each side had 45 hours for their opening statement, direct, cross- and re-examinations, objections to evidence, oral motions, and closing argument. The parties' consent to this time allocation was embodied in a pre-hearing order of the Tribunal.

282 During the hearing, the court reporter kept track of the time expended by counsel. Each morning the parties received a statement of the time each side had expended up to the end of the prior day, expressed on both a daily and cumulative basis. The Tribunal advised that any dispute with respect to time allocation had to be raised immediately. There were no such disputes.

283 In the view of all members of the Tribunal, the procedure worked well. The presiding member is not confident that the hearing would have finished on time in the absence of the use of the chess clock procedure. We have recommended the procedure to other members of the Tribunal.

X. Directions to the Parties Regarding Public Reasons

284 These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, January 12, 2007 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

285 If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 19, 2007.

XI. Costs

286 The issue of costs is, as the parties requested, reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Friday, January 19, 2007, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree costs. If costs cannot be agreed, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

287 Once the issue of costs has been dealt with, an order will issue dismissing the application and dealing with costs as agreed or as determined by the Tribunal.

Schedule A

288 Section 75 of the *Competition Act*:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> > (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> >
> > (b) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> >
> > (c) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
> >
> > (d) the product is in ample supply, and
> >
> > (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.
>
> (2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.
>
> (3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

Schedule B

The Applicants' Experts

Mr. Jack Bensimon

289 Jack Bensimon was an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies. Having reviewed the nature of the applicants' business, Mr. Bensimon confirmed that the applicants are operating a money services business as defined in the PCMLTF Regulations. Significant aspects of Mr. Bensimon's opinion were that:

(i) Overall, the risk posed to The Bank of Nova Scotia through the operation of the applicants' accounts is relatively low;

(ii) Notwithstanding, there are material gaps in the anti-money laundering policies and procedures of the applicants that need to be remediated as soon as possible; and,

(iii) The Bank was required, in his view, to take reasonable steps to ensure that the applicants had a basic framework of policies and procedures in place in order to meet the requirements of FINTRAC.

Dr. Lawrence Schwartz

Dr. Lawrence Schwartz was qualified as "an expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

In order to determine the relevant product market, the approach used by Dr. Schwartz was the hypothetical monopolist test. He did not prepare his report on the basis that the market referred to in paragraph 75(1)(*a*) of the Act was, or could possibly be, different from the market contemplated in paragraph 75(1)(*e*) of the Act.

In Dr. Schwartz's view, there were three product markets where an adverse effect on competition could occur as a result of the Bank's termination of the applicants' banking services. Dr. Schwartz was of the opinion this termination could result in an inadequate supply due to insufficient competition among suppliers. Those product markets were:

(i) The market for online debit payment service for Scotiabank depositors who purchase at merchant websites, consisting of the UseMyBank Service and Interac Online;

(ii) The market for merchants, where the applicants compete with Interac Online transaction acquirers to offer payment processing services; and,

(iii) In relation to the means of providing online debit payment to Scotiabank depositors, biller status at Scotiabank but excluding business accounts that accept deposit by EMTs.

In his initial report, Dr. Schwartz did not carry out an analysis as to whether the applicants' business had been substantially affected by the termination of banking services by the Bank. He disagreed with Dr. Mathewson's approach to this issue because the applicants' behavior after the banking services were terminated is not information to be considered in the hypothetical monopolist approach to market definition. However, even on the approach used by Dr. Mathewson, Dr. Schwartz concluded that the applicants were substantially affected by the termination because GPAY's total payment value did not surpass its September 2005 level until January 2006. This suggested to him that GPAY's business from other banks did not offset the losses of payment volumes from Scotiabank depositors following termination. Scotiabank payment levels had not yet recovered to September 2005 levels up to and including the last month for which data are available.

The Bank's Experts

Mr. Christopher Mathers

Christopher Mathers was qualified as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. Mr. Mathers was of the opinion that the applicants, together with their joint venturer UMB, were operating a money services business.

Mr. Mathers described the three stages of money-laundering and the frequent use of online gaming sites to launder the proceeds of crime. He described some sample money-laundering mechanisms that could be applied to online gaming sites. He described an actual situation, recently identified by the Bank, where there was no apparent connection between the source of a Scotiabank customer's winnings and the online betting site where the winning wager was placed. Mr. Mathers provided comments with respect to Mr. Bensimon's report, described his own experience with offshore Internet casinos, and gave his view with respect to the risk posed to The Bank of Nova Scotia if it provides banking services to the applicants.

Dr. James Dingle

Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was qualified as an expert in respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking as set out in his report. Dr. Dingle testified as to the purpose and importance of the regulatory mechanisms in place for Canadian banks and gave his view that the manner in which the applicants conducted their business was capable of eroding prudent behavior by bank depositors. He provided his view as to the regulatory risks to which the Bank was exposed as a result of the applicants' business model. Dr. Dingle spoke with respect to the development of Rule E2 by the Canadian Payments Association and gave his opinion that such rule would be breached if payments to the applicants pass through the clearing system. He gave his opinion with respect to the risks arising from the OSFI Guidelines on money laundering, the PCMLTF Act, the *Criminal Code*, and risks to which the Bank was exposed if it dealt with the applicants. He also spoke of the reputational risks to the Bank arising from unauthorized or fraudulent transactions.

Mr. David Stewart

David Stewart is an attorney practicing in Washington, D.C. He was accepted as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualification to opine on matters relating to state law was also accepted by the Tribunal. In Mr. Stewart's opinion, online gaming violates the United States federal law and the laws of each of the 50 states. In his further view, any business that knowingly permits its services to be used for the purpose of facilitating online betting by a resident of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling.

Dr. Frank Mathewson

Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. He was qualified as an expert in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

In order to determine the relevant product market, Dr. Mathewson applied the test first described by the Competition Tribunal in the *Chrysler* case. In respect of paragraph 75(1)(*a*) of the Act, he determined that the relevant market is biller services at Scotiabank and EMT deposits *[CONFIDENTIAL]*. In respect of paragraph 75(1)(*e*) of the Act, he opined that the UseMyBank Service and Interac Online are not in the same product market, and products such as credit cards and Interac Online e-wallets are likely to be closer substitutes for Interac Online than the UseMyBank Service.

The Applicants' Lay Witnesses

Mr. Joseph Iuso

Joseph Iuso is the President, Chief Executive Officer, and founder of UMB. He identified the joint venture agreement entered into between UMB and NPAY, and described the respective roles of UMB and the applicants. He explained the technical aspects of UMB pushing payment from a customer's bank account to GPAY's account, the security features in place at UMB, the fraud detection system UMB has in place and the steps taken by UMB to market its services to various merchants.

Mr. Raymond Grace

Raymond Grace is the President of both GPAY and NPAY. He testified with respect to his dealings with The Bank of Nova Scotia, including the various bank account openings, obtaining biller status, GPAY's experience with EMT deposits at The Bank of Nova Scotia (particularly the difficulty caused when payment items could not be posted to an account when the quantity of payments exceeded 100 transactions) and the termination of banking services. He confirmed the terms of the joint venture agreement between NPAY and UMB, and the responsibilities of his companies under the joint venture agreement. He described the banking services his companies enjoyed with other banks, as well as the termination of banking services by TD and CIBC. He described the relationship between the customer (the buyer of goods or services), the joint venture's client (the merchant or seller) and the joint venture, and how payment is effected to merchant clients. He described the nature of the security checks that the joint venture conducts in respect of the transactions and the joint venture's experience with fraudulent transactions. He explained how transactions were conducted when merchant clients were to receive monies in U.S. funds and the resulting foreign exchange profit. He described his involvement in marketing on behalf of the joint venture, his involvement in reporting transactions to FINTRAC, and how his companies deal with anti-money laundering concerns. Finally, he discussed the conduct of the joint venture's business since the termination of banking services by The Bank of Nova Scotia.

Mr. Ryan Woodrow

Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts. He testified with respect to the account opening procedure generally applicable for small business accounts, how that procedure was followed in August of 1999, October of 2004 and November of 2004 for the accounts of GPAY, B-Filer, and NPAY. He described the nature of the privileges associated with the accounts operated by the applicants, the transaction limits relevant to EMT payments and receipts, and the practical consequences of exceeding a certain number of EMT transactions per month. He also described the criteria the Bank applied in order to determine whether any particular venture was a small business. He testified about the decision not to open any more accounts for the applicants because they no longer qualified as a small business, and the subsequent inquiry concerning Mr. Grace and his accounts conducted by the head-office of The Bank of Nova Scotia in Toronto.

Mr. Darren Morgenstern

Darren Morgenstern is the owner of the Ashley Madison Agency, which is an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options". Since July or August of 2003, the Ashley Madison Agency has used UseMyBank as a payment option, in addition to credit card and direct deposit payment mechanisms. He explained that the decision to add UseMyBank as a payment option reflected the desire of his company to offer as many payment options as possible. Mr. Morgenstern testified that when his company adopted UseMyBank as a payment option there was an almost instant increase in its sales, so that now approximately 23% of all of Ashley Madison's Canadian online services are paid for through UseMyBank. In his experience, while credit card fraud is "rampant" in online transactions, his company has had little or no fraudulent transactions processed through UMB.

The Bank's Lay Witnesses

Ms. Margaret Parsons

Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia. She testified with respect to the organization of the branch, the Bank's criteria as to what qualified for service as a small business, and the concept of the "connection" between a small business or businesses and its owner/proprietor. She testified with respect to meeting with Mr. Grace when he first wished to open an account and that she referred Mr. Grace to Mr. Woodrow. She testified that she approved the documentation with respect to the opening of an account in the name of B-Filer, carrying on business as GPAY. She testified that she learned in March or April of 2004 of the number of items that were not postable to the applicants' accounts. She also explained that she learned in November of 2004 of the quantity of new account openings by the applicants and described her resulting concern that led to a meeting with Mr. Woodrow and another Bank employee, Ms. Sharon Gibson-Nault. As a result of the meeting she instructed Mr. Woodrow to find out "what [was] going on", specifically why there were so many items that could not be posted to the applicants' accounts and why the applicants were opening so many accounts. She also instructed Mr. Woodrow that there would be no further account openings for the applicants. Later, she learned that, while she was on vacation, Mr. Grace caused 30 new accounts to be opened through a telephone call centre and that a total of 80 new accounts had been opened in a two-week period. As a result, she and Ms. Gibson-Nault prepared a memorandum recommending that the Bank terminate its relationship with Mr. Grace and his businesses. Finally, she testified that when she made this recommendation she did not know what Interac Online was.

Ms. Sharon Gibson-Nault

Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch. She testified with respect to her responsibility to review new account openings, her experience in early 2004 with a number of transactions that could not be posted to the applicants' accounts, her concern in November of 2004 with the number of new accounts the applicants were opening and her resulting conversation with Ms. Parsons. She testified that while Ms. Parsons was on vacation, the issue of the significant number of new account openings was referred by her to the Bank's Shared Services operation and that an investigation was commenced. Finally, she testified as to her role in the recommendation made to terminate the Bank's relationship with the applicants.

Ms. Susan Graham-Parker

Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia. She testified with respect to the regulatory environment in which the Bank functions, and her view of the trust that such an environment engenders in banking customers. She testified with respect to the criteria for small business status at the Bank, and how the criteria applied on a per-connection basis. She described the nature of the Money Master accounts that the applicants operated. She explained the required due diligence at a branch when accounts were opened. She described the transaction limits for sending and receiving EMTs, and testified that for businesses that did not qualify as small businesses, there was no facility for receiving EMTs. She explained the process that is followed when an entity exceeds the small business criteria and how the customer is referred to commercial banking services. She testified with respect to a number of customer security issues, identifying the Scotiabank Cardholder Agreement and the obligation it imposes on customers with respect to the protection of their electronic signatures. She described other documents in which the Bank stresses this obligation to customers. She explained the process when a person holding a valid, written power of attorney seeks electronic access to accounts belonging to the principal. Finally, she expressed her view as to the Bank's concerns with respect to the nature of the business operated by the applicants and the Bank's concerns with the account aggregation service known as CashEdge.

Mr. Colin Cook

Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia. He testified as to the process followed when a customer is referred to commercial banking, the criteria that apply to determine when commercial banking services are appropriate, the account opening requirements for a commercial client, and he noted the non-availability of EMT facilities for commercial banking clients. He spoke of his involvement in the development of a project that would enable the Bank to better comply with its Know Your Customer requirements and the due diligence obligations upon the Bank in the ongoing business relationship with a client. He spoke about the flags that should alert the Bank to money laundering concerns, and the nature of the concerns raised by the applicants' business model and their manner of opening accounts. He spoke of the importance of trust in the banking relationship and the key elements of the Know Your Customer rule, identified the Bank's Anti-Money Laundering Handbook and described the Know Your Customer's Customer rule. He concluded by stating that in his view, the applicants would not be accepted as commercial banking clients of the Bank either as of the date of termination, or as of the date of the hearing.

Mr. Douglas Monteath

Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank. He testified as to the nature of the services provided by Shared Services, the involvement of Shared Services in the decision to terminate the applicants' banking services, the investigation that took place in 2005 into the applicants' business, the concerns that arose as result of that investigation and the factors that led the Bank to its decision to terminate the applicants' banking privileges.

