



CT - 1994 / 001 – Doc # 118

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



**REASONS FOR ORDER GRANTING LEAVE TO AMEND APPLICATION**

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**Date of Hearing:**

October 31, 1994

**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.  
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**Information Resources, Inc.**

Gavin MacKenzie  
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**Canadian Council of Grocery Distributors**

Paul Martin

## COMPETITION TRIBUNAL

### REASONS FOR ORDER GRANTING LEAVE TO AMEND APPLICATION

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*The Director of Investigation and Research*

v.

*The D & B Companies of Canada Ltd.*

#### **Introduction**

The Director of Investigation and Research ("Director") brings a motion to amend the prayer for relief set out in the notice of application. The relief requested is set out on pages 1 to 3 and again on pages 22 and 23 of the notice of application. The particular changes sought by the Director are set out in the notice of motion filed on October 28, 1994. For example, the following changes (indicated by underlining) are requested in subparagraph (i) of paragraph (a) of the relief sought:

[The Director seeks]

- (a) an order, pursuant to Section 79(1) of the Act, prohibiting the Respondent, its affiliates, officers or agents:
  - (i) from entering into any contracts which preclude or in any way restrict a supplier of scanner data from providing others with access to scanner data, or any other data necessary for the provision of scanner-based market tracking services;

The Director asks that subparagraphs (ii) and (iii), and paragraph (b), be amended in a similar fashion.

The requested modifications are intended to address the question of what has been referred to in these proceedings as "causal data". Causal data include information relating to, for example, promotions, displays and feature advertising which may be used to draw conclusions about the "cause" of observed fluctuations in sales of a product. As it currently stands, the Director's application for relief relates only to the contractual clauses governing the supply of scanner data.

Of the two intervenors, Information Resources, Inc. ("IRI") supports the Director's position while the Canadian Council of Grocery Distributors ("CCGD") supports Nielsen's position.

There is no dispute that the applicable rule is rule 420 of the Federal Court Rules. The *Competition Tribunal Rules* contain no provision specifically relating to amendments to pleadings and therefore recourse must be had to the Federal Court Rules through the Tribunal's "gap rule" (subsection 72(1)). Rule 420 reads as follows:

- (1) The Court may, on such terms, if any, as seem just, at any stage of an action, allow a party to amend his pleadings, and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties.
- (2) No amendment shall be allowed under this Rule  
...  
(b) during or after trial, except . . . on terms that there be a new trial, or that the other parties otherwise be given an opportunity for such discovery and preparation for trial as may be necessary to meet the new or amended allegations.

The members of the panel differ on the application of the rule to the case before us. The majority of the Tribunal, comprised of the two lay members, Dr. Roseman and Mr. Clarke, have decided in favour of the Director's motion. The judicial member, McKeown J., dissents. The Tribunal's order was rendered orally from the bench on October 31, 1994. The text of the order is set out at the end of these reasons for information only.

### **Majority Reasons (Dr. Roseman and Mr. Clarke)**

Counsel for the Director argues that since certain of the respondent's (also referred to as "Nielsen") contracts with retailers contain clauses that *could* be interpreted to require exclusive access by the respondent to causal data, striking down the exclusive over scanner data, should the Tribunal conclude in the Director's favour, would not be sufficient. He submits that amendment is not a new allegation but simply a minor addition to the requested remedies to ensure that an order, if any were issued, would be effective to achieve the intended purpose. He notes that the amendment may reflect Nielsen's own interpretation of its contracts with respect to causal data.

Counsel for the respondent opposes the granting of an amendment at this stage of the proceedings. He argues that the timing of the request causes prejudice to Nielsen as it has been raised *after* the Director's witnesses and his expert have testified. He submits that the question of causal data was not previously raised by the notice of application or on examination for discovery, and only came up during the testimony of the Director's witnesses. He also underlines

that there has been no evidence to date that Nielsen restricts access to causal data notwithstanding the contracts, if indeed the relevant clauses in the various contracts should be interpreted as supporting such a restriction.

The status of the contractual clauses that may or may not support exclusivity over causal data as well as scanner data has not been determined. It may never be definitively determined in this proceeding if the Director fails in his application. If the Director succeeds in the application, there are only two possibilities. Either the clauses in question provide exclusive access to Nielsen over causal data as well as scanner data or they do not.

