Competition Tribunal | Tribunal de la Concurrence

CT - 1994 / 003 – Doc # 140

IN THE MATTER OF an application by
the Director of Investigation and Research
under sections 77 and 79 of the *Competition Act*,
R.S.C. 1985, c. C-34.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Tele-Direct (Publications) Inc.
Tele-Direct (Services) Inc.

Respondents

- and -

Anglo-Canadian Telephone Company
NDAP-TMP Worldwide Ltd. and
Directory Advertising Consultants Limited
Thunder Bay Telephone

Intervenors

REASONS FOR ORDER REGARDING PRODUCTION OF DOCUMENTS SUBJECT TO CLAIM OF PRIVILEGE

Date of Hearing:

August 1 and 2, 1995

Presiding Member:

The Honourable Mr. Justice William P. McKeown

Counsel for the Applicant:

Director of Investigation and Research

James W. Leising

Counsel for the Respondents:

Tele-Direct (Publications) Inc.
Tele-Direct (Services) Inc.

Mark J. Nicholson

Counsel for Intervenors:

NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Limited

John M. Hovland

COMPETITION TRIBUNAL

REASONS FOR ORDER REGARDING PRODUCTION OF DOCUMENTS SUBJECT TO CLAIM OF PRIVILEGE

The Director of Investigation and Research

v.

Tele-Direct (Publications) Inc. et al.

The Director of Investigation and Research ("Director") has brought a motion to require the respondents to produce a group of documents, to compel their representative to re-attend on discovery to answer questions relating to the group of documents and to compel re-attendance to answer questions about another single document. The first group of documents are internal documents of the respondents (also called "Tele-Direct") relating to the so-called "July 1993 commissionability changes", which will be explained further later in these reasons. The second single document is a letter from Thomas Bourke, President of Tele-Direct, to Howard Wetston, then the Director, dated July 12, 1991. A third portion of the motion relating to the production of pricing studies has been resolved between the parties.

The respondents resist production of these documents on the grounds of privilege. Specifically, they rely on settlement negotiation privilege or "without prejudice" privilege. Although mention was made in their written memorandum of argument of litigation and solicitor-client privilege, the oral argument focused on settlement negotiation privilege. The

unusual feature of this case is that the respondents proceeded to implement commissionability criteria that were virtually the same as the proposal set out in the settlement discussions, and which the respondents had been developing for a year.

There is no dispute between the parties regarding the general principles for the recognition of privilege. Counsel for the respondents accepted that the onus of proving the existence of privilege lies with the person claiming the privilege, as stated in *Procter & Gamble Co. v. Nabisco Brands Ltd*.[1] Dubé J. noted in *Santa Ursula Navigation S.A. v. St. Lawrence Seaway Authority*:

> To begin with, it is in the interest of justice that there be the fullest possible disclosures of all relevant material capable of throwing light upon the issues of a case. A party claiming privilege should bring himself clearly within the requirements of the claim for privilege . . . .

In the case at bar this means that the respondents bear the burden of proof with respect to the status of the documents in question.

Both parties also accept the statement of the conditions for the recognition of settlement negotiation privilege set out in the text on evidence by Sopinka, Lederman and Bryant. According to that authority, in order to have a valid settlement negotiation privilege:

> (a) a litigious dispute must be in existence or within contemplation;

---

[1] (1988), 22 C.P.R. (3d) 365 at 366 (F.C.T.D.).

[2] (1981), 25 C.P.C. 78 at 79-80 (F.C.T.D.).

> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
>
> (c) the purpose of the communication must be to attempt a settlement.[3]

I recognize that the rationale behind this type of privilege is the public interest in encouraging settlement of disputes. This is confirmed by various cases among those cited to me by counsel.[4] The general public policy of encouraging settlement applies with equal force to competition proceedings.

I will consider the merits of the respondents' claims of privilege in relation to the individual documents. Some background details are necessary in order to properly assess those claims. Since the first group of documents and the second individual document arose in distinct time frames, it will be most convenient to outline the facts pertaining to each separately.

(1) Internal Documents Relating to July 1993 Commissionability Changes

The first group of documents in dispute are the internal documents relating to the July 1993 commissionability changes. As I understand it, "commissionability changes" refer to changes in the criteria used by the respondents to determine which Yellow Pages advertiser accounts will attract a commission and on what terms. Effective July 1, 1993, the respondents

---

[3] J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 722.

