Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd., [1995] C.C.T.D. No. 20

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Before: McKeown J., Presiding Judicial Member F. Roseman, V.L. Clarke, Lay Members

Heard: October 17-21, 24-28, 31, 1994, November 1, 2,

4, 1994, April 3, 10-13, 18-21, 25-28, 1995

Decision: August 30, 1995

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Reasons for Order IN THE MATTER OF an application by the Director of Investigation and Research under section 79 of the Competition Act, R.S.C. 1985, c. C-34; AND IN THE MATTER OF certain practices by The D & B Companies of Canada Ltd. Between The Director of Investigation and Research, Applicant, and The D & B Companies of Canada Ltd., Respondent, and Information Resources, Inc., Canadian Council of Grocery Distributors, Intervenors

(120 pp.)

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Reasons for Order

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I. INTRODUCTION

The applicant in this case is the Director of Investigation and Research ("Director"), the public official charged with enforcement of the Competition Act[1] ("Act"). The Director brings an application against the respondent, The D & B Companies of Canada Ltd., under section 79 of the Act, commonly known as the abuse of dominant position section. The goal of the application is to obtain from the Tribunal an order that will prohibit certain contracting practices of the respondent which the Director alleges are anti-competitive and have the effect of substantially lessening or preventing competition in the supply of scanner-based market tracking services in Canada. The Director also seeks additional remedies to restore competition in the market.

The Director alleges that the respondent substantially or completely controls the supply of scanner-based market tracking services in Canada; that the supply of such services constitutes a distinct class or species of business; that the respondent has engaged in and continues to engage in a practice of anti-competitive acts within the meaning of section 78 of the Act; and that such acts have the effect of preventing or lessening competition substantially in the supply of scanner-based market tracking services in Canada. The acts of the respondent which are alleged to constitute anti-competitive acts are signing exclusive contracts for scanner data with retailers, offering significant financial inducements for exclusive access, and entering into long-term contracts with manufacturers of consumer packaged goods for the sale of its scanner-based market tracking service.

The respondent, The D & B Companies of Canada Ltd., was formed in December 1991 by the amalgamation of the A.C. Nielsen Company of Canada Limited with Dun & Bradstreet Canada Limited and Media Measurement Services Inc. A.C. Nielsen had operated in Canada since 1944. Through a division called Nielsen Marketing Research, the respondent presently carries on the business operated by A.C. Nielsen prior to 1991. As the application is concerned with this division only, for ease of reference the respondent will also be referred to as "Nielsen" throughout these reasons. The respondent disputes each of the grounds of the Director's application. In particular, it alleges that the intervenor, Information Resources, Inc. ("IRI"), was the first company to attempt to introduce exclusive contracts with retailers for scanner data into the Canadian market. It further alleges that the Director has defined the market too narrowly and the market is either decision support services or market tracking services in general.

Two intervenors participated in these proceedings. The first, IRI, provides a scanner-based market tracking service in competition with Nielsen in the United States, where the two companies are fierce rivals. IRI submitted the complaint to the Director which prompted his investigation of Nielsen's practices. The second, the Canadian Council of Grocery Distributors ("CCGD") which represents the grocery retailers, supported the continued existence of exclusive contracts for scanner data with retailers.

This application is concerned with the field of marketing research as it relates to consumer packaged goods. Consumer packaged goods are products, food and non-food, which are packaged by the manufacturer for purchase by consumers. Marketing research is used by retailers and manufacturers to assist them in decision making and planning for the marketing and distribution of these products. There are a wide variety of marketing research services available, as diverse as the needs of the customers for those services.

In Canada, Nielsen offers the widest range of these services; other companies offer some but not all of them. The marketing research services relevant to this application are: market tracking services, household (or consumer) panels and key accounts. These services are described in detail below under the heading "Class or Species of Business"/Product Market.

