

SCHEDULE "A"

CT - 94/2

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Director of Investigation and Research under sections 79 and 105 of the *Competition Act*, R.S.C. 1985 c. C-34 as amended.

AND IN THE MATTER OF certain practices of the Publishers of Yellow Pages Telephone Directories in Canada.

Between:

I L E D	COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	P R O C E D U R E
	SEP 20 1994 <i>reb</i>	
	REGISTRAR - REGISTRAIRE	
	OTTAWA, ONT. #1(b)	

THE DIRECTOR OF INVESTIGATION AND RESEARCH

APPLICANT

- and -

AGT DIRECTORY LIMITED  
ANGLO CANADIAN TELEPHONE COMPANY  
DIRECTWEST PUBLISHERS LTD.  
EDMONTON TELEPHONES CORPORATION  
THE MANITOBA TELEPHONE SYSTEM  
MT&T HOLDINGS INCORPORATED  
TELE-DIRECT (PUBLICATIONS) INC.  
TELE-DIRECT (SERVICES) INC.

RESPONDENTS

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STATEMENT OF GROUNDS AND AGREED MATERIAL FACTS

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I. SUMMARY OF APPLICATION

1. The Director states that the Respondents substantially or completely control, in each of their respective territories, the business of publishing Telephone Directories.

2. The Director further submits that the Respondents have jointly engaged in a practice of anti-competitive acts within the meaning of sections 78 and 79 of the *Competition Act* (the "Act") stemming from the provisions of the CANYPS Agreement and the methods used in Selling National Advertising into Telephone Directories. Specifically, the Director submits that the anti-competitive acts jointly engaged in by the Respondents were the following:

(i) The Respondents agreed that only Publishers could Sell National Advertising directly into Telephone Directories;

(ii) The Respondents appointed each other as their exclusive Selling Companies for the Selling of National Advertising into Telephone Directories in each of their respective territories and therefore did not compete with such exclusive Selling Companies in those territories;

(iii) The Respondents agreed to a Head Office Rule, thus precluding National Advertisers from either placing advertisements directly with all the Respondents who actually published the advertisements or using an entity unrelated to any of the Respondents to place advertising directly in each Respondent's Telephone Directories.

3. It is the Director's submission that the Respondents possess a dominant position in their respective territories. Through the provisions of the CANYPS Agreement, the Respondents have together foreclosed the entry of independents into the business of Selling National Advertising into Telephone Directories in Canada, and prevented the entry of the Respondents into the territory of other Respondents. In so doing, the Respondents have substantially prevented or lessened competition in the Selling of National Advertising into Telephone Directories in Canada.

4. It is the Director's further submission that an Order of the Tribunal in the form of the Draft Consent Order attached hereto as Schedule "B" is required to restrain the recurrence of the Respondents' anti-competitive acts, which acts have had the effect of preventing or lessening competition substantially in the relevant market, namely in the Selling of National Advertising into Telephone Directories, and to restore competition in this market.

5. At the time of filing of this Application, the Director's investigation into other practices of the individual Respondents in this industry beyond those identified herein is continuing. The filing of this Application is intended to permit the consent resolution of the practices relating to National Advertising only. It is without prejudice to other enforcement action by the Director.

## II. AGREED MATERIAL FACTS

6. The following material facts, set out in paragraphs 7 to 59 below, form the basis of this Application. The Respondents and the Applicant have agreed to these facts for the purposes of this Application and any proceeding initiated by the Director relating to this Consent Order, including an application to vary or rescind under section 106 of the *Act*, but this shall not be taken as an admission by the Respondents or the Applicant of any such facts for any other purposes.

### A. DEFINITIONS

7. For the purposes of this Application, the terms listed below are defined as follows:

(a) "**Accreditation**" means the system by which a Publisher recognizes an Advertising Agency or a Specialized Agency or another Publisher for the promotion and sale of advertising into the Telephone Directories of the first Publisher;

(b) "**Advertising Agency**" means a full service intermediary whose role in the advertising industry at large is to represent and provide other services to advertisers in their dealings with various media, including radio, television, magazines, outdoor advertising, and directory advertising;

(c) "**AGT**" means AGT Limited, a corporation incorporated under the laws of Alberta;

(d) **"AGT Directory"** means AGT Directory Limited, a corporation incorporated under the laws of Alberta;

(e) **"Anglo Canadian"** means the Anglo Canadian Telephone Company, a corporation incorporated under the laws of Canada;

(f) **"BC Tel"** means BC TEL, a corporation incorporated under the laws of British Columbia;

(g) **"Bell"** means Bell Canada, a corporation incorporated under the laws of Canada;