Mr. Robert Rosatelli

Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia. He testified with respect to the significance of the ScotiaCard in electronic banking, described the two constituent elements of a customer's electronic signature, and the steps taken by the Bank to explain to its customers the significance of their electronic signature and the importance of keeping it confidential. He testified with respect to the function of the Interac Association, its network and the security features the network applies to a customer's electronic signature. He testified as to the Bank's efforts to enhance the security applicable to Internet banking, and the steps that the applicants had taken, in his view, to frustrate those enhanced security features. He reviewed the Bank's experience with respect to a number of fraudulent EMT transfers in the applicants' accounts. His testimony then went on to describe the role of CertaPay and Acxsys Corporation with respect to EMTs, the introduction by Acxsys of a 30 minute hold on EMT transactions, and the purpose of this hold. He reviewed the sending and receipt limits applicable to EMTs. Mr. Rosatelli also testified with respect to the development of Interac Online, how it functions from a customer's perspective, the flow of funds, the applicable transaction limits, how Interac Online differs from the UseMyBank Service, and the profitability to date of Interac Online. He identified the merchants that currently use Interac Online as a payment mechanism. He reviewed what is involved in obtaining bill payee status at the Bank, bill payee transaction limits, and he identified both the former and the current Bill Payment Service Agreements, explaining the purpose of the revision to the form of agreement. He described the flow of funds in a bill payment transaction and how, in his view, the applicants are not able to comply with the provisions of the new Bill Payment Service Agreement. Finally, he testified as to his involvement with respect to the applicants' banking services, the investigations of the applicants' accounts that occurred in 2003 and 2005 and the results of those investigations.

Mr. Ronald King

Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies. He testified about the historic money laundering legislative context in Canada, and how money launderers have in the past worked in order to avoid detection. He discussed the creation of the Financial Action Task Force, its annual listing of countries and territories that do not cooperate with anti-money laundering efforts, and the role of OSFI in anti-money laundering efforts. He identified and discussed a number of OSFI and FINTRAC Guidelines. He also described in some detail the Bank's Anti-Money Laundering Handbook, the Know Your Customer's Customer rule, the Bank's obligation to terminate banking relationships in certain circumstances, and the Anti-Money Laundering Handbook's provisions as they apply to money services businesses, unusual transaction reports and suspicious transaction reports. He discussed the role of the Bank's anti-money laundering group in the decision to terminate the applicants' accounts, and his money laundering concerns with the applicants' business. He concluded with comments on Mr. Bensimon's report and expressed his view that the applicants are not compliant with their own anti-money laundering obligations under the applicable legislation.

Mr. David Jones

David Jones is Director of Web Business at WestTet. He testified with respect to the average dollar purchase of WestJet tickets, the factors that his company would weigh when considering partnering with new payment providers, and his opinion that it would be a "non-starter" for WestJet to partner with an entity that admits that there are periods when the banking customer's password is not encrypted.

Schedule C

Undertaking

290 The applicants undertake that, as a condition of Scotiabank supplying bill payee status, associated bank accounts, and/or accounts for depositing EMTs:

A.

Money laundering

1. The applicants will comply with all applicable anti-money laundering legislation in Canada.

2. The applicants will remediate all deficiencies in their anti-money laundering procedures identified by Mr. Bensimon.

3. The applicants will provide copies of all written manuals, procedures, etc, relating to their anti-money laundering procedures to Scotiabank.

4. The applicants will provide the Scotiabank with a list of all current active Merchant Clients.

5. The applicants will provide the Scotiabank with copies of contracts with all new Merchant Clients and the associated industry code and due diligence.

6. The applicants will provide the Scotiabank with a report of the volume of funds sent to each Merchant Client on a frequency to be determined but not more than monthly.

7. The applicants will provide the Scotiabank with annual Financial Statements.

8. The applicants will not process funds where there is reason to believe the funds are destined for a country on the NCCT list.

9. The applicants will submit to periodic audits (not more than annually) upon request of Scotiabank, by an anti-money laundering expert acceptable to both the applicants and Scotiabank.

10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

B.

Computer security

11. The applicants will submit to periodic computer security audits (not more than annually) upon request of Scotiabank, by a computer security expert acceptable to both the applicants and Scotiabank.

12. The applicants will remediate any deficiencies in their computer security procedures identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

C. Blocking access by persons present in the United States

13. The applicants agree that they will not have bill payee status with respect to customers of Scotiabank that are not resident in Canada.

14. The applicants will block payments to online casinos or their management companies where it is able to determine from the account holder's profile on the Scotiabank online banking website that the account holder is resident in the United States.

General

15. Information provided to Scotiabank by the applicants or UseMyBank is provided on the condition that it be kept confidential by Scotiabank.

DATED AT OTTAWA, ONTARIO this 5th Day of October 2006

B-Filer Inc. Per: (s) Raymond Grace Raymond F. Grace, Pres.	NPAY Inc. Per: (s) Raymond Grace Raymond F. Grace, Pres.	B-Filer Inc cob GuaranteedPayment GPAY Per: (s) Raymond Grace Raymond F. Grace, Pres.

Application dismissed.

Footnotes

1 We note that, where the words "Tribunal" or "we" are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

2 Paragraph 75(1)(*e*) refers to "a market" while paragraph 75(1)(*b*) refers to "the market". This suggests that while the market considered under 75(1)(*b*) is that which is defined in 75(1)(*a*), the market considered under 75(1)(*e*) need not be.

3 The Tribunal indicated in *Chrysler*, at page 10, that "[w]here products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers". We note that this statement was made specifically in the context of products that are purchased for resale. That said, the manner in which an output product may be altered as a result of a change in an input and the consequent impact it may have on demand by the buyer's customers is always relevant to the extent that it affects the buyer's business. What is ultimately of concern under 75(1)(*a*) is the buyer of the product that has been refused.

4 Neither the applicants nor the Bank propose any candidate substitutes for EMT deposit accounts that are different to those proposed for biller status. Consequently, we do not separately consider candidate substitutes for EMT deposit accounts.

5 We note here that this contemplates switching, not directly by the applicants, but by the applicants' customers. This type of switching by the applicants' customers, however, would allow the applicants to make greater use of its bill payee status at other banks in order to serve customers who are, or originally were, Scotiabank depositors.

End of Document

TAB 12

1990 CarswellNat 1372
Competition Tribunal

Canada (Director of Investigation & Research) v. Xerox Canada Inc.

1990 CarswellNat 1372, [1990] C.L.D. 1146, 33 C.P.R. (3d) 83

In the Matter of an application by the Director of Investigation and Research for an order pursuant to section 75 of the Competition Act, R.S.C., 1985, c. C-34, as amended, requesting that the respondent accept the Exdos Corporation as a customer for the supply of a product

The Director of Investigation and Research, Applicant and Xerox Canada Inc., Respondent

Clarke Member, Reed J., Roseman Member

Heard: June 11, 1990
Heard: July 20, 1990
Judgment: November 2, 1990
Docket: CT-89/4

Counsel: *James W. Leising, John S. Tyhurst*, for the Applicant
Colin L. Campbell, Q.C., William Donaldson, for the Respondent

Subject: Criminal; Intellectual Property; Property; Corporate and Commercial; Constitutional

Decision of the Board:

I. Introduction

1 The Director of Investigation and Research ("Director") brings an application seeking an order to require Xerox Canada Inc. ("Xerox") to accept Exdos Corporation ("Exdos") as a customer for the supply of certain Xerox copier parts. This application is brought pursuant to section 75 of the *Competition Act*. [1]

2 Xerox followed the practice, for a number of years, of freely selling parts for its photocopier machines to any purchasers willing to pay the list price, of whom Exdos was one. Sales were made without regard to the use subsequently made of the parts, whether they be used by the purchasers as end users [2] of the photocopier machines, or as suppliers of maintenance service to owners of Xerox photocopiers, or as refurbishers of second-hand Xerox machines for resale into the used photocopier market. Then, in August 1988, in response to a policy originating with Xerox Corp. (U.S.) but subsequently adopted by Xerox (Canada), the supply of such parts was curtailed. This was done in order to eliminate competition from organizations which had grown up and were providing maintenance service for Xerox photocopiers. Xerox determined that some of the "margin-rich area" of service revenue was being lost to these competitors. The competitors are referred to in the evidence as independent service organizations ("ISOs"). The curtailment of the supply will also effectively eliminate most of the second-hand market in Xerox copiers, except to the extent that such is controlled by Xerox. Exdos was one of the organizations caught in this general refusal to supply copier parts. Insofar as the particular position of Exdos is concerned, the relevant facts follow.

II. Background and Refusal to Supply

A. Initiation of the Business Relationship

3 In 1982 Xerox found itself with an overly large inventory of used photocopiers. It was Xerox's practice, at the time, to either scrap such machines or to refurbish them to an "as new" condition. In the latter case the machines were resold, leased or rented with a "new machine" warranty. Xerox was concerned about the drain the oversupply of used inventory was creating on the financial position of the company.

4 The oversupply of used machines was the result of a number of factors: there was a general economic downturn in 1980-81; the patent which Xerox held on the photocopier technology had expired in the mid-1970s and, with that expiry, Xerox faced increasing competition from other manufacturers of photocopiers. In addition, Xerox was moving to a new technology, described generally in the evidence as "10 Series copiers", which was eventually introduced in 1983.[3] It was anticipated that many of Xerox's customers would wish to move to this new technology. Consequently, as a result of both the increased competition which Xerox was facing and the desire of customers to move to the new technology, it was expected that the return of old machines to Xerox would increase.

5 The normal practice of Xerox, prior to the late 1970s, had been to place machines with customers on a rental basis. Under this practice ownership of the machines remained at all times in the hands of Xerox or returned to Xerox at the end of the lease. In the late 1970s, the practice in the industry began to change to one of selling the machines to customers either by way of an outright sale or through a lease-purchase arrangement. With more and more machines owned by customers directly, it was anticipated that a considerable second-hand market in the machines would develop.

6 In 1982, Terry Reid was an employee of Xerox. Terry Reid subsequently became and remains the president and majority shareholder of Exdos. Xerox and Reid determined that a mutually advantageous arrangement might be created if Reid left the Xerox company and created an independent company which would purchase some of the used copier machines from Xerox in an "as is" condition, refurbish them and sell them into the second-hand market.[4] It was contemplated that this would tap an area of the market not previously served by Xerox. It would also free the Xerox sales force to concentrate on selling the newer model machines. It would give Reid an opportunity to develop his own business and would have a positive effect on the Xerox balance sheet. It was contemplated that Reid would create a dealer network throughout Canada for the purpose of disposing of the used copiers. It was also contemplated that he would himself market some of the machines directly into the end user market.

7 In May 1983, Exdos (initially carrying the name XDS Corp.) and Xerox entered into a contract pursuant to which Exdos was to be allowed to purchase certain copier models[5] at specified prices. Delivery of the equipment was taken by Exdos at Xerox's three distribution centres in Toronto, Montreal and Calgary. Exdos was also given, under the May 24, 1983 contract, the right to purchase copier parts for the various second-hand models covered by that contract. Such parts were to be sold to Exdos at 50 percent off list (drums for the machines were to be sold at an even more advantageous price, namely twice the Canadian landed price). The contract was expressed to run for a year or to come to an end at an earlier date should Exdos purchase, by that time, a certain dollar volume of equipment. For four months Exdos was given an exclusive right to purchase the used copier models (from May 24, 1983 until October 1, 1983). At the time, this arrangement was clearly, in the eyes of Xerox, an experiment; it was designed to determine if a mutually advantageous business arrangement could be developed.

8 It was recognized from the beginning that there was a potential for Exdos' activity, in moving into or feeding a market for second-hand copiers, to lead to conflict with Xerox's mainline sales activity. Indeed, the initial contract signed by the parties contained an extensive list of Xerox's major customers to which Exdos agreed it would not market the used machines purchased from Xerox. It is clear that Reid understood from the very beginning that if his activities in selling second-hand copier equipment resulted in conflict with Xerox's mainline sales efforts ("raised the field noise level") this could result in the cancellation of his contract.

B. Contract Modifications - Copiers from Sources Other than Xerox - Parts from Xerox

9 The contract between Exdos and Xerox was extended and modified from time to time. Many of the changes need not be detailed here. Suffice it to say that Exdos' exclusive right to purchase certain used photocopier models from Xerox, which was originally designed to operate for only four months, was extended indefinitely; a reciprocal exclusivity obligation was

imposed on Exdos (to purchase the models covered by the contract from Xerox only); the contract was varied to one of indefinite duration, subject to termination by either party at first on 60 days notice and later on 30 days notice. The list of copiers which Reid was entitled to purchase from Xerox under the contract was expanded slightly from time to time to include three or four additional models as such became "obsolete", that is moved off Xerox's active sales list, but this list never included used 9000 [6] or 10 Series machines [7] . The 50 percent discount off list, for parts for the used machines which Reid obtained from Xerox, was subsequently modified to a 25 percent discount and eventually eliminated. He thereafter paid list price for the parts purchased. The most significant change in the contract arrangement between the parties, for the purposes of this case, however, was the addition of provisions with respect to the purchase and sale of parts for copier models acquired by Exdos from sources other than Xerox, about which more will be said later.

