

Competition Tribunal



Tribunal de la Concurrence

CT - 1994 / 001 – Doc # 82

IN THE MATTER OF an application by the Director of Investigation and Research
under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain practices by
A.C. Nielsen Company of Canada Limited.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

A.C. Nielsen Company of Canada Limited

Respondent

- and -

Information Resources, Inc.

Intervenor



**REASONS AND ORDER REGARDING MATTERS CONSIDERED
AT PRE-HEARING CONFERENCE ON SEPTEMBER 14, 1994:
AMENDMENT TO NOTICE OF APPLICATION, EXAMINATION FOR DISCOVERY,
AND PRODUCTION OF DOCUMENTS**

Date of Pre-hearing Conference:

September 14, 1994

Presiding Member:

The Honourable Mr. Justice William P. McKeown

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

Donald B. Houston
Bruce C. Caughill

Counsel for the Respondent:

A.C. Nielsen Company of Canada Limited

John F. Rook, Q.C.
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COMPETITION TRIBUNAL

REASONS AND ORDER REGARDING MATTERS CONSIDERED AT PRE-HEARING CONFERENCE ON SEPTEMBER 14, 1994: AMENDMENT TO NOTICE OF APPLICATION, EXAMINATION FOR DISCOVERY, AND PRODUCTION OF DOCUMENTS

The Director of Investigation and Research

v.

A.C. Nielsen Company of Canada Limited

The Director of Investigation and Research ("Director") brings a motion for an order compelling Stephen Churchill, the representative of the respondent A.C. Nielsen Company of Canada Limited ("Nielsen") to re-attend on his examination for discovery to answer the undertakings and refusals given on his examination for discovery taken on August 16 to 19, 1994. At the same time, Nielsen has brought a motion for an order *inter alia* compelling the Director's representative, Brian Chambers, to re-attend on his examination for discovery to answer proper questions arising out of the answers to the undertakings given at his examination for discovery on July 26 and 27, 1994. As counsel for the parties were able to reach agreement on the majority of issues raised by these motions, the motions have been adjourned *sine die*.

There remain outstanding four issues. The first is a motion by the Director seeking leave to amend the notice of application filed on April 5, 1994 by changing the name of the respondent to The D & B Companies of Canada Ltd. Counsel for the respondent having agreed to the amendment, leave will be granted as requested.

The other three issues argued arise from the rest of Nielsen's motion and will be dealt with *seriatim*.

I. EXAMINATION FOR DISCOVERY OF REPRESENTATIVES

Counsel for Nielsen pointed out that he had examined the Director's representative in accordance with the order of the Tribunal dated June 24, 1994. In response to the questions asked of him, the Director's representative gave approximately 106 undertakings ("the undertakings"). Approximately 90% of the undertakings required the Director's representative to go to Information Resources, Inc. ("IRI") for the information sought. Counsel pointed to various documents of which, as the transcripts of the examination for discovery indicated, the Director's representative had little or no knowledge. Counsel for Nielsen argued that the Director's representative had no personal knowledge of the facts of the case and had never been involved in the industry. He had never interviewed anyone about the case, nor taken witness statements. All of the information obtained during the examination for discovery was second, third or fourth hand. Although it is not unusual for an individual being examined for discovery to make undertakings to produce information which was not in his immediate knowledge, counsel for Nielsen argued that in the present case, the complainant is a direct competitor that will in all likelihood enter the market immediately on the completion of this application in the event that the application succeeds, and is therefore in a good position to provide information. He further submitted that, based on the documents submitted to date, there was reason to question the veracity of aspects of the complaint made by IRI. The only way to ensure that the respondent obtains a complete knowledge of the case it has to meet is to allow Nielsen to examine for discovery a representative of IRI.

Counsel for the Director responded that when the Director's representative is being examined, it is understood that the individual does not have firsthand knowledge and is basically passing on information received in the context of the investigation. When the Director's

representative was asked for undertakings, they were given and have been fulfilled. There was no indication from Nielsen to the Director's counsel that the answers provided were in any way deficient.

The Tribunal is persuaded that counsel for Nielsen has had full opportunity to discover the Director's representative. The fact that he had to rely on undertakings rather than direct answers is not unusual. A different situation exists with respect to the request to discover a representative of IRI. The attention of the Tribunal was directed to certain IRI documents that on their face raise questions relevant to Nielsen's defense. Some of these questions have apparently already been put to the Director's representative who obtained the answers from IRI. Counsel for the respondent would like to examine a representative of IRI on the grounds that the documents in question contain information sufficiently important to the defense of Nielsen that the answers should be provided directly so that they can be tested through cross-examination. The Tribunal grants this motion, but recognizes that it is acting out of an excess of caution since Nielsen has already had its opportunity for discovery.