The issues in this case are dealt with under sections 78 and 79 of the Act and, in particular, the three paragraphs of subsection 79(1), which in turn we have broken down under various headings. For the sake of convenience, we are setting out the facts separately under each heading. Subsection 79(1) reads as follows:

> Where, on application by the Director, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

II. "CLASS OR SPECIES OF BUSINESS": LAW

A question of the legal interpretation of the words "class or species of business" in paragraph 79(1)(a) of the Act has arisen in this case. I propose to address the legal question first and then we will address the facts related to class or species of business or product market. However, it must be kept in mind that the facts and the law are inextricably linked.

Citing the Tribunal's decision in Director of Investigation and Research v. The NutraSweet Company,[2] the Director argues that a "class or species of business" should be defined in the same manner as one would define a relevant product market, that is, in an economic sense. He submits that the Tribunal must decide whether there are other products which are close substitutes for scanner-based market tracking services and, if there are not, then scanner-based market tracking services are a product market and, therefore, a class or species of business within the meaning of section 79.

Nielsen submits that the words "class or species of business" cannot be treated as meaning "product market" because the word "market" was not used in paragraph 79(1)(a) and was employed in paragraph 79(1)(c). The respondent would define class or species of business as the "collection or grouping of all the elements that are necessary for the conduct or performance of the business of the respondent." The respondent does not go so far as to argue that within a company with numerous divisions potentially operating in vastly disparate industries, such as financial services and pharmaceuticals, all divisions should be included. The respondent restricted the class or species of business to that of a particular operating division. In the case at bar, Nielsen submits that the operating division, Nielsen Marketing Research, is in the business of providing decision support services and that is the relevant class or species of business. The respondent further argues that the Director must show that Nielsen controls each and every element of that class or species of business in order to meet the requirements of paragraph 79(1)(a).

It is important in interpreting legislation to keep in mind the purpose of the legislature. What then is the purpose of sections 78 and 79 of the Act? It is not controversial, and it was not disputed before me, that the sections are intended to deal with abuses by dominant firms. The government's explanatory guide neatly summarizes the role of the provision:

> Anti-competitive behaviour on the part of dominant firms imposes artificial restraints on the competitive process, impeding the market from efficiently allocating resources. In a healthy, dynamic economy, goods and services are supplied by the firms which can produce them most efficiently and adapt to the ever-changing demands of the marketplace. The proposed abuse of dominance provision will ensure that dominant firms compete with other firms on merit, not through the abuse of their market power. The provision is of particular importance for the protection of consumers, new entrants and, in particular, the small business community.[3]

These sections were intended to rectify some of the problems which had made the previous criminal law offence of monopoly largely ineffective. These included the fact that there was nothing inherently criminal in the pursuit or maintenance of a monopoly, the high burden of proof required of the Crown to prosecute successfully in a criminal context, the focus of the section on "public detriment" rather than on the anti-competitive conduct and the lack of flexible remedies.

The three paragraphs of subsection 79(1) correspond to the three main elements required to be proven to show an anti-competitive abuse by a dominant firm. The Tribunal must first, assess dominance, second, identify a practice of anti-competitive acts and third, determine the effect of the practice in terms of competition in a market. All three elements must be proven before an order can issue.

To complete the analysis under paragraph (c), the Tribunal will have to define a "market", including both the product and geographic dimensions, and consider market power in its determination of whether there has been a substantial lessening of competition. Likewise, in examining an alleged practice of anti-competitive acts under paragraph (b), the Tribunal will have to consider what is the relevant market. Most of the anti-competitive acts listed in section 78 refer specifically to elimination of a competitor from or preventing expansion into a "market". Even where the word is not mentioned, the concept may have to be applied in order to determine whether the alleged anti-competitive acts are aimed at a competitor (paragraphs (d) and (i)) or to decide which "price levels" are relevant (paragraph (f)).