First, assume that the Tribunal eventually concludes that the contracts do or, even if they are not currently being so enforced, could provide exclusive access to causal data. If the evidence also supports a conclusion that access to causal data is critical to effective competition for scanner-based syndicated market tracking services and if the Tribunal decides that scanner-based data should be no longer subject to exclusivity contracts, then it is logical that the same order should apply to causal data. In those circumstances, any Tribunal order which merely prohibited exclusivity on scanner data would be totally ineffective or severely defective. The entire proceeding would have been conducted for nothing as an important factor was left out of the equation. This seems pointless and wasteful. It is certainly preferable to address all the questions in controversy between the parties in deciding the application.

In the alternative, if the Tribunal concludes that the contracts do not provide Nielsen with exclusive access to causal data, then the amendment may have been made in an abundance of caution. It will certainly be open to Nielsen to argue that the Tribunal should not grant that portion of the relief requested.

We have also considered whether the granting of the requested amendment causes prejudice or injustice to the respondent. Much has been made of the timing of the request, coming as it does after the completion of the Director's case. We agree that it would have been preferable to have brought the amendment at an earlier stage of the proceedings.

We do not consider, however, that the timing alone causes prejudice to the respondent. The amendment sought does not involve a new allegation. The question of causal data is part of the larger issue of entry into scanner-based market tracking services. Issues surrounding the use and supply of causal data have already been raised in the evidence, including expert affidavits. Since it is not a new allegation, the amendment does not require extensive factual evidence and the testing thereof in cross-examination. However, as rule 420 requires, we will allow the respondent to examine for discovery with respect to the issues raised by the amendment and to recall such of the Director's witnesses as the respondent may choose. The respondent has not yet begun to present its own case. The respondent has not yet committed itself to a position or course of action that cannot be altered, should any alteration be required, in light of the amendment as granted. We are therefore of the opinion that no prejudice to the respondent in the conduct of its case will arise.

With regard to the intervenor CCGD, under the terms of its application to intervene it does not participate in the evidentiary portion of the proceedings. It will be making argument solely on remedies. It is difficult to see how its need to address the proposed remedies as amended creates any possibility of prejudice to it.

We further took into account the effect of allowing the amendment on the length of the proceedings as a whole. Many of the witnesses who have testified gave evidence relating to causal data. The evidence, save for that of Terry Rawlings of ISL International Surveys Ltd. ("ISL"), related to the relationship of causal data to scanner-based market tracking services, the alleged market. Some of Mr. Rawling's evidence might be interpreted to have a bearing on the enforcement or, possibly, the interpretation of the clauses in the Nielsen contracts with retailers relating to causal data. Another witness who might be of interest to the respondent on the subject of the revised remedy sought by the Director is Ralph Winter, the expert called by the Director. The respondent might wish to question him on the revised proposed remedy. The foregoing is not meant to preclude the respondent from recalling other witnesses, but the questions that might be put to them must be confined to the amendment, a very limited sphere, and should not take up much time. Even on a pessimistic view the time to be devoted to the recall of witnesses is minor compared to the time devoted to hearing the remainder of the evidence and is, of course, of a much smaller order of magnitude in relation to the overall proceedings.



## **Dissenting Reasons (McKeown J.)**

The issue before us relates to the application of rule 420(2). The majority takes the view that the prejudice or the question of whether it is just to grant an amendment does not relate to the timeliness of the amendment. In my view the delay by the Director in seeking the amendment causes real prejudice to the respondent and it is a delay which cannot be justified since there was no evidence which came to light during the Director's case that justifies the amendment. The evidence relating to the possible restriction on the flow of causal data has been in the hands of the Director for five months. The respondent is entitled to know the remedy sought by the Director prior to the commencement of the hearing in order to be able to meet the case. There may be some cases where the Director will seek the consent of the parties and the Tribunal to leave the question of remedy until the Tribunal has made a decision on the merits but this course of proceeding was not requested here.

I will briefly review the relevant law.

