CT-89/2

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
JUIN / JUNE 1 1989
REGISTRAR — REGISTRAIRE
OTTAWA, ONT. #1

The NutraSweet Company

B E T W E E N

The Director of Investigation and Research

Applicant

\- and -

The NutraSweet Company

Respondent

APPLICATION

Warren Grover Q. C.
Blake, Cassels & Graydon
Counsel to the Director of Investigation and Research
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Toronto, Ontario
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* * *

NOTICE OF APPLICATION UNDER SECTION 8 OF

THE COMPETITION TRIBUNAL ACT

TO: The NutraSweet Company
2330 Argentia Road
P.O. Box 667
Mississauga, Ontario
L5M 2C2

AND TO: The Registrar
The Competition Tribunal
Royal Bank Centre
90 Spark Street
P.O. Box 1899, Station "B"
Ottawa, Ontario
K1P 5R5

TAKE NOTICE that the Applicant, the Director of Investigation and Research (the "Director"), will make an application to the Competition Tribunal (the "Tribunal") pursuant to sections 79 and 77 of the Competition Act, R.S.C. 1985, c. C-34 as amended (the "Act") (formerly sections 51 and 49 of the Act) for:

1. an order of the Tribunal, pursuant to section 79(1) of the Act, prohibiting those practices of anti-competitive acts by the Respondent which have had, are having, or are likely to have the effect of preventing or lessening competition substantially in the supply of aspartame in Canada;

2. such orders of the Tribunal, pursuant to section 79(2) of the Act as are reasonable and necessary to overcome the effects of the aforementioned practices of anti-competitive acts in the market;

3. an order of the Tribunal, pursuant to section 77(2) of the Act, prohibiting the Respondent from continuing to engage in exclusive dealing;

4. such orders of the Tribunal, pursuant to section 77(2) of the Act, as are necessary to overcome the effects of the aforementioned exclusive dealing or to stimulate competition in the market;

5. an order of the Tribunal, pursuant to section 77(2) of the Act, prohibiting the Respondent from continuing to engage in tied selling;

6. such orders of the Tribunal, pursuant to section 77(2) of the Act, as are necessary to overcome the effects of the aforementioned tied selling or to stimulate competition in the market; and

7. any such other order as the Tribunal may consider appropriate.

AND TAKE NOTICE that if you do not file a response with the Registrar of this Tribunal within thirty days of the date upon which this Notice of Application is served upon you, the Tribunal may, upon the ex parte application of the Director, make such order as it considers appropriate.

IN SUPPORT of this application the Director attaches the following Statement of Grounds and Material Facts which sets out the grounds for the application, the material facts upon which the Director relies and the particulars of the orders sought.

STATEMENT OF GROUNDS AND MATERIAL FACTS FOR THE APPLICATION BY THE DIRECTOR OF INVESTIGATION AND RESEARCH UNDER SECTIONS 79 AND 77 OF THE COMPETITION ACT

A. THE PARTIES

1. The Applicant, the Director of Investigation and Research (the "Director") under the Competition Act (the "Act") is the officer appointed under section 7 of the Act (formerly section 5) and is charged with the administration of the Act.

2. The Respondent, the NutraSweet Company is a Delaware corporation with its head office in Skokie, Illinois, in the United States of America, and carries on business in Canada. The Respondent has obtained an extra-provincial licence to carry on business in the Province of Ontario and has an office in Mississauga. The Respondent is a wholly-owned subsidiary of Monsanto Company, a Delaware Corporation, which has its head office in St. Louis, Missouri, in the United States of America.

B. RESPONDENT'S CONTROL OF ASPARTAME MARKET

3. The Respondent presently controls over 95% of the aspartame market in Canada. The largest supplier of aspartame in Canada other than the Respondent is Tosoh Canada Limited ("Tosoh") which maintains its head office in the City of North York in the Province of Ontario. Tosoh markets aspartame in Canada which is manufactured by the Holland Sweetener Company in a medium-sized dedicated plant located in the Netherlands. The Holland Sweetener Company itself is a joint venture between Dutch State Mines and the Tosoh Corporation, a Japanese corporation which owns 100% of the shares of Tosoh. Tosoh distributes approximately 3% of the aspartame sold in Canada.

