CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

The articles in this section were written by Christopher Brown of the Bureau of Competition Policy, Debbie A. Campbell of Fraser & Beatty and Bruce M. Graham of Smith, Lyons, Torrance, Stevenson & Mayer

NEW ISSUES OF *MISLEADING ADVERTISING BULLETIN* RELEASED

Three issues of the *Misleading Advertising Bulletin*, a publication issued by the Director of Investigation and Research, have recently been released. Format changes and a move to in-house production had resulted in the delay of several issues.

For those not familiar with it, the *Bulletin* has a dual purpose. First, it is a public accountability document which provides information to readers regarding enforcement and compliance activities in relation to the misleading advertising and deceptive marketing practices provisions of the *Competition Act*. Second, the *Bulletin* is an information dissemination vehicle designed to advise readers of the policies of the Director of Investigation and Research in carrying out his mandate and it is through this latter function that the Director seeks to spell out his enforcement policies in light of relevant jurisprudence. Perhaps equally important, where there is a lack of such jurisprudence, the Director provides guidance on the direction the Bureau's enforcement actions are likely to take in relation to specified advertising or marketing practices.

Bulletin 1/1993 contains a feature article entitled "'Lies, Damned Lies, and Statistics' Exploring the Links Between Marketing Research and Misleading Advertising". Intended to provide "food for thought" for marketing researchers and advertisers alike, the article addresses common misunderstandings encountered in conducting and interpreting marketing research and how this can lead to the creation of misleading advertising. The issue also contains brief articles dealing with a change in the method of measurement of television screen sizes and how to avoid more than one "correct" answer when using skill-testing questions in contests. Finally, along with an updated questionnaire on the impact of the *Bulletin*, the issue contains the results of a previous questionnaire distributed in 1991 indicating, among other results, that the advertising practices of 88% of respondents had been influenced by the *Bulletin*.

Bulletin 2/1993's feature article, entitled "Performance Claims and Adequate and Proper Testing" discusses the elements of section 52(1)(*b*) of the *Competition Act* including relevant jurisprudence, as well as selected matters connected with the administration and enforcement of the provision by the Director. The issue also contains a summary of an information contact regarding the Director's policy on the use of effective corrective notices in the post-*Wholesale Travel* [1] environment.

Bulletin 3,4/1993 discusses the decision in *R.* v. *Multitech Warehouse (Manitoba) Direct Inc.*[2] which dealt with a number of key elements of the offence of "bait and switch" selling under section 57 of the

Competition Act. An article on misleading "bankruptcy" sales also appear in this issue of the *Bulletin*.

All of the recent issues of the *Bulletin* contain a number of summaries of advisory opinions dealing with proposed multi-level marketing plans in a continuing effort to inform readers of developments regarding newly amended section 55 of the *Competition Act*.

Future issues of the *Bulletin* are currently in production. *Bulletin* 1/1994 will contain the text of a speech given to the Canadian Institute by Rachel Larabie-LeSieur, Deputy Director of Investigation and Research (Marketing Practices) on "Misleading Advertising and the *Competition Act*: Compliance and Enforcement in the Nineties". Also appearing will be an index to the summaries of advisory opinions which have appeared in the *Bulletin* over the years. Issues to be released later in the year will include a general article on misleading price representations and an index to *Bulletin* articles.

In other developments, a new pamphlet and a video on misleading advertising were recently made available to the public. The pamphlet, directed towards small and medium-sized businesses, contains a series of "Dos and Don'ts" which will prove invaluable in devising advertising plans. Through mock television commercials, the video, "It's In Your Hands", also deals with the many pitfalls which exist when designing and implementing promotional plans without any knowledge of the applicable requirements under the *Competition Act*. Copies of the pamphlet and video are available from any Bureau field office.

C.B.

Notes

[1] *R.* v. *Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161.

[2] Man. Q.B., Sept. 28, 1993 (unreported).

CHANGES TO THE RULES FOR REGULATING THE PRACTICE AND PROCEDURE OF THE COMPETITION TRIBUNAL

On April 21, 1994, new Competition Tribunal Rules (the "Rules") were published which became effective as of May 1, 1994. The Rules replace Competition Tribunal Rules, SOR/87-373.

