

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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REGISTRATION	REGISTRATION
OTTAWA, ONT.	# 4

CT94-01

THE COMPETITION TRIBUNAL

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 A.C. Nielsen Company of Canada Limited.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

A.C. NIELSEN COMPANY OF CANADA LIMITED

Respondent

RESPONSE

1. The Respondent, A.C. Nielsen Company of Canada Limited, was amalgamated with Dun & Bradstreet Canada Limited and Media Measurement Services Inc. on December 1, 1991, to become The D&B Companies of Canada Limited ("D&B"). D&B carries on the business formerly carried on by A.C. Nielsen of Canada Limited through a division carrying on business as Nielsen Marketing Research ("Nielsen").

1. RESPONSE TO THE DIRECTOR'S GROUNDS AND MATERIAL FACTS

2. Nielsen admits the grounds and material facts set out in paragraphs 6 and 10 of the Statement of Grounds and Material Facts attached to the Notice of

Application (together the "Application") filed by the Director of Investigation and Research (the "Director").

3. Nielsen denies the grounds and material facts set out in paragraphs 1 through 5, 7 through 9, 11 through 45, inclusive, of the Application.

4. As to the whole of the Application, Nielsen states that:

- (a) The Director has artificially defined the relevant class or species of business to be the supply of "scanner-based market tracking services". In reality, the use of scanning data is only one of many data collection *methodologies* employed by Nielsen and its competitors to provide market tracking information which is, in turn, only one component of the business of providing decision support services described in paragraph 5 below ("Decision Support Services");
- (b) Nielsen does not substantially or completely control any of the methodologies it employs to collect data, including "scanner-based market tracking", or the Decision Support Services business in Canada. Indeed, there is vigorous competition for the supply of raw market tracking data in Canada as well as in the Decision Support Services business;
- (c) Nielsen has not, at any time, engaged in any practice of anti-competitive acts and, in particular, those acts set out in sub-paragraphs 2(a), 2(b) and 2(c) of the Application; and
- (d) None of Nielsen's business practices have, and never have had, the effect of preventing or lessening competition substantially in the

Decision Support Services business, generally, or in the supply of raw market tracking data, more specifically, in Canada.

II THE RESPONDENT AND THE NATURE OF ITS BUSINESS

5. Nielsen provides information services to its customers which involves the effective integration of data, such as market tracking data, with information management tools, applications and human resources. These services (referred to throughout this Response as Decision Support Services) are purchased by Nielsen's customers to assist them in the marketing and distribution of their products. Nielsen is one of several competitors in the supply of Decision Support Services in Canada, some of whom provide a full range of services, as does Nielsen, whereas others provide some, but not all, of the available services.

6. Market tracking is but one component of the business of Decision Support Services and involves using a database to measure, over time, the movement of specified products at some point in the distribution chain from factory to consumer to produce an estimate of market size and direction as well as the relative performance of individual brands and stock keeping units ("SKUs"). The database may also contain information on demographics or "causal" factors which may influence the size or direction of the market and the performance of individual brands or SKUs. Market tracking enables manufacturers and retailers to plan more effectively the marketing and merchandising of their products based on previous trends.

7. Contrary to the characterizations set out in the Application, tracking of consumer product sales is but one segment of the Decision Support Services business, and point-of-sale scanning is but one methodology for collecting tracking data. Other data collection methods which have and continue to be employed in Canada include: pooled factory shipments, warehouse withdrawals, store audits and household panels using diaries, I.D. cards and portable home scanning devices (collectively, "Non-Scanner Methods"). Every market tracking methodology, including scanner-based market tracking, has inherent strengths and weaknesses, but each of the data collection methodologies listed above is used today in Canada.

8. In or about 1980, some retail grocery stores in Canada began to use Universal Product Codes ("UPC") and scanning equipment at check-out counters to record the sale of products. Between 1980 and 1985, Nielsen explored the possibility of using the output from scanner installations as a data collection methodology. Contrary to the definition of "UPC Scanner Data" set out in paragraph 5(b) of the Application, no data, except for the product's identification, is contained on the bar coded label affixed by the manufacturer to many products, such as consumer packaged goods.

9. In or around 1986, Information Resources Inc. ("TRI"), one of Nielsen's competitors, negotiated an agreement with the Canadian Grocery Distributors Institute (the "Institute") to obtain scanner-based data from its members on an exclusive basis. The proposed agreement contemplated that the members of the Institute, which comprised the major grocery retailers in Canada (the "Retailers"),

would provide IRI with exclusive access to all of their scanner-based data for a five year term.

10. Shortly thereafter, Nielsen entered into separate negotiations with each Retailer for access to its scanning data. On the basis of superior proposals and commitments, Nielsen negotiated an agreement with Canada Safeway Limited in June 1986, and shortly thereafter with Steinberg Inc. Subsequently, Nielsen negotiated agreements with other Retailers.