C. **NATURE OF THE APPLICATION**

4. The Director submits that the Respondent has completely controlled, and continues to substantially control, the supply of aspartame throughout Canada; that such supply of aspartame constitutes a class or species of business; that the Respondent has engaged in or is engaging in a practice of anti-competitive acts within the meaning of section 78 of the Act; and that such practices have had, are having and are likely to have the effect of lessening competition substantially in the supply of aspartame in Canada.

5. The Director submits that the following acts of the Respondent constitute anti-competitive acts within the meaning of section 78 of the Act:

   (a) The Respondent has used the strength of its United States' patent position to enter into exclusive world-wide contracts with certain of its multinational customers which effectively preclude such customers from purchasing any of their supply of aspartame in Canada from suppliers other than the Respondent, thereby substantially lessening competition in Canada;

   (b) the Respondent has used its dominant market position in Canada to extract contractual terms which serve to tie its customers to purchase their entire supplies of aspartame from the Respondent. Further, the pricing of the Respondent's aspartame is structured using fidelity rebates pursuant to which customers are effectively forced to purchase their entire supply of aspartame from the Respondent in order to obtain a price competitive with the price offered to other customers. These practices foreclose major portions of the Canadian market of aspartame to competition and therefore prevent or substantially lessen competition;

(c) during the period when it held the Canadian patent for aspartame, the Respondent used the bargaining strength produced by its patent as well as the uncertainty surrounding whether such patent would be extended to acquire written exclusive contracts from many of its customers, which contracts artificially extend the Respondent's dominant market position beyond the expiration of the Respondent's patent, thereby preventing or substantially lessening competition in Canada;

(d) at least one contract entered into by the Respondent contains provisions which permit customers to solicit competitive bids for the supply of aspartame in Canada. The Respondent then has the option either to meet any lower price offered by a competitor or to release the customer from its contractual obligation to purchase a quantity of aspartame equal to the quantity governed by the competitive offer (an "English clause"). Further, the Respondent amended a contract with a customer to include a term which depends upon the exercise of an English clause by any equally large customer (an "extended release clause"). Should such a customer be released from its obligation, the extended release clause would release the first customer from its contractual obligations for a similar amount of product. These practices have given and are giving the Respondent a large degree of market transparency which allows it, in its sole discretion, to determine the relative market shares in the aspartame market;

(e) the Respondent has entered into written and oral agreements with its customers pursuant to which the Respondent agrees that the price charged to the customers would be adjusted to equal the lowest prices charged by the Respondent for the product ("most favoured nation" clauses). These clauses substantially lessen competition in the supply of aspartame;

(f) the Respondent has used its trade mark, co-operative marketing programs and the provision of free aspartame as integral parts of an overall strategy designed to artificially extend its dominant market position after its Canadian patent had expired, thereby substantially lessening competition;

(g) the Respondent has sold aspartame in Canada at a price below its acquisition cost or below its long run average cost, with the result that competition has been lessened substantially; and

(h) the Respondent has granted to some customers price concessions and other advantages not available to competitors of such customers with the result that competition has been lessened substantially.

6. The Director submits that, in addition to the Respondent's practices of anti-competitive acts having had and having the effect of preventing or lessening competition.

substantially in the supply of aspartame, an order under section 79(1) of the Act alone would not be likely to restore competition respecting the supply of aspartame in Canada. Consequently, in addition to seeking an order of the Tribunal under section 79(1) of the Act prohibiting such anti-competitive acts, the Director seeks an order of the Tribunal under section 79(2) of the Act directing the Respondent to take such actions as are reasonable and necessary to overcome the effects of the practices in the market.

7. In addition to the foregoing or in the alternative, the Director submits that the Respondent has engaged in or is engaging in exclusive dealing as that term is defined in section 77(1) of the Act.

8. The Director submits that the following practices of the Respondent constitute exclusive dealing within the meaning of section 77(1) of the Act:

   (a) conditioning the supply of aspartame upon the affixing of the Respondent's trade mark upon the customer's packaging;

   (b) conditioning the supply of aspartame upon the inclusion of an exclusive supply clause; and

   (c) conditioning the supply of aspartame upon the successful resolution of world-wide exclusive dealings contracts.

9. In addition to or in the alternative to paragraph 8 hereof, the Director submits that inclusion of the following contractual provisions in its supply contracts constitutes a practice or practices whereby the Respondent, as a supplier of the product aspartame, induces its customers to meet the conditions set forth in paragraph 8 hereof by offering to supply the product on more favourable terms if the customer agrees to meet such conditions:

   (a) an English clause;

   (b) a most favoured nation clause;

   (c) a trade mark display allowance;

   (d) a co-operative marketing rebate;

   (e) a free product clause; and

   (f) other fidelity rebates.