This article will highlight some of the procedural changes resulting from the new Rules. Readers should note, however, that there are also new definitions, numerous minor wording changes, and sub-rules which have been added which this article will not address.

Service and Filing of Materials

Some of the major changes relate to detailed requirements for service and filing of documents. Now, a party must serve materials on other parties, including the Director, before the materials are filed with the Registrar. Formerly, parties were required to file materials with the Registrar and thereafter serve them upon the requisite parties. There is also now a prescribed form for an Affidavit of Service (Schedule to Rule 52). The requirements for service are similar to most provincial Rules of Civil Procedure. Unlike in most courts, however, most documents may be filed by facsimile with a facsimile affidavit of service. The following is a summary of the changes made on a rule-by-rule basis.

Rule 52(1)	Proof of Service must be in the form prescribed by the Schedule to Rule 52.
Rule 53	A certified copy of a Notice of Application must be served personally (or upon a representative of a corporation or partnership), or upon a party's solicitor, or by alternative service, established by order of a judicial member of the Tribunal.
Rule 54	Documents other than a Notice of Application can be served upon parties not represented by leaving a copy with the party, by registered mail (with acknowledgment of receipt) or by facsimile.
Rule 54(2)	Service of documents other than a Notice of Application can be effected upon represented parties by leaving a copy or sending documents by facsimile to each party's solicitor.
Rule 58	Any document may be filed by facsimile transmission if it is accompanied by the prescribed facsimile cover page (Rule 54(3)), Affidavit of Service (also transmitted by facsimile) and it is transmitted prior to 5:00 p.m. Ottawa time (after which it is deemed to be filed the next day), other than the following documents which must be filed at the Tribunal: • Notice of Application and accompanying documents; • documents filed in multiple copies; and • documents containing confidential material.

Affidavit of Documents

Under Rule 13, each party must serve an Affidavit of Documents on the other parties, and file the Affidavit of Documents with proof of service, 20 days after the expiry of the period for filing a response to a Notice of Application (50 days from the date the Notice of Application is served). Formerly, the timing for an Affidavit of Documents was 20 days from the expiration of the time for the Director to file a reply, or such other period as the parties agreed upon.

Rule 13(2)(a) has adopted the language contained in the Ontario Rules of Civil Procedure (Rule 30.02) concerning what must be produced: "documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party". The language of former Rule 14 (1) was "documents that each party has knowledge of and that might be used in evidence to establish or rebut any allegation of fact relevant to the matters in issue."

Rule 13(2)(c) requires each party to indicate in its Affidavit of Documents whether it intends to bring a motion pursuant to Rule 16(2) for an order restricting the disclosure of the document(s). In bringing a motion pursuant to Rule 16(2), the moving party must set out the details of the harm that would allegedly result from the disclosure of the documents, and provide a draft order. This is quite different from the procedure under former Rule 15(1) which required the party making the claim for non-disclosure to seal the documents and place them in the custody of the Registrar pending adjudication by way of motion.

Intervenors

The new Rules have prescribed the procedure for intervention with more particularity than the former rules:

Rule 27 The request for leave to intervene must set out, among other details, the name of the party whose position the proposed intervenor intends to support (Rule 27(1)(e)) and the nature of the participation that is requested (Rule 27(1)(g)).

Rule 27(4) A request for leave to intervene must be served upon all parties and filed with the Registrar within 30 days after notice of the application is published in the Canada Gazette. Formerly, Rule 20 did not establish any time limit for a request for leave to intervene.

Rule 31 Intervenors (once granted leave) are entitled to receive a list of all the documents in the proceeding, subject to any orders restricting access.

Rule 32 The scope of the intervenor's participation may be determined or varied by order of the Tribunal or the Chairman at a pre-hearing conference, or by order. At a minimum, the intervenor is entitled to attend and make submissions at motions, pre-hearing conferences and the hearing of the application. Formerly, Rule 28(2) only entitled the intervenor to make submissions at motions and pre-hearing conferences.