[4] *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642 (H.C.), aff'd [1968] 2 O.R. 452 (C.A.); *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 W.L.R. 939 (H.L.); *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1990] 4 W.W.R. 39 (Alta Q.B.), aff'd [1990] 5 W.W.R. 377 (Alta C.A.).

altered those criteria from the regime previously in place. The commission criteria now employed by the respondents are the subject of at least two of the remedies sought by the Director in the application to the Tribunal. In paragraph 1(a)(ii) of the notice of application, for example, the Director requests an order that the respondents expand their commission criteria to include certified independent advertising agencies while paragraph 1(b)(ii) asks that the respondents be prohibited from providing advertising space to independent agencies on less favourable terms and conditions than to its own staff.

The documents with respect to commissionability criteria are relevant. The principal issue is whether the documents are subject to settlement negotiation privilege. The documents over which the respondents claim privilege date from February 1993 to August 1993 and are generally described in the affidavit of Charles Mitchell, a representative of the respondents, sworn on July 27, 1995 in connection with the motion. The documents were attached under seal as Exhibits A to I to Mr. Mitchell's affidavit and were available for my inspection.

Other documents and events preceding February 1993 are described in the affidavit of Warren Grover sworn on June 23, 1995 in support of the respondents and the affidavit of Brian Linseman sworn on June 20, 1995 in support of the Director. The affidavits reveal that a presentation was made to the Bureau of Competition Policy by respondents' counsel in June 1992 regarding changes in commissionability criteria. The changes in question were those previously approved by the association of Canadian Yellow Pages publishers, called "CANYPS". In December 1992, counsel for the Director indicated that the new CANYPS

criteria were not acceptable to the Director but left the door open for a further presentation by the respondents on their own. It is indisputable that no settlement of the issue was ever arrived at, as evidenced by the application to the Tribunal. The evidence reveals that as of April 1993 there were no longer any ongoing negotiations between the parties on this issue until December 1993 when Mr. Grover wrote to the Director and offered to change the new commissionability requirements. In paragraph 6 of his affidavit, Mr. Linseman quotes from a letter from counsel for the respondents dated April 20, 1993 which states:

> In our meeting with Mr. Rook [counsel for NDAP and DAC, two independent agencies who are also intervenors in this proceeding], we believed that we kept the commissionability issue quite distinct from the consent order issue. Mr. Rook's letter, however, blurs the two issues together. We believe that the distinction must remain, and progress on each issue may take place independent of each other.
>
> . . .
>
> In our view, the Director and the CANYPS members should proceed on the preparation of the consent order with the assumption that no agreement will be reached with DAC and NDAP which will result in their co-operation.

The consent order referred to was eventually issued by the Tribunal in November 1994. That order dealt with various issues involving the CANYPS members but did not touch on the commissionability criteria which form part of the current contested application. It is also apparent on the evidence that the criteria adopted by Tele-Direct in July 1993 are, at the very least, highly similar to the CANYPS criteria and that the Director and the Bureau had no input into their formulation.

The facts in this case are unique. There was clearly some attempt made by the parties to achieve a resolution of the commissionability criteria issue. Yet, within the same time frame, the

respondents were proceeding with their internal process of review and approval of the changes and ultimately announced the changes on June 22, 1993. The new criteria became effective July 1, 1993. During discovery, Mr. Mitchell was asked by counsel for the Director who within Tele-Direct had the responsibility for conducting the review which resulted in the commissionability changes of July 1993, who made the ultimate decision to implement those changes and when this process of study or evaluation commenced. Mr. Mitchell responded that he was the primary person involved in developing the new criteria, although the various proposals were debated and reviewed internally, and that Douglas Renwicke, the Executive Vice-President, and Mr. Bourke, the President, made the decision. He indicated that the process commenced prior to the CANYPS presentation to the Director in June 1992. The Director is not seeking any documents developed prior to February 1993.

Generally, one either finds a successful settlement, in which case the litigation is not proceeded with on that issue, or an unsuccessful settlement attempt, in which case the party rarely goes ahead with the proposed conduct anyway, as occurred here. There is no evidence before me as to why this was done. The presence of two concurrent processes in this case complicates the assessment of the validity of the privilege claim, in particular the determination of whether the purpose for which these documents were created was "to attempt to effect a settlement". Because of the two parallel processes taking place, it is likely that at least some of the documents had two purposes.