10. The Director submits that, because the Respondent is the major supplier in the market, such exclusive dealing has impeded, and is likely to impede, entry into or expansion of a firm in the market, with the result that competition is or is likely to be lessened substantially.

11. The Director further submits that mere prohibition of such exclusive dealing alone will not be likely to restore competition respecting the supply of aspartame in Canada because of the structural effects of such acts on the market. Consequently, in addition to seeking an order of the Tribunal under section 77(2) of the Act prohibiting such exclusive dealing, the Director seeks an order of the

Tribunal under section 77(2) of the Act directing the Respondent to take such actions as are necessary to overcome the effects of such exclusive dealing in the market or to restore or stimulate competition in the market.

12. In addition to the foregoing or in the alternative, the Director submits that the Respondent has engaged in or is engaging in tied selling as that term is defined in section 77(1) of the Act.

13. The Director submits that the inclusion of a substantial trade mark display allowance in a number of the Respondent's contracts for the supply of aspartame, together with other fidelity rebates, constitute inducements to such customers to meet conditions to refrain from using, in conjunction with NutraSweet brand aspartame, any other sweetener.

14. Alternatively, the Director submits that such trade mark display allowances and fidelity rebates constitute inducements to such customers to acquire obligations to display the Respondent's trade mark from the Respondent.

15. The Director submits that, because the Respondent is the major supplier in the market, such tied selling has impeded, and is likely to impede, entry into or expansion of a firm in the market, with the result that competition is or is likely to be lessened substantially.

16. The Director further submits that mere prohibition of such tied selling alone will not be likely to restore competition respecting the supply of aspartame in Canada because of the structural effects of such acts on the

market. Consequently, in addition to seeking an order of the Tribunal under section 77(2) of the Act prohibiting such exclusive dealing, the Director seeks an order of the Tribunal under section 77(2) of the Act directing the Respondent to take such actions as are necessary to overcome the effects of such tied selling in the market or to restore or stimulate competition in the market.

D. <u>MATERIAL FACTS</u>

(i) <u>Identification of Relevant Product Market</u>

17. The Director submits that aspartame alone constitutes the relevant product market for the purposes of sections 78, 79 and 77 of the Act.

(a) Aspartame

18. Aspartame is the generic name for an esterfied di-peptide, consisting of two amino acids (natural protein building-blocks) which are chemically linked. Both amino acids, aspartic acid and phenylalanine, can be separately found naturally in protein-containing food products such as meat, milk and vegetables.

19. Aspartame is a white, crystalline odourless powder. It is used as a sweetening ingredient and has a taste profile similar to sugar. It is a nutritive sweetener in that it is absorbed by the body. It is also an intense sweetener, 180 times sweeter than sugar. Hence, smaller quantities of aspartame are required to obtain the same sweetness as would be provided by sugar. Aspartame is the only intense

sweetener currently approved for widespread use as set out in paragraph 38 herein.

(b) Substitutability

20. Sugar (sucrose) is the primary sweetening agent employed throughout the world in foodstuffs.

21. The market for Aspartame constitutes a market distinct from that for sugar. Indeed, the very reason for aspartame's existence is to provide an alternative sweetening agent for those individuals who either cannot tolerate sugar because they are diabetics, or do not wish to consume sugar because of its high caloric content. Products sweetened with sugar do not substitute for products sweetened with aspartame to any great extent.

22. Aspartame is used in chewing gum and breath mints, not because of its low caloric value, but rather primarily because it does not have the same deleterious effect on teeth as does sugar. Thus, chewing gum and breath mints which contain sugar constitute a separate market from similar products which contain aspartame. Products containing aspartame may also contain bulk sweeteners such as mannitol or xylitol which are alcohol sugars that do not contribute to tooth decay.

23. A number of sweeteners are used which resemble sugar in sweetness and in caloric content. These sweeteners include: glucose; fructose; high fructose corn syrup; sorbitol; mannitol; and xylitol.

24. Sweeteners such as those listed in paragraph 23 hereof are termed "bulk" or "caloric" sweeteners. They are used primarily either as substitutes for sugar (but not low calorie substitutes) or as bulking agents for intense sweeteners.