Pre-Hearing Management Procedures

One of the other changes reflected in the Rules is the incorporation of "case-management" scheduling for various steps. There are now prescribed time limits which did not formerly exist, and the parties to an application are required to develop a hearing schedule at the outset of the proceeding:

Rule 18 The Director shall serve upon each party and intervenor a proposed schedule for the disposition of the application, including the place and date of the hearing, within 14 days after the expiry of the period to file an Affidavit of Documents, and file the schedule with the Registrar, with proof of service (64 days after the service of the Notice of Application).

Rule 19 Each party must then serve and file its comments regarding the proposed schedule within seven days of being served with the Director's proposed schedule (71 days after the service of the Notice of Application). The Rules do not provide intervenors with a specific entitlement to comment on the schedule.

Rule 20 After consultation with the parties, the Chairman shall issue an order establishing a schedule for the disposition of the application within 7 days after the expiration of the time period for filing comments on the Director's proposed schedule (79 days after service of the Notice of Application).

Rule 21 The Tribunal may conduct one or more pre-hearing conferences. Rule 21(3) provides that the Chairman may develop a list of the matters to be considered and may direct the parties to file memoranda on those issues. This is quite different from the mandatory requirement of former Rule 18(1) to file pre-hearing conference memoranda 7 days prior to the hearing.

Motions

Rule 38 A party bringing a motion must serve a Notice of Motion, affidavit and memorandum summarizing the arguments of each party and intervenor 3 days prior to the day the motion is to be heard, and then file the materials with proof of service. Under former Rule 31(4), only two days' notice was required.

Rule 39 Any other party or intervenor must serve any responding material upon all other parties and intervenors and file the materials with proof of service prior to 2:00 p.m. the day prior to the hearing of the motion. Under the former Rules, there was no prescribed right of response.

Expert Evidence

Rule 47 A party seeking to introduce expert evidence must serve the affidavit material upon every party and intervenor at least 30 days prior to the hearing. Any rebuttal expert evidence in the form of affidavit material must be served upon every party and intervenor and filed at least 15 days prior to the hearing. There is now no right of reply to rebuttal expert evidence which was formerly permitted by Rule 42(3).

Rule 48 Any expert affidavits must be filed with proof of service at least ten days prior to the hearing.

Miscellaneous

Rule 4 The Director must serve a Notice of Application on any person affected within five days after the issuance of the Notice of Application. Formerly, there was no time limit.

D.A.C.

KANZAKI SPECIALTY PAPERS INC. FINED UNDER *COMPETITION ACT* IN JOINT CANADA - U. S. INVESTIGATION

The following is a News Release issued by the Bureau of Competition Policy on July 12, 1994 and is reproduced with permission.

The Director of Investigation and Research of the Bureau of Competition Policy, George N. Addy, announced today that a $950,000 fine has been levied against a foreign firm for having engaged in a conspiracy under the *Competition Act*.

This fine represents the successful conclusion of the first phase of an ongoing joint investigative effort undertaken by the Bureau of Competition Policy and the U.S. Department of Justice (Antitrust Division).

Kanzaki Specialty Papers Inc., of Ware, Massachusetts, pleaded guilty in the Federal Court (Trial Division) of having conspired with others to lessen competition in Canada in the sale of thermal fax paper from July 1991 to early 1992.

"The success of the first phase of this case illustrates how in the new global economy co-operation between competition law agencies is essential in ensuring strong enforcement of the *Competition Act*," Mr. Addy said. "The fine imposed today reflects the seriousness of this type of corporate crime and will be a strong deterrent to foreign companies who engage in anticompetitive conduct having effect in Canada."

DIRECTOR FILES APPLICATION AGAINST NIELSEN UNDER ABUSE OF DOMINANCE PROVISIONS

On April 5, 1994, the Director of Investigation and Research filed an Application with the Competition Tribunal pursuant to the abuse of dominant position provisions of the *Competition Act*. The Application seeks an order requiring A.C. Nielsen Company of Canada Limited ("Nielsen") to cease engaging in a practice of alleged anticompetitive actions which prevent access by Nielsen's competitors to Universal Product Code ("UPC") scanner-based sales information generated by large Canadian retailers and to customers for scanner-based market tracking services. The Application follows a complaint to the Director in 1993 by Information Resources, Inc. ("IRI"), a competitor of Nielsen. Nielsen and IRI provide market research services to consumer packaged goods manufacturers.

