



CT-1994 / 003 – Doc # 83

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 -

White Directory of Canada, Inc.
Anglo-Canadian Telephone Company
NDAP-TMP Worldwide Ltd.
Directory Advertising Consultants Limited
InfoText Limited
Thunder Bay Telephone
Intervenors



REASONS AND ORDER REGARDING DOCUMENTARY ISSUES

Date of Pre-hearing Conference:

March 29, 1995

Presiding Member:

The Honourable Mr. Justice William P. McKeown

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

James W. Leising
John S. Tyhurst

Counsel for the Respondents:

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

Warren Grover, Q.C.
Mark J. Nicholson
Emily Jelich

Counsel for Intervenors:

**Counsel for NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants
Limited**

Martha A. Healey

COMPETITION TRIBUNAL

REASONS AND ORDER REGARDING DOCUMENTARY ISSUES

The Director of Investigation and Research

v.

Tele-Direct (Publications) Inc. et al.

At the first pre-hearing conference in this matter, held on March 29, 1995, the Tribunal dealt with various issues related to the production and exchange of documents. Both parties brought forward motions requesting that the disclosure of certain documents be restricted based on concerns of confidentiality. A confidentiality, or protective, order to that effect has been issued under separate cover. There then remained various other issues also arising from documentary discovery to be dealt with.

The Director of Investigation and Research ("Director") requested that the respondents be required to state the grounds upon which they claim privilege in Schedule II of their affidavit of documents, and that they be required to list and describe the documents over which they claim privilege. The Director also asked that the Tribunal order a timetable for the exchange of documents. The respondents requested that the Director deliver a further and better affidavit of documents, after having reviewed the listed documents and directed his mind to whether the documents listed in the affidavit are truly relevant to the application as now constituted.

An order dealing with each of these issues follows but it is only with respect to the first issue, the treatment of claims for privilege in the affidavit of documents, that we wish to give brief reasons.

Section 13(2) of the *Competition Tribunal Rules* provides that an affidavit of documents shall include:

- (a) a list of the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party;
- (b) a brief description of each document;
- (c) ...
- (d) any claim that a document is privileged; and
- (e) a statement of the grounds for each claim for privilege.

Without conceding that the statement of grounds for privilege set out in Schedule II of their affidavit of documents, sworn by Charles Mitchell on February 13, 1995, was in any way deficient, counsel for the respondents agreed to amend the language used in that statement to elucidate the grounds of privilege claimed, for example, solicitor-client privilege or litigation privilege. He suggested that tracking the language used in the Director's claim for privilege might provide the necessary clarity. This approach seems appropriate as the Director's description clearly indicates which documents are subject to which type of claim for privilege.

With respect to the listing and description of the documents subject to a claim for privilege, the respondents agreed that they were required by the Rules to list and describe the documents but requested a direction that some "bundling" of documents, in the manner set out in

rule 448(3) of the Federal Court Rules, would be appropriate.

The Director opposed this position. In earlier motion documents filed with the Tribunal on February 21, 1995 but which did not come before us for resolution, the respondents requested that the Director be required "to provide a proper list with a description of each document for which privilege is claimed so as to permit a proper evaluation of the propriety of those claims." The respondents later changed their mind and took the position that privileged documents could be "bundled" but the Director had already complied with the earlier request. He has delivered a supplementary affidavit of documents, sworn by Murray Hamley on March 23, 1995, which lists and describes in Attachment 3 each document over which the Director claims privilege. The list goes on for 46 pages.

The question of the sufficiency of the description of documents claimed to be privileged has plagued the Tribunal on numerous occasions. We have, therefore, set out our reasons for our decision in this case, in the hope that future motions dealing with this topic will thereby be discouraged.

While it is true that in the *Chrysler Canada Limited* case, the Tribunal allowed a claim for privilege over a class of documents by the Director, that decision was expressly confined to that case. The Tribunal stated that "*in the present instance*, it was not necessary to list each document."¹ In later decisions, the Tribunal took a different approach, in favour of descriptive claims for privilege rather than the use of "blanket" clauses.²

¹ (5 July 1989), CT8804/180, Reasons and Order at 3, [1989] C.C.T.D. No. 28 (QL).

² *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 68 at 86-87, [1991] C.C.T.D. No. 16 (QL); *Director of Investigation and Research v. Air Canada* (1993), 46 C.P.R. (3d) 312 at 318, [1993] C.C.T.D. No. 4 (QL).

The Tribunal's Rules expressly require a listing and a description of all documents included in the affidavit of documents. The parties can and should take a practical approach to complying with this requirement. If the documents can be listed and described in groups without obscuring or affecting the adequacy of the listing and description, then a party may do so. This is only common sense. There is no need to refer to rule 448 of the Federal Court Rules. The fundamental requirement, however, remains the same, as stated in the rule.

It should be noted that when one party comes to the Tribunal challenging the adequacy of the description provided by the other party, the Tribunal is in an awkward position. Without examining the documents themselves, which we would be reluctant to do, not the least because it would be very time-consuming, we can only fall back on the words of the rule and, in cases of doubt as to adequacy, require strict compliance by the listing and description of each and every document. It is, of course, open to counsel for the persons filing affidavits of documents to agree to proceed on a less arduous basis. Unless the description is challenged before the Tribunal, the Tribunal will not have reason to review or interfere with it.

In the circumstances of this case, where the respondents have asked the Director for a detailed listing and description and the Director has complied with that request, we are inclined to hold the respondents to the same high standard. Rather than run the risk of seeing these parties before us again in a few weeks arguing again about the manner of "bundling" the documents and the sufficiency of the description of the bundles, we believe that the more prudent and expeditious course is to require the respondents to list and describe all privileged documents.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. As they agreed to do, the respondents shall restate the claims for privilege set out in Schedule II of their affidavit of documents and the grounds for each claim of privilege in a clear and unambiguous manner. The respondents shall provide a list of the documents over which privilege is claimed and shall briefly describe each document. These changes shall be reflected in the amended affidavit of documents to be served and filed in accordance with the Order Regarding Withdrawal, Amendment and Striking of Pleadings dated March 28, 1995.

THE TRIBUNAL FURTHER ORDERS THAT:

2. In light of the amendments to the Director's application, the Director shall review forthwith his affidavit of documents and supplementary affidavit of documents. The Director shall serve and file an amended affidavit of documents within five days after being served with an amended response.

3. Each party shall provide to the other party the documents listed in its amended affidavit of documents for inspection and copying by April 20, 1995. The party receiving the documents shall return the documents to the other party by April 27, 1995.

DATED at Ottawa, this 30th day of March, 1995.

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

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