25. For the same basic reason as set out in paragraph 21 hereof, bulk sweeteners in general do not serve as substitutes for aspartame. Those who seek to avoid sugar because of its high caloric content will likewise seek to avoid other caloric sweeteners. When low caloric products are unavailable, they are not replaced by analogous high caloric products to any substantial extent.

26. Sweeteners exist which are much sweeter by weight than sugar (30 to 500 times). Because they are so much sweeter than sugar, the amount of these sweeteners required to achieve the same level of sweeteners required to achieve the same level of sweetness as sugar is much less. Hence, these sweeteners are called "intense" sweeteners. The permitted levels of intense sweeteners as ingredients in food products is controlled under Regulations to the Food and Drug Act, R.S.C. 1985, c. F-27. None of the regulations relate to the practices which are the subject matter of this application.

27. Saccharin and cyclamates are intense, non-nutritive sweeteners which were originally classified as food additives but are now in a separate category. Saccharin is no longer sold except in drug stores in Canada, although its use is permitted in the United States. Cyclamates are approved for use only in table top sweeteners in Canada. Table top sweeteners comprise only a small percentage in value of products made with intense sweeteners in Canada.

28. Aspartame possesses the following characteristics which distinguish it from saccharin and cyclamates:

(a) aspartame is nutritive and is completely absorbed by the body;

(b) aspartame is the only intense sweetener approved by the Health Protection Branch of the Department of Health and Welfare Canada for wide use both in terms of food products and distribution outlets; and

(c) aspartame has a superior taste and does not have the aftertaste problems sometimes associated with other intense sweeteners.

29. Aspartame therefore constitutes a distinct market, separate from sugar, other caloric sweeteners and other intense sweeteners.

(ii) Identification of the Relevant Geographic Market

30. The Director submits that Canada constitutes the relevant geographic market for the purposes of sections 78, 79 and 77 of the Act.

31. In all contracts in the aspartame industry, Canada is treated as a distinct market.

(iii) Manufacture, Distribution and Use of Aspartame in Canada

32. The following firms possess dedicated plants (that is, single use plants) and therefore have the capability to produce aspartame in significant commercial quantities:

(a) The Respondent (United States);

(b) Ajinomoto & Co., Ltd. (Japan); and

(c) Holland Sweetener Company (Holland).

33. The Respondent has entered into a cross licensing agreement with Ajinomoto and Co., Ltd. ("Ajinomoto"), whereby, inter alia, the Respondent markets in North America any aspartame manufactured by Ajinomoto. Hence, Ajinomoto does not compete with the Respondent in the supply of aspartame in Canada.

34. The following firms possess the capability to produce aspartame in non-dedicated (multi-use) plants:

(a) Green Cross (Korea);

(b) Cheil Sugar (Korea);

(c) Lark (Italy);

(d) Farmitalia (Italy);

(e) Pierrel (Italy);

(f) Angus Fine Chemical (Ireland); and

(g) Mitsui Toatsu (Japan).

35. None of the firms listed in paragraph 34 hereof currently manufacture aspartame in significant commercial quantities.

36. There is no manufacture of aspartame in Canada at the present time. Hence, aspartame is imported into Canada.

The following firms currently distribute aspartame in Canada:

(a) The Respondent - source of supply: the United States; and

(b) Tosoh Canada Ltd. - source of supply: Holland Sweetener Company, Holland.

37. The following firms distributed aspartame in the past in Canada, but have since ceased such distribution:

(a) Atlantic Chemicals & Pharmaceuticals - source of supply: Italy;

(b) Semmons Taylor Inc. - source of supply: Japan; and

(c) Ashland Chemicals Co. - source of supply: Korea.

38. Regulation SOR/81-617 to the Food and Drug Act, supra, controls the use of aspartame in food products. This Regulation specifies the maximum percentage of aspartame that can be used in various categories of food products, and sets down labelling requirements when aspartame is used. Aspartame is currently employed in Canada as a principal sweetener in the following food products:

(a) carbonated soft drinks;

(b) non-carbonated soft drinks;

(c) powdered foods and gelatin mixes;

(d) breakfast cereals;

(e) fruit base for yogurt;

(f) chewing gum;

(g) breath mints; and

(h) table top sweeteners.

39. The soft drink industry is the largest user of aspartame. Within that industry the two largest users together account for over 60% of the total market for aspartame in Canada.

