

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
F I L E D	NOV 29 1994 <i>AB</i>
D E P O S E	
REGISTRAR - REGISTRAIRE	
OTTAWA, ONT.	#121

THE COMPETITION TRIBUNAL

File No. CT-94/01

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 as amended.

AND IN THE MATTER OF certain practices by The D & B Companies of Canada Limited.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

APPLICANT

-and-

THE D & B COMPANIES OF CANADA LIMITED

RESPONDENT

-and-

INFORMATION RESOURCES INC.
CANADIAN COUNCIL OF GROCERY DISTRIBUTORS

INTERVENORS

FURTHER AMENDED
NOTICE OF APPLICATION

TAKE NOTICE THAT the Applicant, the Director of Investigation and Research will make an Application to the Competition Tribunal pursuant to Section 79 of the Competition Act, R.S.C. 1985, c.C-34, for:

-2-

- 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;
 - (ii) from enforcing any provisions in any of the Respondent's existing 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; and
 - (iii) from offering any inducements to suppliers of scanner data to restrict access by others to scanner data or any other data necessary for the provision of scanner-based market tracking services;
- (b) an order, pursuant to Section 79(2) of the Act declaring null and void all provisions in all contracts to which the Respondent is a party, which preclude or in any way restrict a supplier of scanner data from providing others with access to such data or any other data necessary for the provision of scanner-based market tracking services;
- (c) an order, pursuant to Section 79(1) or 79(2) of the Act, prohibiting the Respondent, its affiliates, officers and agents from enforcing any provisions in the Respondent's existing contracts for the supply of market tracking services which require the customer to give unreasonable notice

of termination, or which impose any unreasonable penalty or loss of discount on the customer for early termination;

- (d) an order, pursuant to Section 79(2) of the Act, directing the Respondent to make adequate historical scanner data available to any new entrant into the market for the supply of scanner-based market tracking services, on such fair and reasonable terms as may be fixed by the Tribunal;
- (e) an order, pursuant to Section 79(2) of the Act, directing the Respondent to take such other actions as are reasonable and necessary to overcome the effects in the market for the supply of scanner-based market tracking services of the Respondent's practice of anti-competitive acts;
- (f) an order requiring the Respondent to deliver copies of the Tribunal's Order to all customers for scanner-based market tracking services, and to all suppliers of scanner data; and
- (g) such other orders as the Tribunal may consider appropriate.

AND TAKE NOTICE that if you do not file a Response with the Registrar of the Tribunal within thirty days of the date upon which this Notice of Application is served upon you, the Tribunal may make such order as it deems appropriate without further notice to you.

IN SUPPORT OF THIS APPLICATION, the Director relies upon the Statement of Grounds and Material Facts which follows.

STATEMENT OF GROUNDS AND MATERIAL FACTS**TABLE OF CONTENTS**

	<u>Page</u>
I. GROUNDS FOR APPLICATION -----	5
II. MATERIAL FACTS	
A. DEFINITIONS -----	7
B. THE PARTIES -----	9
C. THE CANADIAN MARKETING RESEARCH INDUSTRY -----	10
D. THE RELEVANT PRODUCT MARKET -----	13
E. THE RELEVANT GEOGRAPHIC MARKET -----	16
F. NIELSEN'S CONTROL OF THE MARKET FOR SCANNER- BASED MARKET TRACKING SERVICES -----	17
G. PRACTICE OF ANTI-COMPETITIVE ACTS -----	18
H. SUBSTANTIAL PREVENTION OF COMPETITION -----	19
III. CONCLUSION -----	21
IV. RELIEF SOUGHT -----	22
V. PROCESS -----	24

I. GROUNDS FOR THE APPLICATION

1. The Director of Investigation and Research submits,
 - (a) that the Respondent, The D & B Companies of Canada Limited, (hereinafter "Nielsen") substantially or completely controls the supply of scanner-based market tracking services in Canada;
 - (b) that the supply of such services constitutes a distinct class or species of business;
 - (c) that Nielsen has engaged in and continues to engage in a practice of anti-competitive acts within the meaning of section 78 of the Competition Act (the "Act"); and
 - (d) that such acts have had, are having and, unless restrained, will continue to have the effect of preventing or lessening competition substantially in the supply of scanner-based market tracking services in Canada.
2. The following actions by Nielsen constitute a practice of anti-competitive acts within the meaning of section 78 and, in particular, paragraphs 78(e) and 78(h) of the Act:
 - a) Nielsen has entered into, renewed and maintained contracts with all major Canadian grocery retail chains and has begun to contract with major retail

-6-

drug chains to acquire their UPC scanned data on a long-term exclusive basis, thus precluding any potential competitors from acquiring such data;

- b) Nielsen has paid significant financial inducements to retailers to acquire and maintain exclusive access to their scanner data; and
- c) while the market has been foreclosed to potential competitors through their inability to access scanner data, Nielsen has contracted and attempted to contract with manufacturers of consumer packaged goods to provide market tracking services for terms of three years or more, with conditions requiring substantial notice of termination, and imposing penalties for early termination.