However, the subject matter of the discovery and, by implication, the time spent must be limited. The broad issue of the conditions required for entry into the Canadian market or markets in question in the instant proceedings is raised by the documents to which the Tribunal was referred. Accordingly, questions may be put relating to specific IRI documents concerning the possible entry of that company into the relevant market or markets. Sub-headings that can legitimately be addressed are: the need for historical data; regional entry vs. entry at a national level; and the types of services that could be made available to clients depending on the type or level of entry. The Tribunal is not trying to substitute its judgment for that of counsel in setting out the foregoing headings. It has done so to make clear that the discovery is not to be open-ended and that the questions put must be tied in a clearly identifiable way to the IRI documents relating to entry. Other

sub-headings may be acceptable as long as there is an unambiguous connection between them and the issue of entry.

II. PRODUCTION OF DOCUMENTS BY THE DIRECTOR

We turn now to the second issue in Nielsen's motion which seeks the production, for inspection and copying, by the Director of the following documents over which the Director claims public interest or litigation privilege:

- (i) the complaint by IRI or its counsel and any further correspondence, memoranda or submissions from IRI or its counsel to the Director, his staff or his counsel,
- (ii) notes, materials and statements obtained or prepared by the Director, his staff or his counsel from meetings and discussions with IRI or its counsel, and
- (iii) statements, notes, material and correspondence obtained or prepared by the Director, his staff or his counsel from meetings and discussions with Canadian and U.S. packaged goods retailers, manufacturers and market research companies;¹

Nielsen relies for this motion on the decision of the Supreme Court of Canada in *R. v. Stinchcombe*,² which requires the Crown to disclose all of the "fruits of the investigation" to the defense. He noted that the standard of disclosure established in *Stinchcombe* has already been applied to non-criminal matters in *Human Rights Commission (Ont.) v. House*,³ and was discussed in Laskin J.A.'s dissenting opinion in *Michael Norman Howe v. The Professional Conduct Committee and the Discipline Committee of the Institute of Chartered Accountants of Ontario*.⁴

¹ Notice of Motion, para. (c) at 3.

² [1991] 3 S.C.R. 326.

³ (1993), 67 O.A.C. 72 (Ont. Div. Ct.), leave to appeal denied without reasons 31 January 1994.

⁴ (23 August 1994), (Ont. C.A.) [unreported].

He further submitted that in the past public interest privilege and litigation privilege were assigned to materials by the Tribunal on an *ad hoc* basis, and that no general principles of privilege were established. In the case at bar, the particular circumstances require full disclosure of the documents requested to allow Nielsen to present a full defence.

It is clear from the civil cases cited by the parties that how the principles of *Stinchcombe* are applied depends greatly on the circumstances. In both *House* and in Laskin J.A.'s dissent in *Howe*, stress is laid on the dire personal consequences that could result from an adverse decision. In *House* the Court quotes Beetz J. in *Singh v. Minister of Employment and Immigration*: "The most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned."⁵ The Court then continues:

There is no dispute in these proceedings that the allegations made by the complainants are indeed extremely serious. Any racial discrimination strikes at the very heart of a democratic pluralistic society. It is, of course, of the utmost seriousness if any such racial discrimination exists or has existed in an important public institution such as a major hospital. The consequences attendant on a negative finding by a Board of Inquiry would be most severe for the respondents as any such findings could and should seriously damage the reputation of any such individual.⁶

And in *Howe* Laskin J.A. says:

Discipline proceedings are near the judicial end of the spectrum of administrative decision-making. Therefore they call for disclosure that exceeds the minimum requirements of s.8 of the *Statutory Powers Procedure Act* and that approaches the kind of disclosure applicable in court proceedings. To use Dickson J.'s phrase in *Kane v. Board of Governors of the University of British Columbia*, *supra*, at p. 1113, discipline proceedings require "a high standard of justice". The reason is obvious. Discipline proceedings may have serious consequences on a person's livelihood, reputation and professional career. For some professionals, a finding of professional misconduct is more serious than a criminal conviction.⁷

⁵ [1985] 1 S.C.R. 177 at 229.

⁶ *Supra* note 3 at 78.

⁷ *Supra* note 4 at 10.