40. The total Canadian annual market for aspartame is approximately 400,000 kilograms, with a wholesale value in excess of Cdn. $25,000,000.00.

41. The Respondent sells over 95% of the aspartame currently used in Canada.

(iv) <u>Canadian Patent History</u>

42. G.D. Searle & Co. ("Searle") was granted a patent, number 846,137, on aspartame in Canada in 1970. In the same year Searle was granted a patent on the combination of aspartame and certain other sweetening agents in Canada.

43. In June, 1987, Bill C-259 was introduced in the House of Commons to extend the life of patent number 846,137 for 5 years. The Senate returned an amended Bill to the House of Commons, where it failed to receive unanimous consent. Patent number 846,137 consequently expired in July, 1987. On the other hand, the use patent on aspartame in the United States was extended until 1992.

44. Searle was acquired by Monsanto Company ("Monsanto") as of January 1, 1986. Monsanto reorganized Searle, separating the pharmaceuticals business from aspartame production. Monsanto determined that the Respondent would be responsible for aspartame production and marketing. The Respondent currently holds the United States use patent on aspartame.

(v) <u>Regulatory Response in Other Jurisdictions</u>

45. In 1986, the European Commission (the "Commission") received complaints from Angus Fine Chemicals Limited and the Holland Sweetener Company, who were at the time of the complaint commencing the construction of plants for the production of aspartame to compete with the Respondent, alleging that the exclusive world-wide contracts entered into by the Respondent with the Coca-Cola Company ("Coke") and with Pepsico Inc. ("Pepsi") infringed Article 85 of the <u>Treaty of Rome</u>.

46. After the Commission commenced a formal investigation, the Respondent entered into discussions with the Commission with a view to amending the world-wide contracts in such a way that they would comply with Article 85 of the <u>Treaty of Rome</u>.

47. The world-wide contracts were amended such that the exclusive supply clauses no longer applied to the European Community. However, the amended contracts provided that Coke and Pepsi would be required to purchase a fixed quantity of aspartame from the Respondent for a period of two years. This quantity was set to ensure that Coke and Pepsi were able to purchase a substantial quantity of

aspartame from any source they would like. Thus, emerging competitors of the Respondent have the opportunity to sell to the major purchasers of aspartame within the European Community.

48. Upon receipt of the amended contracts referred to in paragraph 47 hereof, the Commission discontinued its formal enquiry respecting Article 85 of the Treaty of Rome.

49. In 1987, the Commission entertained an additional complaint alleging that the practices of the Respondent violate the competition rules of the European Community respecting abuse of dominant position as established by Article 86 of the Treaty of Rome. The Commission has as yet not taken any further formal actions.

E. GROUNDS FOR THE APPLICATION

(i) Abuse of Dominant Position

A. Practices of Anti-Competitive Acts

(a) Use of U.S. Patent Position to Foreclose Competition

50. The Respondent has used the strength of its United States patent position to enter into world-wide exclusive supply contracts of several years' duration with the parent companies of the largest purchasers of aspartame in Canada. This practice has foreclosed over 60% of the Canadian market for manufactured aspartame.

(b) Inducing Exclusivity through Structure of Contracts to Substantially Lessen Competition

51. In many of the contracts which the Respondent has signed, customers are obligated to purchase their entire supply of aspartame from the Respondent ("exclusive supply clauses"). The existence of exclusive supply clauses substantially lessens competition.

52. Many of the Respondent's contracts also contain provisions which require customers to use aspartame produced by the Respondent as the sole sweetener in the customers' products ("exclusive use clauses"). The existence of exclusive use clauses substantially lessens competition.

53. In addition to exclusive supply and exclusive use clauses, the Respondent has put in place a marketing scheme composed of fidelity rebates designed to induce customers to purchase all of their aspartame requirements from the Respondent. Various contracts contain some or all of the following fidelity rebates:

(a) volume discounts were given which allowed a customer to maximize its profits only by purchasing its entire supply of aspartame from the Respondent;

(b) a customer was given a rebate for each kilogram of aspartame which it persuaded its co-packers to purchase from the Respondent rather than from a competitor ("volume incentive clause");

(c) the Respondent allowed substantial fidelity rebates to its customers for displaying the Respondent's trade mark or brand name, which display required that only NutraSweet brand aspartame could be contained in the product to the exclusion of all other sweeteners ("trade mark/logo display allowance clauses"); and

(d) the Respondent provided substantial sums of money and free products to its customers for co-operative marketing programs respecting products which contain aspartame supplied exclusively by the Respondent as the sole sweetening ingredient.

