

<b>COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE</b>	
F I L E D	D E P O S E
FEB 6 1995 <i>RB</i>	
REGISTRAR - REGISTRAIRE	
OTTAWA, ONT.	<i>#27</i>

**THE COMPETITION TRIBUNAL**

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 as amended.

**Between:**

**THE DIRECTOR OF INVESTIGATION AND RESEARCH**

**Applicant**

**- and -**

**TELE-DIRECT (PUBLICATIONS) INC.,  
TELE-DIRECT (SERVICES) INC.**

**Respondents**

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**REPLY**

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1. This document is filed in reply to the Response dated January 23, 1995.
2. Except as specifically stated below, the Applicant accepts the Respondents' admissions of material fact and denies the other statements of fact in the Response and joins issue therewith.
3. The Applicant accepts the corporate facts as restated by the Respondents in paragraph 1.

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4. With respect to paragraph 3, the Applicant has no knowledge of the terms set by the telcos in supplying "raw subscriber listing information" or where title to such information may reside. The Applicant says that such facts are not material in that such "raw subscriber information" is not the product that is the subject matter of this Application. Further, the Applicant denies that the telcos have thereby set the "usual trade terms" surrounding the Respondents' provision of subscriber listing information as that term is defined in paragraph 12 of the Director's Application. The Applicant says that the Respondents possess and control the subscriber listing information and are capable of supplying such information in a commercially usable form (as defined in paragraph 40 thereof). The Respondents are therefore the proper parties to the Application.

5. The Applicant denies the facts alleged in paragraphs 4 and 5 and says in reply that the existence of copyright does not limit the application of sections 75 or 79 of the Competition Act or the jurisdiction of the Tribunal over the anti-competitive practices alleged. The Applicant says that the Respondents' refusal to supply subscriber listing information in a commercially usable form is not "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act" within s.79(5) of the Competition Act, as such refusal does not flow from the mere exercise or enjoyment of such intellectual property rights, even if they exist, which is denied.

6. The Applicant denies the facts alleged in paragraphs 6 and 7 and says in reply that the jurisdiction of the CRTC over the Respondents, if any, is limited, that such jurisdiction, if it exists, has not been exercised to restrict the provision of subscriber listing information in any way that would be inconsistent with the relief requested by the Applicant. Further, the Applicant says that the Competition Tribunal has full jurisdiction to provide the relief requested.

7. The Applicant denies the facts alleged in paragraph 11 and specifically the

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categorization of the acts of the Respondents and market descriptions therein. The Applicant says that the anti-competitive practices relate to two markets, publishing and advertising services. In respect of the latter, the Applicant states that irrespective of the legal relationship between the Respondents and independent agencies, those parties are in competition, both actual and potential. The Applicant says that the mere presence of an agency relationship between the Respondents and another party (of which the Applicant has no knowledge) does not provide any defence to the application of s.79 of the Competition Act.

8. The Applicant admits paragraphs 14, 15, 17, and 18 as substantially correct.

9. The Applicant has no knowledge of the material facts alleged in paragraphs 16, 19, or 20.

10. The Applicant denies the facts alleged in paragraph 21 with the exception of the first sentence, which it has no knowledge of. The Applicant says that the Respondents, not the CRTC, have set the "usual trade terms" for their sales of subscriber listing information, by selling such information freely and in a commercially usable form to third parties (other than competing publishers) such as telemarketing firms and pollsters.

11. The Applicant denies the facts alleged in paragraph 22 except the first sentence, which it admits. The Applicant refers in reply to paragraph 5, above.

12. The Applicant has no knowledge of the facts alleged in paragraph 23 with the exception of the first sentence, which is admitted. The Applicant says that even if the facts in the remainder of the paragraph concerning the relationship between the telcos and the Respondents are correct, these facts have no relevance to the current proceedings.

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13. With respect to paragraph 24, the Applicant admits that certain directory revenues of the Respondents are considered for regulatory purposes but has no knowledge of whether this is true for each of the Respondents, or what portion of revenues may be so included, or the precise contractual relationship between the telcos and the Respondents.

14. The Applicant has no knowledge of the facts alleged in paragraph 25.

15. The Applicant denies the facts alleged in paragraph 26 except that the first sentence is admitted, to the extent that the "value" referred to in that sentence is the "value" to telephone users. The Applicant specifically denies that a directory becomes more valuable to users based on the extent of advertising per se. The Applicant says that the Respondents need not contact all subscribers to achieve comprehensiveness. The Applicant thus denies that the Respondents "must" maintain an internal sales force, or incur significant costs involved in contacting all subscribers.

16. As a general reply to paragraphs 14 to 26, the Applicant says that while the CRTC requires that subscribers receive any directories published by the telephone companies it regulates, nothing in the CRTC regulatory scheme or its historical origins: (a) requires any particular layout, manner of presentation or method of publication of classified telephone directories; (b) requires any particular method of providing advertising services; (c) restricts the provision of subscriber listing information by the Respondents; nor (d) mandates that they conduct their business by implementing the tying and other abusive practices employed to the detriment of competition, consumer choice and efficiency in the publishing or advertising services markets.

17. The Applicant denies paragraph 27, with the exception of the first sentence. The Applicant has no knowledge of the motivation of the entrants described in that sentence. With respect to the remainder of that paragraph the Applicant says that competing directory publishers are driven by the user and advertiser demand that

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exists for a more innovative and inexpensive product.

18. The Applicant denies paragraph 28 and says that those independent directories which are comparable to the directories of the Respondents compete in the same market as the latter.

