



CT - 1994 / 003 – Doc # 52

IN THE MATTER OF an application by the Director of
Investigation and Research under sections 75, 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 -

White Directory of Canada, Inc.
Anglo-Canadian Telephone Company
NDAP-TMP Worldwide Ltd. and
Directory Advertising Consultants Limited
InfoText Limited
Thunder Bay Telephone

Applicants for Leave
to Intervene



REASONS AND ORDER GRANTING REQUESTS FOR LEAVE TO INTERVENE

Date of Hearing:

February 27, 1995

Presiding Member:

The Honourable Mr. Justice William P. McKeown

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

James W. Leising
John S. Tyhurst

Counsel for the Respondents:

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

Mark J. Nicholson
Bonni L. Harden

Counsel for the Applicants for Leave to Intervene:

**White Directory of Canada, Inc.
NDAP-TMP Worldwide Ltd. and
Directory Advertising Consultants Limited**

John F. Rook, Q.C.
Martha A. Healey

Anglo-Canadian Telephone Company

Russell W. Lusk, Q.C.

COMPETITION TRIBUNAL

REASONS AND ORDER GRANTING REQUESTS FOR LEAVE TO INTERVENE

The Director of Investigation and Research

v.

Tele-Direct (Publications) Inc. et al.

Five requests for leave to intervene have been received in this proceeding. White Directory of Canada, Inc. ("White") publishes an alphabetical and classified telephone directory in St. Catharines, Niagara Falls and Fort Erie. The Anglo-Canadian Telephone Company ("Anglo-Canadian"), through its operating division Dominion Directory Company, publishes Yellow Pages directories in British Columbia for BC Tel and in parts of Quebec for Quebec Tel. Anglo-Canadian licenses the Yellow Pages trademarks from the respondents (referred to collectively as "Tele-Direct"). NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants ("NDAP/DAC") are advertising agencies which provide consulting services to clients who wish to advertise in Yellow Pages directories published by or for the various telephone companies across Canada. They arrange for the preparation and placement of the advertisements in these directories on behalf of their clients. InfoText Limited ("InfoText"), a subsidiary of Newfoundland Tel, and Thunder Bay Telephone ("TBT") supply subscriber listing information to Tele-Direct for directory publication, for subscribers in Newfoundland and Labrador and in the city of Thunder Bay, respectively.

The test for granting intervenor status is set out in subsection 9(3) of the *Competition*

Tribunal Act:

Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.¹

The word "affects" has been interpreted in a previous decision of the Tribunal to mean "directly affects".²

White and NDAP/DAC

Neither party opposes the intervention of White and NDAP/DAC. Since the two requests raise many similar issues, we will deal with them together. We accept that as a publisher of telephone directories, White is directly affected by these proceedings. The same is true for NDAP/DAC as a competitor or potential competitor to Tele-Direct in the provision of advertising services. We also accept that both intervenors have special knowledge and expertise that may assist the Tribunal and that, although they support the Director's position generally, their business interests are different from his public interest mandate.

The dispute between the parties centred on whether these intervenors should be permitted to direct their representations at certain issues identified in their requests for leave to intervene which are, arguably, outside the scope of the Director's application. Counsel for Tele-Direct

¹ R.S.C. 1985 (2d Supp.), c. 19.

² *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL).

submitted that, in the words of subsection 9(3) (quoted above), all representations must be "relevant to the proceedings" and that relevance is defined by the parties' pleadings.

In the case of White, Tele-Direct challenges items (c), (f), (g), (h), (i) and (j) of paragraph 9 of the request for leave to intervene. In the case of NDAP/DAC, the controversial items are found at (d) and (g) of paragraph 6 of its request for leave to intervene. Counsel for White and NDAP/DAC argues that while these issues may not have been specifically pleaded by the Director, they are supported by various paragraphs of the notice of application, in particular paragraphs 65(j), 67(d) and 69(c)(xv) for White and paragraphs 65 and 68 for NDAP/DAC. He also argues that the issues are relevant or potentially relevant as matters that affect White and that the respondents should not be permitted to exclude them at this point of the proceedings. The Director supports his position.

We agree with the respondents that intervenors are restricted to making representations on issues that are relevant to the proceedings as defined by the pleadings. We do not dispute that all the acts alleged by White and NDAP/DAC might be relevant to the general question of abuse of dominant position; however, if the Director has chosen not to put them in issue in his application, then they are not relevant to the instant proceeding before the Tribunal. In fairness to the respondents, the anti-competitive acts on which the Director relies must be pleaded with sufficient particularity to give adequate notice of the case that will be brought against them.

In our opinion, items (f) and (g) of paragraph 9 of White's request for leave to intervene are

supported by the notice of application, as a specific instance of a practice described more generally in the notice, for example at paragraph 65(i). The issues raised in items (c), (h), (i) and (j) are somewhat different: they accuse Tele-Direct (or its parent) of spreading allegedly false information about White's activities or its product to the media, advertisers and the public. We find it difficult to conclude that these issues are supported by the general phrases in the notice of application pointed out by counsel which refer to direct or indirect "discrimination" against competing publishers. If the Director wished to allege that Tele-Direct was engaged in a concerted campaign of misrepresentation against White, then he should have been more specific. The nature of this allegation and the type of proof that would have to be brought forward by the respondents to counter it are quite unique.