This is the third proceeding brought by the Director under the abuse of dominant position civil provisions which replaced the criminal monopolization legislation in 1986. The *Canada (Director of Investigation and Research)* v. *NutraSweet Co.*[1] and *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Systems Ltd.*[2] cases represented the first two applications. The Director was successful in both cases which resulted in orders prohibiting the use of certain business and marketing practices by the two firms. For the provisions to apply, the Tribunal must find that one or more persons, who substantially or completely control a class of business, have engaged in a practice of anticompetitive acts having, or likely to have, the effect of lessening competition substantially in a market. The *Competition Act* contains an inclusive list of nine examples, two of which are referred to in the Director's Application.

The Application submits that the relevant market is the supply of scanner-based market tracking services in Canada and that Nielsen controls 100% of the market as a result of anticompetitive acts which pre-empt scarce facilities or resources needed by a competitor by requiring or inducing a supplier to refrain from selling to another. In particular, Nielsen is alleged to have achieved and maintained complete control of this market through the use of exclusive contracts for the purchase of scanner data from all major grocery retail chains in Canada.

Nielsen is described as the wholly-owned subsidiary of A.C. Nielsen Company (U.S.) which is, in turn, a wholly-owned subsidiary of the Dun and Bradstreet

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Corporation. Its parent corporation provides marketing services around the world. Established in Canada in 1944, the marketing research division of Nielsen provides scanner-based tracking services and other marketing research services to its Canadian customers. IRI is a Chicago-based company which provides a variety of information and software services. It offers scanner-based market tracking services as well as related products and services in the United States, Europe, Japan and Australia. Although IRI was founded only in 1979, it estimates that it has acquired approximately 50% of the U.S. market for scanner-based market tracking services in that period.

Scanner-based data is comprised of product identifying information provided on the UPC label affixed by the manufacturer to a product as well as data entered by the retailer which may include store identification, time of purchase and price, all of which is recorded by an electronic scanning apparatus. The data is used to track sales of a number of product categories and brands in a specified period of time. A scanner-based market tracking service tracks the physical movement of goods and other factors such as advertising levels, promotions, prices and package size. In particular, market tracking monitors the progress and competitive position of a product in relation to other competing products over time and is of value to product manufacturers because it assists them in making informed marketing decisions.

The Application notes that marketing research is used by retailers and product manufacturers to assist in decision making and strategic planning relating to product promotion, pricing and competitive positioning and that there are a substantial number of firms providing marketing research services in Canada. Services offered by such firms may include market tracking, focus groups, individual consumer interviews, surveys and consumer panels. To provide a market tracking service, a market researcher must obtain data on sales of the relevant products. Historically, such data was obtained through in-store audits of retailers and by monitoring warehouse withdrawals. A more effective method was made possible in the late 1970s when electronic scanner technology was introduced to grocery stores for the purpose of recording purchases quickly and accurately by means of the UPC. While scanner technology was intended to benefit retailers in price calculation and control, reduction of labour costs and improved inventory control, scanners also created a constant flow of day to day data that could be used to effectively track sales of products which is significant information for product manufacturers.

Market tracking services based on scanner data are stated to be superior in accuracy, timeliness and cost to those based on other methods. There are no close substitutes. While there are many types of marketing research, there is no other type that can adequately and economically perform the functions of a scanner-based service. A tracking service must be able to track sales of each manufacturer's products and all competing products as well as provide coverage across the market with data from all major retailers in all regions on a timely basis. Other methods of data collection such as audit, warehouse withdrawal and panel data are too labour-intensive, costly and time consuming. The Application states that various types of marketing research, taken separately or in combination, are considered by consumer packaged goods manufacturers to be complements to, rather than substitutes for, scanner-based market tracking services. Accordingly, methods of market tracking other than scanner-based

services are said to fall outside of the relevant market. In Canada, scanners are most prevalent in large grocery chains and are currently expanding into retail drug chains. The use of scanner data from other types of retailers for other types of products is expected to increase in the near future.