Keeping that background in mind, I will now turn to the interpretation advanced by the respondent. Counsel referred us to various dictionary definitions of the words "class" and "species". That taken from The Shorter Oxford English Dictionary is fairly representative of all the references, so I will set it out in full:

> [Class:] . . . A number of individuals (persons or things) possessing common attributes, and grouped together under a general or "class" name; a kind, sort, division. (Now the leading sense.) . . . . [Species:] . . . A class composed of individuals having some common qualities or characteristics, freq. as a subdivision of a larger class or genus . . . . A distinct class, sort, or kind, of something specifically mentioned or indicated.[4]

These definitions would lead one to surmise that the elements considered to be within a single class or species of business should have common characteristics. They do not, however, indicate any basis upon which the common characteristics should be assessed, nor did Nielsen advance one.

In this case, the respondent proposes that the class or species of business should include "all the elements that are necessary for the conduct or performance of the business of the respondent." As evidence of the appropriate class or species of business on the facts before us, counsel referred primarily to the 10-K filing of D & B with the Securities Exchange Commission in the United States which describes Nielsen Marketing Research as a participant in the "global consumer marketing information services market" which "supplies a wide range of services that help consumer-goods manufacturers

screen, plan, test and evaluate their individual brands and marketing programs."[5] Reference was also made to the 10-K and mission statement of IRI, which also offers a variety of related products and services.[6] The testimony of manufacturers was also cited to show that they regard the term "information services" or "decision support services" as descriptive of the various products that they are purchasing, from market tracking services to new product testing to software, when taken together. Only market tracking services based on retailer scanner data are encompassed by the Director's definition of class or species of business.

It was not clear from the respondent's argument what makes the various elements of information services or decision-support services "necessary" to the whole, other than the mere fact that Nielsen chose to offer that combination of products and services. A member of the panel put to counsel that if all the elements of Nielsen's business are "necessary" parts of the class or species of business which he called "decision support services" then it would follow that if one of the elements was not available to competitors (for example, scanner-based market tracking services) Nielsen would, by definition, be the only firm in that class or species of business and thus control it.

Counsel responded that, in effect, Nielsen's competitors need not be in the same business as Nielsen. He submitted that it was not sufficient for the Director to show that Nielsen controlled the class or species of business as a whole but that he had to prove that Nielsen controlled each individual element of that business. Further, the presence of a competitor in any one element would negate Nielsen having control of the decision support services class of business even if Nielsen was the only firm carrying on that class of business as a whole. The logic of this argument escapes me. It seems contradictory to group together all the services provided by Nielsen to call it a "class or species of business", apparently on the basis that all the services are "necessary" to that business, and then require that control extend to each individual element. If all the elements are necessary, then on counsel's own definition, there is a single class or species which Nielsen must be shown to control. The individual elements of the group cease to have any relevance to the analysis. If control must extend to each element, then each element should, on the words of paragraph (a), be considered to be a "class or species of business" in and of itself. The gist of the respondent's argument appears to be that the respondent should be permitted to define the "class or species of business", over which it must be shown to have control for the application to succeed, without reference to any objective criteria.

A further question regarding the logical coherence of the proposed definition arises in connection with the Tribunal's determination in NutraSweet (which was also adopted in Director of Investigation and Research v. Laidlaw Waste Systems Ltd.,[7] another abuse of dominance case) that "control" as used in paragraph 79(1)(a) is synonymous with market power.[8] This interpretation was apparently accepted by Nielsen and has been accepted in the literature. Yet it is difficult to talk about market power without reference to a market.

Moreover, not only is the respondent's proposal difficult to justify on its own merits, it also flies in the face of the logical application of competition law in general. I need only refer to the hypothetical regarding Imasco referred to by counsel. Imasco operates in both the financial arena and in pharmaceuticals. The respondent would only go so far as to say that the financial segment is separate and distinct from the pharmaceutical aspect, in that the pharmaceutical business is not "necessary" in order to produce a product in the financial portion. If that is meant to imply that the entire pharmaceutical division would constitute a single "class or species of business", this would be an extraordinary result. Individual varieties of drugs have widely differing uses and there is not necessarily any logical relationship between them from the demand perspective. Enforcement of competition or antitrust law in numerous cases in North America and Europe has proceeded on the basis of individual drugs or classes of drugs identified as having similar characteristics, not against "pharmaceutical" businesses as such.

