

Competition Tribunal



Tribunal de la Concurrence

CT - 1994 / 001 – Doc # 57

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 FOR CONFIDENTIALITY (PROTECTIVE) ORDER**

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**Date of Pre-hearing Conference:**

July 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  
David Wolinsky  
Bruce C. Caughill

**Counsel for the Respondent:**

**A.C. Nielsen Company of Canada Limited**

Randal T. Hughes  
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**Counsel for the Intervenor:**

**Information Resources, Inc.**

Gavin MacKenzie  
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**COMPETITION TRIBUNAL**  
**REASONS FOR CONFIDENTIALITY (PROTECTIVE) ORDER**

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*The Director of Investigation and Research*

v.

*A.C. Nielsen Company of Canada Limited*

**I. INTRODUCTION**

At the pre-hearing conference on July 14, 1994, the Tribunal considered various motions relating to documents over which confidentiality is claimed by the parties and the intervenor. Proceedings at the pre-hearing conference were greatly facilitated by the fact that all counsel agreed that, for the present, all documents over which confidentiality was claimed would be subject to a protective order restricting access. Challenges to claims of confidentiality, or the level of confidentiality accorded, with respect to individual documents were deferred to a pre-hearing conference to be held in early October. This seems eminently reasonable, in that many of the documents which now might be the subject of heated dispute with respect to their confidential status may turn out to be unnecessary for purposes of the hearing of this application. By early October, the parties and the intervenor should have a better idea of which documents will likely be adduced into evidence. The issues that remained to be dealt with were all related to the terms of access to protected documents<sup>1</sup> by the parties, the intervenor and their counsel and experts.

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<sup>1</sup> For reasons of clarity, the term "protected documents" is used to refer to documents subject to a claim for confidentiality. At this point, no determination of the confidential status of individual documents has been attempted.

In their affidavits of documents, produced in accordance with the Tribunal rules, the Director of Investigation and Research ("Director") and the respondent, A.C. Nielsen Company of Canada Limited ("Nielsen"), claimed confidentiality over and sought to restrict access to some of the documents listed in the affidavits. In the case of the Director, one document was subject to a confidentiality claim; for Nielsen, confidentiality was claimed for the majority of the 840 documents listed in the affidavit. On June 18, 1994, upon the motion of Nielsen, the Tribunal ordered the intervenor, Information Resource, Inc. ("IRI"), to produce an affidavit of documents listing all documents relevant to three subject areas.<sup>2</sup> IRI claimed confidentiality over the majority of the 152 documents listed in its affidavit, including the one document also listed in the Director's affidavit. On June 24, 1994, the Director was ordered to provide summaries of the material facts contained in several groups of documents over which he claimed privilege.<sup>3</sup> The Director claimed confidentiality over those summaries.

## **II. MOTION BY NIELSEN**

Nielsen brought a motion to restrict access to its protected documents to counsel for the Director and to the Director, his staff and consultants or experts retained by him upon execution of a confidentiality agreement. Nielsen opposed any disclosure of its protected documents to IRI, its counsel or experts. Both the Director and IRI took the position that Nielsen's protected documents should be disclosed to IRI's counsel and experts. IRI did not ask that these documents be provided to representatives of the company itself.

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<sup>2</sup> (18 June 1994), CT9401/22, Order Regarding Affidavits of Documents, [1994] C.C.T.D. No. 3 (QL).

<sup>3</sup> (24 June 1994), CT9401/30, Direction Regarding Motion of the Respondent, [1994] C.C.T.D. No. 6 (QL).

The arguments of counsel for Nielsen focused on whether IRI required access to Nielsen documents in order to make effective representations *as an intervenor*, and not as a "co-applicant". Counsel submitted that the request for leave to intervene of IRI sets out its position, which is in most respects identical to the position of the Director who has access to all Nielsen documents. It was further argued that to the extent that the proposed representations of IRI differ from those of the Director, in particular IRI's business in countries other than Canada and the claim that the situation in Canada has affected its ability to compete in those other markets, IRI does not need access to Nielsen documents to recount its experiences.