In my view, it is helpful in these circumstances to adopt the "dominant purpose" test used in evaluating litigation privilege claims to resolve the questions on this motion. In order to succeed in their privilege claim, the respondents must prove that the dominant purpose for creating the documents was settlement negotiations. As stated above, the onus lies on them. Dubé J. noted that: "In order to establish a valid claim for a solicitor-client relationship, the dominant purpose in preparing the documents must be for litigation and such purpose must outweigh the public interest in its disclosure (Vide *New West Construction Co. Ltd. v. The Queen* (1979), 106 D.L.R. (3d) 272 (F.C.T.D.))."[5] The headnote in the *New West Construction Co. Ltd.* case is instructive:

> To support a claim of privilege, the purpose of submission of a report to a party's legal advisors in anticipation of litigation must be at least the dominant purpose for which it has been prepared. Accordingly, where as a result of a dispute arising from a construction contract an expert is retained to assist in the preparation of a claim, such reports are not necessarily privileged. Claims by contractors against owners arising out of construction contracts are commonplace and it cannot be inferred that most or even a significant percentage of these are litigated. The dominant purpose of any work done by such expert, until the time when the Plaintiff determines that its claim is not likely to be resolved by negotiation, is to further their own function as the plaintiff's agent in these negotiations. Accordingly, reports prepared during this phase are not privileged from disclosure on discovery.[6]

I will now review the first group of documents in more detail. The Director does not dispute that Exhibit B to Mr. Mitchell's affidavit, a February 15, 1993 presentation to the Bureau, is subject to settlement negotiation privilege. This is clearly the case as that presentation resulted from the invitation set out in the December 1992 letter referred to above. Nor is the Director seeking

---

[5] *Supra*, note 2 at 80.

[6] (1979), 106 D.L.R. (3d) 272 (F.C.T.D.).

Exhibit I, which postdates the implementation of the new criteria.

I note at the outset that neither the affidavit by the solicitor for the respondents, Mr. Grover, nor the affidavit by Mr. Mitchell state that the dominant purpose in creating the documents in question here was settlement negotiation. The affidavits are very carefully crafted to avoid any statements with respect to the dominant purpose.

Exhibit A is a number of documents prepared in early February 1993 which, as stated by Mr. Mitchell, "provided the basis" for statements in Exhibit B. Exhibit C is a study of the impact of the eight-market rule (the old rule) which Mr. Mitchell characterizes as having been done "as part of our undertaking to the Bureau [in the February presentation] to revisit the new standard". It is dated February 18, 1993. Exhibit D is dated February 23, 1993 and "similarly . . . was prepared to show the impact of different advertisement sizes on the projected revenues."

Since these exhibits consist solely of numbers and calculations, the face of the documents provides little indication of their purpose. If the dominant purpose is settlement, that must be apparent from the evidence of Mr. Mitchell. Mr. Mitchell does not state in his affidavit that the dominant purpose in creating any of Exhibit A was settlement negotiation. I recognize that he should not be required to use those exact words and that different words to the same effect may be sufficient. However, in discussing Exhibit A, Mr. Mitchell says only that the documents "provided the basis" for the quoted statement. He does not even state that the documents were prepared *for* the February 15, 1993 presentation.

The dates of Exhibits C and D follow closely on the presentation of February 15, 1993. With respect to these exhibits, Mr. Mitchell does state that they were prepared "as part of Tele-Direct's undertaking to the Bureau to revisit the new standard". If the July criteria had not been announced these two exhibits would be protected by settlement negotiation privilege.

Exhibit E, dated March 24, 1993 with an earlier draft dated March 8, 1993, is a recommendation as to a possibly acceptable commissionability criteria presented by Mr. Mitchell to Mr. Renwicke and Mr. Bourke. On discovery, Mr. Mitchell identified this document as what was circulated in writing from him to Mr. Renwicke and Mr. Bourke to seek their "review and approval of the criterion that [he] developed". Mr. Mitchell's affidavit confirms that this "documentation was prepared for an internal Tele-Direct meeting". The document outlines the goals of the respondents and the options available to them on the issue of commissionability. The document indicates the goal of Tele-Direct was:

> To develop a commissionable account definition that establishes a National Market, which is equal to or greater than the current market in number of accounts and dollars, while avoiding the cannibalism of the local GSF market.

Furthermore, the document states under the heading "Review of Options" that:

> As a result of the recent CANYPS and Competition Bureau meeting, it is clear that there will not be one standard definition for a National commissionable account.
>
> However, as leaders of the Yellow Pages Industry in Canada, Tele-Direct should provide a definition that may be used as a model for other companies to follow.

