

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

B E T W E E N:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

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

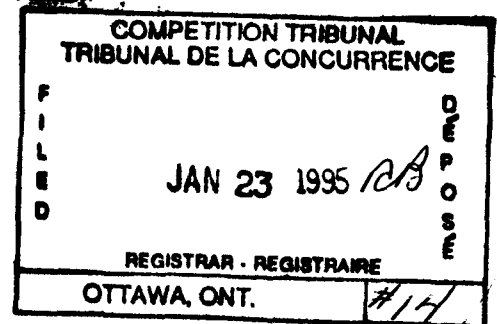
Respondents

RESPONSE

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RESPONSE

A. THE PARTIES

1. The Respondents agree with the descriptions of the parties set out in paragraphs 1 - 4 of the Statement of Grounds and Material Facts (the "Statement"), except that Bell Canada Enterprises changed its name to BCE Inc. in 1988. The Respondents (collectively referred to herein as "Tele-Direct") are both incorporated under the laws of Canada, with their head offices in Montreal. Together, the Respondents are the authorized directory publishers for telephone companies in Ontario, almost all of Quebec, New Brunswick, Newfoundland and Labrador, the Yukon Territory and the Northwest Territories.

2. While the Respondents agree with the general proposition set out in the first sentence of paragraph 5 of the Statement that they publish and distribute telephone directories to subscribers of telephone companies, they deny the second sentence of paragraph 5 and any similar attempt to distinguish directory publishing activities from "services related to the placement of advertisements in these directories".

B. GROUNDS FOR THE RESPONDENTS' OPPOSITION

Refusal to Supply Subscriber Lists

3. The Respondents deny the allegations set out in paragraph 6. While raw subscriber listing information may be the property of the local telephone service providers (the "telcos"), it is not the property of the Respondents. The telcos have set the "usual trade terms" under which a telephone directory publisher is able to obtain such information. These usual trade terms include a requirement to take the telco's entire subscriber list and to pay the telco at least 40% of the gross revenues earned by the publisher from directory advertising within the telco's territory. The consumer directory publishers referred to by the Director have not been willing to meet these usual trade terms. In any event, the owners of the information, rather than the Respondents, are the proper parties for any refusal to deal allegation with respect to their raw subscriber lists.

4. The Respondents take the raw subscriber listing information received from the telcos and manipulate it into compilations which are used, among other things, to create telephone directories. These compilations are subject to copyright. Since the essential right or interest which a copyright under the *Copyright Act*, R.S.C., c. C-42, as amended, confers is the ability to exclude others from reproducing the copyrighted work, any refusal to provide a copyrighted compilation cannot constitute an anti-competitive act under subsection 79(5) of the *Competition Act*. Further, the publishers of consumer directories are unable to obtain these compilations by virtue of the operation of the *Copyright Act*, and not because of

insufficient competition among suppliers in the market. As such, there can be no actionable refusal to deal under section 75 of the *Competition Act*.

5. The Respondents take the position that the Competition Tribunal has no jurisdiction to require them to licence or otherwise deal with copyrighted material as that jurisdiction is in the Federal Court.

6. In any event, the Canadian Radio-television Commission (the "CRTC") has taken jurisdiction over the supply of subscriber listing information to publishers of consumer directories. A decision of the CRTC binds the telco as well as entities like the Respondents. The CRTC has set a tariff which establishes the terms and conditions under which Bell Canada, the largest telco in Canada, and its agents, can supply such subscriber listing information. The tariff is currently under review in proceedings before the CRTC. This tariff represents the "usual trade terms" for the supply of such information to consumer directories, as opposed to telephone directory directories. The Respondents remain willing to provide the information on the usual trade terms established by the applicable CRTC tariff. However, the publishers of consumer directories in Canada have not been willing or able to meet these usual trade terms.

7. In light of the exercise of jurisdiction of the CRTC over the provision of subscriber listing information, the Competition Tribunal has no jurisdiction to make an order under the *Competition Act* requiring the Respondents to provide such information.

Tied Selling

8. The Respondents deny the allegations set out in paragraph 7. The Respondents say that the Director's concept of tying is misconceived. There is no product known as advertising services independent of a product called "advertising space". The sales advice which Tele-Direct's internal sales staff provides forms an inseparable package with the

advertising space which it provides in its directories. Indeed, there is no advertising space without a sale. Tele-Direct imposes no conditions on its customers in respect of the provision of advertising advice or of artwork. Commissions are not paid by Tele-Direct to its customers and are not in any way focused on customers. Rather, the Respondents pay commissions to accredited agents to remunerate them for services rendered on Tele-Direct's behalf and to encourage increased sales in respect of customers which Tele-Direct believes may be better served by a specialized agent.

9. If the provision of advertising services can be said to be "tied" to the sale of blank advertising space, which the Respondents deny, then the Respondents say that the practices engaged in by them have resulted in an increase in the size of the market, have had no exclusionary effect in the market and have not reduced competition substantially in the market.

Abuse of Dominant Position

10. The Respondents deny each of the allegations made in paragraph 8. In particular, the Director has misdefined the relevant markets and has mistakenly concluded that the Respondents control two distinct classes or species of business. If the Applicant is saying that there is such a thing as a product market called "advertising services" or "advertising space", then the Respondents do not substantially or completely control such market in any part of Canada. If the product market is limited to such space or services in "telephone directories" as defined in paragraph 13 of the Statement, then the Respondents say that in many cases market power, and therefore control, does not reside in the Respondents.

11. The anti-competitive acts alleged by the Director throughout the Statement fall into three distinct categories: acts directed to publishers of consumer directories; acts directed to Tele-Direct's accredited agents; and acts directed to non-accredited agents (also known as "consultants"). These acts involve distinct constituencies in three separate markets.