The Application states that in the mid-1980s, IRI unsuccessfully attempted to enter the Canadian market to provide a scanner-based market tracking service. At the time, Nielsen was the principal supplier of market tracking services in Canada, based on audit data and warehouse withdrawal information. IRI's entry into the market was dependent on its being able to acquire scanner data from substantially all major grocery retailers in Canada. IRI sought to acquire exclusive access to such data. However, it was unable to enter the market because, at about the same time, Nielsen contracted with one major grocery retailer to acquire its scanner data on an exclusive basis. Subsequently, Nielsen proceeded to contract with all major grocery retailers for exclusive access to their scanner data. In 1992, Nielsen then began offering a scanner-based market tracking service to manufacturers of consumer packaged goods. IRI has stated its intention to enter the Canadian market provided that it is not denied access to current and historical scanner data from grocery retailers as a result of Nielsen's exclusive contracts.

The alleged anticompetitive acts are:

(a) Nielsen has entered into, renewed and maintained contracts with all major Canadian grocery retail chains, and has begun to contract with major retail drug chains, to acquire their scanner data on a long term exclusive basis, precluding any potential competitor from acquiring such data; in addition, access to such data from substantially all retailers is required by a new entrant but Nielsen's contracts with the retailers expire at different times;

(b) Nielsen has paid significant financial inducements to retailers to acquire and maintain exclusive access to their scanner data; and

(c) Nielsen has contracted and attempted to contract with product manufacturers to provide market tracking services for terms of three years or more, with substantial notice of termination conditions, and imposing penalties for early termination; these agreements would put a new entrant at a competitive disadvantage even if it were able to acquire access to current and historical scanner data.

As a result of these anticompetitive acts, the Application submits that there can be no new entry while Nielsen has exclusive access to the scanner data of all major grocery retailers. As evidence that competition has been substantially lessened, the Application points to the U.S. market where there is vigorous competition between Nielsen and IRI. Grocery and other retailers in the U.S. sell scanner data to A.C. Nielsen, IRI and others which is said to result in lower prices and superior services in term of technology, innovation, quality and range.

The Application requests that the Tribunal issue an order which would include provisions:

(a) prohibiting Nielsen

(i) from entering into contracts which prevent or restrict a supplier of scanner data from making it available to others;

(ii) from enforcing such terms in its existing agreements with suppliers of scanner data;
(iii) from offering financial incentives to suppliers of scanner data to restrict the availability of such data to others; and
(iv) from enforcing any provisions in its existing contracts for the supply of market tracking services which require its customers to give unreasonable notice of termination, or which impose any unreasonable penalty for early termination;

(b) declaring null and void all provisions in Nielsen's contracts which prevent or restrict a supplier of scanner data from making such data available to others;

(c) directing Nielsen to make adequate historical scanner data available to any new entrant into the market for the supply of scanner-based market tracking services, on such fair and reasonable terms as may be fixed by the Tribunal; and

(d) requiring Nielsen to deliver copies of the Tribunal's order to all customers for scanner-based market tracking services and to all suppliers of scanner data.

In its Response dated May 5, 1994, Nielsen states that the Director has artificially defined the relevant market which is "decision support services" rather than "scanner-based market tracking services". Nielsen submits that it is in the business of providing information services to its customers which involve the effective integration of data, such as market tracking data, with information management tools, applications and human resources. These services ("decision support services") are purchased by its 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.

The use of scanning data is said to be 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. Other data collection methods which are used include pooled factory shipments, warehouse withdrawals, store audits and household panels using diaries, I.D. cards and portable home scanning devices. Every market tracking methodology has inherent strengths and weaknesses but each of these data collection methodologies is used in Canada.

The Response states that around 1980, some retail grocery stores in Canada began to use scanning equipment at check-out counters to record products sales. Between 1980 and 1985, Nielsen explored the possibility of using the output from scanner stations as a data collection methodology. Around 1986, IRI is said to have negotiated an agreement with the Canadian Grocery Distributors 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, would provide IRI with exclusive access to all of their scanner-based data for a five-year term.