(h) **"CANYPS"** means the Canadian Yellow Pages Service, an unincorporated association, whose role was defined by the terms of the CANYPS Agreement;

(i) **"CANYPS Agreement"** means the agreement dated December 19, 1991, among the Respondents and all documents incorporated by reference therein;

(j) **"Commission"** means a fee paid to one who is authorized to act as an agent for another in trade; the fee is usually based on a percentage of the total sale;

(k) **"CRTC"** means the Canadian Radio-television and Telecommunications Commission;

(l) **"Director"** means the Director of Investigation and Research under the *Act*;

(m) **"DirectWest"** means DirectWest Publishers Ltd., a corporation incorporated under the laws of Saskatchewan;

(n) **"Dominion Directory"** means Dominion Directory Company, an operating division of Anglo Canadian;

(o) **"ED TEL"** means Edmonton Telephones Corporation, a corporation incorporated under the laws of Canada;

(p) **"Head Office Rule"** means the requirement incorporated by reference into the CANYPS Agreement that National Advertisers were to be allocated among the Respondents on the basis that the Respondent in whose territory the head office of a National Advertiser was located would function as the Selling Company for placement of any advertisements which that National Advertiser placed;

(q) **"Island Tel"** means The Island Telephone Company Limited, a corporation incorporated under the laws of Prince Edward Island;

(r) **"MTS"** means the Manitoba Telephone System, a Crown corporation incorporated under the laws of Manitoba;

(s) **"MT&T"** means the Maritime Tel & Tel Limited, a corporation incorporated under the laws of Nova Scotia;

(t) **"MT&T Holdings"** means the MT&T Holdings Incorporated, a corporation incorporated under the laws of Nova Scotia;

(u) **"National Advertisers"** means those advertisers whose advertising programs qualify as National Advertising;

(v) **"National Advertising"** means advertising placed in the Telephone Directories of two or more Publishers;

(w) **"NB Tel"** means The New Brunswick Telephone Company Limited, a corporation incorporated under the laws of New Brunswick;

(x) **"Newfoundland Tel"** means Newfoundland Telephone Company Limited, a corporation incorporated under the laws of Newfoundland;

(y) **"Northwest Tel"** means Northwestel Inc., a corporation incorporated under the laws of Canada;

(z) **"NYPS"** means the National Yellow Pages Service;

(aa) **"NYPSA"** means the National Yellow Pages Service Association;

(ab) **"Publisher"** means a publisher of Yellow Pages Telephone Directories in Canada; namely, the Respondents;

(ac) **"Quebec Tel"** means Quebec Telephone Company, a corporation incorporated under the laws of Quebec;

(ad) **"Rates & Data Book"** means a book published by a trade or industry association which contains a list of all telephone directories published by members of the association, together with rates for generally available advertising items, closing dates and other information essential to the sale of advertising in the telephone directories;

(ae) **"Sask Tel"** means Saskatchewan Telecommunications, a corporation incorporated under the laws of Saskatchewan;

(af) **"Selling", "Sell", "Sale", and "Sold"** refer to the selling by the Selling Company or Seller of National Advertising;

(ag) **"Selling Company", or "Seller"**, means prior to July 1, 1993 when the Respondents changed their practices as described in paragraph 78 below, any of the Respondents and thereafter any entity, including any of the Respondents, which is in the business of placing National Advertising into the Yellow Pages Telephone Directories of all of the Publishers in which an advertiser wishes to advertise, by using the VAN system or another equivalent system acceptable to the individual receiving Publisher acting reasonably in terms of compatibility of existing systems and costs.

(ah) **"Specialized Agency"** means an entity, other than an Advertising Agency, which specializes in selling advertisements into Telephone Directories;

(ai) **"Subscriber Data Base"** means the raw information found in Telco files concerning telephone service subscribers;

(aj) **"Telco"** means any one of the following corporations which is responsible for providing local telephone services in one or more regions in Canada: BC Tel, AGT, ED TEL, Sask Tel, MTS, Bell, Quebec Tel, NB Tel, MT&T, Island Tel, Newfoundland Tel and Northwest Tel;

(ak) **"Tele-Direct"** means Tele-Direct (Publications) Inc., a corporation incorporated under the laws of Canada;

(al) **"Tele-Direct Services"** means Tele-Direct (Services) Inc., a corporation incorporated under the laws of Canada;

(am) **"Telephone Directories"** means telephone directories published by or on behalf of a Telco or another supplier and includes the alphabetic listing of residential and business numbers often referred to as the "white pages", as well as a classified commercial directory which is often printed on coloured paper;

(an) **"VAN system"** means the Value Added Network, which is the electronic order transmission system established by the YPPA and used to submit orders to YPPA publisher members, including the Publishers, or its successor;

(ao) **"Yellow Pages"** means the registered trademark owned in Canada by Tele-Direct and licensed by Tele-Direct to the other Publishers;

(ap) **"Yellow Pages Telephone Directories"** means those Telephone Directories which are authorized by a Telco and which display the Yellow Pages trademark under license from Tele-Direct; and

(aq) **"YPPA"** means the Yellow Pages Publishers' Association.