The Court in *House* noted that proceedings before the Human Rights Commission of Ontario could not be equated with civil proceedings since there was no documentary or oral discovery in the Commission's proceedings.⁸ The absence of discovery was also stressed by Laskin J.A. in *Howe*: "The desirability of ensuring proper disclosure is especially important in proceedings before tribunals like the Discipline Committee of the ICAO, which do not provide for the discovery and production of documents."⁹

In *Ciba-Geigy Canada Ltd. v. Patented Medicine Prices Review Board*, McKeown J. reviews *Stinchcombe* and then states:

In my view, in the case at bar, I must examine the statutory scheme pursuant to which the Patented Medicine Prices Review Board was created, and construe it as a whole to determine the degree to which Parliament intended the principle of fairness to apply.¹⁰

He then distinguishes *House* from the case before him and continues:

Finally, the nature of the rights the Ontario Human Rights Code is designed to protect are very personal individual characteristics. Tribunals charged with regulating economic activity have not had placed on them the same high standards as tribunals dealing with personal individual rights.¹¹

This decision was upheld by the Federal Court of Appeal.¹² Writing for the Court, MacGuigan J.A. distinguished *House* from the case before the Court by noting that "[t]he Court in *House* analogized the proceedings in question to criminal proceedings and the role of Commission

⁸ *Supra* note 3 at 76.

⁹ *Supra* note 4 at 11.

¹⁰ (3 May 1994), T-375-94 (F.C.T.D.) at 10.

¹¹ *Ibid.* at 13.

¹² *Ciba-Geigy Canada Ltd. v. Patented Medicine Prices Review Board* (7 June 1994), A-209-94 (F.C.A.) [unreported].

counsel to that of the Crown in criminal proceedings."¹³ After quoting *House* on the seriousness of the allegations, the Court went on to say:

This is where any criminal analogy to the proceedings in the case at bar breaks down. There are admittedly extremely serious economic consequences for an unsuccessful patentee at a s. 83 hearing, and a possible effect on a corporation's reputation in the market place. But as McKeown J. found, the administrative Tribunal here has economic regulatory functions and has no power to affect human rights in a way akin to criminal proceedings.¹⁴

The Court concluded: "We are all agreed with McKeown J. that `law and policy require that some leeway be given an administrative tribunal with economic regulatory functions ... in pursuing its mandate.'"¹⁵ While the Competition Tribunal is clearly not a regulatory body, it is equally clear and relevant to the point at issue that the *Competition Act* encompasses a broad scheme of economic regulation.

It is clear in these decisions that the requirements for procedural fairness and natural justice must be considered in the light of the legislative scheme and the way in which that scheme has been implemented. The issue is whether the scheme now in place in applications before the Tribunal affords respondents with both information to know the case that they have to meet and with information that they can use in their defense.

We consider first Nielsen's view that the previous decisions of the Tribunal and the decision of the Federal Court of Appeal upholding one of these decisions did not establish privilege for a class of documents.¹⁶ We cannot agree with this view. The decisions do establish privilege for a class of documents.

¹³ *Ibid.* at 4.

¹⁴ *Ibid.*

¹⁵ *Ibid.* at 5.

¹⁶ *Director of Investigation and Research v. The NutraSweet Company* (29 November 1989), CT-8902/79, Order Regarding Questions on Discovery, [1989] C.C.T.D. No. 54 (Q.L.) (Comp. Trib.); *Director of Investigation and*

In order to better understand the context within which Nielsen's request for further disclosure has been made, we will review what information is available to the respondent in the present instance, and what it is that the respondent still seeks. Nielsen has had both documentary and oral discovery of the Director. The Tribunal granted the respondent documentary discovery of a third party, IRI, because there were few documents in the Director's possession and there were good reasons for believing that there were documents in the possession of IRI that could be useful in the defense of the respondent. Under procedures established by the Tribunal in previous cases, the respondent has been provided with summaries of the documents sought by the respondent for which a claim of public interest or litigation privilege has been advanced by the Director. These include more than 30 summaries of the information that the Director received from industry participants. Furthermore, the Director has agreed to supply lists of witness names and summaries of the evidence to be presented through these witnesses three weeks prior to their appearance at the hearing of the application. There has been no suggestion by counsel for Nielsen that the summaries provided by the Director are incomplete save that the names of firms whose representatives supplied information have been deleted, as has information that could lead to the firms being identified. In the event that Nielsen were of the view that the information was otherwise incomplete, the Tribunal would agree to have a judicial member of the Tribunal who will not sit on the panel that eventually hears the application determine whether the suspicion was well founded.