Shortly thereafter, Nielsen says that it entered into separate negotiations with each retailer and on the basis of superior proposals and commitments

negotiated agreements with all of the retailers. 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 effectively employ the scanner-based technology. Throughout the first years, the scanner-based tracking method proved to be more costly, time consuming and often less accurate than non-scanner methods due to significant ongoing data quality problems. Currently, most of Nielsen's market tracking information is, by necessity, based on a combination of scanning, warehouse withdrawal and store audit data.

With the end of the initial terms approaching by mid-1991, Nielsen states that it prepared and made presentations and individual proposals to each of the retailers. Competitors of Nielsen were not precluded from making proposals to, or negotiating their own agreements with, the retailers and Nielsen was aware that IRI made presentations to and negotiated with at least one retailer in 1991. Like the negotiations which took place in 1986, Nielsen says that its renewed agreements were the result of a vigorous competitive process in which IRI was simply the unsuccessful bidder. Further substantial investments were still required by Nielsen to maximize potential cost savings and efficiencies offered by scanning technology and Nielsen maintained its commitment to work with the retailers in all areas including improving scanner 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 under the earlier agreements, Nielsen was successful in negotiating agreements which provided for exclusive access to each retailer's scanner-based data. As each negotiation was conducted separately, the terms of the agreements vary, including the length of term and termination provisions. With respect to larger retail drug chains, Nielsen says it is currently competing with IRI for access to scanner-based data from such a retailer. That retailer has specifically requested proposals on both an exclusive and non-exclusive basis.

Nielsen submits that it does not substantially or completely control the business of decision support services in Canada, nor the supply of scanner-based data. There are numerous competitors in this business, including IRI, and entry is unrestricted. 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. Nielsen has not imposed the impugned terms on the retailers, but rather the retailers, which own and control the source data, have determined that this is the basis on which they will provide access to their data. Nielsen is not the only company in Canada offering decision support services utilizing scanner-based data and, while Nielsen uses scanner-based data to provide decision support services in Canada on a national basis, such services may also be provided on a regional or account-specific basis without data from all or substantially all retailers.

The Response states that, to the extent scanner-based data is more reliable, timely and cost efficient than other methods of data collecting, it is due to 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. Nielsen submits that the length of the term of the retailer agreements and exclusivity are commercially reasonable because of the significant investments required by Nielsen. It has

needed time to accumulate sufficient data to provide meaningful trended information to its customers. The exclusive arrangements have permitted Nielsen to work with retailers to ensure that data quality is maintained. Nielsen's efforts have resulted in benefits and efficiencies to both retailers and product manufacturers. Nielsen's success is simply the result of superior competitive performance in a vigorous competitive process. Notwithstanding its significant investments, Nielsen has only recently begun to obtain consistent usable data from a majority of retailers.

Nielsen denies that its agreements with product manufacturers constitute an anticompetitive act and says that only a small proportion of such agreements are for terms of three years or more; the longer terms have come about primarily in the context of international arrangements among those organizations. The notice of termination provisions are not substantial and penalties are not imposed for early termination as alleged in the Application. The termination provisions of these agreements are commercially reasonable and the result of negotiations between the parties.

As to the Director's reference to the vigorous competition which prevails in the U.S. market, the Response notes that despite the much larger size of the consumer goods industry and the greater number and regional diversity of retailers, many suppliers of market tracking information have exited this part of the business in the past several years. Moreover, Nielsen says there is significant competition in the Canadian market which has resulted in Nielsen's prices to its product manufacturer customers remaining constant or declining, after accounting for inflation, since the introduction of scanning in the mid-1980s. During the same time period, product quality, delivery and the range of services and software have improved substantially. Product development and innovation in Canada compare quite favourably with the U.S. given the limited quantity of usable scanning data in Canada.

The Response concludes that 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 anticompetitive acts. Nielsen submits that through the relief requested in 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.

By application dated May 13, 1994, IRI requested leave of the Tribunal to intervene in the proceeding. IRI asked to be allowed to participate by attending and making representations at motions, pre-hearing conferences and the hearing of the Application. In addition, IRI requested that it be allowed to attend on (but not participate in) the oral examinations for discovery, to inspect and make copies of documents subject to any confidentiality order issued by the Tribunal, to introduce expert evidence, to present factual evidence which is not repetitive and which the Director is unwilling to adduce and to cross-examine witnesses on questions pertinent to its intervention and which the Director is not willing to ask.