10 Almost from the beginning Exdos began purchasing second-hand Xerox copier models from sources other than Xerox. These were obtained, for example, from finance companies who had repossessed the equipment for non-payment, or from owners of the equipment who were upgrading to a newer model, or at auction. The used copiers obtained in this way at first included only pre-1983 copier models not covered by the contract [8] . Eventually they also included the newer 9000 and 10 Series models. They never, however, included the 50 Series machines which were introduced by Xerox in 1989.

11 Reid used Exdos to purchase the second-hand equipment, either from Xerox or other sources. When the copiers were placed directly into the end user market, Reid used a company called Nezron Office Products ("Nezron") to deal with the end user. Reid acquired a 70 percent interest in Nezron shortly after he established Exdos. (In late 1989, Exdos acquired the remaining 30 percent interest.) Exdos also established contacts with existing Canadian ISOs and encouraged the creation of other ISOs in various locations throughout the country, to which Exdos sold used copier equipment. Eventually, equipment was also sold into the United States and abroad.

12 After a photocopier is sold, there is a continual need to provide maintenance service to support the machine in the customer's hands. Reid used Nezron to support the second-hand machines he placed directly into the end user market. The other ISOs offered service for the machines they placed in that market. Alternatively, the final purchaser could contract with Xerox for service, providing Xerox's terms for dealing with used machines were met. The usual practice in the industry is for the purchaser of a machine to obtain service from the vendor of the machine.

13 In order to provide service, access to spare parts is of course necessary. From the beginning Reid purchased parts from Xerox for this purpose. The parts purchased related to both the used equipment purchased from Xerox and the used equipment purchased elsewhere. This included parts for the newer copier models (9000 and 10 Series). Some of the ISOs who purchased used equipment from Reid apparently bought at least some Xerox parts through him; several of them also bought parts directly from Xerox.

C. Xerox's Reaction to Exdos' Purchasing Equipment Outside the Initial Contract

14 Various Xerox employees of Xerox testified that the activity of Exdos (Reid), in purchasing used machines from sources other than Xerox and in purchasing parts from Xerox for those machines, was considered by Xerox from the beginning to be a breach of, at least, the spirit of its May 1983 contract with Exdos. It was contended that Xerox, with one exception, did not knowingly supply Reid with parts for copier models other than those expressly covered by the May 24, 1983 contract (or any successor contract). The one exception was said to be the supply of parts to Reid when these were required for his *own* end use. The evidence does not support that conclusion. While the initial formal written contract between Exdos and Xerox governed only the purchase of parts and supplies for photocopier models sold under the contract, it is clear that from a very early stage Xerox was aware of both Exdos' expansion of its business into other copier models and its purchase of parts for these machines from Xerox.

15 Insofar as the expansion of the business is concerned Xerox documents record, as early as April 1984, that:

> EXDOS may ... source [buy] Xerox equipment that we will not supply him from other sources. There are several models that we will not sell him and these are the units that we are still actively marketing. He buys these from many sources. [9]

16 With respect to the purchase of parts for the copier models not covered by the contract, during the first year of the contract orders for such were lumped together by Exdos with orders for the copier parts on which Exdos was entitled to a 50 percent discount under the contract. This was not considered by Xerox to have been intended. Thus, when Xerox conducted an internal review of the Exdos contract in December 1984, one of the concerns expressed was that:

> EXDOS/NEZRON or its agents as a condition of our agreement must be prohibited from ordering parts for any piece of equipment not sold to them by Xerox <u>other than at full retail price</u> at which they are available to any customer.
>
> (underlining added) [10]

17 Consequently, Exdos was given separate customer numbers: one under which it was to order parts for copier models pursuant to the May 1983 contract and another under which it could order parts not covered by the contract. The May 1985 version of the contract expressly provided that:

> Parts and drums for equipment not listed in Appendix A [Appendix A listed equipment available from Xerox] may be purchased by Exdos (subject to availability and Xerox's right to limit quantities at any one time) at standard retail prices in effect at the time of purchase. [11]

There is no evidence that Exdos (Reid) tried to circumvent or abuse this ordering system, for example, by ordering parts for the newer copier models under the number which was to be used for the ordering of parts on which he was entitled to a discount.

18 As has been noted, Xerox argues that throughout its relationship with Reid its policy was to sell parts for the newer copier models to the end users of photocopiers only and that it was on this basis that Reid was allowed to purchase parts for models not covered by the contract, including eventually the post-1983 copier models. This is not supported by the weight of the evidence. There is no documentary record of such a restriction having been communicated to or imposed upon Exdos. There is no documentary evidence of such a restriction having been communicated to the employees of Xerox who processed the Exdos orders. There was no monitoring by Xerox of either the volume or type of parts being purchased. And there is no evidence that any monitoring took place with respect to any other customer purchasing Xerox parts. By mid-1985 a monitoring system was easily available to Xerox, as a result of a change made to its parts ordering system at that time.

19 The volume of 10 Series parts Reid purchased is entirely inconsistent with the suggestion that Xerox was only providing such to Exdos for its own end use. In this regard, Xerox employees were aware of the approximate size and nature of Reid's operation. For example, Mr. Hyde visited the Exdos-Nezron business premises in the late fall of 1984 and saw used 10 Series machines in the showroom at that time. Reid sought and received, from Xerox, copies of both parts price lists and service manuals for the 10 Series machines. Such activity is entirely inconsistent with the suggestion that Xerox was only selling parts to end use customers and that Reid's acquisition of post-1983 copier parts was in some way accomplished through subterfuge. It is clear that post-1983 copier parts were being purchased by Exdos and other independent service organisations openly and without restriction.

20 Although not directly relevant to the issues in this case, for completeness one further aspect of Reid's expansion of his business during the 1984-1985 period should be referred to. Reid expanded his business into the United States and purchased and resold second-hand copiers and parts in that market. This expansion was with Xerox Canada's knowledge and at least tacit permission. Again there was a need to support the photocopier sales with a supply of spare parts. In this context some of the parts being purchased by Exdos from Xerox at a discount (particularly the drums) found their way into the United States market. The parts, having been purchased from Xerox at 50 percent off list, and the drums at a more advantageous price, could be resold into the United States market at prices which undercut the sales efforts of the marketing arm of Xerox Corp. (U.S.). This entity is referred to in the evidence as the United States Marketing Group ("USMG"). In response to concerns expressed by

USMG, the discount to Reid for parts for the pre-1983 copier models was revised in the May 1985 contract renegotiations; the 50 percent discount was lowered to 25 percent. In addition, the list prices of the parts themselves were raised. These changes led Xerox officials to conclude with respect to the concerns raised by USMG:

> The contract has recently been renegotiated with Exdos. The issues you have alluded to ought not to occur unless Exdos wishes to take advantage of any currency exchange fluctuations. [12]

D. Expansion of Exdos and Other ISOs - Consumer Benefit

21 At the same time that Exdos was expanding its activities in the marketing and servicing of second-hand Xerox equipment, others were doing likewise. A number of ISOs were becoming established in Canada as they had been for some time in the United States. These enterprises provided competition to Xerox with respect to the provision of service for Xerox machines, both second-hand and new. The second-hand machines also provided some competition at the lower end of the market to the sale of new Xerox machines. With respect to this last, however, Reid generally managed to avoid sales conflicts with Xerox. In general there was little "field noise".

22 Evidence before the Tribunal makes it clear that the second-hand copier market and the option for an alternate source of service provided by ISOs are beneficial to consumers. They allow for customer choice which would not otherwise be available. With respect to the sales of copiers, Exdos-Nezron and other dealers selling second-hand equipment provide the market with machines at a lower price than is the case for a new machine (e.g. $55,000 for a refurbished model 1090 copier as compared to approximately $95,000 for a new machine). [13] Also, the evidence demonstrates that Exdos-Nezron and other ISOs provide service of a quality comparable to that provided by Xerox, and on occasion better and at a lower price. Reid speculated that this was possible, even though the ISOs had to buy the parts for the newer copier models from Xerox at full retail price, because the smaller organizations had less overhead and more flexibility than Xerox. In addition, some customers indicated that they preferred to be free of the rather oppressive overselling of Xerox sales representatives. They were unhappy, for example, with the fact that equipment did not always last the life of a given lease and with the continual pressure from Xerox sales personnel to upgrade even though such might not be in the customer's best interest.

23 The customers of Exdos who were called as witnesses were operating, in general, under significant cost restrictions (some were described by counsel as "mom and pop businesses"). It is clear that a second source of supply for Xerox machines, albeit used machines, and a second source of supply for maintenance services are extremely important in enabling such individuals to obtain quality machines and quality service at an affordable price. In one instance the evidence indicates that in the absence of Exdos the customer, Raymar Equipment Service of Beaton, Ontario, would not have been able to acquire a Xerox machine because service was simply not provided by the company to that geographical area. (Beaton is about an hour northwest of Toronto.)

24 The evidence of Mr. Kelly, Director of Purchasing for Humber College, is particularly illustrative. Humber College has a heavy capital investment in its reprographic equipment. During the 1986-87 period it owned approximately sixty Xerox machines. About thirty of these had been purchased two years previously. In 1986, Humber College was receiving less than satisfactory service with respect to these machines:

> Everything was fine for the first few years, but service began to deteriorate. ...
>
> You have [to] realize that in an academic institution, a copier is very essential as far as preparation of materials for various classrooms. So, it is a very high priority product in our organization.
>
> Service deteriorated to the point where equipment was down for four and six days at a time. Complaints to service management — to our marketing rep — they tried a number of remedies. Nothing seemed to work. They basically explained that it was the high volumes that were causing the problems.

> It got to the point where it became critical. ... We had professors going — walking right into the President's office and throwing it at him. Now, that is something that a President certainly does not need, ...
>
> We had to start to source some kind of an alternative. We had heard about — through colleagues in purchasing — that there were some independent service people out there, so we sourced the marketplace, and found a company by the name of Anco Equipment. [14]

Accordingly, Humber College began using Anco Equipment to service its machines:

> We found that the independent operators were certainly cheaper. We were very skeptical, though. It was about four months of interviews and reassurances to really separate from Xerox and we started off with just a couple of machines and let Anco look after a couple, ...
>
> As he progressed and proved that he could look after our equipment, we added more and more equipment to his installed base. [15]

25 Humber College subsequently purchased nineteen used Xerox copiers from this same ISO to replace some of its existing unsatisfactory machines:

> That was very beneficial to the college. We bought them and installed them and, of course, set him [Anco] up as the service agent for that equipment. ...
>
> [With respect to the service received from Anco] we are looking at least 75 per cent better than it was with the same volumes. ... It is much cheaper. [16]

E. Photocopiers - Service and Parts Revenue - Xerox's Market Position

26 Photocopiers, by their nature, require constant service. This is so whether the machine be second-hand or new. Indeed, there was evidence that the purchaser of a machine, either second-hand or new, is unlikely to make a purchase without at the same time making some arrangement for its servicing. Because photocopiers require constant service, the revenue received therefrom rivals, if not exceeds, that obtained from the original sale of the machine.

27 When buying a machine from Xerox, customers are given several options with respect to a possible service agreement. Customers can choose a full service maintenance agreement under which they pay Xerox an amount which is calculated by reference to the usage which the machine receives. The cost of parts and service are not separated out or identified in the amount paid. For example, Humber College paid Xerox, under its service contract, a certain base charge which was paid as a lump sum at the beginning of each year and then 1.15 cents for each copy produced by the machines. Ninety-five percent of Xerox's customers choose a full service agreement. A second option which customers can choose is a time and materials service agreement. Under this arrangement they pay for parts and service only as and when the machine breaks down. A third option is available for some large volume customers. An employee of the customer can be trained by Xerox to service the photocopiers (at least insofar as the less complicated repairs are concerned). Under this option the customer provides its own service and the required parts are purchased from Xerox. The University of Manitoba, for example, is one customer who chooses this option.

28 Xerox obtains the parts which it either sells (now only to end users) or provides to its service representatives from Xerox Corp. (U.S.). In determining a retail price for these parts there is no evidence that competitive factors are taken into account. Xerox simply uses a grid formula pursuant to which the landed Canadian price, paid by Xerox to its parent, is multiplied by a factor of from two to eight with the multiples being inversely related to the landed price of the parts. Xerox parts are generally more expensive than comparable parts for other copiers. A study of comparable parts was placed in evidence. It shows that prices for Xerox parts are from 198 percent to 951 percent (the median being 389 percent) higher than similar parts used in two equivalent copiers. While Xerox challenges the accuracy of this study it produced no direct evidence to support that challenge. Accordingly, the probative value of that study has not been seriously undermined.

29 Xerox is the largest supplier of copiers in Canada. In 1989, Xerox had a dominant position in the high-volume end of the market (90 percent share of copier placements) and accounted for almost one-half of the copier placements in the medium volume range. [17] It accounts for about one-third of the low-volume copier placements but does not compete in the personal copier market. The copier market is described by Professor Wilson, testifying on behalf of the Director, as a differentiated oligopoly with an active competitive fringe. As Professor Wilson stated, and which the Tribunal accepts, while there is obviously competition in the copier market, with success critically dependent upon an ability to sell upgraded equipment from a cost and features standpoint, the evidence does not warrant the conclusion that Xerox has little market power in the copier market.