At the pre-hearing conference, the Tribunal ruled that IRI's counsel and expert witnesses would be provided access to Nielsen's confidential documents. As indicated briefly at that time, we are of the opinion that the test to be applied is the balancing of the harm to Nielsen and the ability of IRI to make representations effectively. We agree with the position of the Director that in balancing the harm to Nielsen from disclosure to IRI counsel and experts against the harm to IRI if no disclosure is ordered, the role of IRI as an intervenor, rather than a party, enters into consideration. Clearly, potential harm to a party weighs more heavily than potential harm to an intervenor.

Nielsen did not argue that any harm to it would flow from disclosure to IRI's counsel and experts. Non-disclosure does, however, affect IRI's ability to effectively intervene and to assist the Tribunal with its intervention. We agree with counsel for Nielsen that it is appropriate to recognize and maintain a distinction between a party and an intervenor in these proceedings. We are not granting access to Nielsen's protected documents to IRI's counsel and experts for reasons of reciprocity with Nielsen. (IRI did not object to disclosing its protected documents to Nielsen's counsel and experts.) IRI is not a "co-applicant" or party in this proceeding; it is an intervenor and, as such, it has certain, albeit limited, rights to participate. The Director represents the public interest; IRI clearly has a private interest in the outcome of the application. To some extent, these different

interests may coincide but IRI has been granted intervenor status in order to effectively represent its own interest.

The order of June 18, 1994 granted IRI the right to call expert evidence and the right to apply to call factual evidence under certain conditions. IRI also has the right to make submissions in argument on issues relevant to its particular interest. We consider that IRI's right to call expert evidence would be largely nullified if it were kept in ignorance of the factual basis in this matter until the moment when evidence was tendered at the hearing. As well, it would unnecessarily hamper the process if IRI had to apply to the Director, or upon his refusal, to the Tribunal, to call factual evidence relevant to its interest without knowledge of the factual case to be presented by the parties. Preparation by counsel for IRI for final argument regarding his client's interest will also be facilitated.

We do not accept the argument set out in IRI's memorandum in response to Nielsen's motion that its counsel requires access to Nielsen documents in order to "assist" counsel for the Director in preparing for examination for discovery of Nielsen and in preparing for the hearing. We note that counsel for the Director made no such argument and we emphasize that we are not granting access to IRI so that it can "assist" the applicant but rather so that it can fulfil its particular role as an intervenor. When balancing the harm to IRI as an intervenor from non-disclosure against the complete lack of harm to Nielsen from disclosure to counsel and experts, we came to the conclusion that the requested degree of disclosure was warranted.

### **III. MOTION BY IRI**

In its motion, IRI divided its protected documents into three categories: Level A, Level B and Level C. The Director, his staff, counsel and experts and counsel and experts for Nielsen would

have access to all protected documents, whatever the category. The only difference between the categories flows from the degree of access permitted to Nielsen representatives.

Except for certain issues surrounding the definition of and restrictions on "independent experts", which are dealt with separately below, there was no dispute about the terms of access to documents in categories B and C. Level B documents were described by IRI as employment application letters and related documents received by IRI in connection with IRI's proposal to establish a scanner-based national market tracking service in Canada in about 1985 and its subsequent activities in Canada. IRI sought to restrict access to these documents to counsel and experts for Nielsen and two designated individuals on behalf of Nielsen. Level C documents were described by IRI as documents provided to IRI by the Retail Council of Canada to enable IRI to develop the proposal referred to above. IRI proposed that these documents be made available to counsel, experts, employees and representatives of Nielsen but that they not be made public.

With respect to Level B and C documents, the Tribunal ruled as follows, in the words of the presiding judicial member:

With respect to category B and C documents, I reconfirm that neither the Director nor Nielsen have objected. Access to the IRI confidential documents in categories B and C will be restricted as set out in the draft order proposed by IRI.<sup>4</sup>

The dispute centred on the documents classified by IRI as Level A. Counsel for IRI indicated, in general terms, that these documents consisted of marketing, public relations, sales and other business plans of IRI, many of them very recent, pertaining to both IRI's proposed entry into the scanner-based tracking service market and in relation to its existing software business, in which IRI and Nielsen already compete in Canada.<sup>5</sup> IRI sought to restrict access to these documents to

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<sup>4</sup> Transcript at 103 (14 July 1994).