This document does contain references to the possible reaction of the government to the proposals but simply as one "pro" or "con" of the various alternatives. It was first created in early

March and finalized towards the end of March, a time frame prior to the April 1993 date when negotiations with the Bureau clearly ended. Nevertheless, I am of the opinion that Mr. Mitchell's own statements indicate that its primary purpose was to advance Tele-Direct's internal processes of review, which ultimately led to the decision to adopt the new criteria effective July 1993. It was not disputed that if Tele-Direct was going to change, the change would have to be acceptable, first, to Tele-Direct on a business level and, second, to the Director for purposes of settlement.

Exhibits F, G and H were created after the date on which negotiations with the Bureau had ceased. Exhibit F is a May 18, 1993 presentation by Mr. Renwicke to the senior officers of the company. Mr. Mitchell states that he was informed by Mr. Renwicke and believes that the presentation was made "to explain where Tele-Direct was in its ongoing discussions with the Bureau and what option we were considering to present to the Bureau with respect to a commissionability definition." This purpose is not indicated in the text of the presentation which, on its content, could support various purposes.

I find it difficult to accept hearsay evidence that this was the primary purpose of the presentation given that the actual commissionability changes would shortly be announced, on June 22, 1993, without any further presentation to, or input from, the Bureau. The only possible next "presentation to the Bureau" referred to in Mr. Mitchell's affidavit is a June 15, 1993 letter from Mr. Grover to Gilles Ménard since there was no further presentation prior to July 1993 implementation date. In my view, the letter simply advises the Bureau what Tele-Direct proposes

to do and sets out Tele-Direct's view of some of the effects of the changes. The changes were announced a week later. In paragraph 7 of his affidavit, Mr. Linseman properly characterizes the letter as being simply for "informational purposes and not part of any `ongoing negotiations for settlement with the Director' as stated by Respondents' counsel in his letter of May 26, 1995." Mr. Grover describes this particular letter in paragraph 11 of his affidavit in much the same terms when he says "I advised Mr. Ménard of the commissionability criteria Tele-Direct `proposes to use'. In that letter I also set out `the financial impact of this definition' on Tele-Direct." He does not advert to any purpose of attempting to achieve a settlement; he merely states that the proposed consent order and commissionability criteria were "clearly intertwined", a rather ambiguous statement.

Counsel for the respondents also argued briefly that Exhibit F was protected by solicitor-client privilege as Mr. Renwicke was simply passing on legal advice from counsel to the senior officers. I find no evidence of this purpose in the record. It is not apparent from the text of the document nor does Mr. Mitchell make any assertion to this effect.

Exhibits G and H to the Mitchell affidavit were also prepared, according to Mr. Mitchell, "with a view to" or "to be used in" a presentation to the Bureau, namely the June 15, 1993 letter discussed above. I cannot accept that the dominant purpose of these documents was settlement negotiations since I do not regard the June 15, 1993 letter as having that purpose.

Having concluded a review of the individual documents, there is one other general point that I would like to address. It applies particularly to Exhibits C and D and would also apply to the other exhibits if I am wrong in my assessment of their primary or dominant purpose and they can indeed be considered to have been created for purposes of settlement negotiations. I do not believe that any settlement privilege can be maintained in the circumstances of the case before me.

The Director's application alleges that the respondents' commissionability criteria constitute an anti-competitive act. In paragraph 46 of the response, the respondents "deny that their commissionability criteria are `arbitrary'" and state that those criteria are set "based on the business judgment of Tele-Direct management in order to meet the specialized needs of an identified category of Tele-Direct's customers." Thus, the rationale for the criteria is clearly in issue. In face of this, I do not see why the respondents should be able to use the privilege to keep relevant evidence regarding that rationale from the Tribunal.

The privilege is intended to protect parties from having their *bona fide*, although unsuccessful, settlement discussions brought before the court as evidence, in order to encourage settlement. Here, the changes which constitute the unsuccessful settlement negotiations are themselves directly in issue before the Tribunal because those changes were, notwithstanding that no settlement was reached, actually put into place by the respondents. The respondents seek to justify the criteria based on the business judgment of Tele-Direct's management and yet prevent the Director from examining the business and financial information on which the judgment was based. It is not part of the public policy justification for this privilege to allow a

party to use the privilege to selectively decide which evidence on the issue should be brought forward. This is one of those rare cases where the privilege attaching to settlement negotiations can be lost.