F. Introduction of an ISO Policy (United States)

30 In January 1987 a policy respecting ISOs was issued by USMG for the United States market. This was a revised version of an earlier policy which had been developed in April 1984 but which had not been implemented. The policy was to refuse, thereafter, to supply ISOs with 10 Series and any new product parts for resale. Part of the documentation describing the initial policy change in 1984 reads:

> We have had a long standing policy of selling parts at commercial list price to all third parties, including direct purchasers of our equipment, third party leasing companies and third party service companies. The establishment of resellers authorized to service Xerox equipment has necessitated a significant change to this policy. [18]

The January 1987 policy reads in part:

> For 10 Series copiers ... we will not knowingly supply ISOs with parts for resale, technical training, technical documentation, or other resources (not generally available to end-users). When an order for such resources is received, we may require verification that the purchaser is an end-user and that any parts are not intended for resale. (Resources for new Xerox products introduced after the effective date of this policy likewise will not be offered to ISOs.) [19]

31 The ISO policy for the United States was clearly designed to undercut the viability of the ISOs and to preserve, if not enhance, the revenue derived by Xerox Corp. from the service aspect of its business. This policy was subsequently adopted in similar form by Xerox Canada in June 1988 and led to the refusal to supply which is in issue in this case. [20] Before dealing further with the events which led to the refusal to supply, evidence respecting the Xerox-Exdos business relationship during the April 1987 to August 1988 period will be referred to.

G. Xerox/Exdos' Business Relationship — April 1987 to August 1988

32 In April 1987, Reid received notice that Exdos' contract with Xerox for the purchase of used equipment was being terminated as of the end of May. It was the view of the person in charge of dealing with Reid at that time (Mr. Haltigin) that the contract was not profitable from Xerox's point of view. This view was based on Mr. Haltigin's analysis of the difference between the cost to Xerox of scrapping the used machines (including the recoverable metal obtained in that process) and the profit received as a result of selling the machines to Reid. The analysis was successfully challenged by Reid who pointed out that it had not taken into account the revenue received by Xerox from the sale to Exdos of parts and supplies for the machines.

33 Thus, while Reid's 1983/1985 contract was cancelled, subsequent negotiations led in November 1987 to an arrangement whereby he was allowed to purchase second-hand equipment from Xerox on a "one off basis". There was no change, however, in Reid's pattern of purchasing parts from Xerox. He continued to purchase parts for both the used machines which he had purchased from Xerox and for the used copiers, including post-1983 models, which he had purchased elsewhere. Both categories of parts were sold to him at full retail price.

34 Correspondence which documents the agreement clearly provides that:

> Parts for Xerox equipment not purchased by EXDOS from XCI [Xerox] (i.e. equipment not listed in Attachment B), will continue to be available for EXDOS purchase at standard retail prices. Order fulfilment will be subject to availability and Xerox's right to limit quantities. [21]
>
> (some underlining added)

This portion of the correspondence was a direct response to Reid's May 1987 request for clarification from Xerox of various issues arising from the contract termination:

> There are a number of models of Xerox equipment which we service which were not purchased directly from XCI but rather were purchased from XCI customers, through XCI sales representatives, leasing companies and end users directly. We need confirmation that parts for this type of equipment will continue to be available at a standard retail rate. [22]

All during the May 1987 to August 1988 period parts for both pre-1983 and post-1983 copier models were sold to Exdos.

H. Development of Canadian ISO Policy — Refusal to Supply Parts

35 To return to a consideration of the Xerox ISO policy, the evidence establishes that the USMG policy, concerning the refusal to sell 10 Series and newer copier parts to ISOs, would not be effective unless it was implemented by Xerox worldwide. Thus, this ISO policy which originated in the United States was subsequently adopted in Canada. Xerox argued that insofar as Canada was concerned, the implementation of the policy was nothing more than the formalization of what had always been the company policy, that is, that it would only sell post-1983 copier parts to end users of the machines. As has been noted, the evidence does not support that conclusion except, perhaps, with respect to 50 Series parts, which were not on the market until well after the effective date of the Canadian policy.

36 The first draft of the Canadian ISO policy was prepared by Xerox in December 1987. This policy was modeled on the Xerox Corp. (U.S.) policy. Background documents on the policy provided Xerox employees with the following information:

> Senior management is increasingly emphasizing the importance of service revenue to XCI profits.
>
> Our challenge is to grow service revenue stream which is essential to Xerox success.
>
> Sale of parts, training documentation and other support requirements for 10 Series, EP, OS products to ISOs (independent service organizations) is contrary to this objective. [23]

On March 7, 1988, a meeting was held to discuss the final draft and implementation of the policy. As part of that implementation procedure, Xerox compiled a list of its top 150 parts customers for the purpose of identifying those among them who were ISOs. The highest volume parts purchaser identified as an ISO was Exdos. In June 1988 the Canadian ISO policy became effective. [24] By July 6, 1988, a list of ISOs had been prepared along with a draft letter notifying them of the parts cut off.

37 On August 26, 1988, a letter was sent to Exdos advising it that Xerox had recently reviewed its product strategy and determined that:

> ... continuation of a used equipment sales and support channel would conflict with other market initiatives presently underway. As a result, we find it necessary to discontinue the sale of used equipment, supplies and parts to EXDOS .... [25]

The cut-off date for used equipment sales was September 26, 1988; parts for resale or service would be unavailable after October 26, 1988. Exdos purchases as an "end user customer" were unaffected.

38 On August 29, 1988, letters were sent by Xerox to all the other Canadian ISOs announcing the refusal to continue to sell 10 Series parts, 9000 Series parts and parts for various other listed products, other than to end users. For this purpose, ownership

of a machine was considered to be irrelevant. The person who actually used the machine, regardless of who owned it, was classified as the end user. Thus ISOs who owned used Xerox equipment, which they had placed under rental to customers, were not entitled to parts for even those machines.

III. Competition Law Issues

39 An order is sought pursuant to section 75 of the *Competition Act* to require Xerox to supply Exdos (Reid) with post-1983 copier parts. For the purposes of the present case, section 75 can be excerpted as follows:

75. (1) Where, on application by the Director, the Tribunal finds that

(a) a person is substantially affected in his business ... due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person ... is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person ... is willing and able to meet the usual trade terms ..., and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer.

(underlining added)

40 There is no dispute that the parts in question are in adequate supply. There is no dispute that Exdos is willing and able to meet the usual trade terms. There is little doubt that Exdos is unable to obtain adequate supplies of the parts. And, there is little doubt that the inability to obtain supply of the parts has and will substantially affect Exdos' business.

41 The main competition law issue in this case is the proper product market definition and concomitantly whether it can be said that Exdos' inability to obtain adequate supplies of the product arose because of "insufficient competition among suppliers of the product in the market" ("en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché"). More particularly, does section 75 encompass a situation in which the product is proprietary and derives largely from a single source?

A. Inadequate Supply

42 Prior to Xerox's refusal to sell post-1983 copier parts, except to end users, Exdos could obtain supplies from Xerox itself and from other ISOs either in Canada or the United States. It also could obtain parts from Rank Xerox, the British arm of the Xerox corporate family. Indeed, for some time after the supply of parts had been cut off in both Canada and the United States the supply from Rank Xerox continued. As of February, 1990, however, this source dried up as Rank Xerox implemented the ISO policy which had been adopted previously in the United States and Canada.

43 Exdos can now obtain Xerox copier parts: (1) from Xerox, to the extent that Exdos is recognized by Xerox as an end user of any given machine; (2) from the "cannibalization" of used machines; and (3) from independent manufacturers of Xerox parts. With respect to the first source of supply, upon being notified of Xerox's refusal to supply parts except to end users, Reid moved a number of different copier models into his showroom. He had them registered with Xerox in the name of Exdos, as an end user. He is receiving through this process a limited number of parts. This source of supply was described by counsel for the Director as a "trickle" of parts.

44 The second source of supply, the "cannibalization" of machines, is not an adequate source of supply over the long run. Many parts in a photocopier are "consumable" parts. That is, they wear out on a regular basis, after a given amount of use. They must be frequently replaced. Consumable parts which are obtained from used machines automatically have a more limited life than new parts. Thus replacing a worn out consumable part with a used one invites more frequent service calls. In addition,

an ISO is left with a stock pile of unused parts (from the rest of the machine) which do not need to be replaced with the same frequency as the consumable parts. The cannibalization of machines is not in the long run an economically viable source for consumable parts.

45 With respect to the third source of supply, the evidence establishes that there were and are independent manufacturers who make some Xerox copier parts. They manufacture the parts that are in heavy demand but they do not manufacture all the parts necessary to properly service the machines. Some unique parts, which are essential for proper service, cannot be obtained from this source. It is clear on the basis of the evidence, then, that the sources of supply of Xerox parts left, in the face of Xerox's refusal to supply, are inadequate.

B. Business Substantially Affected

46 The evidence establishes that the Exdos-Nezron business has three overlapping aspects. The first is the purchase and sale of used Xerox photocopiers from a variety of sources and the marketing of them, together with the parts required to refurbish and service them, to customers in Canada and elsewhere. This is sometimes referred to as the "brokering" aspect of the business. The second is the refurbishing of the machines by Exdos-Nezron and the marketing of those machines directly into the end-user market, whether by sale, lease or rental. This involves both the placement of the copiers in the end-user market and the provision of continuing service for the machines in the customers hands, should the customer so wish. The third aspect of the business is the servicing of Xerox copiers independently of the sale of the machines. All three aspects of the business require access to Xerox copier parts for the business to survive.

47 Xerox argues that since it is still willing to supply Exdos with pre-1983 copier parts there should be a finding of no substantial effect on the Exdos business. This is not convincing both because of the volume of the Exdos-Nezron installed 10 Series customer base and because the pre-1983 copier market is a shrinking one. Xerox further argues that since its policy is to allow end users to purchase parts, there should be a finding of no substantial effect. It argues that Reid's customers can order service from Exdos-Nezron, then order the parts themselves directly from Xerox, after which Exdos-Nezron can complete the service. This is clearly so impractical that it has the appearance of a charade. Customer after customer testified that this was not a viable procedure. In the first place, customers do not want to be involved in the administrative task of ordering parts. More importantly, however, they will not tolerate the machine down-time which such a process of service and repair would entail.

48 While it seems axiomatic, from the nature of the Exdos-Nezron business and from the facts set out above, that the refusal to supply will substantially affect if not destroy the Exdos-Nezron business, the Tribunal does not rely solely on the evidence which has already been described. The evidence of Mr. Banks, the accountant who performed an audit of the Exdos-Nezron business for the purpose of assessing the effects of the Xerox refusal to supply, establishes beyond any doubt that the Exdos business will be substantially affected by the refusal. One caveat must be added to this conclusion. No evidence was led with respect to the effect that the non-supply of 50 Series parts would have on Exdos. Mr. Banks did not deal with this matter in his evidence. Mr. Reid did not give evidence with respect thereto. As the Tribunal understands it, the 50 Series operates by means of new technology. They were first marketed in 1989 and parts have apparently never been sold to Exdos or to other ISOs.

C. Product/Market

49 Section 75 requires that one find that a person is unable to obtain adequate supplies "of a product anywhere in a market". In this case, there is little question about the geographic dimension of the market; it was tacitly assumed to be Canada. The main issue between the parties is the relevant product and, concomitantly, the relevant product market. The Director argues that the relevant product is Xerox copier parts, in particular post-1983 Xerox copier parts. The respondent submits that the relevant product market is that in which Xerox itself competes, namely "the provision of reprographic equipments, parts and service to end use customers."

50 The various arguments which have been raised before the Tribunal with respect to product definition will be considered in the following order: (1) whether, in the present case, Xerox parts should be considered to be a relevant product market for section 75 purposes; (2) whether vertical integration exists as a norm in the industry and the extent to which such might be relevant

in the identification of a relevant market; (3) the significance of the complainant's conduct to the identification of the relevant market; and (4) whether the respondent need exercise market power in the relevant market in order for section 75 to apply.

(1) Xerox Parts

51 The parties called various economists to testify on their behalf as to the relevant product market. While the process of product market definition is clearly founded on economic analysis, the question of the "relevant" market for the purposes of section 75 depends largely on the construction of section 75 and the identification of its objectives within the context of the *Competition Act* as a whole. It is clear that much of the difference between the expert economists in this case rests upon differing views as to the objectives of section 75 rather than upon differences regarding the proper economic principles respecting market definition. This is particularly true of the evidence given by Professor Waverman. Whether much of this expert evidence was proper opinion evidence was not raised by counsel. In any event, to the extent that Professor Waverman or any other expert was opining on questions of law or on what they considered to be the proper policy of the legislation rather than giving what can legitimately be classified as expert evidence as an economist, the Tribunal has treated that opinion as the personal policy preference of the witness only.

52 "Product" is a term of art in competition law. [26] The determination of what is a relevant product, for any given purpose, carries with it an identification of the relevant product market. The relevant product and product market may be very broad or may be very narrow depending upon the context within which and the purpose for which that identification is required.

53 The Director argues that section 75 focuses on the objective of promoting efficiency and consumer choice through the enhancement of participation by individual businesses and that, therefore, the product market is most appropriately defined by reference to the acceptable substitutes available to the business refused supply in satisfying its customers. The Director submits that Exdos must satisfy its customers' demands for the refurbishing, service and sale of used copiers. Those customers own or wish to purchase Xerox machines and therefore, the Director continues, the technical inability to substitute other parts, to make or to keep the machines operational, limits the product definition to Xerox copier parts.