11. These agreements provided Nielsen with exclusive access to the scanner-based data from each Retailer for a five year term. During the term of these agreements, Nielsen made substantial investments and worked with the Retailers to employ effectively scanner-based technology. Throughout the first years of the original agreements, the scanner-based tracking method proved to be more costly, more time-consuming and often less accurate than Non-Scanner Methods due to significant ongoing data quality problems. Even today, while tracking data based solely on scanning is available for a few individual retail grocery chains, most of Nielsen's market tracking information is, by necessity, based on a combination of scanning, warehouse withdrawal and store audit data.

12. In 1989, Nielsen negotiated a renewed agreement with Canada Safeway Limited as a result of its acquisition of Woodwards. With the end of the initial five year terms approaching by mid-1991, Nielsen prepared and made presentations and individual proposals to each of the remaining Retailers in an effort to renew the respective relationships. Competitors of Nielsen were not, nor have they ever been, precluded in any way from making proposals to, and negotiating with, Retailers for

access to scanner-based data or other information. In fact, IRI also made presentations to and negotiated with at least one Retailer in 1991. Like the negotiations which took place in 1986, Nielsen's agreements with the Retailers were the result of a vigorous competitive process. IRI, an unrestricted participant in that process, was simply the unsuccessful competitor.

13. By 1991, further substantial investments were still required by Nielsen to maximize the potential cost-savings and efficiencies offered by scanning technology as a data collection methodology. Nielsen maintained its commitment to work with the Retailers in all areas including improving scanning quality, protecting sensitive data and offering an intensive product and servicing package to the Retailers. As a result of these ongoing commitments, and Nielsen's performance during the term of the earlier individual agreements, Nielsen was successful in negotiating agreements with each of the Retailers which provided for exclusive access to their scanner-based data (the "Retailer Agreements"). As each negotiation was conducted on an individual basis, the terms of the Retailer Agreements vary as among Retailers, including the length of the term of the contract and the respective termination provisions.

III. NIELSEN'S RESPONSE TO THE SPECIFIC GROUNDS FOR THE APPLICATION

14. Nielsen repeats that the Director has artificially defined "scanner-based market tracking services" as the relevant class or species of business for the purposes of sections 78 and 79 of the *Competition Act*. As described in paragraph 7 above,

collecting data through scanner technology is a method by which information is gathered, and the Director admits as much at paragraphs 24 to 27 of the Application.

15. Nielsen does not substantially or completely control the business of Decision Support Services in Canada, nor the supply of scanner-based data, and has not done so at any time in the past. There are numerous existing competitors in this business, including IRI, and entry is unrestricted.

16. In particular, with respect to scanner-based data, each Retailer controls its own data and determines to whom and on what terms access to that data will be provided. As discussed above, there has been and continues to be significant competition for access to this data. Contrary to the Director's allegations, particularly in paragraphs 16, 34, 35 and 41 of the Application, Nielsen is not the only company in Canada offering Decision Support Services utilizing scanner-based data. Further, with respect to paragraph 33 of the Application, while Nielsen uses the scanner-based data to provide Decision Support Services in Canada on a national basis, such services may also be provided on a regional or on an account-specific basis, without data from all or substantially all Retailers.

17. Contrary to the allegations made at paragraphs 24 to 27 of the Application, Non-Scanner Methods are alternative methodologies to the scanner-based data collection methodology. In fact, Nielsen's experience has been that the scanner-based method may, in fact, be more time consuming and expensive than other methods of market data gathering. Further, as stated above, Nielsen has used, and continues to use both Non-Scanner Methods and the scanner-based method of data collection. To the extent that scanner-based data is more reliable, more timely

and more cost-efficient than other methods of data gathering, as alleged in paragraph 14 of the Application, it is only through the extensive labour, financial, and intellectual resources expended by Nielsen in developing the technology necessary to harness the potential of this method of data gathering, as more particularly described in paragraphs 11 to 13 above.

18. Contrary to paragraph 15 of the Application, access to UPC scanner data is not required from substantially all retail chains in order to offer effective Decision Support Services to customers. First, as stated above, there are a number of effective and viable alternatives to the scanner-based method of tracking sales data. Further, even if one were limited to the scanner-based tracking method, effective services could be provided on a region-by-region or chain-by-chain basis, without the need to acquire data from all or substantially all retail chains.

19. In any event, access to scanner-based data is not foreclosed to Nielsen's competitors who are able to, and in fact do, negotiate with Retailers to acquire such data once the Retailer Agreements expire or are terminated. Further, with respect to large retail drug chains specifically referred to in paragraphs 2(a) and 21 of the Application, Nielsen is currently competing with IRI for access to scanner-based data from such a retailer. In the course of these negotiations, that retailer has specifically requested proposals on both an exclusive and non-exclusive basis. IRI, and any other competitor, has every opportunity to compete for access to scanner-based and non-scanner-based data from retail drug chains, and indeed any other type of retailer which has the capability of providing access to such information.

20. Nielsen denies that it does engage, or has ever engaged, in any anti-competitive acts, and specifically those acts described in paragraph 2 and 37 of the Application. The Director has incorrectly characterized the process of competition and commercial negotiation in one aspect of the Decision Support Services business in Canada as a "practice of anti-competitive acts".