The Director emphasized that, in assessing whether there has been an abuse of dominant position under section 79, the Tribunal's object is not to identify all the different businesses that Nielsen carries on. He argues that the issue is rather whether scanner-based market tracking services are a well-defined

product market. He submitted that Nielsen's definition focuses on the business that Nielsen carries on rather than a class or species of business, in the words of section 79.

I agree that the respondent cannot be the person who determines the class or species of business in a particular case. I also agree with the Director that if the class or species of business in this case is decision-support services, a whole gamut of products which are used for different purposes and which have a different function are included.

The Director relies on previous decisions of the Tribunal to argue that class or species of business and product market are synonymous and, thus, that the supply of scanner-based market tracking services in Canada can be a class or species of business. The most extensive discussion of the issue is in the Tribunal's decision in the first abuse of dominance case, NutraSweet. In defining the product market in that case, the Tribunal established a test of product substitutability:

> The question is whether, and in what ways, other sweeteners are good substitutes for aspartame. In any given competition law case, a wide range of factors may be relevant in considering product substitutability.[9]

The Tribunal also stated:

> It is the tribunal's view that it is necessary that the over-all purpose of a section be kept in mind when dealing with the elements which the legislative scheme requires to be specifically addressed. In approaching the discussion of product market, the tribunal has kept in mind the implications that its conclusions would have for its consideration of market power.[10]

The Tribunal then went on to discuss the interpretation of the words "class or species of business" in more detail. It is interesting to note that in that case, the parties took the opposite views to the positions of the parties in the present case.

> In the Director's view, the "class or species of business" referred to in para. 79(1)(a) should be interpreted in a "commercial" sense rather than in the economic sense of a product market, and when a commercial interpretation is applied the class or species of business is the manufacture and supply of aspartame. The tribunal concurs with the opposing view of the respondent that "class or species of business" is synonymous with the relevant product market. This interpretation is consistent with the tribunal's view that the meaning of "control" is market power since this concept can only meaningfully be related to a product market. Nothing hangs on the distinction in the instant case since the tribunal considers the relevant product in Canada to be aspartame.[11]

There was some debate before us as to whether the Tribunal actually determined the question of the interpretation of the words "class or species of business" in NutraSweet. In my view, the last sentence of the paragraph quoted above makes the Tribunal's findings on the meaning of the words "class or species of business" in paragraph 79(1)(a) obiter.

The Tribunal then analyzed Eddy Match Co. v. R.,[12] a case relied on by the Director in support of his position. Under the predecessor to the Competition Act, the Combines Investigation Act, Eddy Match Co. was charged with operating a combine, namely a merger, trust or monopoly, which controlled the business of manufacturing and distributing wooden matches. The Tribunal described the finding in that case regarding "class or species of business" as follows:

> In identifying wooden matches as the relevant "class or species of business" the court did not consider it necessary to take into account other means of producing a flame as possible substitutes. The court recognized that "lighting devices" was a general class which could contain many types of business but held that "class or species of business" meant wooden matches since

> that was the only business of Eddy and the matches were distinct from the other lighting devices.[13]

The Tribunal distinguished the Eddy Match decision based on its facts and the different legislative schemes of the Combines Investigation Act and the Competition Act:

> The court in that case was seized with charges under a criminal statute, a case in which the accused had engaged in highly aggressive conduct towards other producers of wooden matches; Eddy certainly acted as though wooden matches were sufficiently distinct so that it was worthwhile for it to concentrate its efforts on that industry. In the present statute, however, s. 79 provides other remedies and the deciding body is a specialized tribunal. It would run contrary to the spirit of this legislation for the tribunal to eschew other relevant factors (i.e., possible substitutes) on some presumed technical ground.[14]

The Tribunal went on to find that the product market should be identified under paragraph 79(1)(a):

> Furthermore, the Director recognizes that the product market must be considered at some point in s. 79(1). In his view, the appropriate place to do so is in para. 79(1)(c) in reference to the substantial lessening of competition in "a market", which requires the identification of both the product and geographic dimensions. In the view of the tribunal, the logic of the section is better followed if the product market is precisely identified in connection with the question of "control" rather than being partially dealt with under para. 79(1)(a) and then revisited in para. 79(1)(c).[15]