54 This is consistent with the position taken by the Tribunal in *Director of Investigation & Research v. Chrysler Canada Ltd.*:

> Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers. [27]

55 The Director's expert economist in the present case, Professor Gillen, defined an economic market by reference to the following criteria:

> An economic market is defined as an area in which prices of qualitatively similar goods tend to equality with allowance for transportation or transactions cost. In essence a market defined in this classical economic sense is the set of products within which prices are closely linked to one another by supply and demand and whose prices are relatively independent of prices of goods not in the market. The extent of the market can be measured by the degree of product substitution in the presence of relative price changes [cross elasticity of demand]. ... Products which are close substitutes will exhibit a high cross elasticity of demand or supply and would be included in the same market. [28]

56 Professor Gillen accepted as a starting point that one possible market definition in this case was the product refused, post-1983 Xerox copier parts. In order to test this hypothesis, he asked: (1) whether a market for parts used by ISOs could be defined separately from a market for a service package demanded by end users; (2) whether parts and service are distinct and

separate products; (3) whether other companies' copier parts should be included in the market; and (4) whether Xerox sourced parts alone form the supply side. That is, he asked as a factual matter whether a market existed: whether there were demanders, suppliers, and transactions occurring. Then, he examined the boundaries of that market and since parts for different vintages and models of Xerox equipment cannot be substituted, he concluded that post-1983 Xerox copier parts was a relevant market.

57 The respondent's expert economist, Professor Waverman, considered this to be an overly simplistic approach. He attempted to demolish the analysis by stating that if post-1983 Xerox copier parts was a market (or submarket) then logically each part for each machine should be considered a separate market because they are non-substitutable one for the other. The Director's expert was not claiming, however, that post-1983 Xerox copier parts was an exclusive definition of the market which might exist in relation to copiers. Rather he was "limiting the scope of the parts under *consideration to those which were refused and which constitute the base of the definition for the market.*" [29]

58 This approach is consistent with that which has been articulated in the academic literature. For example, Areeda and Turner emphasize the need to determine products and product markets by reference to the legislative purpose for which such identification is required:

> One cannot determine ... the "proper" market definition, without reference to the legal context in which the issue arises. One must consider what is under attack, the substantive rules of liability that govern the particular case, and the relief that is at issue. ... [30]

And, in a recent supplement to the same text, the authors note that:

> ... talk of markets and submarkets is both superfluous and confusing in an antitrust case, where the courts correctly search for a <u>relevant</u> market — that is a market <u>relevant</u> to the legal issue before the court. [31]
>
> (underlining added)

59 This approach is also consistent with the decision in *R. v. J.W. Mills & Son Ltd.*, [32] a decision to which both counsel referred. In *J.W. Mills & Son Ltd.*, a conspiracy prosecution, Mr. Justice Gibson stated:

> In examining and assessing the competitive feature of the market structure, what is pertinent is the boundaries of the market because the determination of what competition is relevant is one of the key issues, ...
>
> As a matter of law of course there is no definition of the "market" in relation to which the evidence of any alleged violation ... may be examined. What is the relevant market in every case is a matter of judgment based upon the evidence. ...
>
> But speaking generally, it is of importance to bear in mind that <u>the term "market" is a relative concept</u>. In one sense, there is only one market in an economy since, to some extent, all products and services are substitutes for each other in competing for the customer's dollar.
>
> In another sense, almost every firm has its own market since, in most industries, each firm's product is differentiated, to some extent, from that of all other firms.
>
> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.
>
> . . .
>
> For this purpose <u>the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended</u>. For example, two products may be in the same market in one case and not in another.

> And many characteristics or dimensions may be considered in defining the relevant market. All are not of the same order. And, in any particular case, usually, not all of the many characteristics or dimensions will have to be considered. In some instances, the definition may turn on only one characteristic or dimension or two .... [33]
>
> (underlining added)

60 Mr. Justice Gibson then listed a number of characteristics which could be used in the definition of a relevant market: actual and potential competition; integration and stages of manufacturers; method of production or origin; physical characteristics of products or services; end users of products; product substitutability; geographic area; relative prices of goods or services. As arranged, the first three characteristics relate primarily to the supply side of the market, and the subsequent three to product substitutability. "Geographic area" is a conclusion rather than a factor in market definition and it would often be established after extensive analysis of the other factors. Price information can be used to draw conclusions about substitutability in supply, between products and over distance.

61 Professor Waverman for the respondent stated that the relevant product in the present case is the provision of a package of services which leads to the creation of an imaged piece of paper. [34] He was of the opinion that this definition is consistent with the manner in which the product is purchased by the final consumer. The respondent's expert economist did not deny that Xerox copier parts are products for which an identifiable market exists, a market in which persons wishing to service Xerox machines are customers. However, it was his view that this was not the *relevant* market for section 75 purposes. He argued that the product market which was relevant for section 75 purposes should be determined by reference to the market in which Xerox competes and that that is the end user market:

> ... the relevant competition is not that for Xerox proprietary parts, but among the providers of photocopying services, of which there are many.
>
> To argue that the market is Xerox parts ignores the manner in which consumers make decisions. End-users (those who want photocopying services) are not indifferent to the prices of Xerox parts since ultimately that price, whether explicit or implicit, is a component of the cost per copy. Competition among providers of photocopying services in the cost per copy provides discipline in the market for parts. [35]

Professor Waverman took the position that Xerox's actions in curtailing supply were motivated by competition in the copier market and would only, in the long run, result in the intensification of that competition. He was of the view that an order under section 75 would cause a welfare loss to consumers by substituting inefficient distribution systems for efficient (as dictated by the market) systems. Therefore, it was argued that the fact situation does not fall within either the spirit or intention of section 75.

62 Even if this position were correct, however, the evidence in the present case would not support a conclusion that the end-user market provides competitive discipline to the parts market. It is clear that at present Xerox does not price its parts by reference to competitive factors but, rather, sets prices according to an arbitrary "formula". In addition, even if Xerox were forced to price parts competitively in the long run, a present owner of a Xerox machine cannot easily, during the economic life of that machine, switch to another manufacturer's brand of copier. As counsel for the Director argues, it is no answer to Exdos' customers to tell them that "based on some Chicago School of Economics theory ... [they] should wait until the market rights itself" and that in the long term when they purchase their next copier they can purchase from a company that provides better and cheaper parts and service.

63 To turn then to a consideration of whether or not proprietary replacement parts should ever be categorized as a "product" or as constituting the base of a "product market", it should first of all be noted that the *Competition Act* and, in particular, section 75, is not limited to ensuring the availability of *final* products at competitive prices. The Act itself is not expressly so worded and there is nothing in the statement of its purposes which leads to a conclusion that such a limitation was intended. Indeed one of the purposes set out in section 1.1 of the Act is "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy". This would seem on many occasions to contemplate, if not require, action to preserve

the competitive situation in an intermediate market. It was argued to the Tribunal that if the respondent's interpretation of the legislation was correct, it would mean, for example, that because General Motors and Ford compete in the final market for automobiles there would be no definable market for captive parts for Ford cars. Or, it would mean that for purposes of the *Competition Act*, the concentration of upstream assets in the hands of suppliers, such as oil companies, should be ignored because such companies face retail competition downstream.

64 In other competition law contexts intermediate markets in proprietary replacement parts have been identified as relevant markets. None of these, of course, relate to section 75 of the *Competition Act*. They can only be cited, and have only been cited, for the purpose of demonstrating that such product markets *may* be relevant for competition law purposes. For example, in *R. v Chatwin Motors Ltd.*,[36] the Crown alleged a conspiracy between franchised dealers with respect to one part of the motor vehicle parts and accessories market: captive parts for Ford and General Motors vehicles and, in particular, those captive parts secured on special orders where the dealer paid the freight charges. The British Columbia Supreme Court held that the only substantial competition in captive parts was between franchised dealers and that, however narrow a field of competition, the public was entitled to have it preserved.[37]

65 In *Hugin Kassaregister AB v. Commission of the European Communities*,[38] Article 86 of the Treaty of Rome was under consideration. Article 86 provides that any abuse of a dominant position within the European Economic Community ("EEC") or a substantial part of it shall be prohibited insofar as it may affect trade between member states. The Swedish company and its subsidiaries had refused to supply spare parts for Hugin cash registers to a British firm that specialized in the service, reconditioning and renting out of Hugin cash registers. Hugin Kassaregister AB ("Hugin AB") argued that the supply of spare parts and of maintenance services was not a separate market but rather a component of the cash register market. The headnote describing the Commission's decision that Hugin AB had infringed Article 86 states in part that:

> Where a particular brand of a product uses spare parts which are not interchangeable with spare parts of other brands of the same product and cannot otherwise be economically reproduced, and the parts are made to the (non-EEC) manufacturer's design, with tools belonging to the manufacturer and are exclusive to the manufacturer such that the manufacturer controls the supply of all its spare parts throughout the world, it enjoys a monopoly in the parts and thus, with its subsidiaries established in the EEC, holds a dominant position in the Common Market for the supply of such spare parts. It therefore has also a dominant position for the maintenance and repair of the product itself in relation to companies which need a supply of the spare parts. This is so even if the market share of the manufacturer in the product itself does not give him a dominant position in the product.
>
> . . .
>
> A manufacturer who has a monopoly in the supply of spare parts for his product and who delivers such parts only to his own subsidiaries and authorized dealers for their own use and not for resale abuses his dominant position in that he restricts competition through his refusal without objective justification to supply others.[39]

66 In *Image Technical Service, Inc. v. Eastman Kodak Co.*,[40] it was held that a refusal by Eastman Kodak Co. ("Kodak") to sell copier equipment parts to ISOs, after having sold them to such businesses for several years, was a triable issue under section 2 of the Sherman Act.[41] Section 2 makes it an offence to monopolize or to attempt to monopolize "any part of the trade or commerce among the several States, or with foreign nations". No definitive ruling was given on the facts of the case because the issue was addressed by the Ninth Circuit Court of Appeals in the context of an appeal from the summary dismissal of the plaintiffs' private antitrust action. In reaching the decision that such a summary dismissal was not appropriate, the Court stated:

> ... there is logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand market. But in light of appellants' evidence we cannot say that this theory mirrors reality.[42]

67 The same case also involved an allegation that Kodak had infringed section 1 of the Sherman Act in refusing to sell replacement parts to end users of its equipment except on condition that they not engage ISOs to service the copiers. [43] Kodak argued that parts and service formed a single product market and that therefore there could be no tying arrangement. The Court held that this argument presented, at best, a disputed issue of fact.

> That products must be used together does not eliminate the possibility that they form distinct markets. ... Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service. [44]

68 The Court also stated that, assuming a tying arrangement existed, there was an issue of material fact as to whether Kodak had the requisite economic power in the tying product market. Plaintiffs/appellants argued that Kodak had power in the parts market because its parts were unique and because owners of its machinery could not readily switch. Kodak countered that it did not have market power in the interbrand market for copiers and therefore could not have market power in the after-market for spare parts. The Court stated:

> We believe that competition in the interbrand markets might prevent Kodak from possessing power in the parts market. ... In this case, Kodak has tied parts to service, not equipment to parts. Interbrand competition in the equipment market does not in the abstract negate appellants' claim that Kodak has power in the parts market.
>
> . . .
>
> While appellants have not conducted a market analysis and pinpointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality. It is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market. [45]

In coming to this decision the Court distinguished one of its earlier tying decisions: *General Business Systems v. North American Philips Corp.* [46]

69 The decision in the *Image Technical Service, Inc.* case has been quoted at length because much of the expert evidence filed by the respondent in the present case seems infused with and based on concepts which exist in United States antitrust jurisprudence and upon arguments which have been made or are being made in relation thereto. These are not necessarily relevant to the interpretation of the Canadian legislation. [47] The case does demonstrate, however, that even in that jurisdiction proprietary replacement parts may be a relevant product market for competition legislation purposes.

70 In the present case, a determination of the relevant product market and an assessment of the extent of the market in which that product is situated, by reference to the product which has been refused and to factors such as those set out in the decision of Mr. Justice Gibson, are appropriate. The geographical extent of the market is not seriously in doubt; it has basically been assumed to be Canada. Prior to the implementation of the refusal to supply by both Xerox Corp. (U.S.) and Rank Xerox, the market might have been described as larger in extent; parts could, at that time, be imported.

71 The boundaries of the product market can properly be defined as parts for Xerox copiers. The relevant submarket, or class of product falling within that market, for purposes of the present case, is parts for post-1983 model copiers. There is no compelling reason flowing from either the legislative text of section 75 or from general economic principles which requires that proprietary replacement parts should not be considered to be a relevant product for section 75 purposes.

72 The consumers of the product are Exdos, other ISOs and those Xerox customers who service the machines themselves. While the Director's expert economist's position is that Xerox is the sole supplier, he also notes that this is essentially a factual question rather than one for expert evidence. Professor Gillen identifies Xerox as the sole supplier because other sources of

supply located both within Canada and without are qualitatively different from the supply provided by Xerox. In the Tribunal's view, it is more accurate to identify the suppliers, prior to the refusal to supply, as Xerox, other ISOs, Rank Xerox, and the independent manufacturers of parts.