<sup>5</sup> For further description, see the affidavit sworn by Edward S. Berger on July 11, 1994 at para. 10-11.

counsel and experts for Nielsen. Even with a confidentiality agreement, and without assuming any bad faith on the part of the Nielsen representatives, counsel for IRI argued that the representatives to whom the documents were disclosed would be placed in an intolerable situation of conflict of interest. Even if the representatives did not reveal any confidential information directly, it would be difficult, if not impossible, for them not to consider what they had learned in making subsequent decisions which they are obligated to make in the best interests of Nielsen.

The Director supported the restriction, pointing out that access by Nielsen representatives to this type of information about a competitor, both existing and potential, could lead to adverse competitive consequences notwithstanding the outcome of this application.

Nielsen did not dispute the confidential nature of the documents but argued that fairness to Nielsen should be the overriding concern. It was submitted that since these documents were arguably the most relevant to critical factual issues, representatives of Nielsen must have access to them (upon execution of a confidentiality agreement) in order to instruct counsel for Nielsen properly in preparing to respond to the Director's application. Counsel also argued that some of the documents contained technical information for which operational assistance would be required. Counsel for IRI, on the other hand, characterized the documents as largely non-technical, although highly sensitive. Counsel for Nielsen indicated that he was willing to consider designating the particular representatives and restricting the number of representatives to whom the documents would be disclosed.

On July 14, 1994 the Tribunal made the following ruling:

Category A documents will at this time only be made available to counsel for Nielsen and independent experts. This ruling is made without prejudice to the right of counsel for Nielsen to come back to the Tribunal after having consulted with experts with a request to provide particular documents to named representatives of Nielsen.

At that time, unless Nielsen and IRI are able to reach some agreement on the question, we will hear representations from both parties and IRI in camera.



We consider that we will better be able to balance properly the important competing interests in the context of disclosure of particular documents to one or more named representatives. We place no restriction on the timing of such a motion but express the hope that it would not occur until after Discovery.<sup>6</sup>

Once again applying a balancing test, we weighed the potential harm to IRI from disclosure of these documents against the potential harm to Nielsen in preparing for the hearing without full disclosure to Nielsen representatives. Even placing additional emphasis on fairness to Nielsen as a party to this application facing the prospect of an order issuing against it, we were not prepared to issue a ruling that Nielsen representatives should have access to all Level A documents. The "blanket" nature of the request and of the arguments put forward by counsel for Nielsen caused us some concern. While we recognized that counsel for Nielsen might find it more difficult to get instructions and technical assistance with respect to certain documents and situations without the assistance of Nielsen representatives, we were not convinced that this would be a bar to all effective preparation by counsel on Nielsen's behalf or that the argument applied to every document contained in category A with equal force. We therefore declined to force wholesale disclosure of the documents to Nielsen representatives on the basis that the considerable potential harm from such disclosure, both to IRI and to competition in Canada, appeared to us, at least at this point, to outweigh the general concern raised by Nielsen's counsel.

While we were not prepared to order disclosure of all Level A documents at this juncture, our ruling on July 14, 1994 expressly left open to counsel for Nielsen the option of returning to the Tribunal to ask for disclosure of particular documents or parts of documents to identified representatives of Nielsen. We are of the opinion that the Tribunal will be better able to balance the competing interests at stake when faced with a particular fact situation, rather than a blanket request for disclosure of all documents to Nielsen representatives.

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<sup>6</sup> Transcript at 103-4 (14 July 1994).

There was some further dispute between Nielsen and IRI with respect to the appropriate definition of an "independent expert" and possible restrictions on the number and type of experts that could be retained. At the pre-hearing conference, the Tribunal ruled as follows:

With respect to experts, we agree that the definition of an independent expert excludes current and former employees of Nielsen. We are not prepared to restrict the definition further unless both parties and IRI so agree. We are prepared to restrict the number of experts that can be consulted by a party or the intervenor. We would set the number at six initially, again without prejudice to the right of a party or the intervenor to come back to us to ask for more.