Item (d) of paragraph 6 of the request for leave to intervene of NDAP/DAC is clearly supported by paragraph 65(c) of the notice of application as an example of "providing advertising space to independent advertising agencies on less favourable terms and conditions than to its own sales staff". In item (g), NDAP/DAC alleges that Tele-Direct has threatened to use its market power to put uncooperative agencies out of business. Again, we cannot find anything in the notice of application dealing with such types of threat and must conclude that the Director chose not to put them in issue.

Both White and NDAP/DAC requested broad participation rights as intervenors, including participation in the discovery of the respondents, access to discovery documents, introduction of expert and factual evidence and cross-examination of witnesses at the hearing. While the

Director supported the request, with some restrictions on their participation in oral discovery, the respondents opposed allowing them to do anything more than submit argument. Argument at the hearing of the requests for leave was, however, focused on the question of participation in discovery and the submission of expert evidence.

We have not granted the intervenors any right to conduct examination for discovery of the respondents. To date, the Tribunal has not allowed an intervenor to actively participate in the examination for discovery of a party, although, in a recent case, an intervenor was subjected to production of documents and to discovery by one of the parties.³ The Tribunal has stated that it would be a "rare" case in which an intervenor participated actively in the discovery process, which is primarily the province of the parties.⁴ The arguments of the intervenors here did not provide us with a compelling reason to allow them to discover the respondents over the respondents' objections. We are reluctant to expand and further complicate the discovery process without cogent reasons why fairness to the intervenor demands such an extraordinary departure. Speculation that Tele-Direct may later seek to examine either or both of these intervenors for discovery is not a sufficient reason. Even were it certain that Tele-Direct would seek, and be granted, such discovery, reciprocity for the intervenor does not necessarily follow.

³ *Director of Investigation and Research v. A.C. Nielsen Co. of Canada Ltd* (18 June 1994), CT9401/22, Order Regarding Affidavits of Documents, [1994] C.C.T.D. No. 3 (QL); *Director of Investigation and Research v. A.C. Nielsen Co. of Canada Ltd* (22 September 1994), CT9401/82, Reasons and Order Regarding Matters Considered at Pre-hearing Conference on September 14, 1994: Amendment to Notice of Application, Examination for Discovery, and Production of Documents, [1994] C.C.T.D. No. 15 (QL).

⁴ *Supra*, note 2 at 190.

We accept that some access to discovery documents and transcripts is a practical necessity in order for these intervenors to exercise the other rights that they have been granted with respect to expert evidence and, possibly, factual evidence and the cross-examination of witnesses at the hearing. Counsel for the intervenors would prefer to attend the discovery of the respondents rather than read the transcripts. The respondents oppose the presence of intervenor counsel at their examination. As we have not been convinced that their presence is required for purposes of their intervention, we have allowed them access to the discovery transcripts only.

With respect to the examination for discovery of the Director, counsel for the respondents agreed to the presence of counsel for these intervenors for the purpose of assisting the Director's representative to answer questions about which the intervenors have first-hand knowledge. It appears to us that this is an efficient way of proceeding and we have, therefore, allowed counsel for these intervenors to be present. This presence should also alleviate the concern expressed by counsel for these intervenors that the Director might not provide complete and accurate information on the matters pertaining to his clients.

On the question of expert evidence presented by intervenors, counsel for the respondents argued persuasively that such evidence has in the past been largely duplicative of the expert evidence submitted by the parties, resulting in a waste of the time and resources of the parties and the Tribunal. He suggested that the intervenors should file their expert reports after the parties and that the Tribunal should require, as with factual evidence, that those reports be strictly non-repetitive. We recognize the validity of this position; expert evidence filed by

intervenors is not subject to the same stringent requirements as factual evidence and does risk being largely duplicative of the parties' expert evidence. We cannot, however, think that the suggested solution is practical. It seems to us that allowing the intervenors to file later than the parties gives them the advantage of having read the parties' expert reports before being required to file their own. No alternative solution having been suggested, we have not included any additional restrictions on expert evidence in the order, but leave it to the panel hearing the application to control the more obvious instances of duplication in the evidence submitted.

Anglo-Canadian

In its request for leave to intervene, Anglo-Canadian suggested that it was affected by five issues arising out of these proceedings and asked to submit argument on all five. In oral argument, counsel for Anglo-Canadian emphasized one of those issues: the potential effect on Anglo-Canadian if the Tribunal orders that the Yellow Pages trademarks be licensed to consultants. The Director seeks to limit the participation of Anglo-Canadian to questions of remedy related to possible licensing of the trademark. We are of the opinion that the interest of Anglo-Canadian is somewhat broader than the terms and conditions of any potential licensing order. We consider that Anglo-Canadian can assist the Tribunal with its submissions on all matters related to the possible compulsory licensing of the trademarks, as those matters directly affect it. Anglo-Canadian can validly contribute, for example, to the arguments regarding the respondents' jurisdictional motion in this regard.