## **B. THE PARTIES**

8. The Applicant is the Director.

9. In addition to extensive participation as an intervenor in the CRTC proceedings described below, the Director has conducted an extensive study of the commercial Telephone Directory industry, and has consulted widely with industry participants, and experts, both in Canada and the United States.



10. The Respondent Anglo-Canadian carries on its Telephone Directory business through Dominion Directory, an operating division. Dominion Directory has its head office in Burnaby, British Columbia and is the Publisher for British Columbia and parts of Quebec.

11. The Respondent AGT Directory has its head office in Calgary, Alberta and is the Publisher for all of Alberta except for the City of Edmonton, and for the Saskatchewan portion of the City of Lloydminster.

12. The Respondent ED TEL has its head office in Edmonton, Alberta and is the Publisher for the City of Edmonton.

13. The Respondent DirectWest has its head office in Regina, Saskatchewan and is the Publisher for the Province of Saskatchewan, except for the City of Lloydminster.

14. The Respondent MTS has its head office in Winnipeg, Manitoba and is the Publisher for the Province of Manitoba.

15. The Respondent Tele-Direct has its head office in Montreal, Quebec and is the Publisher for most of the Provinces of Ontario and Quebec.

16. The Respondent Tele-Direct Services has its head office in Montreal, Quebec and is the Publisher for parts of Ontario and Quebec, New Brunswick, Newfoundland and Labrador, the Yukon Territory and the Northwest Territories.

17. The Respondent MT&T Holdings has its head office in Halifax, Nova Scotia and is the Publisher for Nova Scotia and Prince Edward Island.

## **C. DESCRIPTION OF THE INDUSTRY**

### **1. Industry Structure**

18. The structure of the Telephone Directory publishing industry in Canada evolved from the structure of the telephone industry in Canada. To understand the former one must understand the latter.

19. For a telephone network to function efficiently, it must provide a convenient means by which subscribers can locate the access codes, or telephone numbers, of others on the system. Traditionally, this has been accomplished through paper telephone directories. Generally, each of the Publishers is mandated by its associated Telco to publish the Telephone Directories required to be distributed to subscribers within the territory of its associated Telco. The Telephone Directories are distributed by the Publishers to all subscribers to the telephone service within their associated Telco's territory, but generally not beyond. With minor exceptions which are not material to this Application, no Publisher currently publishes within the boundaries of another.

20. Local telephone service in Canada has historically developed into a number of regional monopolies. The principal Telcos are as follows:

<u>Province</u>	<u>Principal Local Telco</u>
British Columbia	BC Tel
Alberta (ex. Edmonton)	AGT
Edmonton	ED TEL
Saskatchewan	Sask Tel
Manitoba	MTS
Ontario	Bell
Quebec	Bell Quebec Tel
Nova Scotia	MT&T
New Brunswick	NB Tel
Prince Edward Island	Island Tel
Newfoundland and Labrador	Newfoundland Tel
Northwest Territories	Northwest Tel
Yukon Territory	Northwest Tel

21. There are other small, independent telephone companies located primarily in Ontario, Quebec and British Columbia. At the present time, these companies contract out their publishing requirements to Tele-Direct Services or Dominion Directories.

22. The Telcos each have readily identifiable trademarks, such as "Bell", "AGT" or "MT&T", which have accumulated significant goodwill in Canada. Each Telco (other than those Telcos which are the same entities as the Publishers - see paragraph 23 below) has licensed one Publisher to use these trademarks in connection with its Telephone Directories in the province in which the Telco is the principal supplier of local telephone services. To this extent, therefore, the Publisher either is the Telco or becomes "authorized" by a Telco.