The possible importance of the missing information to the defense of the respondent (or of any respondent, save for circumstances unforeseeable at this time) has to be evaluated in the light of the types of cases heard by the Tribunal. Prior to the amendment of the *Combines Investigation Act* in 1975 all areas were dealt with under criminal law. In 1986 there was the transfer of the very

Research v. Hilldown Holdings (Canada) Limited (11 July 1991), CT-9101/51, Order Regarding Scope of Discovery to be Provided by The Director of Investigation and Research [1991] C.C.T.D. No. 20 (Q.L.) (Comp. Trib.); *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 68, [1991] C.C.T.D. No. 16 (Q.L.) (Comp. Trib.); *Hilldown Holdings (Canada) Limited v. Director of Investigation and Research* (10 October 1991), (F.C.A.) [unreported].

important areas of mergers and monopoly from criminal to civil law. What is characteristic of these and other matters heard by the Tribunal is that there is rarely an issue about what was done, about the actions taken. The dispute typically revolves around the effects of the conduct such as a merger or, as in this case, about the effects of contracts entered into by the respondent. Thus the nature of the case that the respondent has to meet does not involve allegations of particular conduct related to specific times and places. While it might be useful for the respondent to know what every individual that the Director spoke to had to say, because it would probably reduce the length of case preparation, whether or not such information is made available is primarily a matter of convenience; the nature of the issues are not such that a case depends on the views of a few industry participants. Should this ever be so, the respondent would undoubtedly know who the participants in question were.

The Director starts a case in virtual ignorance of the industry unless there has been a recent case concerning it. He must depend on the co-operation of industry participants to gain general background information as well as to evaluate a complaint or complaints. There are good reasons for ensuring that the Director is able to obtain such co-operation by ensuring that, unless they are called as witnesses, individuals called upon by the Director are protected from having their names divulged which could result in an unnecessary possible souring of commercial relations with the respondent. There is no reason to doubt the importance to the Director of voluntary co-operation by industry participants.

Enforcement of the *Competition Act* depends on the willingness of complainants to come forward. It is true that once an application has been filed the identity of the complainant is known. However, the same cannot be said about examples or allegations made that introduce the names of other firms or individuals. For the reasons already stated, this type of information is not what determines cases before the Tribunal. However, should representatives from the firms in question be called as witnesses, the respondent is informed of their identity and the content of their evidence in good time.

Respondents, on the other hand, start with a knowledge of the industry, including the participants therein. This fact does not change the requirement that respondents must fully know the case that they have to meet and that they must be afforded full opportunity to defend themselves. The discovery procedures in place are designed to ensure that this occurs. There is no reason for re-evaluating the grounds on which privilege was accorded to various documents and to some information contained therein unless there is good reason to believe that either the documents themselves or the excluded information are important to the defense of the respondent.

There is one further matter that needs to be addressed and that is the position put forward by counsel for Nielsen that there are special issues in this case that justify a departure from the practice of the Tribunal in previous cases. It is argued that IRI is a sophisticated litigant who is using the machinery of the Director towards its own ends and some of the IRI documents tend to confirm this. However, all complainants undoubtedly seek to convince the Director to adopt their view and to thereby improve their circumstances. It is up to the Director to take adequate measures to ensure that he is not taken in, since he has responsibility for the carriage of a case. Ironically, yielding to Nielsen's request could jeopardize the Director's ability to adequately evaluate complaints in the future since he would face greater difficulty in obtaining the willingly-given and candid views of industry participants. In any event, it is the Director's case that the respondent must meet, and not the complaint of IRI.

Given the above, and particularly given the amount of disclosure already afforded Nielsen and the fact that the respondent has been given the opportunity to examine a representative of IRI, although admittedly restricted to narrowly defined issues, it is our view that Nielsen should not be entitled to production of the documents requested. As stated above, if Nielsen feels that the

summaries of the documents supplied are incomplete, a review of the documents and summaries by a judicial member of the Tribunal who is not part of this case can be arranged.

III. PRODUCTION OF IRI DOCUMENTS TO REPRESENTATIVES OF NIELSEN

The third issue in Nielsen's motion concerns a request for access by two representatives of Nielsen to virtually all of IRI's documents provisionally protected under the highest level of confidentiality, "Level A".¹⁷ The term "provisional" applies because an evaluation of the claims for confidentiality and objections thereto is the subject of a pre-hearing conference on October 3, 1994. In responding to Nielsen's motion, counsel for IRI stated that some of the documents with a recent date were highly confidential and that providing them to Nielsen could have severe repercussions for IRI since the documents deal with recent plans.