*Francoeur v. R.* stands for the proposition that an amendment should be allowed as a general rule "for the purpose of determining the real questions in controversy between the parties" provided that the allowance of such amendment "would not result in an injustice to the other party not capable of being compensated by an award of costs."<sup>1</sup>

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<sup>1</sup> [1992] 2 F.C. 333 at 337-38 (C.A.), citing *Baker (G.L.) Ltd. v. Medway Building and Supplies Ltd.*, [1958] 1 W.L.R. 1216 (Ch.D.).

*Francoeur, supra*, dealt with the situation of an interlocutory motion to amend the statement of claim by one of the parties, not an amendment of a statement of claim during trial, or after trial. While the general holding of that case with respect to rule 420(1) of the Federal Court Rules is sound, it does not apply to the situation where, as in this case, the matter has already come to trial and one of the parties has concluded their case in chief.

In Ontario, unless the opposing party can demonstrate prejudice, an amendment must be allowed. The Ontario Rules of Civil Procedure rule 26.01 reads as follows: "On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment."

The burden of showing prejudice lies with the party opposing the amendment. As a consequence, the general rule in Ontario is that the proponent must be granted leave to amend by a judge, unless the opposing party can show that it fits squarely into the exception; that the prejudice cannot be compensated through costs or an adjournment.

A somewhat different approach is taken in rule 420(2). It unquestionably shifts the onus from the respondent to the applicant when the amendment is sought during or after trial. In particular, rule 420(2)(b) dictates that a motion to amend made during or after trial should not be granted, except on terms that provide the other party an opportunity to discover and make preparations for trial necessary to answer the new or amended allegations. Unlike rule 420(1) and the Ontario rule, under rule 420(2) the respondent does not need to demonstrate prejudice

but rather the applicant must demonstrate that there is no prejudice or injustice which cannot be remedied by terms.

The clear intention of this rule is to preserve the integrity of the litigation process by preventing one party from introducing new causes of action or prayers for relief at a stage that would be prejudicial. The need for this protection is highlighted where the issues have been defined by the parties well in advance of trial and one of the parties seeks during the course of the proceedings to amend their claim. If amendments were permitted without the right of the opponent to discover, there would be nothing less than trial by ambush.

Counsel for the Director argues that since certain of the Nielsen's contracts with retailers contain clauses that *could* be interpreted to require exclusive access by the respondent to causal data, striking down the exclusive over scanner data, should the Tribunal conclude in the Director's favour, would not be sufficient. He submits that amendment is not a new allegation but simply a minor addition to the requested remedies to ensure that an order, if any were issued, would be effective to achieve the intended purpose.

The respondent submits that the Director's request is untimely and will result in unfair prejudice if accorded leave to amend. The respondent points to the fact that there is no new evidence relating to restriction of causal data on which the Director founds the additional prayer for relief. Furthermore, it is alleged that the evidence on which the Director relies is purely anticipatory, and stems from the speculation that some of the respondent's contracts may be

interpreted to restrict access to causal data. Consequently, the respondent asserts that there is no justification to allow the proposed amendment at this late stage in the hearing.

In *R. v. Canderel Limited* the Tax Court of Canada determined it inappropriate to allow the Crown leave to amend its pleadings, as those amendments had not been sought until the fifth day of trial. In concluding as it did, it observed that the nature of the amendments were such as to necessitate the recall of witnesses and experts who had previously testified. On this basis, it concluded there would be an injustice to the taxpayer and would not aid in resolving the questions in controversy established before the commencement of trial. In upholding this finding the Federal Court of Appeal stated:

As regards interests of justice, it may be said that the courts and the parties have a legitimate expectation in the litigation coming to an end and delays and consequent strain and anxiety imposed on all concerned by a late amendment raising a new issue may well be seen as frustrating the course of justice. The principles were in our view best summarized by Lord Griffiths, speaking for the majority, in *Ketteman v. Hansel Properties Ltd*:

This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. *Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.*<sup>2</sup>

[footnotes omitted, emphasis in original]

The rationale enunciated in *Canderel, supra*, is germane to resolving the present motion. Here, the Director two weeks into the hearing is seeking to modify the pleadings. Undoubtedly, the effect of such modifications will be to unnecessarily delay the proceedings and create new

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<sup>2</sup> (1993), 93 D.T.C. 5357 at 5361 (F.C.A.).

evidentiary obstacles for the respondent to overcome. The more advanced the trial or hearing has progressed at the time of the motion the more likely it is to be prejudicial for the opposing party. The reasons of the majority of the members give no effect to rule 420(2).