These practices substantially lessen competition.

54. Thus, the Respondent has devised a scheme of marketing and pricing which binds its customers to it and inhibits their dealing with competitors. In order to remain competitive, a customer must take advantage of all of the rebates offered by the Respondent. This not only forces the customer to purchase its entire supply from the Respondent, it also forces the customer to affix the Respondent's trade mark to the customer's packaging. Another supplier of aspartame would therefore have to set its price at a level which is not only competitive on the bottom line price, but which also justifies the cost of removing the Respondent's trade mark from the product's packaging.

(c) Extending Patent through Exclusive Contracts, Thereby Foreclosing Competition

55. Ingredients for food products are normally sold as commodities, and it is unusual for them to be sold under long term contracts. During the period immediately prior to the expiration of patent number 846,137 the Respondent negotiated a number of relatively long term exclusive supply contracts for aspartame, thereby ensuring that its dominant position would remain regardless of whether its patent expired.

(d) Creation of Market Transparency to Control Competition

56. The Respondent has in place a number of written and oral agreements which, while apparently ensuring that particular customers remain competitive in the industry, also in fact preclude entry into the market and therefore prohibit or substantially lessen competition. These agreements take the following forms:

(a) certain contracts contain a "meet or release" or "English" clause which allows customers to entertain competitive offers. The Respondent, after being presented with a lower bona fide offer, may meet that price. If the Respondent chooses not to meet the lower price, the customer is able to place some or all its business with the supplier making the competitive offer;

(b) one contract contains a provision (the "extended release clause") whose terms depend on the exercise of an English clause by any other customer who purchases at least as much aspartame from the Respondent (the "third party customer"). Should the Respondent choose to release the third party customer pursuant to the terms of its English clause, the extended release clause requires the Respondent to release a similar volume from the customer whose contract contains the extended release clause;

(c) certain contracts contain a "most favoured nation" clause, which obligates the Respondent to ensure that the customer is not charged a price for aspartame which places it at a competitive disadvantage in the industry; and

(d) the Respondent has orally assured various customers that it will not allow them to be put at a competitive disadvantage through the pricing of aspartame by itself or by others.

57. The presence of these provisions gives the Respondent a type of market transparency which allows the Respondent to know the prices charged by competitors and to decide whether it will allow competition, and if so, to what extent. Further, the large profits reaped from the monopoly position of the Respondent allow the Respondent to meet any price in the world and to advertise extensively. Thus, the practical effect of these types of provisions is to restrict access to, and thereby lessen competition substantially in, that portion of the market to which they apply.

(e) Insertion of Most Favoured Nation Clause to Lessen Competition

58. In addition to creating market transparency as set out in paragraphs 56 and 57 hereof, the presence of a most favoured nation clause exacerbates the effects of the fidelity clauses set out in paragraphs 51 to 54 hereof by further inducing the Respondent's customers to purchase their entire supply of aspartame from the Respondent. Customers whose contracts contain a most favoured nation clause benefit whenever the Respondent meets competitive prices which arise either because of the operation of an English clause or through normal contractual negotiations. Because of the Respondent's overwhelming market share, and since the Respondent has historically never failed to meet a competitive price, customers of the Respondent feel confident in placing their entire order with the Respondent

because the price which they will pay for this aspartame will be at or near the lowest price anywhere in the industry for the entire length of the contract.

(f) Abuse of Trade Mark to Delay Entry into Market

59. Placement of the Respondent's trade mark on its customers' products represents an integral component of its marketing strategy. This practice is unusual and is designed to, and has the effect of, preventing entry by alternative suppliers into the market.

60. In the early stages of product development the Respondent subsidized the placement of its trade mark on labels or containers. Subsequently, the Respondent paid a substantial allowance to customers who continued to display the trade mark or brand name on products. These practices raised barriers to entry into the market in that in order to be competitive, a competitor's price must justify both the cost of removing the trade mark from the label and foregoing the trade mark display allowance.

(g) Selling Below Acquisition Cost or Long Run Average Cost to Lessen Competition

61. The Respondent produces the major portion of aspartame which it supplies to its Canadian customers, while the balance of its Canadian supply comes from outside the United States. The net prices which the Respondent charges to certain of its Canadian customers, after all of the discounts, allowances, rebates and free products are considered, are less than the Respondent's average acquisition cost or long run average cost.