The Director opposed IRI's request to attend any oral examinations for discovery on the ground that it could inhibit Nielsen's willingness to provide

information of a commercially sensitive nature. Subject to an appropriate confidentiality order, the Director was prepared to support an order providing for IRI's counsel to receive discovery transcripts. Otherwise, the Director supported the intervention request.

Nielsen did not oppose IRI's request to intervene but asked that the Tribunal hold a hearing to consider the scope of IRI's participation. In Nielsen's view, IRI sought all of the benefits of a full party to the proceeding without proposing to assume all of the related obligations. In order to have a fair and adequate opportunity to respond to the allegations contained in the Application and repeated in IRI's request to intervene, Nielsen submitted that the Director's production of documents should contain all of the IRI documents that are relevant to the matters in issue failing which IRI should be required to produce such documents. Nielsen submitted that it might also be necessary and appropriate for the Tribunal to order that a representative of IRI be examined on discovery.

By Order dated June 18, 1994, the Tribunal granted IRI leave to intervene in the proceedings on the following terms:

(a) IRI shall have access to the transcripts of the examinations for discovery conducted by the parties, subject to any order that may be issued by the Tribunal restricting the disclosure of portions of the transcripts for reasons of confidentiality;

(b) IRI shall be permitted to inspect and make copies of the documents listed in the affidavits of documents filed by the parties, other than those documents subject to a claim for privilege or which are not within the party's possession, control or power, subject to the same restriction regarding confidentiality as set out in (a) above;

(c) IRI shall be permitted to introduce expert evidence in accordance with the procedure set out in the *Competition Tribunal Rules*;

(d) IRI shall be permitted to adduce factual evidence at the hearing, provided that it demonstrates to the satisfaction of the Tribunal that such evidence is relevant and within the scope of its intervention, is not repetitive and that the Director has been asked to adduce the evidence and has refused; and

(e) IRI shall be permitted to cross-examine witnesses after the Director has conducted his cross-examination, provided that IRI demonstrates to the satisfaction of the Tribunal that it has questions pertinent to its intervention which the Director was not willing, or could not be requested, to ask.

Also by Order dated June 18, 1994, with supporting Reasons dated June 22, 1994, the Tribunal denied Nielsen's motion for a further and better Affidavit of Documents from the Director and for a list, by date and description, of the individual documents listed in the Director's Affidavit of Documents for which privilege was claimed. However, the Tribunal ordered that IRI serve and file by June 30, 1994, an Affidavit listing documents relevant to three specified subject areas.

Subsequently, Nielsen sought an Order that the Director produce certain documents for which claims of public interest privilege and litigation privilege were made in the Director's Affidavit of Documents. The documents sought by Nielsen were:

(a) 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;

(b) notes, materials and statements obtained or prepared by the Director, his staff or his counsel from meetings and discussions with IRI and its counsel; and

(c) statements and 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 and manufacturers.

Nielsen submitted that the Director is under a general duty to disclose all relevant information, there is a reasonable prospect that the withholding from production of the documents requested will impair Nielsen's right to make full answer and defence in the Application and the Director's refusal to disclose those documents cannot be justified on the basis of the existence of a legal privilege. In determining the validity of the Director's claims for privilege, Nielsen submitted that the Tribunal should have regard to the principles of disclosure by the Crown set out in the Supreme Court of Canada decision in *R.* v. *Stinchcombe.*[3] In opposing Nielsen's request for production of documents over which privilege was claimed, the Director relied upon the principles of public interest privilege and litigation privilege established by the Competition Tribunal in previous decisions, particularly in the abuse of dominant position case *Canada (Director of Investigation and Research)* v. *NutraSweet Co.*[4] and merger cases *Director of Investigation and Research* v. *Southam Inc., et al.,*[5] and *Director of Investigation and Research* v. *Hillsdown Holdings (Canada) Limited, et al.*[6]

By Order dated June 24, 1994, the Tribunal issued a decision regarding Nielsen's motion in which it stated its view that the motion was premature and may be brought again after the completion of discovery. In the meantime, in order to facilitate the progress of preparation for the hearing of the Application, the Tribunal issued a Direction that:

