

Competition Tribunal



Tribunal de la Concurrence

CT - 1994 / 001 – Doc # 143c

IN THE MATTER OF an application by the Director of Investigation and Research
under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain practices by
The D & B Companies of Canada Ltd.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

The D & B Companies of Canada Ltd.

Respondent

- and -

Information Resources, Inc.
Canadian Council of Grocery Distributors
Intervenors



CONSOLIDATED ORDER

Dates of Hearing:

October 17-21, 24-28, 31, 1994;
November 1, 2, 4, 1994;
April 3, 10-13, 18-21, 25-28, 1995

Presiding Member:

The Honourable Mr. Justice William P. McKeown

Lay Members:

Dr. Frank Roseman
Mr. Victor L. Clarke

Counsel for the Applicant:

Director of Investigation and Research

Donald B. Houston
Bruce C. Caughill

Counsel for the Respondent:

The D & B Companies of Canada Ltd.

John F. Rook, Q.C.
Randal T. Hughes
Lawrence E. Ritchie
Karen B. Groulx

Counsel for the Intervenors:

Information Resources, Inc.

Calvin S. Goldman, Q.C.
Gavin MacKenzie
Geoffrey P. Cornish

Canadian Council of Grocery Distributors

Paul Martin

COMPETITION TRIBUNAL

CONSOLIDATED ORDER

The Director of Investigation and Research

v.

The D & B Companies of Canada Ltd.

UPON APPLICATION by the Director of Investigation and Research ("Director") for an order under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND ON HEARING the evidence and the submissions of counsel for the parties and the intervenors;

AND UPON CONSIDERING THAT the intervenor, Information Resources, Inc. ("IRI") has undertaken to the Tribunal that it will not enter into any exclusive contracts for the retailer scanner data of retailers in Canada if the respondent is so prohibited;

AND FOR THE REASONS issued on this date under separate cover;

THE TRIBUNAL ORDERS THAT:

Definitions

1. In this order,

(a) "Retailer" means a grocery or drug retailer only;

(b) "Retailer scanner data" means product identifying information provided on the bar-coded label affixed by a manufacturer to products as well as data input by a retailer of such products, which may include store identification, time of purchase and price, all of which is recorded by the retailer's scanning apparatus;

(c) "Scanner-based" means based in whole or in substantial part on scanner data; and

(d) "Market tracking service" means a service used to monitor the progress and competitive position of a product over time.

Retailer Contracts

2. (1) The respondent shall not enter into a contract which precludes or restricts a supplier of retailer scanner data from providing a supplier or potential supplier of a scanner-based market tracking service with access to scanner data or causal data necessary for the provision of that service.

(2) The respondent shall not offer an inducement to a supplier of retailer scanner data to restrict access by a supplier or potential supplier of a scanner-based market tracking service to scanner data or causal data necessary for the provision of that service.

(3) Without limiting the generality of subparagraphs (1) and (2), the respondent shall not enter into a contract with a supplier of retailer scanner data which prescribes or limits the terms upon which the supplier of retailer scanner data may make its scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service.

(4) For a period of 24 months from the date of this order, the respondent shall not enter into a contract with a supplier of retailer scanner data which requires the supplier of retailer scanner data, if it makes its data available to a supplier or potential supplier of a scanner-based market tracking service on more favourable terms, to make those terms available to the respondent.

3. (1) The respondent shall not enforce provisions in the respondent's existing contracts which preclude or restrict a supplier of retailer scanner data from providing access to scanner data or causal data necessary for the provision of a scanner-based market tracking service to a supplier or potential supplier of that service.

(2) Without limiting the generality of subparagraph (1), the respondent shall not enforce the following provisions in its existing contracts:

(a) "exclusivity" provisions which preclude or restrict a supplier of retailer scanner data from making scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service;

(b) "preferred supplier status" provisions which preclude or restrict a supplier of retailer scanner data from making scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service, or which provide for lower payments by the respondent if the data are made available to a supplier or potential supplier of that service; and

(c) provisions which prevent a supplier of retailer scanner data from making scanner data or causal data necessary for the provision of a scanner-based market tracking service available to a supplier or potential supplier of that service on terms as or more favourable than those under which it is made available to the respondent, or which require the supplier of retailer scanner data, if it makes its data available to a supplier or potential supplier of a scanner-based market tracking service on more favourable terms, to make those terms available to the respondent.

Manufacturer Contracts

4. (1) The respondent shall not enforce any provisions in its existing contracts for the supply of scanner-based market tracking services which

(a) prevent the customer from giving notice of termination during any "minimum commitment period";

(b) require the customer to give more than eight months notice; or

(c) require the customer to pay a penalty or lose a discount for early termination of its contract with the respondent.

(2) For a period of 18 months from the date of this order, the respondent shall not enter into any contracts for the supply of scanner-based market tracking services which

(a) prevent the customer from giving notice of termination during any "minimum commitment period";

(b) require the customer to give more than eight months notice; or

(c) require the customer to pay a penalty or lose a discount for early termination of its contract with the respondent.

Historical Scanner Data

5. (1) This paragraph shall have effect for nine months from the date of this order.

(2) Subject to subparagraph (3), upon the request of a supplier or potential supplier of a scanner-based market tracking service, including IRI, and if directed to do so by a supplier of retailer scanner data which has not retained its own historical scanner data for the relevant period, the respondent shall provide to the supplier or potential supplier of a scanner-based market tracking service the historical scanner data which it has for that supplier of retailer scanner data for the fifteen months prior to the request by the supplier or potential supplier of the service, whether the data are in the form originally received from the retailer or otherwise. The respondent shall be entitled to take reasonable steps to clean up its historical data in order to protect its sample design and related proprietary data.

(3) The respondent need not comply with the request by a supplier or potential supplier of a scanner-based market tracking service if the supplier or potential supplier of the service does not agree:

(a) to pay 50 percent, if only one request is received for the data, or a proportional share, if more than one request is received for the data, of any reasonable, documented costs already incurred by the respondent in cleaning up the historical scanner data where the data are no longer in their original form;

(b) to pay 100 percent of the respondent's reasonable expenses of providing the data to the supplier or potential supplier of the service; and

(c) to pay 100 percent, if only one request is received for the data, or a proportional share, if more than one request is received for the data, of any reasonable, documented costs incurred by the respondent in manipulating or reformatting the historical scanner data in order to mask its sample design prior to providing the data to the supplier or potential supplier of the service.

(4) In the event of a disagreement regarding the terms of this paragraph, the Director or the respondent may apply to the Tribunal for further directions.

General

6. The respondent shall forthwith deliver copies of this order to all persons to whom it presently supplies scanner-based market tracking services and to all persons from whom it presently obtains scanner data.

7. (1) For a period of two years from the date of this order, the respondent shall, upon the request of the Director, provide copies of

(a) any contract or proposal pertaining to the supply of retailer scanner data or causal data necessary for the provision of a scanner-based market tracking service, and

(b) any contract, service request, letter of intent or proposal pertaining to the provision of scanner-based market tracking services by the respondent,

which may be required by the Director for purposes of monitoring compliance with this order.

(2) The Director shall treat the copies of documents obtained pursuant to this section as confidential.

8. This order applies to the successors and assigns of the respondent.

9. In the event of a dispute, the Director or the respondent may apply to the Tribunal for a further order interpreting any of the provisions of this order.

DATED at Ottawa, this 30th day of August, 1995.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown
W.P. McKeown