3. Nielsen has engaged in this practice of anti-competitive acts for the purpose of excluding potential competitors from the market for the supply of scanner-based market tracking services.

4. Nielsen's practice of anti-competitive acts has had and continues to have the effect of preventing competition substantially in the supply of scanner-based market tracking services in Canada.

II. MATERIAL FACTS

A. Definitions

5. In this application, the following terms have the meanings set out below:

a) Consumer packaged goods:

Food products and other non-food products packaged by the manufacturer, normally but not always sold in supermarkets and/or drug stores, that are purchased by consumers for consumption or use on a regular basis.

b) UPC Scanner Data:

Universal Product Code (UPC) scanner data are comprised of product identifying information provided on the bar coded label affixed by the manufacturer to consumer packaged goods as well as data input by the retailer which may include store identification, time of purchase and price, all of which is recorded by a scanning apparatus.

c) Scanner-Based Market Tracking Services:

As described in this application, a scanner-based market tracking service is a type of syndicated market tracking service that is based on UPC data. The data are used to track sales of a number of product categories and brands in a specified period of time. The service tracks the physical movement of goods and other factors such as advertising levels, promotions, prices, and package size.

d) Audit Data:

Data obtained from a manual examination of items in a store's inventory. Products are counted or "inventoried" in periodic visits to store locations and that information is combined with data from store records on merchandise received in order to get item sales figures.

e) Warehouse Withdrawal Information:

Computerized data on individual items shipped to each store served by the retailer's warehouse.

f) Panel Data:

Consumer household purchase data recorded either at the retail grocery counter by shopper identification card or, more commonly, at the consumer's residence by methods of manual diary recordings of purchases or by a hand held UPC scanning device.

g) Focus Group Interviews:

A method of marketing research directed toward seeking insight into purchase motivation. Small groups of consumers are asked to explain reasons behind their purchase of a product or they may be asked to evaluate product attributes.

B. The Parties

6. The Applicant, the Director of Investigation and Research (the "Director"), is the officer appointed under section 7 of the Act, and is charged with the administration and enforcement of the Act.

7. The Respondent, D&B Companies of Canada Limited ("Nielsen"), is a privately held, wholly-owned subsidiary of A.C. Nielsen Company (U.S.), which is, in turn, a wholly-owned subsidiary of the Dun & Bradstreet Corporation. The parent A.C. Nielsen (U.S.) provides marketing services around the world and characterizes itself as the worldwide leader in the marketing research industry. As Nielsen is a privately held company, revenue figures are not available in Canada. However, in 1992 its U.S. parent reported total revenues of approximately U.S. \$1.12 billion. Established in 1944, Nielsen is based in Markham, Ontario. The marketing research division of the company (Nielsen Marketing Research) provides scanner-based tracking services and other marketing research services. Nielsen has two other separate business divisions, namely: Nielsen Television Rating Service, which measures television statistics, and Nielsen Promotion Services, which handles contest judging, promotion activities and coupon redemption.

7(a). Prior to December 1, 1991, the business presently carried on by the marketing research division of the Respondent was carried on by A.C. Nielsen Company of Canada Limited. On December 1, 1991, A.C. Nielsen Company of Canada Limited amalgamated with Dun & Bradstreet Limited and Media Measurement Services Inc. to become the D & B Companies of Canada Ltd.

C. The Canadian Marketing Research Industry

8. Marketing research is used by retailers and manufacturers to assist in decision making and strategic planning relating to product promotion, pricing and competitive positioning. There are a substantial number of firms of varying size providing marketing research services in Canada. Services offered by such firms may include market tracking, focus groups, individual consumer interviews, surveys and consumer panels.
9. Manufacturers of consumer packaged goods are significant users of marketing research. A 1992 Conference Board of Canada study found that major consumer packaged goods manufacturers typically spend one half of one percent of sales on marketing research activities.
10. Marketing research services may be either syndicated or custom designed for a particular company or product.
11. Market tracking is a service that monitors the progress and competitive position of a product in relation to other competing products over time.
12. In order to provide a market tracking service, a market researcher must obtain data on sales of the relevant products. Historically, such data were obtained through in-store audit of retailers and by monitoring warehouse withdrawals.
13. New marketing research services were made possible in the late 1970's when electronic scanner technology was introduced to grocery stores for the purpose of

recording purchases quickly and accurately by means of Universal Product Codes ("UPC"). While the intended purpose of scanners was price calculation and control, reduction of labour costs and improved inventory control by retailers, scanners also created a constant flow of day to day data that could be used to effectively track the sales of products.