21. Contrary to the allegation set out at paragraph 40(e) of the Application, the contractual terms of Nielsen's agreements with Retailers have been and continue to be the result of commercial negotiations in a vigorous, open and free competitive process. These terms do not constitute a practice of anti-competitive acts, nor the creation of any barriers to entry. The terms of the Retailer Agreements vary as among Retailers, including the length of the term of the contract and respective termination provisions. Nielsen has not imposed these arrangements on the Retailers, but rather the Retailers, which own and control the source data at issue, have determined that this is the basis on which they will provide access to their data.

22. The length of the term of the Retailer Agreements and exclusivity are commercially reasonable, in that, significant investments by Nielsen have been and continue to be required. Further, Nielsen has required time to accumulate sufficient data to provide meaningful trended information to its customers. The exclusive arrangements have permitted Nielsen to work with the Retailers to ensure that data quality is maintained for each sample store required. Accordingly, Nielsen's efforts have resulted, and continue to result, in various benefits and efficiencies to both retailers and manufacturers in Canada. Notwithstanding significant investments

made by Nielsen over time, Nielsen has only recently begun to obtain consistent usable data from a majority of Retailers.

23. Nielsen's arrangements with Retailers are open to competition at the conclusion of the term of each of the Retailer Agreements or earlier, depending on the termination provisions negotiated as part of each agreement. Such competition has occurred and continues to occur. Further, Nielsen repeats that there are not now, nor have there ever been, any restrictions on Nielsen's competitors in using Non-Scanner Methods or otherwise participating in the business of providing Decision Support Services in Canada and such competition has occurred and continues to occur.

24. As previously stated, any amounts paid, as well as the level and range of products and services committed to by Nielsen, under the Retailer Agreements reflect the process of commercial negotiations in a competitive environment.

25. Nielsen denies that any agreements or intended agreements with manufacturers of consumer packaged goods to provide Decision Support Services constitute any form of an anti-competitive act as alleged at paragraph 37 of the Application. In fact, only a small proportion of Nielsen's agreements with these customers are for terms of three years or more, and such longer terms have come about primarily in the context of international arrangements among those organizations.

26. Nielsen denies that the notice provisions of any of these agreements are "substantial", and that any penalties are imposed for early termination as alleged in the Application. The termination provisions in Nielsen's agreements with

manufacturers are commercially reasonable and the result of negotiations between the parties.

27. Nielsen denies that any of its competitive business activities, more particularly described above, in any way has had the effect of preventing competition substantially in the market for Decision Support Services or specifically, in the supply of services dependent on scanner-based data.

28. Contrary to the allegations in paragraph 38 of the Application, Nielsen's success in negotiating arrangements with Retailers for access to scanning data has been the result of a vigorous competitive process and this process continues. Nielsen's success has been, and is, a result of superior competitive performance.

29. The Director's focus on the United States in paragraphs 17 and 39 of his Application is ill-founded. As the Director asserts in paragraph 32 of the Application, there are significant differences in the marketing of consumer goods as between Canada and the United States. Despite the much larger size of the consumer goods industry in the United States and the greater number and regional diversity of retailers, many providers of market tracking information have exited this part of the business in the past several years.

30. Even so, contrary to the Director's allegations, there is significant competition in Canada. This has resulted in Nielsen's prices to its manufacturer customers remaining constant or declining, after accounting for inflation, since the introduction of scanning in the mid-1980s, while product quality, delivery and the range of services and software have improved substantially. Further, product

development and innovation in Canada has compared quite favourably with the United States given the limited quantity of usable scanning data in Canada.

31. The circumstances identified in paragraph 40 of the Application are not barriers to entry, but are simply the result of the competitive process and commercial negotiations. With respect to paragraph 40(c) of the Application, Nielsen does not retain historical raw scanning data from Canadian grocery retailers. Nielsen does retain proprietary information which it has developed from the raw data.

IV. RELIEF SOUGHT BY THE DIRECTOR

32. In requesting the relief set out in paragraph 45 of the Application, the Director seeks to obtain for IRI what IRI was unsuccessful in achieving through the competitive process. If successful, the result will disrupt the commercial relationships between Nielsen and its suppliers and customers which have resulted in efficiencies, product development and innovation and competitive prices in the consumer packaged goods industry in Canada.


33. Nielsen states that the Tribunal does not have jurisdiction to grant the relief sought in paragraph 45(b) of the Application.

34. For the reasons set out above, Nielsen requests that the Director's Application be dismissed.

V. PROCEDURAL MATTERS

35. Nielsen is agreeable with the Director's request that the Application be heard in Ottawa and in the English language.
36. Service of documents may be effected on Nielsen's counsel at the addresses set out below.

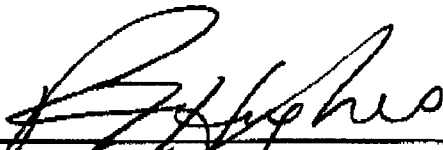
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