In the second abuse of dominance case before the Tribunal, Laidlaw, there was no discussion as to the distinction, if any, between class or species of business and product market as the parties were in agreement on the relevant product market. In fact, the heading used in the reasons is "Class or Species of Business -- Product Market". The Tribunal went on to say:

> There is no dispute in this case as to the relevant product market. It is a specific category of waste collection and disposal service.[16]

I will now examine one additional case which may shed some light on the definition of "class or species of business". In R. v. Canadian General Electric Co. Ltd., the accused, three manufacturers of electric large lamps with 95 percent of the Canadian market, were charged under both the conspiracy and the monopoly provisions of the Combines Investigation Act.[17] In his reasons regarding the conspiracy count, Pennell J. commenced by discussing the relevant market:

> [I]n every adjudication under s. 32 of the Act there is an examination of two competitive features and these relate to (1) the market structure and (2) the behaviour or conduct of the participants, and in respect to both, the way in which the "relevant market" is defined is of the essence.[18]

He concluded:

> In my view, it is clear that the relevant market for the distribution of large lamps was the geographical unit of Canada. The term "large lamps" was coined by the lamp industry to designate a specific segment of the lamp market. Large lamps were treated by each of the accused as a distinct segment of the industry for the purposes of manufacture and sale. They constituted a significant portion of the sales of all lamps in Canada during the period in question. Looked at from any angle, the manufacture or sale of large lamps may be said to constitute a class or species of business in itself.
>
> Large lamps are basically homogeneous products. There was little product differentiation among the large lamps of the three defendants. The public purchasing large lamps would be faced with comparable lines from each of the accused with the same physical characteristics and designed

> for the same use. The degree of substitutability or cross-elasticity is, for all practical purposes, non-existent.
>
> The distribution of large lamps may therefore be considered a relevant market for the purpose of s. 32(1)(c) of the Act. It is a special class of business and is a distinguishable range of lamps within the total variety of lamps produced. The market has not been artificially created to suit the purposes of the present charges but flows from the nature of the product, its lack of cross-elasticity or substitutability with other products, and the treatment given the product through a special mode of distribution and a distinctive sales policy.[19]

Although Pennell J. was referring to the conspiracy provision, in which the words "class or species of business" do not appear, he may have had in mind the monopoly provisions in phrasing his reasons as he did. One can infer that Pennell J. used the same relevant market throughout the decision as he does not return to address the question again in the section headed "Monopoly" but rather proceeds to deal with other issues such as shared monopoly and detriment.[20] Pennell J. focuses on substitutability in defining the relevant market and also appears to use the terms "relevant market" and "class or species of business" interchangeably.

Having reviewed the caselaw, I am in agreement with the finding of the Tribunal in NutraSweet that when determining the "class or species of business" one must look at substitutability. There is also no doubt that "class or species" is intended to narrow the word "business". However, while I agree that the logic of the section is better followed when the product market is precisely identified in connection with the question of control, as stated above in the quotation from the decision in NutraSweet, I cannot agree that one can ignore the difference in the wording in paragraphs 79(1)(a) and 79(1)(c).

In my view, to address the issue of the different wording in paragraphs 79(1)(a) and 79(1)(c) and the reasons for the difference, it is necessary to look briefly at the legislative history of the Act. Although not binding or even, theoretically, admissible in construing a section of a statute, it may be instructive to refer to the legislative history of the particular provision.