The Respondents do not compete with the publishers of consumer directories, since consumer directory advertising is not directly substitutable for telephone directory advertising and is therefore either in a separate market or in a market which includes all forms of advertising. The Respondents do not compete with their agents, who at law are the same entity. Finally, Tele-Direct does not compete with consultants, who are in an entirely different business which focuses on reducing an advertiser's Yellow Pages™ advertising expenditures. Tele-Direct's consultant policies do not constrain the ability of consultants to carry on their business and do not substantially lessen or prevent competition in any market in Canada.

12. To the extent the Respondents control of any class or species of business, the Respondents say they have not engaged in the practice of any anti-competitive acts and, if they have engaged in any such practice, such practice has not substantially lessened or prevented competition.

C. MATERIAL FACTS

The Business and the Products: Telephone Directories in the Context of the Canadian Telephone System

13. The Respondents deny the assertion contained in paragraph 9 that the publication of telephone directories consists of two businesses, as well as the related assertion in paragraph 10 that the purchaser of a directory advertisement obtains two separate products. There is one business and one product. To fully understand the Respondents' position, it is necessary to set out the context in which telephone directories are produced in more detail than the Director has included in the Statement.

14. The basic telephone system in Canada consists of a sophisticated country-wide network owned by various telcos, all of which are either regulated by or subject to the jurisdiction of the CRTC. Before 1988, the CRTC did not purport to regulate all the telcos

in Canada, but it is now established that the Federal Government has exclusive jurisdiction over all telcos in Canada and, as a result of the *Telecommunications Act*, S.C. 1993, c. 38, all are subject to the jurisdiction of the CRTC. While the CRTC has not yet regulated all of the telcos in Canada, it is proceeding to do so.

15. The value of telephone service increases in direct proportion to the number of other telephones a customer can call. It is therefore sound public policy that subscribers are able to call other telephone subscribers and are provided with effective means of finding subscribers' telephone numbers. A subscriber wishing not to be listed in a directory pays an additional monthly charge. The means to find other subscribers' telephone numbers include telephone directories for the subscriber's local area, 411 service for numbers within the area code and 555-1212 service for numbers outside the area code. The provisioning of directories to each subscriber together with the 411 and 555-1212 systems are essential features of every telco in Canada.

16. Accordingly, as part of the comprehensive scheme of regulation over telcos in Canada, the CRTC has required each telco to distribute to each of its subscribers one or more directories which set out an alphabetical list of all of the telco's subscribers. Over 80 years ago it was also decided to provide all customers with business listings, grouped by the business involved and not just alphabetically. The telco must provide this type of directory, free of charge, to every subscriber. Each business subscriber must also be given a basic listing in the Yellow Pages™ directory, free of charge. Through the business listings, now published under the "Yellow Pages" trade-mark, a customer can find the names and numbers of service providers, such as plumbers, lawyers, pizza parlours and physicians.

17. Thus, it has been a feature of Canadian telephony that all telco subscribers receive free, as part of their telephone service, both alphabetical and Yellow Pages™ directories. These directories are required to be provided whether or not any advertisements appear in them.

18. To provide telephone directories to all subscribers, as required by the CRTC, the telcos can do the job themselves, use an agent or contract with a third party. Across Canada each system is in use.

19. Tele-Direct Services Inc. ("T-D Services") contracts with various telcos in Canada other than Bell Canada. T-D Services has contracts with Canadian telcos such as Newfoundland Tel (through its parent company, Infotext Limited), New Brunswick Tel (through its parent company, Bruncor Inc.), Télébec Ltée, the town of Dryden, the town of Kenora, the city of Thunder Bay, Northern Telephone Limited and Northwestel.

20. Tele-Direct Publications Inc. ("T-D Pubs") services its affiliate, Bell Canada, and services many of the smaller telcos located in Ontario and Quebec as a third party contractor. There are 26 independent telcos in Ontario serviced by T-D Pubs. With each of those companies, T-D Pubs has a contract. A similar situation exists with approximately 11 independent telcos in Quebec.

21. Tele-Direct is contractually bound by the regulatory requirements imposed on the telco. Since the CRTC has outlined how Bell Canada (and its agents or sub-contractors) is to provide subscriber listing information to consumer directory publishers, Bell Canada (and its agents or sub-contractors) must follow the dictates of the CRTC in respect of the provision of subscriber listing data. As such, the CRTC establishes "usual trade terms" for the provision of subscriber listing data to other consumer directory publishers. Such publishers are able to obtain adequate supplies of the product in the market, but are unwilling to meet the usual trade terms dictated by the CRTC as the regulator of the supplier. Moreover, the reason that such suppliers are unable to obtain adequate supplies of the product is not because of insufficient competition among suppliers in the market.

22. In order to publish a telephone directory, the telco must provide the publisher with the names, addresses and telephone numbers of each subscriber. This raw subscriber

listing data is then compiled by the publisher where value is added as the data is manipulated into a verified directory format. The compilation is further enhanced by the inclusion of additional listings under numerous headings. The CRTC and Canadian courts have consistently held that the data as so manipulated enjoys copyright protection in the hands of the publisher. Where copyright exists, any inability to obtain the copyrighted product stems from the rights and interests afforded the copyright holder by the *Copyright Act*, and is not because of insufficient competition among suppliers of the product in the market.

23. Telephone directories have also become an effective advertising medium. What was initially conceived as an essential but costly feature of telephone service has become a lucrative revenue source for the telcos. Not only do the telcos not pay the publishers to publish the required directories, the publishers pay for the privilege of providing the subscribers, free of charge, both alphabetical and Yellow Pages™ directories and providing the telcos with the computerized information for the 411 and 555-1212 services. This situation is not unique to the Respondents, but applies to virtually all publishers of telephone directories in Canada.