(2) Vertical Integration

73 The respondent has put forward several arguments with respect to the proper market definition which are based on conclusions of fact not supported by the evidence. For the sake of completeness, however, they will be discussed. One such argument is that the end-user market and not the parts market should be identified as the relevant market because the industry norm is one of vertical integration. It is argued that vertical integration is adopted by firms for reasons of efficiency and that it should be assumed in this case that this is the reason for Xerox's desire to remain with or return to a system of vertical integration.

74 "Vertical integration" was used by the respondent's expert in a very limited sense, as meaning only that Xerox did not sell parts except to end users, not that Xerox only provided its parts through its own service technicians. It is clear that Xerox, for many years, sold parts freely and openly to anyone who wished to purchase them; sales were not limited to end users. Xerox did not practice a system of vertical integration even in the sense in which that term has been used in the evidence by Professor Waverman and Xerox does not practice vertical integration in any more comprehensive sense, since it is still willing to sell parts directly to end users. Nor does the evidence establish that vertical integration is the norm in the industry either in this restricted sense or in a more general one.

75 The respondent's expert stated that firms adopt vertically integrated structures for reasons of economic efficiency [48] and that if vertical integration is not preserved the benefits which accrue therefrom (e.g. the use of increased service revenues to defray high research and development costs or the ensuring of a consistent quality of service) are denied to consumers. The difficulty with the respondent's expert's argument is that it is entirely hypothetical. While it may be true that firms adopt systems of vertical integration for efficiency reasons, there is no evidence that such is true in the present case.

76 Whether situations where vertical integration is either the norm in the industry or is dictated by reason of economic efficiency fall within section 75 can only be determined in the context of cases where a relevant factual basis exists. It may be that such factors would lead the Tribunal to conclude that a product market did not exist or it may be that they would lead the Tribunal to conclude that the complainant's inability to obtain supply did not arise "because of insufficient competition among suppliers of the product in the market". But it suffices for present purposes to note that the conclusions of fact which are sought to be drawn, in this case, to support such an argument cannot be substantiated.

(3) Conduct of Complainant/Burden on Xerox

77 The respondent alleges that no market was established because Reid acquired parts through subterfuge. As has been noted elsewhere, this is not supported by the evidence. Also, the evidence does not support a conclusion that Reid was refused supply because of particularly onerous administrative obligations and expenses which arose for Xerox as a result of dealing with him (e.g. inventory costs). Nor is there convincing evidence that Exdos can "free ride" on Xerox's investments in many areas. There is evidence that many of the ISO dealers who were part of the Exdos network and some of the Nezron service people were ex-Xerox employees who had been trained by Xerox to service Xerox equipment. But this is hardly sufficient to constitute the "free-riding" which is alleged. There is also no convincing evidence that Xerox could be injured because Exdos generally would not, and could not be expected to, take the standard of care in maintenance and repair of Xerox machines that Xerox would. Nor is there evidence to support the assertion that Xerox's reputation suffers every time Exdos is unable to service a photocopier properly or that if Exdos-Nezron is unable to fix a machine it then calls on Xerox to fix the machine. In fact, it might be argued that Exdos, perhaps more than Xerox, has an *immediate* interest in providing timely, high-quality service and repairs since that is its business. In general, it is to be noted that Professor Waverman's expert affidavits are replete with assertions of fact that are entirely unsupported by the evidence.

78 Whether factors relating to the conduct of the complainant or the administrative burden or other costs placed upon a supplier might be relevant to a determination of the existence and the definition of a product market can only be assessed in

the context of a case where factual evidence establishes that *such* factors exist. It may be that the existence of those factors would lead the Tribunal to conclude that a "product market" did not exist, or more likely, it may be that they would lead the Tribunal to conclude that the inability of the complainant to obtain adequate supplies did not arise "because of insufficient competition among suppliers of the product in the market" but rather for objectively justifiable business reasons, or that as a matter of discretion an order to supply should not be given. It suffices for present purposes to note, as with the arguments based on vertical integration, that the conclusions of fact which are sought to be drawn, in this case, to support those arguments, cannot be substantiated.

(4) Market Power of the Respondent

79 One last consideration respecting the definition of the relevant product market should be considered, that is, whether the market must be one in which the respondent exercises "market power". As will be noticed from the references above to both EEC competition law and the United States antitrust jurisprudence, this is a question which is relevant in those jurisdictions. A similar argument was addressed by the Tribunal in the *Chrysler Canada Ltd.* decision:

> The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this can have on the sale of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.
>
> This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion. [49]

80 This argument has already been dealt with to some extent above, in the context of the discussion of what constitutes a relevant product market for section 75 purposes. If the relevant product market is identified as parts, then it is clear that Xerox has almost a monopoly position in that market. If the product market is copiers then Xerox still has substantial power in that market. Whether or not it could be said to have a dominant position was not in issue in this case. In any event, it is useful to stress that the respondent's market power is not an element which need be proven for the purposes of obtaining a section 75 order. It may be that it will be rare to find a situation in which a supplier refuses to supply a would-be purchaser, for anti-competitive reasons, without holding significant market power in the relevant market. It would be counterproductive if the would-be purchaser could easily find an alternate source of supply. Nevertheless, neither the identification of the relevant product nor the definition of the relevant market hinges, for section 75 purposes, on an assessment of the respondent's market power in the relevant market. All that is required is that the complainant's inability to obtain adequate supplies occur "because of insufficient competition among suppliers of the product in the market".

D. Insufficient Competition Among Suppliers of the Product

81 Although section 75 does not directly demand that the Tribunal find any specified effect on competition in the market resulting from the refusal to supply, it is clear that not all situations where a supplier decides to discontinue selling its products to a customer will fall within the section. Paragraph 75(1)(b) requires that the person who has been refused the product be "unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market".

82 Thus, a particular market situation must exist at the time of the refusal, a situation that can fairly be described as "insufficient competition among suppliers". How much competition between suppliers is insufficient will depend on the facts of the particular case. Clearly a market composed of numerous suppliers acting independently would not qualify. (It is also very difficult to conceive of a case before the Tribunal where so many of a multitude of suppliers would refuse to supply an individual that his business could be "substantially affected". One would postulate that if one supplier did not want the business, another would be more than happy to earn the extra revenue.)

83 In addition, the refusal to supply must occur "*because* of insufficient competition among suppliers of the product". That is, the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market.

84 In this case, the Director submits that since the relevant product market is confined to Xerox parts, the only issue raised by paragraph (b) is whether adequate supplies can be obtained from sources other than Xerox itself. Since, as was discussed above, the alternative sources are neither adequate nor economically viable, the Director argues that, by definition, the market for these parts is characterized by insufficient competition. On this characterization, this is undoubtedly true, since Xerox is, for all practical purposes, a monopolist in its own proprietary parts.

85 The respondent's argument on this point is inextricably linked to its position on the question of the definition of the relevant product market for section 75 purposes. The respondent submits that the wording of paragraph (b) contemplates that the "market" should consist of more than one supplier since the word "suppliers" is specifically used. Therefore, the respondent reiterates, the relevant market must be that in which the manufacturers of copiers compete.

86 In response to questions concerning the proper interpretation of the phrase "because of insufficient competition *among suppliers* in the market", counsel for the Director pointed out that the usage of the word "suppliers" in that phrase can legitimately apply to a situation where the refusal emanates not only from a dominant manufacturer/supplier of parts but also from a single supplier. Subsection 33(2) of the *Interpretation Act*,[50] clearly establishes at least a presumptive rule that "words in the plural include the singular".

87 Counsel for the Director further argued that, although such a presumption could be overturned if dictated by the context in which the particular phrase occurred, an interpretation including the singular[51] is supported by reference to the rest of section 75. He submitted that the intent of section 75 was clearly to *catch* rather than to *exclude* the single supplier market. Counsel pointed to subsection 75(2) to support this argument: subsection 75(2) would allow an article differentiated by a trademark or proprietary name to be considered a separate "product" for the purposes of the section *if* the article occupies such a dominant position in the market as to substantially affect the ability of the person denied access to carry on business. In appropriate circumstances, he argued, this would lead to a product market definition limited to a proprietary or trademarked article with a dominant position and therefore the order would issue against a sole supplier.

88 The Tribunal accepts that the use of the plural in paragraph 75(1)(b) includes the singular. There has been no convincing argument before us that would lead us to conclude that the statutory context of that paragraph dictates otherwise. It would import a logical inconsistency into the section to hold that a supplier of the relevant product in, for example, a market with three or four suppliers, could be subject to review by the Tribunal for refusing to supply while a supplier with a monopoly position could not be.

89 Many arguments were made to the Tribunal concerning the implications an order to supply proprietary replacement parts would have for the future application of section 75. The *Chrysler Canada Ltd.* decision has already established that an order to supply proprietary replacement parts can properly be issued pursuant to section 75. Many of the arguments raised before the Tribunal in this case were also raised in that case; many refer to hypothetical situations which it is suggested might arise in the future and with respect to which it is argued that the Tribunal might, then, have to make a section 75 order if such an order is granted in this case.

90 As has already been noted, it is difficult to deal with this kind of argument. In the absence of an actual situation establishing the facts which are hypothesized, a conclusion that they might or might not justify a section 75 order is difficult to make. For example, it has been suggested that if an order can be given in the circumstances of this case one might also issue in a situation where a manufacturer/supplier of proprietary parts had never unbundled the sale of its parts from the sale of its machines. Whether such an order could properly be obtained under section 75 is not in issue in this case, but one can ask whether the Director, in such circumstances, would be able to prove the existence of a market for the product in question; one can ask whether a complainant could say that his or her business was substantially affected by such a refusal to supply. It is useful to quote some of the respondent's argument which seems to recognize this:

> It was accepted by all the economic experts that from an economic perspective there is nothing either inefficient or anti-competitive about a manufacturer carrying on business within a vertically integrated structure.
>
> . . .
>
> The only competition issue arises then, when a manufacturer operates in a fashion to "break the bundle" of goods and services and to create a market where none previously existed. The most typical situation in which this occurs is at the dealer level.
>
> If a manufacturer distributes his product through a dealer network then it may be appropriate to look at the competition aspects of this market so created to ensure that as between dealers there is not discrimination and restricted competition.
>
> . . .
>
> Absent the conduct of the manufacturer which can clearly and unequivocally be said to have created a market for parts at the dealer level there is no competition issue to be dealt with. [52]

In the present situation the manufacturer/supplier did create a market for Xerox copier parts. It created a market for Xerox copier parts not through use of a dealer network but by selling to anyone who wished to purchase.

91 Another hypothetical situation raised was whether section 75 could catch a manufacturer who refused to supply certain customers merely because he wished to change his distribution system for the product. Again, in the absence of an actual factual situation, it is impossible to conclusively answer such a question. At the same time, one can question whether an inability to obtain supply in such circumstances would necessarily meet the test of occurring "because of insufficient competition among suppliers of the product in the market". It may very well be that the inability to obtain supply in such circumstances could be related to a legitimate business decision unconnected to anti-competitive factors. In any event, the present situation is not one in which the respondent is attempting to change its dealer distribution system. And, it is abundantly clear that the decision was taken for the very purpose of curtailing competition in the after-sale market.

92 The last consideration which is relevant to this issue is the legislative framework of section 75. Counsel for the Director argues and the Tribunal accepts that section 75 must be read in the light of the express purposes of the legislation and the other provisions of the Act. Section 1.1 describes the purposes of the *Competition Act* as including "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" and "to provide consumers with competitive prices and product choices." Both these purposes would be served by granting an order in favour of Exdos as sought by the Director. Exdos will continue to have an "equitable opportunity to participate" and consumers will have price and product choices available which they would not otherwise have.

IV. Constitutional Issues

93 The constitutional jurisdiction of the Parliament of Canada to enact section 75 is challenged. The respondent argues that if the Tribunal can make an order under section 75 to govern a supplier's conduct without reference to the effect on competition that section is legislation with respect to property and civil rights in the province (subsection 92(13) of the *Constitution Act,*

1867 [53]) and that it is not legislation with respect to any matter falling under Parliament's jurisdiction pursuant to section 91 of the *Constitution Act, 1867*. Even if the section might otherwise be constitutionally valid, counsel argues that it is inoperative with respect to the facts of this case because the facts do not encompass a situation where the refusal to supply is one having anti-competitive effects.