We would also require that experts execute a confidential agreement, which includes a limitation on the activities that can be engaged in by that expert for a specified future period. It is understood that all counsel will provide confidential information to experts on a "need to know" basis.

Agreement has been reached between counsel that it would be satisfactory to file confidentiality agreements executed by experts with the Tribunal on a confidential basis to be released to other counsel and their clients at the close of the hearing of the application.<sup>7</sup>

At the time, counsel for Nielsen rightly pointed out that current or former employees of IRI would also be disqualified as "independent" experts and the ruling was so corrected. The draft order submitted by counsel requires that the executed confidentiality agreements be retained in confidence by the Registrar of the Tribunal until "completion or final disposition of this proceeding and any appeals relating thereto, at which time such agreements may be disclosed to the parties or the intervenor, upon request." Although this wording differs from the ruling handed down on July 14, 1994, the Tribunal has no objection to the wording suggested by counsel and has adopted it in the order.

We did not accept the argument put forward by IRI that independent experts should be restricted to full-time academics. Given that the real concern appeared to be the future industry participation of those persons retained as experts in this proceeding, we adopted the suggestion of counsel for the Director that a limiting clause be included in the confidentiality agreement to be

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<sup>7</sup> Transcript at 104-5 (14 July 1994).

executed by experts. The exact wording of the clause was left to counsel. For the same reasons, we acceded to the argument of counsel for IRI that the number of experts retained should be limited. He had suggested two experts. We recognized the validity of the argument of counsel for Nielsen that it required flexibility in preparing its case. We therefore set the number of experts at six initially but allowed for further application to the Tribunal to increase the number. The restriction on the number of experts applies equally to both parties and to the intervenor.

#### **IV. MOTIONS BY THE DIRECTOR**

The Director brought a motion to restrict access to the protected summaries of facts taken from documents subject to privilege claims. At the pre-hearing conference, all counsel agreed that the summaries could be disclosed to IRI on a counsel and expert only basis and could be disclosed to Nielsen counsel, experts and three designated representatives. The experts and the three Nielsen representatives are required to execute confidentiality agreements.

The Director also requested that the eventual order issued by the Tribunal not restrict the Director and his staff from discussing protected documents with persons to whom the documents had already been disclosed. In argument, counsel for the Director clarified that what he envisaged was discussing correspondence to and from Nielsen with the sender or the recipient and discussing Nielsen contracts with the other party to the contract. All counsel then agreed with the request.

Finally, the Director asked the Tribunal to revisit its previous decision that an implied undertaking not to use material obtained on discovery for purposes other than the conduct of the litigation in which it was produced applies in Tribunal proceedings.<sup>8</sup> He also asked that the Tribunal

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<sup>8</sup> *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 395, [1991] C.C.T.D. No. 15 (QL) (Comp. Trib.), aff'd (6 May 1993), A-634-91 (F.C.A.).

order that the Director and his staff were not required to execute confidentiality agreements (also referred to as "express undertakings") prior to receipt of protected documents, as requested by Nielsen. On the first point, the decision of the Tribunal was affirmed by the Federal Court of Appeal. In light of the Federal Court of Appeal decision, we ruled that it was not open to us to reconsider the question of the implied undertaking. On the second issue, we ordered that "[t]here is no requirement for the Director or his staff to execute a confidentiality agreement. The Director is bound by the order [confidentiality/protective order] and implied undertaking." Since there was no reason to suspect that either the order or the implied undertaking would be breached, we were of the view that requiring execution of the agreements was unnecessary in the circumstances.

## **V. CONCLUSION**

All counsel agreed that the most efficient course of action would be for them to draft an order based on the rulings handed down by the Tribunal at the pre-hearing conference. The draft order was duly filed on July 22, 1994 and an order based on the draft has been issued today, under separate cover.

DATED at Ottawa, this 26<sup>th</sup> day of July, 1994.

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

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