Competition Tribunal | Tribunal de la Concurrence

CT - 1994 / 003 – Doc # 127

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.

B E T W E E N:

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

REASONS AND ORDER REGARDING ACCESS BY INTERVENORS TO DOCUMENTS SUBJECT TO PRIVILEGE CLAIM

Date of Hearing:

July 27, 1995

Presiding Member:

The Honourable Mr. Justice William P. McKeown

Counsel for the Applicant:

Director of Investigation and Research

James W. Leising

Counsel for the Respondents:

Tele-Direct (Publications) Inc.
Tele-Direct (Services) Inc.

Mark J. Nicholson
Diane M. Rodgers

Counsel for Intervenors:

NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Limited

John M. Hovland

COMPETITION TRIBUNAL

REASONS AND ORDER REGARDING ACCESS BY INTERVENORS TO DOCUMENTS SUBJECT TO PRIVILEGE CLAIM

The Director of Investigation and Research

v.

Tele-Direct (Publications) Inc. et al.

The intervenors NDAP-TMP Worldwide Ltd. ("NDAP") and Directory Advertising Consultants ("DAC") have brought a motion to obtain access to sealed documents deposited with the Tribunal in relation to another motion to be heard on August 1, 1995. The motion scheduled for August 1, 1995 is brought by the Director of Investigation and Research ("Director") to require further production of documents by the respondents and re-attendance of their representative on discovery to answer questions about documents. The respondents resist producing the documents and answering the questions on the basis of privilege. The respondents claim solicitor-client privilege, litigation privilege and settlement negotiation privilege for the various documents.

In support of and in opposition to the motion, respectively, the Director and the respondents filed affidavits to which the sealed documents in question are appended as exhibits. The sealed documents consist of Exhibits C, E, F and J to the affidavit of Brian Linseman sworn on June 20, 1995, Exhibits A to L to the affidavit of Warren Grover sworn on June 23, 1995 and

Exhibits A to L to the affidavit of Brian MacLeod Rogers sworn on June 23, 1995. The respondents claim settlement negotiation privilege over the sealed documents. The Director takes no position on that claim; he does not oppose it (except with respect to the so-called "Bourke letter" which is one of the documents forming the subject of his motion and which is appended to the affidavit of Mr. Linseman). The sealed documents can be described, broadly speaking, as correspondence between the respondents or their counsel and the Director or his counsel. The parties are relying on the sealed documents to prove or disprove a course of settlement negotiations that may be relevant to whether the documents sought by the Director in the motion to be heard on August 1, 1995 must be produced by the respondents or whether the respondents' privilege claims over those documents can be supported.

The motion brought by the Director is an integral part of the discovery process. The Director is requesting further production and the respondents are resisting based on grounds of privilege. In the Reasons and Order Granting Requests for Leave to Intervene dated March 1, 1995, the Tribunal declined to allow NDAP and DAC to conduct discovery of the parties.[1] They were granted access to discovery documents and transcripts as a practical matter to allow them to exercise their rights to prepare expert evidence and, possibly, factual evidence and cross-examination of witnesses at the hearing. The key players in determining which documents are produced on discovery are the parties.

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[1] *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, CT9403/52, [1995] C.C.T.D. No. 4 (QL).

Counsel for NDAP and DAC relied heavily on the *Competition Tribunal Rules*[2] as conferring the "right" to make submissions on the motion and to obtain access to all documents available to the parties in order to do so. Subsection 32(1) and paragraphs 31(b) and 38(4)(a) were referred to by counsel in his argument. I do not view any of these rules as determinative, standing alone, of whether the intervenor should get access to the sealed documents here. The cited rules must be placed in context, taking into account other rules, the order governing the grant of intervenor status and the circumstances of the case.

Subsection 32(1) of the Rules provides that an intervenor may, unless the Tribunal orders otherwise, "only attend and make submissions" at motions, pre-hearing conferences and the hearing. The intervention order establishes a scenario in which the intervenors do not play an active role in discovery. Having access to and reviewing copies of privileged documents in order to make argument regarding other documents over which privilege is claimed is taking a rather active role in the discovery process. This is, in fact, exactly the role the Director will play on the motion. Sections 13 and 14 of the Rules themselves also recognize that challenges to claims of privilege generally take place within the framework of documentary discovery between the parties.

Paragraph 31(b) and 38(4)(a) of the Rules provide for service upon an intervenor of documents, including motion documents, filed by the parties (and other intervenors) once the intervention is granted. I do not believe that this rule was intended to preclude the possibility that

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[2] SOR/94-290.

a party could submit a document under seal to the Tribunal for its examination in a privilege dispute without providing it to everyone else. Section 14 provides that the controversial documents may be inspected by the Tribunal to decide a claim of privilege. In this case, the fact that the Director is already in possession of the sealed documents because of the nature of the privilege claimed (settlement negotiations) surely cannot preclude the respondents from keeping the documents from everyone else except the Tribunal.

I would not go so far as counsel for the respondents and prohibit the intervenors from attending and making submissions at the August 1, 1995 motion. The intervenors are entitled to address the legal issues from their perspective, as long as they are not repetitive of the parties' submissions, and, with notice to the parties, they may bring forward any relevant information that they might have. However, I see no reason why privileged documents relating to negotiations between the parties should be given to these intervenors so that they can participate more generally.

The question was raised of whether, by referring to the privileged documents in the affidavits, the respondents' privilege had been waived. Since the Director did not challenge the respondents' claim of privilege over the documents, I am of the view that, at least for now, the intervenors have to accept their privileged status. Mounting challenges to privileged documents accepted by the parties for the purposes of making argument on a motion regarding other privilege claims seems to me to be within the discovery arena. In this context, I am not convinced that the cases dealing with waiver of solicitor-client privilege, which establish that

disclosure of part of a privileged document may require disclosure of the entire document, are relevant. To the extent those decisions are based on a concern that use of part of a privileged document alone might be unfair or misleading because only the party claiming privilege would have access to the entire document and the other side would be unable even to present argument on the point, that reasoning does not apply on the facts before me. Both parties have access to the entirety of the sealed documents to present argument on the motion on August 1, 1995. It may be that other circumstances will arise later, perhaps at the hearing, which would cast the issue of possible waiver in a different light.

Finally, I am mindful of the cautionary words set out in the case of *Risi Stone Ltd. v. Groupe Permacon Inc.*, when it comes to dealing with privileged or allegedly privileged documents. The court commented:

> With respect to the procedure for dealing with claims of solicitor-client privilege, I would first of all note, that, it is my practice not to allow disclosure of a privileged document to counsel for the other side for the purposes of argument with respect to the document's status. . . . . This does hobble counsel who is opposing a claim for solicitor-client privilege in making argument. However, in general claims of this nature can be determined by the judge without extensive argument thereon and disclosure to counsel, even for the purposes of argument only, can render any subsequent finding that the document is privileged academic.[3]

In the circumstances before me today I cannot even say that the privileged status of the documents to which access is sought is in dispute. It is not.

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[3] [1990] 3 F.C. 10 at 13 (T.D.).

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT the motion of NDAP and DAC is dismissed. If NDAP and DAC wish to make submissions at the hearing of the motion on August 1, 1995, they shall serve and file a memorandum of argument by 3 p.m. on Friday, July 28, 1995.

DATED at Ottawa, this 27th day of July, 1995.

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

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