(2) The "Bourke Letter"

The events relating to the Bourke letter date from 1991. In 1991, the Director resumed his inquiry into the Canadian Yellow Pages industry. The inquiry was initially commenced in 1985 but was not pursued from 1988 to 1990. As set out in the affidavit of Brian MacLeod Rogers sworn on June 23, 1995 in support of the respondents' position, counsel for the Director contacted Mr. Rogers, as counsel for the respondents, in March 1991. A course of correspondence then ensued during which documents and information were requested by counsel for the Director and provided by Mr. Rogers. In early June 1991, Mr. Rogers met with counsel for the Director to provide further information. During the meeting counsel for the Director indicated that she would be recommending that the Director proceed with an application to the Tribunal and suggested that Mr. Rogers encourage his clients to take the steps necessary to avoid litigation. On July 12, 1991, Mr. Bourke sent his letter to the Director.

The letter, which is over 30 pages long, provides a great deal of information about the Yellow Pages industry and Yellow Pages advertising which certainly seems, on its face, to be relevant to the application before the Tribunal. The respondents claim settlement negotiation privilege over the letter.

The letter is not marked "without prejudice". Although the failure to mark the letter is not determinative of the question, it is one piece of evidence that enters into consideration. Since Mr. Bourke did not provide an affidavit as to the purpose of the letter, I must look to the text of the letter itself and the surrounding circumstances for an indication of whether the parties were seeking to compromise litigation and whether this letter formed part of any such course of dealing.

In my view, the text of the letter provides no evidence of even an "overture" for settlement but, instead, indicates that it was written simply to provide information on a very preliminary basis. In the introduction, the author states:

> We understand that the Director is presently reviewing the advertising sales practices of Tele-Direct in relation to the structure of the Canadian Yellow Pages Service ("CANYPS"). This letter sets out our view of how the Canadian Yellow Pages industry operates, and describes the important role which CANYPS plays within the Yellow Pages industry. In particular, this letter focuses on describing how Yellow Pages advertising space is sold in Canada.

In conclusion, he writes:

> This letter has been prepared on an expedited basis, and provides only an overview of the Canadian Yellow Pages industry. Consequently, there may be additional facts or other information which you require to complete your investigation. To facilitate matters, we would like to meet with you to discuss any matters which are of concern. In keeping with the informal, informational purpose of this meeting, we propose that the meeting take place without lawyers.

Further, he adds:

> While we believe that most of the information contained in this letter is in the public domain, we would ask that you treat as confidential the following information: . . .

and lists three specific items that are to be kept confidential. This request for confidentiality is particularly significant. Even if the letter were characterized as part of settlement negotiations, recognition by the author that most of the information is in the "public domain" seems to negate any "express or implied" intention on his part "that it would not be disclosed to the court in the event negotiations failed", the second condition set out by Sopinka *et al.*

Nor do the surrounding circumstances change my assessment of the purpose of this letter. In his affidavit, Mr. Rogers asserts that he considered his correspondence and discussions with counsel for the Director to be "off the record" based on his letter of May 31, 1991. Further, he asserts that the Bourke letter was a submission in furtherance of the settlement negotiations between himself and counsel for the Director, made on a "client to client" basis to complement his submissions as counsel.

Mr. Rogers wrote the letter of May 31, 1991 prior to meeting in person with counsel for the Director in early June. At the meeting, Mr. Rogers was to provide copies of documents and answer questions. In the letter, Mr. Rogers clearly stated that the meeting was to be "off the record". Based on the wording of the letter itself, his concern, however, appeared to be that if use was made of the information conveyed at the meeting in future proceedings, he (and counsel for the Director) would become a potential witness, rather than concern about protecting a settlement negotiation from future exposure. Mr. Rogers' use of "off the record" in this context was quite different from what is meant by "without prejudice" in settlement discussions. I do not consider that the May 31, 1991 letter brings the Bourke letter within a settlement negotiation privilege.

I note that the Bourke letter was included in the *Director's* affidavit of documents in the list of privileged documents and was (apparently) subject to a claim by the Director of public interest privilege. In any event, it is clear from this motion, and it may have been clear earlier on discovery, that the Director has changed his mind. The respondents cannot claim a public interest privilege and, therefore, they must assert and prove some other grounds of privilege to resist production of the letter. This they have failed to do.

For these reasons, I have, by order under separate cover, granted the Director's motion and required the respondents to produce Exhibits A, C, D, E, F, G and H to the Mitchell affidavit and cause their representative to re-attend on discovery to answer questions on these documents and the Bourke letter.

DATED at Ottawa, this 9th day of August, 1995.

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

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