With respect to the remaining issues raised in its request for leave to intervene, Anglo-Canadian appears to be largely concerned about the precedential effect of the Tribunal's decisions in this proceeding on the other major players in Yellow Pages publishing in Canada. It is evident that the decisions of the Tribunal will affect the Director's decisions on whether to proceed against any other potential respondents and may also affect how the industry conducts its business in light of the possibility of further applications. While this may be a more direct effect than the effect on the public at large of a court ruling of general application, we do not think that, in and of itself, it is sufficient to justify intervenor status. Therefore, we see no reason to permit Anglo-Canadian to address these issues.

InfoText and TBT

Info Text and TBT did not appear at the hearing of the requests for leave to intervene. Nevertheless, with the agreement of the parties, they have been granted leave to intervene on the extremely limited terms they requested. As suppliers of subscriber listing information to Tele-Direct, they certainly appear to be directly affected by the proceeding. They seek only to have their respective requests for leave to intervene accepted as part of the record, which has been ordered. To avoid imposing a burden on the parties and on the Registry, we have abridged certain of our Rules that provide for the service of documents on and the notification of intervenors. With the filing of their requests for leave to intervene, these intervenors have essentially completed their desired participation. We will not require the parties and the Registry to provide them with documents and notices they are unlikely to want.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. Subject to paragraph 3 of this order, White is granted leave to intervene in these proceedings to make representations relevant to the proceedings in respect of those matters which directly affect it. Items (c), (h), (i) and (j) of paragraph 9 of White's request for leave to intervene are not relevant to the proceedings as defined by the parties' pleadings.

2. Subject to paragraph 3 of this order, NDAP/DAC is granted leave to intervene in these proceedings to make representations relevant to the proceedings in respect of those matters which directly affect it. Item (g) of paragraph 6 of NDAP/DAC's request for leave to intervene is not relevant to the proceedings as defined by the parties' pleadings.

3. White and NDAP/DAC shall have the participation rights set out in subsection 32(1) of the *Competition Tribunal Rules* and, in addition:
 - (a) They shall have access to the transcripts of the examinations for discovery conducted by the parties, subject to any order that may be issued by the Tribunal restricting the disclosure of portions of the transcripts for reasons of confidentiality. Counsel for White and counsel for NDAP/DAC may attend at the examination for discovery of the representative of the Director of Investigation and Research ("Director") for the purpose of assisting that representative in answering questions put by the respondents' counsel;

(b) They shall be permitted to inspect and make copies of the documents listed in the affidavits of documents of the parties, other than those documents subject to a claim for privilege or which are not within the party's possession, control or power, subject to the same restriction regarding confidentiality as set out in (a) above;

(c) They shall be permitted to introduce relevant expert evidence which is within the scope of their intervention in accordance with the procedure set out in the *Competition Tribunal Rules*;

(d) They shall be permitted to adduce factual evidence at the hearing, provided that they each demonstrate to the satisfaction of the Tribunal that such evidence is relevant and within the scope of the intervention, is not repetitive and that the Director has been asked to adduce the evidence and has refused;

(e) They shall be permitted to cross-examine witnesses after the Director has conducted his cross-examination, provided that they demonstrate to the satisfaction of the Tribunal that they have questions pertinent to their intervention which the Director was not willing to ask.

4. Anglo-Canadian is granted leave to intervene in these proceedings to make representations relevant to the proceedings in respect of matters related to the possible compulsory licensing of the Yellow Pages trademarks as those matters directly affect it. Anglo-Canadian shall have only those participation rights set out in subsection 32(1) of the *Competition Tribunal Rules*.

5.(1) Info Text and TBT are granted leave to intervene for the sole purpose of placing on the record their respective requests for leave to intervene. The documents shall be accepted as filed

and shall constitute submissions that will be considered by the panel hearing the application in light of the evidence tendered at the hearing by the parties and other intervenors. Subject to further order of the Tribunal upon the motion of the intervenors, Info Text and TBT shall have no other rights of participation in this proceeding.

(2) The provisions of section 31 of the *Competition Tribunal Rules* shall not apply to the interventions of Info Text and TBT. In addition, the Registry is not required to serve any interlocutory orders issued in this proceeding on either Info Text or TBT.

(3) Counsel for the parties, as agreed, shall serve any notice of motion to be presented by them on Info Text and TBT prior to filing the notice with the Tribunal.

(4) The Registrar shall inform Info Text and TBT of the date and place of the hearing of this application.

6. For greater certainty, all intervenors except Info Text and TBT may attend and present submissions within the scope of their respective interventions at the hearing of the respondents' motion regarding jurisdiction on March 28, 1995.

DATED at Ottawa, this 1st day of March, 1995.

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

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