24. In Ontario, for example, T-D Pubs pays each of the independent telcos with which it contracts 43% of the gross revenue collected from subscribers of the telco who advertise in the telephone directories. In the case of T-D Pubs, this revenue source, as well as the entire net income of T-D Pubs, are included by the CRTC in Bell Canada's revenues to reduce the cost of local service. Each residential telco subscriber in Ontario and Quebec receives a subsidy of over \$2 per month as a result of the revenues captured through telephone directory advertising.

25. The Respondents have attempted to convince all of the telcos' business subscribers of the value obtainable from advertising in Yellow Pages™ directories. In that regard they have been quite successful, showing an increased share of total advertising expenditures over the past two decades. But even today, in major metropolitan area such as

Toronto or Montreal, less than 50% of the business subscribers advertise. The balance simply accept the free listing provided as part of the telephone service.

26. The value of a telephone directory depends to a large extent on its comprehensiveness. That is to say, the more businesses that choose to advertise in a directory, the more valuable that directory becomes. As such, Tele-Direct has made a core business decision to contact every potential customer in its publication area, whether or not that customer appears to be a good business prospect or not. Thus, Tele-Direct must maintain an internal sales force and incur significant fixed costs.

27. The financial success of Yellow Pages™ directory advertising has attracted other entrepreneurs who would like to capture a piece of this lucrative advertising revenue. Various attempts have been made to create consumer directories, which resemble the telephone directories, except that the publisher does not pay the telco any royalty and cannot use either the telco's or Tele-Direct's trade-marks. These consumer directories are not driven by any requirement to publish, but rather are driven by available advertising revenues which are sought to be captured by aping the telco directory model. These consumer directories compete with flyers, direct mail and community newspapers to capture advertising revenue from local merchants.

28. Directories produced by publishers which are not authorized by telcos are not substitutes for Tele-Direct's directories, but rather are complements. That is to say, a rational advertiser will not choose to advertise in either Tele-Direct's directory or in a consumer directory, but will advertise in both directories. They are not a substitute advertising medium but rather an additional expense for advertisers who advertise in the Yellow Pages™ telephone directories. None have ever supplanted the telephone directory or ever will do so, so long as the telco is required by law to continue to provide free directories to customers, whether or not those directories are profitable. Thus, Tele-Direct does not control a class or species of business in which consumer directory publishers compete.

Further, Tele-Direct denies having engaged in any practice of anti-competitive acts involving consumer directory publishers. The anti-competitive acts alleged by the Director in this regard either did not occur, or cannot be anti-competitive acts because they are solely the product of Tele-Direct's enjoyment of its intellectual property rights and are therefore protected by subsection 79(5) of the *Competition Act*.

29. In operating their business, the Respondents act as any rationale business and attempt to control expenses while at the same time seeking to maximize the effectiveness of their efforts. Thus, in certain areas (such as directory printing and delivery), the Respondents contract out their entire operations to third parties. In other areas (such as publishing), the Respondents perform all operations in-house. In the sales area, the Respondents have chosen a hybrid. As their primary sales channel, they maintain a sales force of approximately 483 employees. They have also chosen to employ external agents to sell to a limited group of large advertisers who may have distinct needs which may be more easily addressed by an agent. Virtually every directory publisher in North America has made a similar choice, and services local accounts only through an internal sales force. The Respondents do not compete with their agents or with their customers (or their agents).

30. There are four types of accounts on which the Respondents pay commission, as follows:

(a) National accounts - - have advertising of a specified minimum value placed in at least 20 Yellow Pages™ directories in two or more provinces, with at least 20% of the total advertising value placed outside of the predominant publisher territory. The national account level was introduced on July 1, 1993. When placed by a Certified Marketing Representative ("CMR") (an agent accredited by the Yellow Pages Publishers Association as described below), national accounts attract a 25% commission;

(b) Grandfathered accounts - - are accounts which were commissionable prior to July 1, 1993. Before July 1, 1993, a commissionable account had to satisfy Tele-Direct's "8 Market Rule". North America was divided into a number of markets, based upon the relative importance of given geographic areas to Tele-Direct's business. Ontario had seven markets, Quebec, five, each other Canadian Yellow Pages™ publisher territory, one and the U.S., one. To be commissionable, an account had to advertise in at least eight markets, with a minimum value of advertising in each market. In addition, there were a few large advertisers (*e.g.*, Ontario Hydro and Hydro Quebec) that were considered to be commissionable even though they were not in eight markets. To the extent that these accounts were commissionable on July 1, 1993 and are not now national accounts, they attract a 15% commission.

(c) YPPA "A" Accounts - - the Yellow Pages Publishing Association (the "YPPA") has a longstanding national or "A" definition which includes any advertising program which involves two or more publishers in three or more states (or provinces), is ordered in 20 or more directories, with at least 30% of total revenue outside of the primary state (province). All publisher members of the YPPA (including the Respondents) must accept "A" definition accounts submitted by CMRs, although they do not have to pay commissions on these accounts. Tele-Direct pays 25% to CMRs for "A" accounts;

(d) Foreign number accounts - - are accounts whose advertising in Tele-Direct's directories does not contain a telephone number from a telco exchange for which Tele-Direct publishes the telephone directory. Foreign number accounts attract a 15% commission.

31. The size of the commissionable account pool in the Respondents' territories is approximately \$46.5 million.

32. External agents account for over 90% of the sales of commissionable accounts in Tele-Direct's territories.

33. Tele-Direct also sets the specifications and prices for advertising in its directories. In many cases, however it cannot decide to change the coverage of any directory without the consent of the telco. Thus, the telephone directory publisher is partly its own master and partly subject to control by the telco, without whom its telephone directory business could not exist.