94 In addition, issues respecting the constitutionality of the Tribunal itself are raised. These last rely on the decision of Mr. Justice Philippon of the Superior Court of Quebec in *Alex Couture Inc. c. P.G. Canada.* [54]

A. Constitutionality of Section 75

95 The starting point for a discussion of the constitutionality of a provision of the *Competition Act* is the Supreme Court decision in *General Motors of Canada Ltd. v. City National Leasing.* [55] That decision dealt with the constitutionality of section 31.1, added to the *Combines Investigation Act* in 1976, [56] which section provided that a person who had suffered damage as a result of conduct contrary to Part V of that Act (the criminal offences) or in breach of an order of the Restrictive Trade Practices Commission or a court, could sue for damages. In the *City National Leasing* decision, Chief Justice Dickson referred to the history of subsection 91(2) (the federal trade and commerce power) of the *Constitution Act, 1867.* [57] He noted that *Citizens Insurance Co. of Canada v. Parsons* [58] had established three important propositions with regard to the federal trade and commerce power:

> ... (i) it does not correspond to the literal meaning of the words "regulation of trade and commerce"; (ii) it includes not only arrangements with regard to international and interprovincial trade but "it may be that ... (it) would include general regulation of trade affecting the whole dominion"; (iii) it does not extend to regulating the contracts of a particular business or trade. [59]

96 The Chief Justice noted that since *Parsons*, the jurisprudence relating to subsection 91(2) had largely consisted of an elaboration of federal authority with respect to "international and interprovincial trade" and that the second branch of federal authority, that with respect to the power over "general trade and commerce affecting Canada as a whole", had remained largely unexplored. He indicated that in assessing the interaction of subsection 91(2), Parliament's authority to legislate in relation to trade and commerce, with subsection 92(13), provincial legislative authority in relation to property and civil rights in the province, a balance must be struck:

> ... somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless. [60]

97 The Chief Justice cited *MacDonald v. Vapor Canada Ltd.*, [61] where three criteria were set out as relevant in assessing the constitutionality of legislation in relation to general trade and commerce under the second branch of *Parsons*: (1) the impugned legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry. [62] Chief Justice Dickson also adopted two further criteria, identified in *A.G. Canada v. Canadian National Transportation Ltd*, [63] that were relevant in assessing the constitutional validity of legislation in relation to general trade and commerce; (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. [64] The five factors thus identified were said to be *indicia* which, however, *did not represent an exhaustive list of traits* which might be relevant for the purpose of characterizing legislation as general trade and commerce legislation. Also, *the presence or absence of any one criteria was held not to be necessarily determinative*, in reaching a decision with respect to the legislation's constitutional characterization.

98 Throughout its history, various provisions of the *Combines Investigation Act* have been subject to challenge on constitutional grounds. [65] The Act was extensively amended in 1976 and again in 1986 when it was renamed the *Competition Act*. It is unnecessary to describe the substance of these amendments; they are well known. Suffice it to say, they too have given rise to several constitutional challenges.

99 In addition to the Supreme Court decision in *City National Leasing*, several other of the 1976 amendments were challenged and supported. In *P.G. Canada c. Miracle Mart Inc.*, [66] the Court held that the prohibition on making sales above advertised prices (a criminal offence) was constitutionally valid under Parliament's power over trade and commerce. The Federal Court of Appeal in *Re BBM Bureau of Measurement and Director of Investigation and Research* [67] was of the opinion that the reviewable trade practice of tied selling (previously the jurisdiction of the Restrictive Trade Practices Commission and now within that of the Tribunal) was valid federal legislation under subsection 91(2). Most recently, in *Alex Couture Inc. c. P.G. Canada*, [68] Mr. Justice Philippon upheld Parliament's legislative authority to enact the civil merger provisions, added to the *Competition Act* in 1986, under the trade and commerce power. He struck down those provisions on the basis that they violated the freedom of association of commercial undertakings subjected to them.

100 As a result of the various constitutional challenges and particularly the Supreme Court decision in *City National Leasing* it is clear that the general legislative scheme of the *Competition Act* is constitutionally valid. In *City National Leasing* Chief Justice Dickson wrote with respect to the *Combines Investigation Act* as amended up until 1980:

> From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme or regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy. [69]

While that decision related to the *Combines Investigation Act* before the amendments of 1986, the reasoning and conclusions are equally applicable to the amended legislation. [70]

101 Indeed counsel for the respondent does not contest the constitutional validity of the Act as a whole. Rather he argues that section 75 is invalid, if it carries an interpretation which would allow it to apply whether or not there is an effect on competition. Counsel's argument in this regard mirrors Chief Justice Dickson's characterization of the *City National Leasing* case as one where:

> The issue is not whether the Act as a whole is rendered *ultra vires* because it reaches too far, but whether a particular provision is sufficiently integrated into the Act to sustain its constitutionality. [71]

102 Counsel for the respondent argues, in addition, that even if section 75 is valid it cannot support an order which affects a manufacturer's legitimate business interests but is not founded upon an effect on competition. That is, the section may be constitutionally valid but still inoperative with respect to certain factual situations. If the section's breadth is such as to encompass both orders directed at the preservation of competition and those which are not, then the section might be operative to support the former but inoperative with respect to the latter. This second prong of the constitutional argument is easily disposed of given the findings of fact which have been made. It is clear that the order sought, in the present case, is directly related to the preservation of competition in the service market for Xerox copiers. It is also directed to the preservation of the competition which exists as a result of the existence of a second-hand market for those machines. Thus, if section 75 is valid it is operative to support an order in the present circumstances.

103 To turn then to the constitutional validity of section 75. The approach to be taken, when an isolated section of an Act is being assessed for constitutionality, was addressed in *City National Leasing*. In that case it was argued that section 31.1 taken alone was clearly unconstitutional because it was legislation in relation to property and civil rights in the province. A contrary argument was put, urging that the section could not and should not be assessed in isolation but had to be considered in the context of the scheme of the Act as a whole. The Chief Justice answered these arguments by stating that if the impugned provision was clearly constitutional as within federal authority and did not intrude on provincial authority, then, no further consideration was needed:

> [I]f in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further. In that situation both the provision and the act are constitutionally unimpeachable. If, as may occur in some instances, the impugned provision is found to be constitutionally unimpeachable while the act containing it is not, then the act must be assessed on it [*sic*] own. In these instances, it is clear that the claim of invalidity should originally have been made against the act and not against the particular provision. [72]

104 In most cases, however, it was noted that it was likely that an impugned section could be characterized as being, *prima facie*, in relation to a provincial head of power (intruding to some extent on provincial powers). The degree of "intrusion on provincial powers" is to be assessed not for the purpose of ascertaining the section's constitutionality but in order to weigh this as a factor in assessing the justification of the section as part of the regulatory scheme of the legislation as a whole.

105 Next, it is necessary to assess the constitutional validity of the legislative scheme as a whole. Once this is done the relationship between the impugned provision and the legislative scheme is to be assessed by reference to a test which is of varying strictness. The strictness of the test varies with the degree of intrusion which the impugned section exhibits with respect to provincial powers. The mere inclusion of a provision in a valid legislative scheme does not *ipso facto* confer constitutional validity upon that provision:

> [T]he court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such a determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law, to which I turn below, shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive *vis-à-vis* provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.
>
> In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate. [73]

The Chief Justice then referred to the various ways the required "fit" or test had been described. He listed these in what appears to be an ascending order of strictness: having a rational and functional connection; ancillary to the main purpose of the legislation; necessarily incidental; truly necessary; having an intimate connection; being an integral part of the scheme.

106 The Chief Justice found that since section 31.1 of the *Competition Act* constituted a minimal intrusion on provincial authority, it was only necessary to demonstrate that a rational and functional connection existed between that section and the overall scheme of the legislation. At the same time he indicated that section 31.1 could also have been justified on the basis of a stricter test; it could have been classified as an integral part of the legislative scheme.

107 What then of section 75. It is obvious that a section 75 order may affect the property and civil rights of the person who is ordered to supply and of the person receiving supply. The effect of the section, however, as an intrusion into a provincial legislature's domain with respect to property and civil rights in the province, is not generally very extensive. The section is not, as the respondent has suggested, aimed primarily at governing or regulating contractual relations. That effect is secondary. The section's impact is limited and carefully constrained to redress conduct which is considered to be of competitive prejudice. Simply refusing to supply is not an offence in itself. Section 75 is one of a group of trade practices that are *reviewable* and that *may* be prohibited if certain conditions are met. The elements of paragraphs 75(1)(a), (b), (c) and (d) limit the application of the section and its effect.

108 Pre-1976 the only prohibitions in the *Combines Investigation Act* which dealt, indirectly, with refusal to supply, were conspiracy, monopoly and resale price maintenance. It was decided that there was a need to deal with refusal to supply in cases having anti-competitive effects, that is, where a person, because of an uncompetitive supply situation in a market, was unable to obtain adequate supplies of a product essential to the operation of his business. Section 75 provides that this type of refusal may be prohibited by the Tribunal; other, justifiable refusals will not be so prohibited.

109 Section 75 is not a greater interference with provincial jurisdiction than many other valid remedial or prohibitory provisions of the Act which are directed toward controlling competitively undesirable conduct. Such remedies or prohibitions always affect property and civil rights or local contracts within a province to some extent. Certainly the effect on property and civil rights of an order under section 75 is no greater than one under section 77 of the Act (tied selling) or those which regulate mergers and hence affect contracts that may involve parties wholly within a province.

110 While section 75, unlike section 31.1, is a substantive provision, it is limited in scope and application. It can only be called into play when the Director, after investigation, initiates an action. There is good reason to conclude, then, that the section attracts a no more stringent test than the rationally and functionally related test which was applied to section 31.1. However, like section 31.1, it could satisfy a more stringent test if required.

111 Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section's objective is to promote or preserve competition. Section 75 operates within the same regulatory parameters as do the other provisions of Part VI. Only the Director may bring an application to require that an order to supply be issued. The Director does so after investigation and in the context of the common enforcement policy of the Act with which he is charged.

112 Accordingly, section 75 meets the required test set out in *City National Leasing*.

B. Constitutionality of the Competition Tribunal

113 The parties filed an agreed statement of facts on which an argument could be founded to challenge the constitutionality of the Tribunal. The argument contemplated would follow that set out in the decision of the Quebec Superior Court in *Alex Couture Inc. c. P.G. Canada* [74] This argument, however, was being considered by another panel of the Competition Tribunal, insofar as it related to that panel's constitutional validity, in the hearing of the application in *Director of Investigation and Research v. The NutraSweet Company*. The parties to the present proceeding, accordingly, agreed that rather than rearguing the issue in the context of this case, they would be bound by the decision given in *The NutraSweet Company* case. The agreement provides that either party is free to appeal from a finding of the Tribunal as though the constitutional question raised in *The NutraSweet Company* case had been fully argued and decided in the context of this case.

114 The decision in *The NutraSweet Company* case has now been rendered. [75] The conclusion reached, contrary to that in the *Alex Couture Inc.* case, is that the panel of the Tribunal hearing that case was validly constituted. Pursuant to the agreement of the parties, that decision is taken as also applicable to the panel hearing this case.

V. Conclusion

115 As has been set out above, Xerox followed a practice, for a number of years, of selling parts to willing purchasers. As a result of that practice independent service organizations grew up and a second-hand market in Xerox copiers developed. The refusal of Xerox to supply parts to Exdos and to others (except end users) was specifically designed to eliminate competition in the service market. Xerox's refusal was part of a concerted effort to eliminate such competition. This effort was initiated originally by Xerox Corp. (U.S.). It was subsequently adopted both in Canada and elsewhere, for example, by Rank Xerox in the United Kingdom.

116 Section 75 of the *Competition Act* states that where, pursuant to an application by the Director, the Tribunal finds that a person is substantially affected in his business due to an inability to obtain adequate supplies of a product in the market and that inability occurs because of insufficient competition among suppliers of the product, the Tribunal may order a supplier to accept the person as a customer.

117 In the present case, for the reasons which have been given, the Tribunal finds that all the requirements of section 75 have been met. Therefore an order will issue, as requested by the Director, requiring Xerox to accept Exdos as a customer for post-1983 Xerox copier parts. These will not include parts for the 50 Series copiers. As has been noted, there has been no evidence adduced that a lack of supply of those parts would substantially affect the Exdos business.

VI. Order

118 FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT:

119 The respondent, Xerox Canada Inc., shall accept the Exdos Corporation as a customer for the supply of Xerox copier parts, manuals and related resources on usual trade terms.

120 This order does not encompass parts for 50 Series copiers or for any model of copier which has not yet been introduced, with respect to which no evidence was placed before the Tribunal.

Footnotes

1 R.S.C. 1985, c. C-34, as amended.

2 The "end user" is the person who, irrespective of *ownership*, is *in possession of* and actually *uses* one or more Xerox copiers.

3 The "10 Series copiers" are also referred to in the evidence as the "Marathon" family of copiers.

4 The other options open to Xerox at the time were to: (1) refurbish as many of the machines as the market would bear to an "as new" condition and scrap the remainder (as it had been doing in the past); or (2) develop an in-house second-hand market division.

5 Model Nos. 660, 3100, 3103, 3107, 4000, 4500, 2400, 3600, 7000; all were pre-10 Series machines.

6 The 9000 Series of copiers both pre-dated and post-dated 1983 and the introduction of the 10 Series. They were manufactured from 1979 to 1986.

7 Some 9000 and 10 Series copiers were acquired by Exdos, at a later period of time, through Xerox sales representatives. Such representatives, when faced with competition from other copier manufacturers for the business of a particular customer, would persuade the customer to buy a new Xerox machine by offering a better price for the old machine. They would contact Reid to buy the customer's machine because Exdos would pay more for the used copier than Xerox allowed on a trade-in. In such cases, Exdos sometimes made the purchase cheque payable to the customer and sometimes to Xerox directly, depending on who actually owned the machine. Reid did not hide from Xerox the fact that this activity was taking place although he did refuse to name the sales representatives who were approaching him. Xerox did not approve of this activity by its sales representatives.

8 Models Nos. 2300, 2350, 5400, 5600 and the older 9000 Series machines.

9 Exhibit A-1, tab 26.

10 Exhibit A-1, tab 35.

11 Exhibit A-1, tab 56A, clause 12.

12 Exhibit A-1, tab 55.

13 Exhibit A-1, tab 230. These prices are taken from a February 1990 letter soliciting business for Nezron. The Tribunal has taken due account of the fact that this is promotional material.