The relevant portions of paragraphs (a) and (c) appeared in exactly the same form in the first reading of the bill which eventually became the new Competition Act. They were not amended in committee or in the House. One witness before the House committee considering Bill C-91 did refer to the difference in wording between paragraphs (a) and (c) in some detail. William Stanbury made the following submission on (then) section 51 of the Bill:

> Now we come to the matter of defining the market. Paragraph 51.(1)(a) speaks of a "class or species of business". On the other hand paragraph 51.(1)(c) speaks of a "market". The problem is, are these the same terms, or just different terms for the same thing? I think we need to clarify them both; and I would argue that the phrase that should be substituted in both cases is "the relevant market."
>
> I do not want to see a snare, trap, or delusion inserted in the bill merely by the failure to recognize the slight difference in the use of terminology in two different places in the same proposed section. I think that is a technical amendment everyone could support, and I think it would reduce a lot of bickering.[21]

Unfortunately, the Committee did not adopt Professor Stanbury's suggestion, at least to the extent of using the words "the relevant [product] market" in paragraph (a) instead of "class or species of business".

The wording in paragraph (a) was clearly adapted from the definition of "monopoly" in section 2 of the Combines Investigation Act.[22] That definition read, " monopoly' means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged . . . ". The government's guide to Bill C-91 confirms this in its description of the new abuse of dominance provision:

> The elements to be proved are as follows. First, "one or more persons" must substantially or completely control a class or species of business in Canada or any area thereof. This is based on the definition of monopoly in the existing legislation. The Bill, by retaining the words "one or more", will continue to allow the application of the law to behaviour engaged in by unaffiliated persons. This means that in some circumstances the section would apply to so-called "joint dominance" situations.[23]

The latter comment, rather than the use of the words "class or species of business", was the subject of attention and debate before the committee.

> The guide goes on to describe paragraph (c):
>
> Third, the practice of anti-competitive acts must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market. This test is used elsewhere in the existing legislation and in the new merger proposal.[24]

There has been some discussion in the literature regarding subsection 79(1) and the difference in wording in paragraphs 79(1)(a) and 79(1)(c). Some commentators attribute significance to the fact that the words used in paragraphs (a) and (c) are different; others endorse an approach which focuses on the relevant market and market power, similar to the approach taken by the Tribunal in NutraSweet. No one, however, provides a compelling reason for the difference in wording.

Although it was not argued before me, I have found that the discussion of the section by R.J. Roberts provides helpful insights into why paragraph (a) speaks of controlling a class or species of business in a part of or throughout Canada. In a 1991 article, Professor Roberts criticizes section 79 because, in his view, it only reaches firms which are dominant, or have market power, in Canada and cannot be used to reach a firm which, while dominant in the world market for a product, has a small market share in Canada.[25] He expresses concern that, for example, the Canadian statute cannot be used to stop an American firm that is dominant in the world market, but has a small Canadian market share, from taking anti-competitive action against a Canadian company in Europe. He believes this situation causes harmful effects in Canada because the Canadian company will be crippled and may even go bankrupt. Professor Roberts therefore advocates extending the reach of the Canadian abuse of dominance provisions to assert extraterritorial jurisdiction in cases in which the "foreign commerce of Canada" is adversely affected.[26] He recognizes that the existing provisions focus upon "defence of economic efficiency, and ergo, consumer welfare, in Canada."[27]

In identifying that the abuse of dominance provisions, as written, do not appear to extend the Tribunal's jurisdiction beyond cases in which a firm is dominant in a market which is, or at least includes, some or all of Canada, Professor Roberts may have provided a possible explanation of the difference in wording. Geographic markets defined according to economic factors can be much larger than Canada. Based on the words of section 79 as drafted, Parliament was concerned about firms dominant in Canada and the effects of abuse of that dominance on Canadian consumers. If Parliament had simply referred in paragraph (a) to control of a market, "market" having both product and geographic dimensions, the section could apply to situations where there were no direct connection to Canadian consumers. It could have been used for aggressive, extraterritorial application to protect Canadian firms operating in other markets in which Canadian consumers do not buy the product.[28] Professor Roberts is, of course, suggesting that the section be amended to accomplish this very result. I am here concerned, however, with the current wording, not the merits of the proposed reform.