23. The "authorized" Telephone Directory Publishers in Canada are as follows:

<b><u>Province</u></b>	<b><u>Principal Local Telco</u></b>	<b><u>Authorized Publisher</u></b>	<b><u>Relationship Between Publisher and Telco</u></b>
British Columbia	BC Tel	Anglo Canadian (Dominion Directory)	affiliate
Alberta (except Edmonton)	AGT	AGT Directory	affiliate
Edmonton	ED TEL	ED TEL Directory	same entity
Saskatchewan	Sask Tel	DirectWest	non affiliate
Manitoba	MTS	MTS	same entity
Ontario	Bell	Tele-Direct	affiliate
Quebec	Bell Quebec Tel	Tele-Direct Anglo Canadian (Dominion Directory)	affiliate affiliate
Nova Scotia	MT&T	MT&T Holdings	affiliate
New Brunswick	NB Tel	Tele-Direct Services	non affiliate
Prince Edward Island	Island Tel	MT&T Holdings	affiliate
Newfoundland and Labrador	Newfoundland Tel	Tele-Direct Services	affiliate
Northwest Territories	Northwest Tel	Tele-Direct Services	affiliate

Yukon Territory Northwest Tel Tele-Direct Services affiliate

24. All of the Publishers, except for ED TEL, publish a number of Yellow Pages Telephone Directories within their exclusive territories. The following chart sets out the number of Yellow Pages Telephone Directories currently published by each company:

<u>Province</u>	<u>Publisher</u>	<u>No. of Directories</u>
British Columbia	Dominion Directory	49
Alberta (except Edmonton)	AGT Directory	22
Edmonton	ED TEL	1
Saskatchewan	DirectWest	10
Manitoba	MTS	10
Ontario	Tele-Direct Tele-Direct Services	45 3
Quebec	Tele-Direct Tele-Direct Services Dominion Directory	37 3 11
New Brunswick	Tele-Direct	9
Nova Scotia	MT&T Holdings	10
Prince Edward Island	MT&T Holdings	1
Newfoundland and Labrador	Tele-Direct Services	4
Northwest Territories	Tele-Direct Services	1
Yukon Territory	Tele-Direct Services	1

25. Individual Telephone Directories are revised, reproduced and distributed annually. The "churn" rate, that is, the number of new connects, disconnects and other changes to the Telco Subscriber Data Base, is approximately 2.7 percent per month on average.

26. The production of Telephone Directories is an undertaking of sufficient scale and complexity that it generally requires specialized staff dedicated year round to the role.

27. Paragraph 23 above illustrates that there are at least three ways that a Telco or local telephone company can ensure that Telephone Directories are published: it can publish them itself using an internal operating group or division (*e.g.*, ED TEL, MTS); it can use a publishing affiliate (*e.g.*, BC Tel, AGT Directory, Bell, MT&T, Island Tel, Newfoundland Tel, Northwest Tel); or it can contract with an unaffiliated Publisher (*e.g.*, Sask Tel, N.B. Tel, and the independent telephone companies located in British Columbia, Ontario and Quebec).

28. The use of the Yellow Pages trademarks, combined with the identification of the Publisher with the Telco, confer a significant competitive advantage on the Publisher over other publishers of Telephone Directories from the perspective of local telephone subscribers, and therefore also from the perspective of local advertisers which target those same subscribers. This advantage has proven difficult to overcome by potential and existing competitors. Thus, the structure of the Telephone Directory publishing industry to a great extent parallels the structure of the telephone industry itself, with the dominant Publishers in each region closely identified with the Telco.

29. The competitive advantage which the association with the local telephone company confers on publishers is consistent throughout North America. Almost without exception, when an arm's length publisher loses its contract with the local telephone company, it is almost completely displaced by its successor.

30. Publishers associated with telephone companies pay a large part of the revenue generated from telephone directory advertising to the local telephone company with which they are associated. Throughout Canada, the U.S. and Europe, on average approximately 50 percent of total telephone directory advertising revenues go to the local telephone company. (For Telcos regulated by the CRTC, these revenues constitute deemed earnings of the telephone company for the purposes of rate setting.) This percentage does not change materially based on the relationship between the telephone company and the publisher (affiliate or arm's length); the type of relationship only affects the form that the payments may take (licence and royalty fees, dividends and so on).

31. Publishing Yellow Pages Telephone Directories has historically produced substantial profits.

32. Because of the predominantly local focus of Telephone Directories, the Publishers do not cooperate to any appreciable extent with each other in soliciting intraterritorial advertising for Telephone Directories. At the same time, however, the Publishers have co-operated extensively through CANYPS to facilitate the Selling of National Advertising.