(h) Differential Pricing

62. The Respondent granted, and continues to grant to a customer, price concessions and other advantages not available to a competitor of the customer for the same or greater quantities of aspartame.

B. Effect on Competition

63. The majority of the Canadian aspartame market is not open to competition at all because of the existence of world-wide contracts which are negotiated outside of Canada and which require exclusive use of the Respondent's aspartame in Canada.

64. The cumulative effect of the Respondent's practices outlined in heading A above foreclose most of the aspartame market to potential alternative suppliers and substantially prevent or lessen competition in the aspartame market in Canada.

65. The Respondent's practices have raised the following barriers to entry into the aspartame market in Canada:

(a) contractual requirements discourage customers from following their normal practice of purchasing ingedients from multiple suppliers;

(b) prices for aspartame in Canada have been set at a level making it impractical for prospective competitors to enter the market;

(c) prices have been selectively lowered to foreclose competition; and

(d) subsidization of the Canadian market has been funded from profits enjoyed by the Respondent in other markets.

66. With the exception of Tosoh Canada Ltd., all of the suppliers and manufacturers who possess the capability to produce aspartame and market it in Canada have left the Canadian market and are no longer tendering for the supply of aspartame in Canada.

67. Mere prohibition of further anti-competitive acts by the Respondent would not address the structural effects of past practices of the Respondent. Significant barriers to entry into the market presently exist, such as the existence of exclusive dealings provisions, fidelity clauses, English clauses and meet competition clauses, which would continue to foreclose most of the market to competition. Further, the current pricing structure, with its attendant structural barriers to entry, prevents or substantially lessens competition.

(ii) <u>Exclusive Dealing</u>

68. In various contracts with its customers, the Respondent has placed the following conditions upon the sale of aspartame:

(a) affixing the Respondent's trade mark upon the customer's product label, with the size and specifications of the trade mark display set by the Respondent. Initially, while the Respondent possessed the Canadian patent for aspartame, there was no consideration for affixing the trade mark to the product label. Before the Respondent's patent expired, however, the Respondent began giving its customers a substantial rebate for displaying the trade mark;

(b) including an exclusive supply provision, which obligates the customer to purchase its entire supply of aspartame from the Respondent; and

(c) entering into exclusive world-wide supply contracts.

69. In addition to or in the alternative to paragraph 68 hereof, the Director submits that inclusion of the following contractual provisions in its supply contracts constitutes a practice or practices whereby the Respondent, as a supplier of the product aspartame, induces its customers to meet the conditions set forth in paragraph 69 hereof by offering to supply the product on more favourable terms if the customer agrees to meet such conditions:

(a) an English clause;

(b) a most favoured nation clause;

(c) a trade mark display allowance;

(d) a co-operative marketing rebate;

(e) a free product clause; and

(f) other fidelity rebates.

70. As set out in paragraphs 36 to 41 hereof, the Respondent is the dominant supplier in the aspartame market.

71. As set out in paragraphs 63 to 67 hereof, the exclusive dealing by the Respondent has impeded, and is likely to impede, entry into and expansion of a firm in the market, with the result that competition is or is likely to be lessened substantially.

(iii) Tied Selling

72. In various contracts with its customers, the Respondent has adopted a practice of placing the following conditions upon the supply of aspartame to its customers:

(a) that such customers affix the Respondent's trade mark upon the customer's product label; and

(b) that such customers refrain from using, in conjunction with the Respondent's brand of aspartame, another brand of aspartame that is not manufactured by the Respondent.

73. The inclusion of a substantial trade mark display allowance in a number of the Respondent's contracts for the supply of aspartame, together with other fidelity rebates, constitute inducements to such customers to meet conditions to refrain from using, in conjunction with the tying product, NutraSweet brand aspartame, any other brand of aspartame or any other sweetener produced by any other manufacturer.

74. Alternatively, such trade mark display allowances and fidelity rebates constitute inducements to such customers to meet conditions to acquire the Respondent's trade mark from the Respondent.

75. As set out in paragraphs 36 to 41 hereof, the Respondent is the dominant suppliers in the aspartame market.

76. As set out in paragraphs 63 to 67 hereof, the tied selling by the Respondent has impeded, and is likely to impede, entry into and expansion of a firm in the market, with the result that competition is or is likely to be lessened substantially.