The Publishing of Telephone Directories

34. With respect to paragraph 11 of the Statement, the Respondents agree that a telco supplies subscriber listing information to the entity which it chooses to publish its directories. To the extent that they can understand the second sentence of paragraph 11, however, the Respondents deny the assertion which it appears to make; namely, that the telcos have chosen to deal only with the dominant telephone directory publisher. The manner in which the telcos supply subscriber listing information to the publisher of telephone directories is set out in some detail below.

35. The Respondents agree, as set out in paragraph 12 of the Statement, that the telco supplies its publisher with subscriber listing information. This information remains the property of the telco which supplied it. The publisher then manipulates that information into compilations useful for the required directory. Such compilations are subject to copyright in Canada under the *Copyright Act* (see item (b) in definition of "compilation" in section 2 of the statute). Accordingly, the Respondents' provision or withholding of these compilations cannot constitute an anti-competitive act because of subsection 79(5) of the *Competition Act*.

36. The Respondents agree with the facts set out in the first three sentences of paragraph 12 of the Statement regarding the need for and the manner of publishing telephone

directories. These points are explored in more detail below. The Respondents also agree with the assertion contained in the last sentence of paragraph 12 regarding the need to obtain subscriber listing information in order to publish a directory, but state that subscriber listing information may be obtained from sources other than directly from a telco or from the publisher of a telephone directory. The very existence of many consumer directories in Ontario and Quebec bears this assertion out.

37. The Respondents agree with the description of telephone directories set out in paragraph 13 of the Statement, with the following exceptions:

(i) The Respondents deny that telephone directories published by or on behalf of telcos are commonly referred to as "Yellow Pages" telephone directories because of the paper they have traditionally been printed on, as claimed in the final sentence of sub-paragraph (ii). "Yellow Pages" is a trademark owned by the Respondent T-D Pubs, as correctly noted by the Director in sub-paragraph (iii). Only those directories published by publishers that are licensed to use the Yellow Pages mark are referred to as Yellow Pages™ directories.

(ii) While the Respondents agree that they licence the publishers of telephone directories and their agents in Canada to use the marks owned by T-D Pubs, they note that such users are no longer registered users, as the concept of registration of users under the *Trade-marks Act*, R.S.C. 1985 c. T-13, as amended no longer exists.

38. The Respondents agree with the general description of telcos set out in paragraphs 14 and 15 of the Statement. The Respondents state, however, that it is crucial to keep in mind the relationship between each telco and the publisher that publishes their telephone directories, as discussed below.

39. The Respondents agree with the fact stated in paragraph 16 of the Statement but not the reason given therefor. That is to say, the Respondents agree that the publishers of telephone directories historically have been either a telco or a company authorized by the telco to publish its directory. The Respondents also agree that the telco historically has supplied its authorized directory publisher with subscriber listing information. The Respondents deny the assertion, however, that the identity of telephone directory publishers has stemmed from the necessity of obtaining current and continuous access to the telco's records. Rather, as described more fully below, the identity of directory publishers flows from the requirement imposed on telcos to publish directories.

40. It is important to understand that the small, independent telcos in Ontario each have separate contracts with T-D Pubs pursuant to which the telco supplies T-D Pubs with its subscriber list. Often the independent telco services a small locality and its listings are interlisted in a larger Bell Canada directory published in the area. T-D Pubs contacts each of the independent telco's business subscribers to see if the subscriber wishes to advertise in the local telephone directory. If the subscriber decides to advertise, T-D Pubs publishes the advertisement in the local telephone directory and bills the independent telco for 58% of the price to be charged for the advertisement. The independent telco pays that bill and then bills the subscriber 100% of the price, normally on a monthly basis over 12 months. As telephone directories come out every 12 months, this effectively spreads the price to the subscriber to a monthly basis. T-D Pubs also supplies the independent telco with access to a computer program so its operators can perform a 411 service in the area.

41. The Respondents agree with the facts set out in paragraphs 17, 18 and 19 of the Statement, but state that these facts are irrelevant in the instant case. In respect of paragraph 19, the Respondents note that the "churn rate" applies to the alphabetical subscriber listing information.

42. Paragraph 20 of the Statement is misleading as the correctness of the subscriber information for publishing purposes only matters annually at the time the directory is published (note a telephone directory is called an "annuaire" in French). By its very nature, therefore, every telephone directory no longer contains current information almost immediately after it is published. Moreover, the Respondents maintain that, contrary to subparagraph 20(c), a directory sales force can operate effectively without a continuous and up-to-date list of subscribers which is provided by the telco.

43. While paragraph 21 of the Statement is essentially correct, the important missing fact is that the revenues derived by the telco from the publisher are required by the CRTC to be incorporated into its earnings for rate setting purposes. In Ontario and Quebec these resources can be viewed as a subsidization of local service tariffs and amount to over \$2 per month for each residential subscriber.

44. The Respondents state that the Yellow Pages™ telephone directory publishing industry in Canada generated revenues of approximately \$856 million in 1993 rather than more than \$1 billion as alleged in paragraph 22 of the Statement and agree that Yellow Pages™ directory publishing generated substantial accounting profits for the Respondents as set out in paragraph 23 of the Statement.

45. The Respondents also agree that they publish telephone directories in the geographic areas identified in paragraph 24 of the Statement. The Respondents disagree with the concept that there are other competing publishers of telephone directories in those areas. There are, in certain areas, publishers of consumer directories which broadly compete with all other advertising media, including direct mail, community newspapers, radio, television, billboards and the telephone directories published by the Respondents. While the appearance of consumer directories resembles telephone directories, the two advertising media are not substitutes for one another. To the extent that telephone directories compete with consumer directories, therefore, it is only in the broader sense that involves all advertising media.