14 Transcript at 547-48 (13 June 1990).

15 *Ibid.* at 550.

16 *Ibid.* at 552.

17 "Volume" refers to the copier's rate of copy production per minute.

18 Exhibit A-1, tab 114A.

19 Exhibit A-1, tab 114E.

20 Discussed *infra* at 27ff.

21 Exhibit A-1, tab 153, Attachment A.

22 Exhibit A-1, tab 117.

23 Exhibit A-1, tab 179.

24 A copy of the policy is included in Exhibit A-1, tab 201.

25 Exhibit A-1, tab 198.

26 S. 2(1) of the *Competition Act* defines "product" as "including an article and a service".

27 (1989), 27 C.P.R. (3d) 1 at 10.

28 Expert affidavit of D. Gillen at para. 17 (Exhibit A-1, tab 2).

29 Expert affidavit of D.W. Gillen (reply to L. Waverman) at para. 4 (Exhibit A-3, tab 6) (emphasis added).

30 P. Areeda & D.F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 2 (Boston: Little, Brown, 1978) at para. 518 [references omitted].

31 P.E. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 1989 Supp. (Boston: Little, Brown, 1989) at para. 518.1c [references omitted].

32 [1968] 2 Ex. C.R. 275, aff'd (*sub nom. J.W. Mills & Son Ltd. v. R.*) (1970), [1971] S.C.R. 63.

33 *Ibid.* at 304-6.

34 Expert affidavit of L. Waverman at para. 9 (Exhibit A-3, tab 3):

the provision of the services of imaged pieces of paper with a given set of cost and performance specifications, through the provision of reprographic equipment and the service, parts and supplies, required to enable the equipment to produce copies on a regular basis with minimum interruption from the equipment not working.

35 Expert affidavit of L. Waverman (rebuttal to D.W. Gillen) at para. 9 (Exhibit A-3, tab 4).

36 (1978), 37 C.P.R. (2d) 156 (B.C.S.C.). The appeal courts quashed the Crown's appeal on the basis that it involved questions of fact: (1978), 7 B.C.L.R. 171, 40 C.P.R. (2d) 106 (C.A.), aff'd [1980] 2 S.C.R. 64.

37 The Court found an agreement between the dealers to levy a freight charge on the special orders but also decided that the agreement had no effect on the competitive nature of their dealings. In fact, the Court accepted the defendants' argument that they were improperly joined in the same conspiracy charge since there was never any competition between Ford and General Motors dealers that could have been restricted by an agreement.

38 (No. 22/78), [1979] C.M.R. 7439 (E.C.J.).

39 *Liptons Cash Registers and Business Equipment Ltd v. Hugin Kassaregister AB* (1977), [1978] 1 C.M.L.R. D19. The Court of Justice also found that Hugin parts required by independent undertakings constituted a relevant market for the purposes of applying Article 86 to the facts before it and that Hugin had a dominant position in that market. The Court annulled the decision of the Commission on the narrow ground that the actions of Hugin had not affected trade between member states since the servicing, rental and sale of cash registers was a local business by nature.

40 No. 88-2686 (9th Cir., 1 May 1990).

41 15 U.S.C. § 1-7.

42 *Supra*, note 40 at 3643.

43 Section 1 of the Sherman Act declares "every contract, combination ... or conspiracy, in restraint of trade or commerce" illegal. The particular restraint alleged in this case was the illegal tying of parts to service. In order to be successful in such a claim, the plaintiff had to prove: (1) that separate markets for parts and service existed and (2) that the defendant had sufficient economic power in the tying product market (parts for Kodak copiers) to restrain competition appreciably in the tied market (service for Kodak copiers).

44 *Supra*, note 40 at 3632-33.

45 *Ibid.* at 3634-36.

46 699 F. 2d 965 (9th Cir. 1983). The dissenting judge in *Image Technical Service, Inc.* described the argument accepted by the Ninth Circuit in *General Business Systems* as "similar" to the reasoning set out by Judge Posner (of the Seventh Circuit) in dissent in *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F. 2d 228 (7th Cir. 1988). The dissenting judge was of the opinion that:

the majority has misconstrued the nature of Kodak's argument. Applying Judge Posner's analysis in *Sterling*, competition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively — yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions — not the sort of thing the antitrust laws do or should worry about."

Supra, note 40 at 3646. The dissenting judge considered that the majority in *Image Technical Service, Inc.* had rejected this line of reasoning as too theoretical to serve as a basis for summary judgment.

47 Unlike the *Competition Act* the concept of refusal to supply in both U.S. law and EEC law operates within the framework of provisions preventing abuse of dominant position or monopolization and tied selling and other vertical restraints.

48 The term "efficiency" has (at least) two meanings in economic literature: (1) welfare benefits (the best allocation of resources in society as a whole); (2) cost minimization by a firm (see J. Tirole, *The Theory of Industrial Organization* (Cambridge, Mass.: MIT Press, 1988) at 16). In the present context "efficiency" is being used as synonymous with the cost-minimizing organization of economic

activity. Efficiency gains from vertical integration may arise for technological reasons or because of reduced transaction costs and reduced uncertainty.

49 *Supra*, note 27 at 12.

50 R.S.C. 1985, c. I-21.

51 The words "among suppliers" would have to be read out of the phrase altogether for it to continue to make grammatical sense in the singular.

52 Written argument of Xerox at paras 148, 150, 151, 160.

53 (U.K.), 30 & 31 Vict., c. 3.

54 (6 April 1990), Quebec 200-05-001361-877.

55 [1989] 1 S.C.R. 641.

56 R.S.C. 1970, c. C-23 as am. S.C. 1974-75-76, c. 76, s. 12. The same section, slightly modified, appears as section 36 of the *Competition Act*, R.S.C. 1985, c. C-34, as am. *Miscellaneous Statute Law Amendment Act, 1987*, R.S.C. 1985 (4th Supp.), c. 1, s. 11.

57 Initially set out in *A.G. Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206.

58 (1881), 7 App. Cas. 96 (P.C.)

59 Quoted in *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 656.

60 *Ibid.* at 660.

61 (1976), [1977] 2 S.C.R. 134.

62 *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 661. In *MacDonald v. Vapor Canada*, paragraph 7(e) of the *Trade Marks Act*, R.S.C. 1970, c. T-10 was found to be invalid federal legislation. That section was a general catch-all section which prohibited a person doing "any act" or adopting any "business practice contrary to honest industrial or commercial usage in Canada". It was not connected to a federal regulatory scheme relating to the general trade and commerce.

63 *Supra*, note 57.

64 *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 662.

65 See, *e.g.*, *R. v. Hoffman-La Roche Ltd. (Nos. 1 & 2)* (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (Ont. C.A.) (predatory pricing offence could be supported under s. 91(2) as well as s. 91(27) and the residual power); *A.G. Canada v. Canadian National Transportation Ltd.*, *supra*, note 57 (the three judges of the Supreme Court who dealt with the issue would have supported the conspiracy provisions under s. 91(2)).

66 [1982] C.S. 342, (sub nom. *R. v. Miracle Mart Inc.)* 68 C.C.C. (2d) 242 (C.S. Que.) [translation].

67 (1984), 9 D.L.R. (4th) 600, (sub nom. *BBM Bureau of Measurement v. Director of Investigation and Research under the Combines Investigation Act)* 82 C.P.R. (2d) 60.

68 *Supra*, note 54.

69 *Supra*, note 55 at 676.

70 See Memorandum of law (constitutional issue) of the Director at para. 18:

The basic structure of the *Combines Act* referred to by Mr. Justice Dickson was kept intact in the amendments that created the *Competition Act* and *Competition Tribunal Act* in 1986. The major changes implemented in 1986 were:
(i) insertion of a purpose clause (s. 1.1);

(ii) provision for application of the Act to crown corporations (s. 2.1);

(iii) revision of the investigatory powers of the Director to comply with the *Hunter v. Southam* decision and other considerations (ss. 11-20);

(iv) addition of an offence concerning banking conspiracies (s. 49);

(v) addition of the civilly reviewable abuse of dominance (s. 78-79) and merger provisions (s. 91-100), including special procedural remedies for mergers such as interim injunctions;

(vi) addition of a scheme of merger prenotification (sections 108-124);

(vii) abolition of the RTPC and its jurisdiction over research inquiries and "s. 18" inquiries and its replacement with the Competition Tribunal for adjudication of civilly reviewable matters, and the regular courts for adjudication of search warrants and other investigative applications.

71 *Supra*, note 55 at 670.

72 *Ibid.* at 667.

73 *Ibid.* at 668-69.

74 *Supra*, note 54.

75 (4 October 1990), CT-89/2, Reasons and Order (Competition Trib.).

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TAB 13

Competition Act, **RSC 1985, c C-34, sections 45, 75, 79 and 103.1**

Conspiracies, agreements or arrangements between competitors 45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges (a) to fix, maintain, increase or control the price for the supply of the product; (b) to allocate sales, territories, customers or markets for the production or supply of the product; or (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**Complot, accord ou arrangement entre concurrents** 45. (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement : a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit; b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit; c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.
Jurisdiction of Tribunal where refusal to deal 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms, (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market, (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, (d) the product is in ample supply, and (e) the refusal to deal is having or is likely to have an adverse effect on competition in a	**Compétence du Tribunal dans les cas de refus de vendre** 75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut : a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales; b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché; c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

market, the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.	d) que le produit est disponible en quantité amplement suffisante; e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché, le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce dé- lai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, ré- duits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.
Prohibition where abuse of dominant position 79. (1) Where, on application by the Commissioner, the Tribunal finds that (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, (b) that person or those persons have engaged in or are engaging in a practice of anticompetitive acts, and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.	**Ordonnance d'interdiction dans les cas d'abus de position dominante** 79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante : a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions; b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels; c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Granting leave to make application under section 75 or 77	Octroi de la demande
103.1(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.	103.1(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

TAB 14

***Copyright Act*, R.S.C. 1985, c C-42, sections 2, 3, 5 and 27**

s. 2	**"compilation"** "compilation" means (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data;	**« *compilation* »** «compilation» Les oeuvres résultant du choix ou de l'arrangement de tout ou partie d'oeuvres littéraires, dramatiques, musicales ou artistiques ou de données
s. 3	**Copyright in works** 3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right (a) to produce, reproduce, perform or publish any translation of the work, (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work, (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise, (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed, (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as	**Droit d'auteur sur l'oeuvre** 3. (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif : a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre; b) s'il s'agit d'une oeuvre dramatique, de la transformer en un roman ou en une autre oeuvre non dramatique; c) s'il s'agit d'un roman ou d'une autre oeuvre non dramatique, ou d'une oeuvre artistique, de transformer cette oeuvre en une oeuvre dramatique, par voie de représentation publique ou autrement; d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être reproduite, représentée ou exécutée mé- caniquement; e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter

	a cinematographic work, (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication, (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan, (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and (j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner, and to authorize any such acts.	publiquement l'oeuvre en tant qu'oeuvre cinématographique; f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique; g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une oeuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988; h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil; i) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore; j) s'il s'agit d'une oeuvre sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur. Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.
s. 5	**Conditions for subsistence of copyright** 5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met: (a) in the case of any work, whether published or unpublished, including a	**Conditions d'obtention du droit d'auteur** 5. (1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute oeuvre littéraire, dramatique, musicale ou artistique originale si l'une des conditions suivantes est réalisée : a) pour toute oeuvre publiée ou non, y compris une oeuvre cinématographique,

	cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country; (b) in the case of a cinematographic work, whether published or unpublished, the maker, at the date of the making of the cinematographic work, (i) if a corporation, had its headquarters in a treaty country, or (ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country; or (c) in the case of a published work, including a cinematographic work, (i) in relation to subparagraph 2.2(1)(a) (i), the first publication in such a quantity as to satisfy the reasonable demands of the public, having regard to the nature of the work, occurred in a treaty country, or (ii) in relation to subparagraph 2.2(1)(a) (ii) or (iii), the first publication occurred in a treaty country.	l'auteur était, à la date de sa création, citoyen, sujet ou résident habituel d'un pays signataire; b) dans le cas d'une oeuvre cinématographique — publiée ou non —, à la date de sa création, le producteur était citoyen, sujet ou résident habituel d'un pays signataire ou avait son siège social dans un tel pays; c) s'il s'agit d'une oeuvre publiée, y compris une oeuvre cinématographique, selon le cas : (i) la mise à la disposition du public d'exemplaires de l'oeuvre en quantité suffisante pour satisfaire la demande raisonnable du public, compte tenu de la nature de l'oeuvre, a eu lieu pour la première fois dans un pays signataire, (ii) l'édification d'une oeuvre architecturale ou l'incorporation d'une oeuvre artistique à celle-ci, a eu lieu pour la première fois dans un pays signataire.
s. 27	**Infringement generally** 27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.	**Règle générale** 27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.

Public

File No. CT-2015-010

COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended.

AND IN THE MATTER of an Application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*.

BETWEEN:

AUDATEX CANADA, ULC

Applicant

– and –

CARPROOF CORPORATION, TRADER CORPORATION, and eBAY CANADA LIMITED

Respondents

MEMORANDUM OF FACT AND LAW OF MARKTPLAATS B.V.

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