14. Market tracking services based on scanner data are superior in accuracy, timeliness and cost effectiveness to those based on other methods. As scanner penetration increases in Canada, scanner-based market tracking is displacing other tracking methods and is expected to largely replace such methods, as has occurred in the United States.

15. At the present time in Canada, scanners are most prevalent in large retail grocery chains. UPC scanner data from substantially all such chains is required in order to produce an effective scanner-based market tracking service for manufacturers of consumer packaged goods. UPC scanner usage is currently expanding into retail drug chains. The use of scanner data from other types of retailers to provide market tracking services for other types of products is likely to increase in the near future.

16. Nielsen is currently the only company in Canada offering scanner-based market tracking services. It sells such services to manufacturers of consumer packaged goods. Its exclusive contracts to acquire UPC scanner data from all major grocery retail chains preclude any new entrant from offering a competing service.

17. In contrast, in the U.S. market, there is vigorous competition between Nielsen and Information Resources Inc. (IRI) in the supply of scanner-based tracking services. Grocery and other retailers in the U.S. sell scanner data to A.C. Nielsen, IRI

and others. The U.S. market for scanner-based market tracking services is characterized by rapid technological innovation, expanding services, and strong competition on points of price and service.

18. In the mid 1980's, IRI unsuccessfully attempted to enter the Canadian market to provide a scanner-based market tracking service. At that time, Nielsen was the dominant supplier of market tracking services in Canada and these services were based on audit data and warehouse withdrawal information. IRI's entry into the market was dependent on its being able to acquire scanner data from substantially all major grocery retailers in Canada. IRI sought to acquire exclusive access to such data. It was unable to enter the market because, at or around the same time, Nielsen contracted with one major grocery retailer to acquire its UPC scanner data on an exclusive basis. Subsequently, Nielsen contracted with all major grocery retailers for exclusive access to their scanner data. In 1992, Nielsen then began offering a scanner-based market tracking service to manufacturers of consumer packaged goods.

19. IRI has recently announced its intention to enter the Canadian market, provided that it is not denied access to current and historical UPC scanner data from Canadian grocery retailers as a result of Nielsen's exclusive contracts.

D. The Relevant Product Market

20. Scanner-based market tracking services constitute the relevant product market for the purposes of sections 78 and 79 of the Act.

21. The current level and nature of scanner use in Canada is such that at the present time, an effective scanner-based market tracking service can be provided only to the consumer packaged goods industry, using scanner data from large grocery retail chains and, where available, from large retail drug chains. The use of scanner data from other types of retailers is likely to increase in the near future making scanner-based market tracking services possible for other products.

22. Scanner-based market tracking services are generally provided as Syndicated Market Tracking ("SMT") services. They are referred to as such because the service is a research product sourced from pooled data, manipulated or organized by the seller and resold to many customers as a standard product. Variations of the product can be purchased by choosing combinations of options such as the number of stores covered in the service, the number of product categories covered, geographic areas, and individual retail store data.

23. Scanner-based market tracking services are of value to manufacturers because they assist them in making informed marketing decisions.

Substitute Products

24. There are no close substitutes to scanner-based market tracking services.

25. While there are many types of marketing research, there is no other type that can adequately and economically perform the functions of a scanner-based market tracking service. A tracking service must be able to track sales of each manufacturer's products and all competing products. The service must also provide coverage across the market with data from all major retailers in all regions on a timely basis.

26. Other methods of data collection such as audit, warehouse withdrawal and panel data are, for these purposes, too labour-intensive and costly to match the capability of scanner-based data collection. Furthermore, these methods tend to be less timely, accurate and precise for tracking purposes and are seldomly used where scanner data is available.

27. Methods of market tracking other than scanner-based market tracking services fall outside of the relevant market. Buyers of scanner-based services believe that the scanner-based product is qualitatively superior to any alternate market tracking methods due to greater accuracy, timeliness and cost effectiveness.