33. CANYPS is an informal association of the Publishers whose mission is to improve the utility of their Telephone Directories to subscribers and National Advertisers. Independent Telephone Directory publishers cannot gain admission into CANYPS. CANYPS was formed in 1961 to provide a uniform national system for the Selling of directory advertising space in the members' Telephone Directories by enabling members to Sell Telephone Directory advertising in their own territories on behalf of other members, and to provide national standards for advertising specifications. A major purpose of CANYPS which has evolved over time is to develop ways to promote Yellow Pages Telephone Directories as an advertising medium. Historically, CANYPS published a Rates & Data Book which displayed only information with respect to CANYPS members; however, it has not published a Rates & Data Book since June, 1993.

34. The CANYPS system of Selling National Advertising was a parallel of the American system originally known as NYPS, which was developed and operated in-house by AT&T. The idea for the NYPS system was conceived of by AT&T in response to a perceived need of the advertising public for a central clearing house for national advertising which would provide "one contact, one contract, one bill" service, rather than having each national advertiser deal on an individual basis with each publisher for each of its directories. National advertisers in the United States found it difficult and expensive to place advertising with over twenty major telephone companies, which together published literally thousands of different directories, each with their own closing dates and price lists. NYPS rationalized the system. It was divested in 1975 and became an independent association called NYPSA. In 1988, NYPSA merged with the American Association of Yellow Pages Publishers to become the YPPA. The YPPA is a much broader organization than CANYPS, being comprised of more than 300 companies including publishers, independent sellers, and others who provide services to the telephone directory publishing industry in North America. The YPPA publishes a Rates & Data Book for its members. While the American market is larger and more complicated than the Canadian, the same problems for National Advertisers existed in this country. Hence, like NYPS, the CANYPS system was put in place primarily in response to a perceived need of National Advertisers.

35. The YPPA has developed an electronic order transmission system, called the Value Added Network or VAN system, to submit orders to the YPPA publishing members. This system has been adopted by the industry in Canada and has been accepted as the standard for order transmission by the Respondents.

36. In the early 1980s, the Respondents were members of NYPSA, as one of the predecessors to YPPA was then known. NYPSA interpreted its own by-laws as meaning that members of that association had the right to operate in Canada as Selling entities. The Respondents disagreed and resigned from NYPSA. Certain of the Respondents re-joined the association (now the YPPA) in 1991 after it was understood that independent American Selling entities would not have any inherent rights to receive remuneration for advertisements placed in Canada.

37. The Telephone Directory industry can be viewed as having a "publishing side" and a "selling side".

(i) The "publishing side" includes all matters relevant to the production of a Telephone Directory, including access to a subscriber data base (including information relating to new subscribers) upon which the Telephone Directories are based, physical creation of hard copy, printing, promotion and distribution. The terms of access to Subscriber Data Bases are essentially dictated by the Telco or one of its affiliates which owns the Subscriber Data Base. In the case of Bell, terms of access are regulated in some respects by the CRTC. Physical creation of hard copy involves transcription of an advertiser's order. Most Publishers contract out printing and distribution functions to independent third parties.

(ii) The "selling side" refers to the provision of services relating to the sale of advertising in a Telephone Directory, including establishing new customers, calling on customers, and providing advice, information and other services relating to the design, cost, content, location, creation and placing of advertisements.

(iii) There is a Selling function between advertisers and Publishers for the purposes of the placement of National Advertising which is performed by Selling Companies. Where a Publisher does not function as its own Selling Company, it can retain another to perform the role on an exclusive basis, or it can rely on accredited independent Selling Companies. An independent or unrelated Selling Company may be remunerated by Commissions paid by Publishers. In Canada, because of the terms of the CANYPS Agreement, only CANYPS members were recognized as Selling Companies prior to July 1, 1993 so there were no independents in this role.

38. The Publishers recognize a distinction between commissionable and non-commissionable accounts. As the names suggest, commissions are payable only on the former.

39. Each Publisher has established an Accreditation system which screens and authorizes Advertising Agencies and Specialized Agencies to operate in the industry and to receive commissions. The following chart sets out the number of companies recognized by each Publisher as of the end of 1993 as Advertising Agencies or Specialized Agencies, and at June 30, 1994 as Specialized Agencies:

<b><u>Publisher</u></b>	<b><u>Dec. 31, 1993 No. of Advertising Agencies</u></b>	<b><u>Dec. 31, 1993 No. of Specialized Agencies</u></b>	<b><u>June 30, 1994 No. of Specialized Agencies</u></b>
Dominion Directory	45	6	6
AGT	15	4	4
Ed Tel	2	2	2
Direct West	6	2	2
MTS	8	2	2
Tele-Direct	68	6	10
Tele-Direct (Services)	68	6	10
MT&T Holdings	4	0	0

40. Each Publisher has independently formulated commissionability standards for accounts located within its territory. Accredited Advertising Agencies and accredited Specialized Agencies may receive Commissions on sales that meet the commissionability criteria. As is the case in other media, the commission rate paid on these sales prior to July 1, 1993 had traditionally been 15 percent of the total value of the sale.