I conclude that the wording "class or species of business" is used in paragraph 79(1)(a) of the Act as an alternative to the word "market" because "market" has a geographic element to it and there is already a geographic element in paragraph 79(1)(a), being the phrase "throughout Canada or any area thereof", which was put in specifically to limit the application of the word "control" to Canada. I agree with the interpretation placed on paragraph 79(1)(a) by the Tribunal in both NutraSweet and Laidlaw, which the Director urges on this panel. Paragraph (a) specifically divides the two dimensions of a market: "class or

species of business" refers to the relevant product market and "throughout Canada or any area thereof" to the relevant geographic market. Parliament has made clear that, although the section may from time to time address powerful international firms, for the section to apply they must have market power in parts of, or all of, Canada. I conclude that "class or species of business" is synonymous with the relevant product market and "control" is synonymous with market power.

III. "CLASS OR SPECIES OF BUSINESS"/PRODUCT MARKET

A. Facts

(1) Market Tracking Services

Market tracking involves collecting data, over time, on product movement to produce an estimate of total market size and direction of growth for each product category being tracked and to indicate the relative performance or market share of a particular brand or item within the product category. Each different flavour, size or format within a brand is considered an item. As part of a market tracking service, data may also be collected on "causal" factors which explain the observed changes in product movement. Causal factors include price, promotions, feature advertising, in-store displays, etc. Market tracking enables manufacturers and retailers to plan more effectively the marketing and merchandising of their products based on previous trends.

Because patterns of distribution for product categories vary widely, a market tracking service may be tailored to appeal to certain types of manufacturers by focusing on different channels of distribution. For example, a grocery product tracking service will cover those channels where food products are generally sold while a health and beauty care service will include a different mix of retail outlets.

Several methods can and have been used to collect the necessary data for a market tracking service. The original method of data collection was the store audit. The Nielsen Food Index ("NFI"), the Nielsen Drug Index ("NDI") and the Nielsen Mass Merchandiser Index ("NMMI") were traditional store audit-based services. Each of the NDI, NFI and NMMI was based on a sample of stores whose data were projected to represent the relevant population. As the names imply, the NFI sample was drawn from food stores, the NDI sample from drug stores and the NMMI sample from a population limited to the three dominant mass merchandisers, namely K mart, Woolco and Zellers.

Data were collected from each of the sample stores by Nielsen's field auditors who visited the prescribed stores every 60 days. They took an opening inventory at the beginning of the period and a closing inventory 60 days later. They obtained information on the store's purchases during the 60-day period and by combining that number with the inventory observations, arrived at a figure for sales for that store during the period. During the store visit, the auditors also collected in-store "causal data", including the shelf prices for the various products on the day of their visit, any in-store displays, stock outages and any promotional material in the store.

Reports for NFI, NDI, and NMMI were generated and provided to customers bi-monthly (six times a year). The reports presented data on market volume and market share and the various causal factors. The data were presented for the national level and were also broken down by regions of the country.

Nielsen was the only company offering retail audit-based tracking services in Canada except for a local Canadian company which was active in the early to mid-1980s. That company offered an audit-based tracking service primarily directed at the manufacturers of confectionery and tobacco products.

A second, more recent, method of data collection is based on warehouse shipments, also called warehouse withdrawals. In 1981, Nielsen launched the Nielsen Warehouse Shipment Service ("NWSS"). Data on shipments from the warehouses of a co-operating organization to its stores are recorded electronically at the warehouse and provided to Nielsen. To obtain relevant price data under this method, which focuses on shipments to retail stores rather than sales, Nielsen uses a suggested retail price from the manufacturer of the product. No other causal data are included. NWSS data are reported for four-week periods at the item level on both a national and regional basis.

In 1989, Nielsen upgraded NWSS to NWSS Plus, in an effort to appeal to the marketing departments of customers as well as their sales forces. NWSS Plus includes some basic causal data and tables, graphs and charts.

A U.S. company called SAMI apparently attempted to enter the Canadian market to offer a warehouse shipment-based service in the late 1970s or early 1980s. There was some disagreement between the witnesses as to whether this company actually produced any reports for the Canadian market. There was, however, no question that if SAMI ever was truly in business in Canada, it was not operational for long. Apart from this incident, Nielsen has been the sole provider of warehouse shipment-based services in Canada since 1981.