Complementary Products

28. Various types of marketing research, taken separately or in combination, are considered by consumer packaged goods manufacturers to be complements to scanner-based market tracking services. They are not substitutes.

29. By subscribing to a scanner-based market tracking service, a manufacturer receives data on the performance of its product in relation to those of its competitors. Information concerning consumer demographics, opinions, preferences and household

-15-

buying patterns is not evident in scanner data but is available through a complementary class of related products such as diary panels, consumer usage and attitude surveys and focus group interviews. These complementary services relate the consumers' buying patterns, opinions and preferences to the information provided by scanner-based market tracking. Neither scanner-based market tracking services nor the class of related products is a substitute for the other. However, when used together, these services can assist a manufacturer in determining how a product is moving in the market place and for what reasons.

E. The Relevant Geographic Market

30. The relevant geographic market for scanner-based market tracking services is Canada.
31. The geographic market does not extend across national borders as the relationship between price and promotion for a product and sales volume depends on the economic and social conditions, tastes and on the nature of product market competition in each country.
32. There are significant differences in the marketing of consumer packaged goods between Canada and the U.S. Given the differences in consumer preferences, brands, product formulations, distribution channels and promotions across countries, a scanner-based market tracking service based on U.S. data would be a poor substitute for a service that measures the performance of such goods in Canada. This is also supported by the fact that North American companies purchase separate services for U.S. and Canadian operations.
33. Although consumer buying patterns may differ among the regions of Canada, most consumer packaged goods manufacturers who purchase scanner-based market tracking services are organized on a national basis and typically sell their products across the country. They therefore require a service which is national in scope and which covers all of the regions in Canada using the same methodology.

E. The Respondents Control Of The Market For Scanner-Based Tracking Services

34. Nielsen substantially or completely controls the market for the supply of scanner-based market tracking services in Canada, a class or species of business within the meaning of paragraph 79(1)(a) of the Act.

35. Nielsen controls 100 percent of the market for scanner-based tracking services in Canada. Nielsen has achieved and maintained complete control of this market through its use of exclusive contracts for the purchase of scanner data from all major grocery retail chains in Canada and through the other anti-competitive acts described herein.

G. Practice Of Anti-Competitive Acts

36. Nielsen has engaged in a practice of anti-competitive acts, contrary to section 79 (1)(b) of the Act, and as defined in Section 78 of the Act and, in particular, in paragraphs 78(e) and 78(h) of the Act.

37. The particulars of Nielsen's practice of anti-competitive acts are as follows:

- a) Nielsen has entered into, renewed and maintained contracts with all major Canadian grocery retail chains and has begun to contract with major retail drug chains to acquire their UPC scanned data on a long term exclusive basis, thus precluding any potential competitors from acquiring such data;
- b) Nielsen has paid significant financial inducements to retailers to acquire and maintain exclusive access to their scanner data; and
- c) While the market has been foreclosed to potential competitors through their inability to access scanner data, Nielsen has contracted and attempted to contract with manufacturers of consumer packaged products to provide market tracking services for terms of three years or more, with conditions requiring substantial notice of termination, and imposing penalties for early termination.

H. Substantial Prevention Of Competition

38. The effect of Nielsen's practice of anti-competitive acts has been to prevent competition substantially in the market for scanner-based market tracking services. Nielsen has promoted and maintained its dominant position by completely foreclosing the market for scanner-based market tracking services to potential alternative suppliers of the service. There can be no new entry while Nielsen has exclusive access to the scanner data of all major grocery retailers.

39. In contrast to Canada, there is vigorous competition in the U.S. in the supply of scanner-based market tracking services. Differences between the Canadian and U.S. markets include the following:

- a) Prices for scanner-based tracking services have remained high in Canada while they have fallen in other jurisdictions where there is competition;
- b) Services in Canada generally lag behind those available in the U.S. in terms of technology, innovation, quality, and range.

40. Nielsen's practice of anti-competitive acts has created or led to the following barriers to entry into the market for the supply of scanner-based market tracking services:

- a) Nielsen's exclusive access to scanner data from all major grocery retailers and certain major retail drug chains completely forecloses any new entry;

-20-

- b) Nielsen's contracts for exclusive access to scanner data from all such retailers expire at different times. Access to data from substantially all retailers would be required by a new entrant;
- c) A new competitor who obtained access to current scanner data would not have access to a database of historical Canadian sales information, an integral part of a scanner-based market tracking service; and
- d) Nielsen's contracts to provide its services to manufacturers for terms of three years or more, with disincentives for early termination, would put a new entrant at a competitive disadvantage, even if it were able to acquire access to current and historical scanner data.