> To the extent that it is possible to do so without revealing the information over which privilege is claimed, the Director shall provide to Nielsen, subject to appropriate confidentiality restrictions, a summary of the material facts contained in each of the following groups of documents for which privilege is claimed:
>
> (a) the complaint from IRI or its counsel and any further correspondence, memoranda or submissions from IRI or its counsel to the Director, his staff or his counsel;
>
> (b) notes, materials and statements prepared by the Director, his staff or his counsel from meetings and discussions with IRI and its counsel;
>
> (c) notes, materials, statements prepared by the Director, his staff or his counsel from meetings and discussions with industry participants; and
>
> (d) documents obtained from industry participants.

Also on June 24, 1994, the Tribunal established a schedule for pre-hearing procedures, including examinations for discovery and the filing of expert reports, and ordered the hearing of the Application to commence on October 17, 1994, in Ottawa.

The hearing of the Director's Application is scheduled to commence before the Tribunal in Ottawa on October 17, 1994.

B.M.G

Notes

1 (1990), 32 C.P.R. (3d) 1 (Comp. Trib.).
2 (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).
3 Young [1992] 1 W.W.R. 97 (S.C.C.).
4 (1989), 28 C.P.R. (3d) 316 (Comp. Trib.).
5 (1991), 38 C.P.R. (3d) 68 (Comp. Trib.).
6 July 11, 1991, Competition Tribunal, unreported; Aff'd October 10, 1991, (F.C.A.).

1994 CANADIAN BAR ASSOCIATION NATIONAL COMPETITION LAW SECTION ANNUAL CONFERENCE * September 30, 1994

"Canadian Competition Law in a Global Marketplace"

[Registration and Reception evening before program]

Morning

1. Opening Remarks and Welcome

2. Concurrent Session 2(a)

Confidentiality of information provided to the Bureau and cooperation among enforcement agencies
- section 29 issues
- effect of Memorandum of Understanding/Mutual Legal Assistance Treaty
- discussion of proposed Bureau policy/draft bulletin (assuming it has been released)
- discussion of Bureau's working relationship with other domestic and foreign law enforcement agencies
- disclosure issues of specific concerns to parties, third parties, etc.

3. Concurrent Session 2(b)

Competition law issues relating to strategic alliances
- conspiracy/merger/abuse law considerations relating to international joint ventures, distribution arrangements, etc.
- how the Bureau views such arrangements
- business and economic justifications for such arrangements
- related multi-jurisdictional issues (e. g. coordinating multi-jurisdictional compliance, coordination of enforcement responsibilities, etc.)

CANADIAN COMPETITION RECORD

4.	Concurrent Session 3(a)	Effect of Globalization on Market Definition Issues effect of transborder business considerations and trading relationships on market definition experience in the EC impact under various provisions of the Act dealing with difficulties in measuring the effect of anti-competitive practices/transactions on transnational markets
5.	Concurrent Session 3(b)	Interface between the Canadian competition law and enforcement and foreign laws harmonization of substantive laws and procedures multi-lateral coordination of enforcement comparative analysis/discussion of Canadian/US/EC Mexican competition laws - inter-face with trade law remedies
6.		**L U N C H**
7.	Concurrent Session 5(a)	Competition issues relating to benchmarking and other forms of information sharing what is "benchmarking" business and legal justification/defenses when is it a problem concerns re: facilitating practices and signalling compliance issues
8.	Concurrent Session 5(b)	Impact of NAFTA and other trading relationships on competition law enforcement in Canada and elsewhere - discussion/analysis of the 1994 ABA NAFTA Task Force report substantive and procedural issues pertaining to Canadian competition law practice
9.	Plenary Session	Looking Forward - Future challenges for Canadian competition law in the global marketplace
10.		**R E C E P T I O N**

*** Sponsored by the Canadian Bar Association in Montreal, Quebec.**

Contact: Georgina Pickett, Director of Continuing Legal Education, Canadian Bar Association, 50 O'Connor Street, Suite 902, Ottawa, Ontario, Canada K1P 6L2. Telephone: (613) 237-2925. Fax: (613) 237-0185.