F. PARTICULARS OF THE ORDER APPLIED FOR

77. The Director therefore applies to the Tribunal for the following orders:

(a) an order, pursuant to section 79(1) of the Act, prohibiting the Respondent or its affiliates, its officers or agents:

(i) from entering into world-wide contracts with multinational customers which govern the supply of aspartame to the Canadian affiliates of such customers;

(ii) from requiring customers to purchase their entire supply of aspartame from the Respondent;

(iii) from selling aspartame to Canadian customers at prices below its acquisition costs; and

(iv) from granting to a customer price concessions and other allowances not available to competitors of such customer for the same or greater volume of aspartame;

(b) a declaration, pursuant to section 79(2) of the Act, that the following clauses, when contained in contracts between the Respondent and its customers, are of no further force and effect and may not be judicially enforced by the Respondent:

(i) exclusive supply clauses;

(ii) exclusive use clauses;

(iii) volume discount clauses;

(iv) English clauses;

(v) extended release clauses;

(vi) trade mark/logo display allowance clauses; and

(vii) clauses which prohibit or penalize exportation of processed product into the United States;

(c) an order, pursuant to 79(2) of the Act, declaring that if most favoured nation clauses are to be included in any contracts by the Respondent for the supply of aspartame to a customer, such clauses must be included in all contracts made by the Respondent for the supply of aspartame to customers that sell products containing aspartame that compete with the products of that customer;

(d) a declaration, pursuant to section 79(2) of the Act, that any contracts entered into by the Respondent or any of its affiliates pursuant to world-wide contracts are of no force and effect, insofar as they affect the supply of aspartame in Canada;

(e) an order, pursuant to section 79(2) of the Act, directing the Respondent not to require in a supply contract a minimum, exclusive annual volume commitment greater than 50% of the customer's total annual volume requirements;

(f) an order, pursuant to section 77(2) of the Act, prohibiting the Respondent from placing the following conditions upon the sale and supply of aspartame:

   (i) a trade mark display allowance clause;

   (ii) a fidelity clause;

   (iii) an exclusive supply clause; and

   (iv) an exclusive use clause;

(g) a declaration, pursuant to section 77(2) of the Act, that the following clauses, when contained in contracts between the Respondent or its affiliates and their customers, so far as such clauses relate to Canada, are of no further force and effect and may not be judicially enforced:

   (i) exclusive supply clauses;

   (ii) exclusive use clauses;

(iii) volume discount clauses;

(iv) English clauses;

(v) extended release clauses; and

(vi) trade mark/logo display allowance clauses;

(h) an order, pursuant to 77(2) of the Act, declaring that if most favoured nation clauses are to be included in any contracts by the Respondent for the supply of aspartame to a customer, such clauses must be included in all contracts made by the Respondent for the supply of aspartame to customers that sell products containing aspartame that compete with the products of that customer;

(i) a declaration, pursuant to section 77(2) of the Act, that any contracts entered into pursuant to world-wide contracts are of no force and effect, insofar as they affect the supply of aspartame in Canada;

(j) an order, pursuant to section 77(2) of the Act, prohibiting the Respondent from including in a supply contract a minimum exclusive annual volume commitment greater than 50% of the customer's total annual volume requirements; and

(k) any such other order as the Tribunal may consider appropriate.

G. LANGUAGE

78. The Director requests that this Application be heard in the English language.

H. LOCATION OF HEARING

79. The Director requests that this Application be heard in the City of Toronto.

I. PROCEDURE

80. The Director will seek directions from the Chairman regarding the interlocutory proceedings herein and for the expeditious hearing of this Application. In this regard, the Director hereby requests a pre-hearing conference.

J. ADDRESS FOR SERVICE OF THE APPLICANT

81. The address for service on the Applicant for all pleadings relating to this application is:

Warren Grover Q. C.
Blake, Cassels & Graydon
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P.O. Box 25,
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M5L 1A9

Dated at the City of Hull in the Province of Quebec on this 1st day of June, 1989.

Calvin S. Goldman, Q.C.
Director of Investigation
and Research

TO: The Registrar of the
Competition Tribunal

AND TO: The NutraSweet Company
2330 Argentia Road
P.O. Box 667
Mississauga, Ontario
L5M 2C2

6166s