41. Prior to July 1, 1993, by virtue of the CANYPS Agreement, all National Advertising had to be channelled through the CANYPS member in whose territory the advertiser's head office was located. All of the CANYPS members paid commissions to the responsible Selling Company on all National Advertising accounts, regardless of the size of the account. None of the



Advertising Agencies or the Specialized Agencies referred to above were able to qualify for this Selling Company commission.

42. A Selling Company takes an advertisement placed by an advertiser or by an Advertising Agency or a Specialized Agency on behalf of an advertiser, readies it for publishing, transmits it to the other Publishers and bills the entity which placed the advertisement. Prior to July 1, 1993 a Selling Company in Canada usually received a 25 percent commission from the Publisher into whose Telephone Directories the advertisements were placed.

43. The CANYPS Agreement provided that any advertising emerging from the territory of a given Publisher/Selling Company for publication in a Telephone Directory outside of its territory earned a commission for that Selling Company. If no agency was involved, the Selling Company received 25 percent of the price of the advertisement and the publishing company 75 percent. When an outside agency was involved, it received 15 percent, the Selling Company received 25 percent of the remaining 85 percent (or 21.25 percent of the full price of the advertisement), and the publishing company received 75 percent of 85 percent (or 63.75 percent of the price of the advertisement).

### **Regulation**

44. All of the telephone systems in Canada have been either government owned or regulated for at least 50 years. As a result of two cases decided by the Supreme Court of Canada, federal jurisdiction over the entire industry has now been decided.

45. The principal regulatory decisions of the Federal regulator, the CRTC relating to Telephone Directories are:

- (a) Directory Data Base proceeding; CRTC 90-12 (decided June 14, 1990); CRTC 92-1 (decided March 3, 1992);
- (b) 1977 BC Tel Rates proceeding; CRTC 77-5 (decided May 17, 1977); and
- (c) 1977 Bell Rates proceeding; CRTC 7707 (decided June 1, 1977).

46. Following the June 14, 1990 decision, Bell filed a proposal setting out the elements of the directory data base it would provide as part of its general tariff offerings together with the fees to be charged.

47. As of April 6, 1993 Bell Canada reported to the CRTC that there had been no sales of the directory data base pursuant to the tariff.

48. An application was filed with the CRTC requesting that the Commission review and vary its decisions in the *Directory Data Base* proceeding. This Application is the subject of a proceeding before the CRTC (Public Notice 94-3), but no decision has yet been rendered.

49. For all regulated Telcos, the Terms of Service provide that subscribers are entitled to receive, without charge, copies of the most recent Telephone Directory for their district. Most Telco tariffs also provide that the contents of the Telephone Directories may not be published or reproduced in any form without the written consent of the Telco.

50. There are three aspects of the Telephone Directory industry in Canada which are regulated. First, the Telcos are required to provide copies of the current alphabetical and classified directories to all subscribers to the telephone system "free", or at no charge additional to that of basic telephone service. Second, the Subscriber Data Bases, which consist of the raw information on each subscriber to the networks and which reside in the computer files of the Telcos, are regarded by regulators as being assets of the Telcos. Third, the CRTC has, with the recent *Directory Data Base* proceeding, affirmed that it has the jurisdiction to force the Telcos which are under its authority to make the Subscriber Data Bases, or portions thereof, generally available pursuant to a tariff.

51. The CRTC does not regulate other aspects of the publication of Telephone Directories by or on behalf of the Telcos or any aspect of the publication of Telephone Directories by independent publishers. Therefore, the subject market of this Application, being the Selling of National Advertising into Telephone Directories, is unregulated.

### **Trademarks**

52. Tele-Direct has more than 50 registered trademarks. These trademarks include "Yellow Pages", "Pages Jaunes", the "Walking Fingers" design, "Let Your Fingers do the Walking", and the "Open Book" design. The "Yellow Pages" trademark was used in Canada as

early as 1948. It was registered in 1955 as a response to new provisions in the *Trademarks Act* that permitted, for the first time, the registration of authorized users of registered trademarks. Originally registered by Bell, ownership of the trademarks was transferred to Tele-Direct, and Tele-Direct in turn licenced other Publishers to use these trademarks. As of 1991, there were 24 registered users of the trademarks "Yellow Pages", and the "Open Book" design, and 26 registered users of the "Walking Fingers" design.