There is no separate market which includes only telephone directories and consumer directories.

Telephone Directory Advertising Services

46. The Respondents agree that one part of telephone directory advertising, known as National Advertising, has been dealt with by the Consent Order referred to in paragraphs 32 and 33 of the Statement. National Advertising is defined in the Consent Order as any advertising by a subscriber that appears in the book of more than two Publishers. In fact such National Advertising comprises over 25% of all advertising in telephone directories. Of the remaining 75%, only those parts of Canada where the Respondents publish directories can be the subject of this Application. In this geographical area there are 103 directories published by the Respondents, as set out in paragraph 18 of the Statement. In many of these directories 100% of the advertisers who are not National Advertisers are serviced by the internal sales force of the Respondent that publishes the telephone directory in that area. As the Applicant has not defined either a geographical or product market, the Respondents cannot agree or disagree with paragraph 25.

47. The Respondents deny the implication of paragraph 26 that the three "independent agencies" are agencies of the same principals and therefore should be considered together as a single group. Moreover, the "specialized" agencies rely on commissions from the Respondents, the "general" advertising agencies sometimes rely on commissions from the Respondents but more often on fees from their customers, while the consultants rely only on splitting "savings" with their clients.

48. The Respondents agree with paragraph 27 of the Statement and are aware of six "in-house agencies" as defined therein. The Respondents state, however, that the existence of in-house agencies is irrelevant to the instant proceedings.

49. While the Respondents believe that most of the accounts served by general and specialized agencies are commissionable as alleged in paragraph 28, they state that this fact is irrelevant in the instant case. Further, the Respondents deny that their commissionability criteria are "arbitrary". While the precise levels of these criteria are not established with scientific certainty, they are set based on the business judgment of Tele-Direct management in order to meet specialized needs of an identified category of Tele-Direct's customers.

50. The Respondents agree that they pay commission only to accredited agencies, as the Director appears to allege in paragraph 29. Many specialized agencies, however, are accredited by the YPPA, an international directory association based in the United States. Agencies accredited by the YPPA are known as CMRs. The Respondents also accredit Selling Companies. Accredited agencies are the only entities able to place directory advertising with Tele-Direct on behalf of a customer of Tele-Direct.

Regulation

51. The Respondents agree with paragraphs 30(a) and (b) as to the jurisdiction of the CRTC over how telcos make their subscriber listing information available and the requirement that telcos must provide free directories to their subscribers. The Respondents have no knowledge of the commercial viability of the tariff referred to in paragraph (b) and state that such an issue is currently before and properly decided by the CRTC, as further noted in paragraph (b). They agree with subparagraph 30(c).

52. The Respondents agree with what they interpret to be the gist of the first sentence of paragraph 31 of the Statement; namely, that the CRTC has not yet chosen to regulate the Respondents' advertising practices. The Respondents deny the second sentence of paragraph 31 where the Director alleges that the provision of subscriber listing information by the Respondents is not currently restricted by the CRTC. As agents or sub-contractors of Bell Canada, for example, T-D Pubs is bound just as Bell Canada is.

53. On November 15, 1988, the CRTC issued CRTC Telecom Public Notice 1988-46, Bell Canada-Provision of Telephone Directory Data Base in Machine-Readable Form ("PN 88-46"), to investigate whether the provision of directory services in competition with Tele-Direct might be facilitated if Bell's telephone directory data base information were made available to other parties in machine-readable form.

54. Numerous parties, including the Director, intervened in the proceedings. The Director actively participated in every aspect of the proceedings, including submitting interrogatories and making final submissions. The Director submitted that subscriber information should be provided to third parties in accordance with a tariff established by the Commission, and made recommendations on, among other things, the data elements which should be included in the tariff, the terms and conditions of the tariff (including the price, frequency and cost of updates), the form of agreement, and title to information. At no time did the Director challenge the CRTC's jurisdiction to deal with the matters before it. In fact, the Director submitted a letter arguing in favour of the CRTC's jurisdiction.

55. The Respondents state that the Directors, by submission filed on September 14, 1989 by J.H. Bocking, stated:

"It is only relatively recently that the telephone book emerged as an important advertising medium with the potential to earn large revenues".

"It is the Director's submission that it is time the Bell Canada's monopoly use of its data base was ended".

"For all practical considerations, there are no alternative directories which compete directly with the official telephone books...There are, as well, a variety of specialized, or niche, directories...but they complement the utility related books and in no way could be regarded as substitutes".

"Certain of the data elements heretofore unpublished by Tele-Direct should also form a part of the set under discussion in this proceeding".

"There is no requirement for the monopolist to subsidize those wanting to utilize [an essential facility] by undervaluing its worth to potential users".

"The Director submits that this data base is the property of the ratepayers and not of the shareholders of Tele-Direct or Bell Canada".

"Pursuant to the terms of Telecom Decision CRTC 77-7, a portion of the net income generated by Tele-Direct is included in the rate case for regulated rate setting purposes...This...equates to two dollars per month for each of the network's eight million main line subscribers".

"Within the advertising industry at large, there are two important concepts from the view of agencies - accreditation and commissionability. In order to be paid commissions at all by the various media, an agency must first be accredited and, after that, the advertising it places must be commissionable".

"The commissionability of any given advertisement is, to the knowledge of the Director, an admittedly more fluid concept which has, over the years, resulted in a variety of disputes between various elements of the media and the agency community".

"The Director is of the view that a tariff for the Bell Canada data base will serve as an important step in alleviating his concerns about the absence of entry and competition in the directory publishing and advertising industry in Canada".