III. CONCLUSION

41. Nielsen is the single, dominant supplier of scanner-based market tracking services in Canada.

42. Nielsen has engaged in a practice of anti-competitive acts which have had the effect of substantially preventing competition in the market for scanner-based market tracking services in Canada. Through the actions described herein, Nielsen has effectively excluded any competition from the market.

43. Nielsen has engaged in this practice of anti-competitive acts for the purpose of excluding potential competitors from the market for the supply of scanner-based market tracking services.

44. Nielsen's actions have had, are having, and unless restrained will continue to have the effect of substantially preventing competition in the market for scanner-based market tracking services in Canada.

IV. RELIEF SOUGHT

45. The Director submits that Nielsen is in breach of section 79 of the Competition Act and therefore applies to the Tribunal for the following:

- (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;
 - (ii) from enforcing any provisions in any of the Respondent's existing 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; and
 - (iii) from offering any inducements to suppliers of scanner data to restrict access by others to scanner data or any other data necessary for the provision of scanner-based market tracking services;
- (b) an order, pursuant to Section 79(2) of the Act declaring null and void all provisions in all contracts to which the Respondent is a party, which preclude or in any way restrict a supplier of scanner data from providing

-23-

others with access to such data or any other data necessary for the provision of scanner-based market tracking services:

- (c) an order, pursuant to Section 79(1) or 79(2) of the Act, prohibiting the Respondent, its affiliates, officers and agents from enforcing any provisions in the Respondent's existing contracts for the supply of market tracking services which require the customer to give unreasonable notice of termination, or which impose any unreasonable penalty or loss of discount on the customer for early termination.
- (d) an order, pursuant to Section 79(2) of the Act, directing the Respondent to make adequate historical scanner data available to any new entrant into the market for the supply of scanner-based market tracking services, on such fair and reasonable terms as may be fixed by the Tribunal;
- (e) an order, pursuant to Section 79(2) of the Act, directing the Respondent, its affiliates, officers and agents to take such other actions as are reasonable and necessary to overcome the effects of the Respondent's practice of anti-competitive acts in the market for the supply of scanner-based market tracking services;
- (f) an order requiring the Respondent to deliver copies of the Tribunal's Order to all customers for scanner-based market tracking services, and to all suppliers to scanner data; and
- (g) such other orders as the Tribunal may consider appropriate.

-24-

V. PROCESS

46. The Director requests that this Application be heard in the city of Ottawa.
47. The Director requests that this Application be heard in the English language.
48. The Director will seek directions from the Tribunal regarding interlocutory proceedings herein and for the expeditious hearing of this Application. In this regard, the Director hereby requests a pre-hearing conference.

Dated at Hull, this...5th.....day of April, 1994.

George N. Addy
George N. Addy
Director of Investigation and Research

The Director's address for service is as follows:

Donald B. Houston
Bruce C. Caughill
Stikeman, Elliott
Commerce Court West
Suite 5400, P.O. Box 85
Toronto, Ontario
M5L 1B9
Phone: (416) 869-5621
Fax: (416) 947-0866

Counsel for the Director of
Investigation and Research

TO: The Registrar,
Competition Tribunal
600-90 Sparks Street
Ottawa, Ontario

-25-

K1P 5B4

AND TO: OSLER, HOSKIN AND HARCOURT
Barristers & Solicitors
P.O. Box 50, 66th Floor
1 First Canadian Place
Toronto, Ontario
M5X 1B8

John F. Rook, Q.C.
(416) 862-4280

Lawrence E. Ritchie
(416) 862-4237

Solicitors for the Respondent

AND TO: FRASER & BEATTY
Barristers & Solicitors
1 First Canadian Place
42nd Floor, P.O. Box 100
Toronto, Ontario
M5X 1B2

Randal T. Hughs
(416) 863-4446

Karen B. Groulx
(416) 863-4618

Solicitors for the Respondent

AND TO: DAVIES, WARD & BECK
Barristers & Solicitors
Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Geoffrey P. Cornish
(416) 863-0900

Solicitors for the Intervenor,
Information Resources Inc.

AND TO: PAQUETTE, GADLER

-26-

Barristers & Solicitors
300 Place d'Youville
Suite B-10
Montreal, Quebec
H2Y 2B6

Paul Martin
(514) 849-0771

**Solicitors for the Intervenor,
Canadian Council of Grocery Distributors**