53. All of the Publishers make extensive use of trademarks in the promotion of their Telephone Directories.

54. The "walking fingers" design and the "yellow pages" word mark are not registered trademarks in the United States, although they originated in that country. Trademarks are used in the American yellow pages industry to indicate specific classified telephone directory origin. These include: Ameritech - "Pages Plus", NYNEX - "NYNEX Yellow Pages" and Pacific Bell - "SMART Yellow Pages".

55. As of April, 1991, the words "yellow pages" were registered as trademarks in forty countries around the world.

D. SIZE OF THE INDUSTRY AND THE RESPONDENTS' CONTROL OF IT

56. The Canadian Media Directors' Council, an association of Advertising Agencies, publishes annually *The Canadian Media Directors' Council Media Digest* (the "Media Digest"). The Media Digest is a compendium of advertising media and related information, including statistics taken from, among others, Statistics Canada and the Maclean-Hunter Research Bureau.

57. The 1992/93 edition of the Media Digest contains a table which breaks the Canadian advertising industry into twelve media categories and provides, for each, an estimate of net advertising revenue. The revenues in 1990 (the most recent year in the 1992/93 edition) for all twelve, taken together, is shown as \$9,205,523,000. The category "Directories, Phone, City" accounts for \$1,109,604,000, or 12.1 percent of the total. "Television", "Daily Newspapers", and "Other Print" accounted for greater proportions at 16.7, 17.5 and 23.9 percent respectively. The same table also shows that over the period 1985 through 1990, the category "Directories, Phone, City" was the fastest growing of all media listed in the table, from 8.3 percent in 1985 to 12.1 percent in 1990. By contrast the proportions for all other media listed in the table grew by less than 1 percent in the same five year period. In addition, the category "Directories, Phone, City"

was the only category of all those listed to show growth from 1989 to 1990 - it went from 11.4 percent to 12.1 percent of total revenues.

58. The above-noted table is based on estimated figures, and precise data is not available as to what share of the category "Directories, Phone, City" is held by the Respondents, but an estimate of 90 percent would likely be conservative.

59. The Respondents agreed prior to July 1, 1993:

(i) That only Publishers could Sell National Advertising directly into Telephone Directories;

(ii) To the appointment of each other as their exclusive Selling Companies for the Selling of National Advertising in Telephone Directories in each of their respective territories, an effect of which was that they did not compete with such exclusive Selling Companies in those territories; and

(iii) To a Head Office Rule.

### III.    GROUNDS FOR APPLICATION

#### A.    THE SUBJECT BUSINESS

60. The Publishers have been willing to resell information which they received from Telco Subscriber Data Bases only under strict conditions, including a condition which precludes further use of the information in Telephone Directories that would compete with those of the Publishers. There has been very little entry on the publishing side of the industry despite sustained high profits, which are consistently in excess of 50 percent on sales when the contribution to the rate base is taken into consideration.

61. Tariffed access to the Subscriber Data Bases under the auspices of the CRTC has, to date, not resulted in any competitive entry on the publishing side.

62. There are no other sources for data bases as current, complete and accurate as those in the possession of the Telcos.

63. Historically, the Telcos have allowed access to their data bases only to their affiliated or associated Telco Publishers, which have used them to publish Telephone Directories in fulfilment of the Telcos' obligations.

64. A Publisher could introduce a non-trademarked Telephone Directory into another Publisher's territory. This has happened only once in Canada and it was short-lived. These occurrences have been comparatively frequent in the United States, albeit also with limited success. Accordingly, the likelihood of any further attempted entry is low.

65. The Publishers created National Advertising as a separate channel of trade and, prior to July 1, 1993 reserved to themselves the sole ability to fully service that channel.

66. National Advertisers have unique needs related to the placing of ads with several Publishers. Moreover, the Respondents treat National Advertisers differently than they treat local advertising accounts. Selling National Advertising into Telephone Directories, therefore, constitutes a separate product market.

67. The Publishers had agreed neither to retain nor recognize independents as Selling Companies - they were obliged to use in this role the Publisher from whose territory the advertising was coming. There were thus no independent Selling Companies in Canada. From the National Advertiser's standpoint, because of the Respondents' anti-competitive practices the National Advertiser could not place its advertisements in regions outside of its Telco's service area without first going through its area Publisher. This was so even if it retained an Advertising Agency or Specialized Agency - the other recognized level of intermediation - to represent it. In that circumstance, the National Advertiser placed the advertisement with its agency, which in turn was required to place it with the local Publisher as the Selling Company, which then relayed it to the Publisher which actually published the advertisement. Thus, there were no means on the Selling side of the industry by which a National Advertiser could decline to use its local Publisher as its Selling Company.