56. By CRTC Telecom Decision 90-12, Bell Canada Provision of Telephone Directory Data Base Information in Machine Readable Form ("TD 90-12"), the CRTC decided that Bell Canada's provision of its telephone directory data base information in machine-readable form to T-D Pubs constituted a service which was incidental to a telephone business, and, therefore, within the CRTC's jurisdiction under the *Railway Act*. The CRTC held that the service engages fundamental components of Bell Canada's telephone system and is closely related to essential directory services generally provided by Bell.

57. In TD 90-12, the CRTC also held that Bell Canada conferred a preference on T-D Pubs by granting it the exclusive right to use subscriber information collected by Bell for the purposes of selling directory advertising, and producing and distributing directories.

The CRTC held that this preference was undue, in contravention of section 340(2) of the *Railway Act*, in respect of *non-confidential non-residential* listing information, as it held that the benefits of providing such information in machine-readable form to other parties pursuant to a general tariff would outweigh any disadvantages. To remedy the undue preference, the CRTC decided that Bell Canada should be required to provide such information in machine-readable form pursuant to a general tariff. The CRTC also decided, in response to concerns raised by the Privacy Commissioner, that subscribers should clearly be informed of their right to be excluded from the subscriber listing information subject to the general tariff. The CRTC directed Bell Canada to, among other things, propose wording for an announcement to be included in the telephone directories advising subscribers of how they could exclude themselves from lists other than alphabetical and Yellow Pages directories. The Director became actively involved in determining the language to be used in the announcement.

58. TD 90-12 also directed Bell Canada to submit a report to the CRTC setting out the data elements in its data information systems file which it provided to T-D Pubs, and the data elements which it proposed to make available under the general tariff. Bell Canada complied with this direction. Bell Canada also filed Tariff Notice 3641 which requested approval for the introduction of a new service which would offer, on a magnetic medium, a data base file containing ten elements and covering all of its operating territory. Tariff Notice 3641 also proposed to make updates available under terms requiring customer purchase updates for three consecutive months.

59. The CRTC then issued CRTC Telecom Public Notice 1990-82, Bell Canada - Directory File Service ("PN-90-82), which invited comment on Bell Canada's report and Tariff Notice 3641. Comments were received from numerous parties, including the Director.

60. Based on the comments received and the information provided previously pursuant to PN 88-46, on March 3, 1992, the CRTC released its decision regarding the provision of subscriber listing information, CRTC Telecom Decision 1992-1, Bell Canada -

Directory File Service ("TD 92-1"). The CRTC ordered Bell Canada to make available, on magnetic medium, the following information: the customer's name and address as listed in the directory; the postal code as provided by the customer; the seven-digit listed telephone number; the abbreviated name of the exchange serving the listed telephone number; and an indicator specifying whether the listing is a business or government. These information elements came to be referred to as the Directory File Service. Based on the arguments made in respect of Tele-Direct's claim of copyright in the sorted, arranged and compiled information, the CRTC held that copyright may arise in favour of Tele-Direct. In addition, the CRTC found that Bell Canada's approach to the provision of updates were reasonable at that time, as were Bell Canada's proposed tariffs of \$250 per thousand listing of basic offerings and \$1500 per thousand listings of updates.

61. After the CRTC had finally established the terms of the subscriber listing information to be provided and the rate of the tariff, one of the intervenors to the PN 88-46 proceedings, White Directory of Canada Inc. ("White Directory"), applied to the CRTC for a review of TD 92-1 as it was dissatisfied with the data elements made available and the general tariff. All parties to the previous proceedings, including the Director, were provided with White Directory's application and were provided with an opportunity to comment on it, which the Director did.

62. As a result of the information provided to the CRTC, it issued CRTC Public Notice 1994-3, Provision of Directory Database Information ("PN 94-3") which requested comments on a number of issues, including: whether Bell Canada, and certain other telephone companies in Canada, should be required to provide further *non-residential* and residential information under the Directory File Service; the terms and conditions which should govern the provision of such information; and the appropriate level and structure of rates for the provision of the database access services.

63. Once again, the Director actively participated in these proceedings, submitting extensive interrogatories and final submissions. The CRTC's decision regarding PN 94-3 is still pending.

64. During the course of the proceedings described above, the CRTC issued CRTC Telecom Public Notice 1992-78, Review of Regulatory Framework ("PN 92-78"), which initiated an oral public hearing to examine whether the existing regulatory framework should be modified in light of the developments in the telecommunications industry and the introduction of the new *Telecommunications Act*. Among other things, the Commission requested parties to address the question of what modifications to regulatory safeguards might be necessary to protect against abuses of dominant power in competitive telecommunications markets.

65. The Director also participated extensively in these proceedings as he filed initial submissions, submitted extensive interrogatories, and presented witnesses at the oral hearing. The Director submitted that, until such time as adequate competition was reached, the CRTC was better equipped to monitor the telecommunications industry and to move the industry toward the appropriate level of competition. Once the appropriate level of competition was reached, the Director submitted that the CRTC should forbear from regulating, or exempt from regulating, services or classes. At such time, the Director submitted, market forces would control industry practices and the *Competition Act* would permit the Director to monitor any excesses.

66. On September 16, 1994, the CRTC issued CRTC Telecom Decision 1994-19, Review of Regulatory Framework. While the CRTC did not specifically comment on the interrelationship of the CRTC and the *Competition Act*, it did state that forbearance and exemption orders should not be issued until a significant degree of competition existed in a service or class.

Consent Order

67. The Respondents agree with the facts in paragraph 32 except that a commission is not available under Tele-Direct's criteria for a majority of National Advertising accounts.

68. The Respondents agree with the statement in paragraph 33 that the Consent Order did not deal with markets other than National Advertising. They deny the assertion that National Advertising services constitute only a component of the so-called market for the provision of advertising services.