The Director's request for leave to amend is dilatory as all his witnesses and expert witness have completed giving their *viva voce* evidence. In order to apply rule 420(2) it will be necessary to permit the respondent to discover whatever parties it thinks prudent to mount a proper defence to the new remedy and to recall certain witnesses or in the extreme order a new trial. I find this option repugnant given the legitimate expectations of the respondent to know in advance of the hearing the remedies sought against it and prepare a response accordingly. The effect of allowing modifications at such a late stage in the proceedings is sufficiently prejudicial to the respondent to make it "unjust".

Whether an amendment is just or results in prejudice is not a factual question to be determined on the merits without regard to the process. The respondent is only required to oppose any remedy sought against it. It is prejudicial to it to have to re-examine witnesses on a remedy which it had no reason to believe was being sought. While the respondent was aware that causal data was important, it had no notice that the Director was concerned that the respondent was restricting access to that information.

The only evidence on causal data availability was given by the Director's witness, Mr. Rawlings, the President of ISL, who noted that he had received from retailers point of sale

information and the price files that are used in their own systems when requested. No testimony was given by Mr. Rawlings, experts or lay witnesses to indicate that there was ever a problem in obtaining causal data from retailers, or that a remedy that included access to causal data would be required. Neither the majority nor counsel for the Director allege that any such problem was raised at the trial. They rely on the possible interpretation of the contracts only.

It is immaterial in determining whether it is just or there is prejudice that an economics expert witness for the respondent states in her report that there is nothing preventing IRI from obtaining access to the causal data. In my view this is not evidence of Nielsen's opinion. The expert witness was just stating her understanding of the evidence available to her. Since there is nothing in the material supporting a contrary conclusion, except a possible interpretation of some of Nielsen's latest contracts with retailers, I do not see how this can be advanced as Nielsen's opinion.

It would be contrary to accepted legal tenets if it were possible to assert at the end of the day, after the evidence was presented, that an additional remedy was sought unrelated to the evidence presented, compelling a trial de novo or recall of a number of witnesses. It is the responsibility of counsel to seek the necessary relief before the hearing commences, unless newly discovered evidence of a critical nature is disclosed during the proceedings, not previously in that party's possession. This exception does not apply here since there is no new evidence relating to restrictions on access to causal data.

The injustice to the respondent by virtue of the amendment is apparent upon review of the Director's claim. He now decides five months after receiving the Nielsen contracts that the contracts may potentially be interpreted to mean that causal data is included in the exclusivity provisions of the contracts, and determines an amendment is needed in order for there to be an effective remedy. In my view, the Director's case can never be concluded if he is allowed to make amendments at this stage with no new evidence to justify it. In addition to the injustice to the respondent in granting such an amendment at this stage, there is also an injustice to the intervenor CCGD. Since they have been preparing their response to the remedy sought by the Director in advance of the hearing, the intervenor will be unfairly put to additional costs to respond to this new remedy. I also note that there is no way the Tribunal can compensate the respondent and the intervenor CCGD in costs. I do not however need to rely on this point in light of the foregoing reasons.

The search for a perfect remedy cannot prevail over the duty of fairness to the parties. The Director notes that the amendment may reflect Nielsen's own interpretation of its contract with respect to causal data. Even if this were true it does not overcome the requirement that a respondent is entitled to know the remedies sought and to have the opportunity to make full answer and defence.

There must be finality to a hearing and only in exceptional circumstances should an amendment be permitted after the applicant has completed its case. The Director has not met the onus of showing it would be just to grant the amendment in this case. I therefore decline to exercise my judicial discretion to grant leave to amend the Director's pleadings.

**Order (rendered October 31, 1994)**

The Director is granted leave to amend the notice of application as set out in his notice of motion. The respondent is granted such discovery and recall of witnesses as required. The discovery shall take place before the resumption of the hearing in December; the witnesses shall be recalled upon resumption of the hearing in December.

DATED at Ottawa, this 4<sup>th</sup> day of November, 1994.

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

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