68. Furthermore, as was noted above, the Publishers so dominate the Telephone Directory industry generally that, effectively, a National Advertiser could not decline to accept the Selling Company services of its home Publisher by advertising in an alternative Telephone Directory. Thus, there were no means on the publishing side of the industry by which a National Advertiser could decline to use its local Publisher as its Selling Company.

69. The Telcos each possess a monopoly over local telephone services. The Publishers each possess market power in respect of local Telephone Directory advertising, having gained that market power, *inter alia*, through their association with the Telcos. The Publishers in turn collectively used this local market power to create a separate national market, that being the market for supplying Selling Company services in the placement of National Advertising, and, through the provisions of the CANYPS Agreement, excluded all potential competitors from that market and essentially eliminated competition among themselves within that market.

70. Advertisers who engage in National Advertising have no practical choice of Telephone Directories in each jurisdiction; the Respondents' Telephone Directories are so dominant in each area that it would make no business sense to use another exclusively even if one were available.

**B. SUBSTANTIAL OR COMPLETE CONTROL OF A CLASS OF SPECIES OF BUSINESS**

71. The Respondents substantially or completely control, in each of their respective territories, the business of publishing Telephone Directories. The Respondents jointly control this class or species of business for the purposes of subsection 79(1)(a) of the *Act*.

**C. PRACTICE OF ANTI-COMPETITIVE ACTS**

72. Certain advertisers place advertising copy in the territories of more than one of the Respondents. Through the various elements of the CANYPS Agreement, as previously described, and the industry concept of the Selling Company, the Respondents allocated markets and ensured through the expedient of the Selling Company role that they did not compete with one another in the Sale of advertisements.

73. The CANYPS Agreement also ensured that no independent company would play the Selling Company role in the Canadian industry. If independents were allowed to do so, it could lead to competition for the Selling of advertising between the Respondents and the independents and between Respondents.

74. In summary, it is the Director's submission that the Respondents engaged in the following anti-competitive acts to impede or prevent a competitor's entry into or eliminating a competitor from a market. The anti-competitive acts of the Respondents constituted a practice of

anti-competitive acts by the Respondents which had the effect of substantially preventing or lessening competition in the relevant product market of the Selling of National Advertising into Telephone Directories in Canada. The Respondents:

(i) agreed that only Publishers could Sell National Advertising directly into Telephone Directories;

(ii) appointed each other as their exclusive Selling Companies for the Selling of National Advertising in Telephone Directories in each of their respective territories and therefore did not compete with such exclusive Selling Companies in those territories;

(iii) agreed to a Head Office Rule, thus precluding the National Advertiser from either placing the advertisements directly with all the Respondents which actually published the advertisements or using an entity unrelated to any of the Respondents to place the advertising directly in each Respondent's Telephone Directories.

75. The CANYPS Agreement has been in place since 1971 and has been amended from time to time, the most recent version being dated December 19, 1991. As such, each of the ongoing anti-competitive acts engaged in to impede or prevent a competitor's entry into or eliminating a competitor from a market constitutes a practice of anti-competitive acts.

76. Also, the Publishers were contractually precluded from Selling in any region other than their own, and the CANYPS Agreement allocated markets among the Respondents. This effect was clearly foreseeable by the Respondents and was intended by them.

#### **D. SUBSTANTIAL LESSENING OF COMPETITION**

77. The CANYPS Agreement created artificial barriers to entry into the market for the Selling of National Advertising into Telephone Directories in Canada. The operation of the CANYPS Agreement necessarily meant that no entity other than the Respondents could compete in Canada for National Advertising accounts as a Selling Company. Thus, barriers to entry were total. Consequently, the impugned practices identified in Part III.C. above have substantially lessened or prevented competition in that market for the purposes of subsection 79(1)(a) of the Act.

**IV. RELIEF SOUGHT**

78. The Director has engaged in discussions with the Respondents to the effect that the foregoing alleged anti-competitive acts and consequent substantial preventing or lessening of competition in the market as defined above can be adequately dealt with and remedied through the provisions of the Draft Consent Order, attached to the Notice of Application as Schedule "B". As a consequence of these discussions, the Respondents on July 1, 1993 voluntarily put into practice many of the changes contemplated in the Draft Consent Order. On June 21, 1994, the CANYPS Agreement was abrogated by the Respondents. Nevertheless, it is the Director's opinion that the Draft Consent Order is necessary to guard against recurrence of these practices. The Director thus seeks, pursuant to subsections 79(1) and (2) and section 105 of the *Act*, the issuance of the Draft Consent Order attached hereto.