Facts Material to Refusal to Supply Subscriber Listing Information

69. The Respondents agree with paragraphs 34 and 35, as more fully discussed herein. The nature of the relationship between the telcos and the Respondents is governed by contracts and, with respect to Bell Canada, by their affiliation as subsidiaries of BCE Inc.

70. The Respondents are aware that the CRTC has reviewed the supply of subscriber listing information by the telcos to third parties in a proceeding commenced by public notice in 1988. The CRTC published decisions in that matter, after a lengthy procedure throughout which the Applicant was a major participant, and made decisions in 1990 and 1992. The proceeding was reopened in 1994 at the request of White Directory and the Applicant again was heavily involved. A decision is now awaited from the CRTC. The Respondents deny the assertion in paragraph 36 that the terms of supply under the current CRTC tariff do not permit access to subscriber listing information in a commercially useable form since the form is identical to that provided to T-D Pubs, which in paragraph 35 the Director recognized as being in a commercially useable form.

71. The Respondents agree with the description of how Bell Canada supplies subscriber listing information to third parties as set out in paragraph 36, except that they deny that the terms of supply under the CRTC tariff do not permit access in a commercially usable form. The Respondents also agree with the brief summary statement in paragraph 37 as to how they use subscriber listing information. It must be remembered, however, that the Respondents use subscriber listing information from all the telcos for whom they publish directories. If in paragraphs 36 and 37 the Applicant is suggesting that the information from independent telcos comes through Bell Canada or as a result of some action by the CRTC, the Respondents deny such suggestions.

72. The Respondents agree with the fact alleged in paragraph 38 that subscriber listing information is necessary to publish a telephone directory but deny that it must come directly from a telco or directly from a telephone directory publisher. Viable consumer directories are now published without obtaining such information directly from Bell Canada or directly from the Respondents.

73. The Respondents deny that they supply subscriber listing information to other parties, as asserted by the Director in paragraph 39. The Respondents admit that they do supply other parties with copyrighted lists compiled from manipulations of the subscriber list information received from the telcos. These lists differ in a number of respects from the subscriber list information. The CRTC is aware of this practice.

74. With respect to paragraphs 40 and 41, the Respondents say that Bell Canada does offer to provide subscriber listing information in accordance with a tariff approved by the CRTC.

75. The Respondents deny that any person is unable to obtain such information or that the Respondents are the sole suppliers of this product in certain areas of Canada as alleged in paragraphs 42 and 43. The usual trade terms for the supply of such information to

directory publishers involves paying at least 40% of gross revenues to the telco and taking the telco's entire raw subscriber data base. The usual trade terms for the supply of this information to independent consumer directories are established by the CRTC approved tariff. The "affected companies" are not willing to meet the usual trade terms as alleged in paragraph 44.

76. The Respondents agree that the product is in ample supply as alleged in paragraph 45.

Facts Material to the Alleged Tied Selling

77. The Respondents deny that they supply advertising space separately from advertising services. The Respondents publish advertisements in the telephone directories which they publish. How such advertisements are sold is a business decision to be made by the Respondents and is not justiciable. Except with respect to this fundamental difference and the fact that the Applicant has ignored that National Advertising is not part of this proceeding, the Respondents do not disagree with paragraphs 49, 50 and 51 other than as otherwise stated above.

78. The Respondents say that they determine, as a legitimate business decision, when it is more appropriate to sell their product through their internal sales force and when they will employ and pay a commission for agents to sell their product. There is no legal requirement that the Respondents must pay agents to do something the Respondents wish to do themselves. Accordingly, the Respondents deny paragraphs 52 through 56.

Facts Material to the Alleged Abuse of Dominant Position

79. The Respondents deny the statements made in paragraphs 57 to 61 of the statement as to the two alleged product markets for the reasons set out above.

80. The Respondents deny the geographic market definitions alleged in paragraphs 62 and 63.

81. The Respondents deny the general statement in paragraph 64 that they have engaged in a practice of anti-competitive acts. Further, the Respondents say that:

- a) the Respondents are not required to deal with "consultants" who are trying to diminish the effectiveness of the Respondents' business;
- b) the Respondents are not in competition with their agents to whom they pay commissions;
- c) to the extent the Respondents engage in any of the practices alleged by the Applicant, they do so for valid business reasons and not with any anti-competitive intent;
- d) offers, such as free colour or expanded space in certain areas for limited time periods are examples of normal marketing techniques designed to add value to the customer or encourage the customer to experiment thereby ultimately attracting more advertisements in the long term;
- e) the transferring of obligations to others in order to reduce expenses is a common business practice and is not "squeezing" as defined in paragraph 78(a) of the Act; and
- f) refusing to licence intellectual or industrial property is not an anti-competitive act.

82. The Respondents deny each anti-competitive act listed in paragraph 65. In respect of the facts alleged in paragraph 65, the Respondents state as follows:

(a) the Respondents agree that they have issued guidelines to their sales representatives to direct them in their dealings with consultants, as alleged in sub-paragraph (b). These guidelines provide that the customer, who will be billed for the directory advertising, must approve the final form of the advertisement and must sign the actual advertising contract with Tele-Direct. While consultants may deal with Tele-Direct's sales representatives, they may not contract on behalf of the advertiser. These requirements are motivated by legitimate business concerns and are not anti-competitive;

(b) contrary to the implication of sub-paragraph (c), the Respondents do not attempt to prejudice the sales activities of their external agents and do not attempt to confer any advantage on their internal staff over their external agents. The Respondents do not regard their internal staff to be in competition with their external agents and desire both groups to maximize their sales of Yellow Pages™ advertisements. With respect to the specific allegations made by the Director:

(i) the Respondents require all external agents to work to a "National Close Date" which is 25 days earlier than the date on which its internal staff must submit orders. External agents also have a seven day "grace period" following the National Close Date during which they have the right to submit orders. Further, the Respondents have had a liberal policy of allowing late orders, to the extent that such orders can be accommodated within the publication framework. Almost all telephone directory publishers in North America have National Close date, which are earlier than their local close dates. They, like the Respondents, require the additional time in order to convert the data provided by the external agents into Tele-Direct's internal

format. Since Tele-Direct's internal sales force already uses Tele-Direct's internal format, this lead time is not required for them;

(ii) in Tele-Direct territories, the telcos retain the billing responsibilities for their subscribers' directory advertising. Bell Canada, for example, has chosen to bill its subscribers monthly. To the extent that the Respondents have responsibility for billing, they bill exclusively on an annual basis. Rather than constituting an anti-competitive act designed to put the Respondents' external agents at a disadvantage, therefore, the monthly billing practice represents an accommodation which the telcos are willing to make towards their customers. This action cannot constitute an anti-competitive act by the Respondents not only because it is not their action, but also because it lacks the necessary anti-competitive purpose, intent or effect;

(iii) the Respondents deny the allegation in sub-paragraph (iii) that they make certain promotional programs available only to orders placed through internal staff. Tele-Direct's policy is that all promotional programs available to internal staff are also to be made available to external agents;

(iv) the Respondents deny that they have refused to supply tear sheets and other promotional material to agencies while providing it to customers who use internal staff as alleged in sub-paragraph (iv). Tear sheets are provided to all CMRs pursuant to guidelines established by the YPPA. Directory libraries are provided to Tele-Direct's other agents in sufficient numbers so that the agents can create tear pages for their clients. Further, the Respondents make available directories to all of their agents at cost;

(v) the Respondents deny the assertion in sub-paragraph (v) that they treat orders differently when they are received from external agents than when they are received internally. All orders are treated alike;

(vi) the Respondents provide all maps, information on promotional programs, etc., at approximately the same time to both internal and external salespeople, contrary to sub-paragraph (vi). In a few instances, these programs have been developed at the last minute as a result of feedback from the sales force in the market. No advantage, however, is either consciously or unconsciously accorded to internal staff; and

(vii) the Respondents deny sub-paragraph (vii), and state that they have never offered free colour and expanded space to inhibit the ability of its external agents to operate in the market.

(c) the Respondents deny that they have acted anti-competitively by squeezing the return available to independent agencies, as alleged in sub-paragraph (d). Turning to each example cited by the Director:

(i) the functions which were transferred to CMRs are a product of Tele-Direct no longer acting as a "gateway" for all of its agents. Under the YPPA guidelines, a CMR is responsible for verifying the accuracy of bills. When the agencies obtained CMR status, they accepted these additional responsibilities. In addition, they gained the opportunity to earn 25% commission, rather than 15%, on national accounts which they service;

(ii) the Respondents agree with part of sub-paragraph (ii) in that they no longer provide certain services to CMRs such as the provision of free directory libraries. In place of this service, the Respondents provide tear pages pursuant

to YPPA guidelines, as discussed above. This change does not constitute "squeezing" and is not anti-competitive. The Respondents have no knowledge of the reference to free copies of maps and can therefore neither admit nor deny the allegation;

(iii) the Respondents deny the characterization, in sub-paragraph (iii) of the Statement, of the changes to payment periods and the procedures for account verification as "making the terms of supplying advertising space to independent agencies ... more onerous". In any event, payment periods in effect have remained unchanged. A change was announced to conform to YPPA guidelines; however, this change has not been enforced. The procedures for account verification have changed in light of the fact that all orders no longer come through the Respondents, and therefore must be independently verified. In any event, there are offsetting benefits gained by the CMRs in addition to increased commission, such as the right to retain commissions even if a refund is granted; and

(iv) contrary to sub-paragraph (iv), the Respondents have not restricted the availability of commission to its agents over time.

(d) the Respondents deny the allegation of sub-paragraph (e) that they have refused to provide specifications for their directories and state that such specifications have been made available to accredited agencies and to individual customers;

(e) the Respondents state that the refusal to licence trademarks referred to in sub-paragraph (f) of the Statement constitutes the enjoyment of a right conferred by the *Trade-marks Act*, and as such cannot constitute an anti-competitive act by virtue of subsection 79(5) of the Act;

(f) the Respondents deny that they have improperly threatened or taken legal action as alleged in sub-paragraph (h);

(g) the Respondents deny sub-paragraph (i), that they have targeted price reductions and other discounts to those markets in which entry by competing publishers has occurred or is occurring. There are many published consumer directories in Ontario and Quebec. Price reductions and other discounts are made in many markets for a wide variety of reasons that may include, but are in no way limited to, the behaviour of competitive media, including consumer directories in those markets. To the extent that price reductions or other discounts have occurred in markets where other consumer directories exist, such a response represents the normal competitive response in a market, and is not an anti-competitive practice; and

(h) the Respondents deny making any attempt to directly or indirectly cause any of its agents to discriminate against publishers of consumer directories or to refuse to place advertisements into such directories, contrary to sub-paragraph (j).

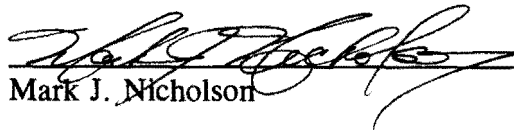
83. The Respondents deny the allegations in paragraphs 66, 67 and 68, which are conclusions based on facts which have been denied above.

84. The Respondents request that the Application be denied and that no relief be granted.

85. The Respondents wish to use the English language in the proceedings.

DATED at Toronto this 23rd day of January, 1995.


Warren Grover


Mark J. Nicholson
Counsel for the Respondents