While as a general rule it is always preferable for counsel to be able to share information with a client, this general preference has to be tempered when the information is confidential. The standard for confidentiality set out in the *Competition Tribunal Rules* is that of "direct commercial harm".¹⁸

It is relevant in considering Nielsen's motion to recognize that Nielsen's documents are protected from the kind of disclosure sought of IRI's documents. While counsel for the Director may consult with his client, i.e., the Director and his staff, this does not pose any danger of commercial harm to Nielsen. Counsel for the Director is not able to seek the views of industry participants or other knowledgeable individuals unless they are to be consulted as experts. Counsel for IRI, an intervenor, is foreclosed from showing any confidential material to his client. While the

¹⁷ (26 July 94), CT9401/56, Confidentiality (Protective) Order, [1994] C.C.T.D. No. 10 (QL) (Comp. Trib.).

¹⁸ *Competition Tribunal Rules*, SOR/94-290, s.16(3).

role of an intervenor is necessarily smaller than that of the parties, the intervenor does have the right to present argument and to call evidence where it is not duplicative of that called by the Director.

While the rights of Nielsen are somewhat greater by reason of being a defendant, they must be considered in the light of the needs of all counsel and in relation to the harm that could be caused to IRI. Nielsen is repeating a request made at the pre-hearing conference held on July 14, 1994. The Tribunal stated at that time that it could not consider a blanket request for disclosure of confidential documents unless it had an explanation of the particular need to disclose an entire document or part of a document. Counsel for Nielsen is in effect repeating his request without providing the detail requested by the Tribunal save for discussion of a particular document. The Tribunal cannot accede to such a blanket request. All counsel are sophisticated in the types of matters before the Tribunal. Where documents contain difficult technical information counsel are free to seek the input of experts. They are able to explore and illuminate documents during oral discovery. There can be no question of their ability generally to carry on without detailed input from industry participants. However, there may be exceptions, and the Tribunal is willing to consider them. But in doing so it must balance the harm to the party whose documents are being disclosed. To disclose recent marketing and business plans of IRI to a Vice-President of Marketing of the respondent, as counsel for Nielsen proposes, could clearly be very harmful to IRI and, as claimed by the Director, potentially to the competitive process as well, since IRI is the most likely entrant into the industry.

It is possible that a number of documents which IRI claims are highly confidential may not retain that status. They might then become available to agreed upon representatives of Nielsen. Any disclosure of documents to Nielsen representatives beyond these documents would only be entertained if there were good reasons in support of such disclosure.

Nielsen has withdrawn part of its motion since it no longer seeks disclosure of documents 2, 3, 4, 5, 6, 7, 8, 9, 10, 103, 104, 105, 115, 116, 117, 119, 141, 144, 147 and 152 to Nielsen representatives. The Tribunal will not permit disclosure of documents 139, 140, 142, 143, 145, 148, 149, 150 and 151 to Nielsen representatives. Documents 106, 107, 108, 120, 121, 122, 123, 124, 125, 126, 127, 128 and 131 will be released to Nielsen representatives after the pre-hearing conference on October 3, 1994 unless IRI, at that time, provides the Tribunal with further information why they should not be released. The Tribunal is not deciding whether any of the documents are confidential or not since it was agreed that this was to be settled at the pre-hearing conference on October 3, 1994. The issue as to which representatives of Nielsen should be permitted to review any documents in this latter group may be raised at the pre-hearing conference on October 3, 1994.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

1. Leave is granted to the Director to amend the notice of application filed on April 5, 1994 by changing the name of the respondent A.C. Nielsen Company of Canada Limited to The D & B Companies of Canada Ltd. and the name of the respondent is hereby amended.
2. A representative of IRI shall attend at an examination for discovery to answer to the best of his or her knowledge, information and belief any proper questions relating to specific IRI documents concerning the possible entry by IRI into the relevant market or markets. More specifically, questions may address the following sub-headings: the need for historical data, regional entry vs. entry at a national level, and the types of services that could be made available to clients depending on the type or level of entry. Other sub-headings may be addressed provided that there is a clear and unambiguous connection between them and the issue of entry.

3. The motion by Nielsen (now known as The D & B Companies of Canada Ltd.) that the Director produce for inspection and copying by Nielsen privileged documents as set out in paragraph (c) of the respondent's notice of motion, is dismissed.

4. The motion by Nielsen to permit its representatives to inspect "Level A" documents of IRI is dismissed with respect to documents 139, 140, 142, 143, 145, 148, 149, 150 and 151. Nielsen has withdrawn the motion with respect to documents 2, 3, 4, 5, 6, 7, 8, 9, 10, 103, 104, 105, 115, 116, 117, 119, 141, 144, 147 and 152. Regarding the balance of the "Level A" documents, in accordance with the reasons herein the motion is adjourned to the pre-hearing conference on October 3, 1994.

DATED at Ottawa, this 22nd day of September, 1994.

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

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