19. The Applicant has no knowledge of the contents of paragraph 29, except that the Applicant denies the last sentence thereof, subject to noting that it has never suggested that the Respondents compete with their "customers", to the extent that term refers to advertisers. The Applicant says in reply that, but for the practices of the Respondents, all or a substantial additional portion of the advertising services market could be efficiently and effectively served by competing independent agencies. The Applicant says that the Respondents have no legal entitlement to arbitrarily choose the portion of the market that will benefit from competition when the implementation of such choice results in acts contrary to s. 75, 77 and 79 of the Competition Act.

20. The Applicant admits that subparagraphs 30 (a) to (d) generally describe the categories of accounts for which commission is paid but has no knowledge of whether this list is comprehensive or accurate.

21. The Applicant has no knowledge of the facts alleged in paragraphs 31 to 33, with the exception of the first sentence of paragraph 33, which it admits.

22. The Applicant denies the facts alleged in paragraph 35, with the exception of the first sentence thereof, which it accepts, and the second sentence, of which it has no knowledge. The Applicant refers in reply to paragraphs 4, 5 and 11, above.

23. With respect to paragraph 36, the Applicant accepts the Respondents' admissions but has no knowledge of other sources of subscriber listing information in commercially useable form and puts the Respondents to the strict proof of the

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existence of such sources.

24. The Applicant accepts paragraph 37 as substantially correct, with the exception of the first sentence in subparagraph 37 (i), the accuracy of which is not material.

25. The Applicant has no knowledge of the contents of paragraph 40.

26. The Applicant has no knowledge of the correctness of the revenue data alleged in paragraph 44.

27. With respect to paragraph 46, the Applicant has no knowledge of the facts alleged in the third through sixth sentences. The Applicant notes that the Respondents have misstated the definition of National Advertising in the Consent Order, which is advertising appearing in the books of two or more Publishers. The Applicant also says, with respect to the last sentence, that the Application indeed defines the relevant markets (see, e.g., paragraph 9 and pages 17 and 18 of the Application). The market covered includes both National Advertising services and the remaining portion of the market for advertising services not covered by that term.

28. The Applicant admits paragraphs 53 to 59, 62 and 63.

29. The Applicant admits paragraph 60 except in respect of the summarization of the CRTC's decision therein. The CRTC neither "held" (it could not) that copyright existed in any of the information, nor did it accept that copyright applied to raw non-confidential subscriber listing information. It merely stated that copyright "could" possibly apply to a directory, whether in printed or electronic form. Even if persuasive, that observation in no way limits the Tribunal's jurisdiction over the subscriber listing information sought here for the reasons set out in paragraph 5 above.

30. The Applicant admits paragraph 61 except in respect of the characterization of

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the basis of the White directory complaint. The complaint asserted, inter alia, that the information made available had not permitted viable competition in the directory market.

31. The Applicant submits that paragraphs 64 to 66 are neither relevant to the merits of this proceeding nor any jurisdictional issue raised by the Respondents. Subject to this, the Applicant admits those paragraphs except in respect of the Respondents' attempt to summarize the Director's position in the Regulatory Framework proceeding, which is inaccurate. While the detail of such submissions is not material, it is sufficient to note that the Director recognized the existence of overlap between telecommunications regulation and competition law and never suggested that the CRTC had any exclusive jurisdiction over the products that are the subject matter of this Application.

32. The Applicant accepts, to the extent it contains an admission, paragraph 69, but has no knowledge of the last sentence thereof.

33. The Applicant admits the facts alleged in paragraph 70, except the last sentence thereof, which is denied. The Applicant says the access afforded T-D Pubs is tailored to suit its publishing needs and to that extent the information is in a commercially usable form. However, tailored access is denied competing publishers who have different publishing needs.

34. The Applicant denies paragraph 73 and specifically that the nature of the subscriber listing information sold by the Respondents to various third parties differs materially with the nature of the subscriber listing information in a commercially usable form as described in paragraphs 12 and 40 of the Application.

35. The Applicant admits that, as stated in paragraph 74, Bell Canada provides subscriber listing information under a tariff, but says such tariff does not make the

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information available in a commercially usable form.

36. The Applicant denies paragraphs 77 and 78. With respect to the third sentence in paragraph 77, the Applicant says that the fact that the Respondents have made certain business decisions provides no defence if those decisions result in the implementation of practices that are contrary to s. 77 of the Act and those practices cause a substantial lessening of competition. With respect to paragraph 78, the Applicant says that s. 77 does provide for a legal restriction against tied selling, and that a remedy is required against the Respondents' practices in this respect, including their arbitrary commission rules, which contribute to such tying. The Applicant notes that unbundling the pricing of two products (advertising space and service) would also sever the tie, if the Respondents reject the expansion of the availability of commission as the appropriate remedy.

37. The Applicant denies paragraph 81 and specifically that business reasons provide any legal justification for any of the anti-competitive practices engaged in, given the anti-competitive purpose and effect of such practices.

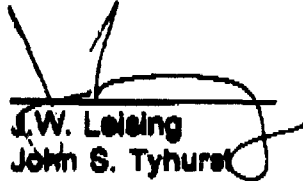
38. The Applicant denies paragraph 82, except to the extent that it has no knowledge of the factual details of the Respondents' internal operations as set out in the subparagraphs thereto. The Applicant says that if the Respondents have discontinued any of the anti-competitive acts within three years from the filing of the Application, s. 79 of the Competition Act nevertheless applies by virtue of subsection 79(6) thereof. The Applicant says that remedies are required in respect of any discontinued anti-competitive acts because any such discontinuance has been voluntary and may be reversed by the Respondents anytime in the absence of an order.



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39. In this Reply, where the Applicant has no knowledge of facts, no admission thereof is made.

DATED at Toronto, Ontario, this 6th day of February, 1994.



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