A third data source for a market tracking service is scanner data. Scanner data are generated when a product is scanned at the retail check-out counter instead of being processed by manual entry into the cash register. Consumer packaged goods have a bar-coded label, the Universal Product Code ("UPC"), affixed on them by the manufacturer. The UPC contains product-identifying information which can be scanned electronically. Additional data input by the retailer, such as store identification, price and time of purchase, are also recorded when the product is scanned. Retailers install scanners and collect scanner data for internal management purposes. The cost to them of supplying the scanner data to Nielsen is not much more than the cost of copying it.

In 1988, Nielsen introduced a limited market tracking service using scanner data from a sample of grocery stores in Ontario only (Ontario ScanTrack). It was not a success in terms of sales and was eventually discontinued in 1992. In 1989, Nielsen began selling the Nielsen Grocery Index ("NGI"), an integrated grocery tracking service based on a combination of store audit and scanner data. With some exceptions for categories where NGI did not produce useable data, NGI replaced NFI "across the board"; manufacturers were not given the choice of remaining with the audit-based NFI. In addition to covering traditional grocery outlets using either scanner or audit data, NGI included scanner data from a sample of "superstores" or very large grocery stores which had been excluded from NFI because of the difficulty and expense of auditing them. Because the audit data provided the lowest common denominator, NGI was also a bi-monthly product. Despite the dual nature of the underlying data, the NGI reports were similar in appearance to the prior NFI reports.

In July 1992, Nielsen launched the MarketTrack Grocery service to replace NGI as its primary grocery product tracking service. MarketTrack Grocery is primarily based on scanner data although the scanner content of the service does vary with the particular distribution channel being tracked.

MarketTrack Grocery tracks grocery and related product categories in three channels. The first is "grocery supermarket banners" and includes chains (four or more stores under common ownership) and extra large independent stores with over $150 million per year in sales. This group includes the major grocery retailers across the country. Grocery supermarket banners are the largest component of MarketTrack Grocery and, in 1994, represented about 85 percent of the grocery universe tracked by the service. The overwhelming majority of the stores in this category provide scanner data.[29]

To get data from the non-scanning stores in this channel, Nielsen uses "manual" data collection. "Manual" data collection involves combining purchase information obtained by Nielsen from individual stores with warehouse shipment information that Nielsen already collects for the organization. Although this method of data collection was sometimes described in the evidence as an "audit", it should not be confused with the traditional audit method which involved 60-day inventory counts. Under the manual method, price information is obtained from a variety of sources within the Nielsen organization since purchases are not a good source of retail price. The prices used tend to be average prices.

The second channel included in the MarketTrack Grocery service is "remaining grocery". This group comprises independent food stores of all sizes and convenience food stores. The third channel is "defined non-grocery". This group includes stores other than grocery or food stores which also carry "grocery" products, for example, drug stores, mass merchandisers and department stores. The data collected for these categories are generally not scanner data but rather are based on warehouse

shipments or purchase information. The second and third categories together make up about 15 percent of the grocery universe covered by MarketTrack Grocery.

MarketTrack Grocery reports provide data on a four-weekly basis. The service is available on a national level and for the regions of British Columbia, Alberta, Manitoba and Saskatchewan, Ontario, Quebec and the Maritimes. Ontario is further divided into Metropolitan Toronto and the rest of the province. Montreal is similarly divided from the rest of Quebec.

In late 1993, Nielsen replaced the NDI, Nielsen Food Index - Collateral ("NFIC")[30] and NMMI, all completely audit-based, with the MarketTrack Personal Care and MarketTrack Health Care services. MarketTrack Confectionery, MarketTrack Tobacco and MarketTrack Snack Food were also introduced in 1993 to replace the Nielsen Confectionery and Tobacco Index, another traditional audit-based service. Each "MarketTrack" service is based on a different combination of scanner, audit and warehouse shipment data depending on the availability of scanner data for the particular channel of distribution being tracked. MarketTrack Grocery has the highest component of scanner data at about 80 percent.[31]

Reports based on household panel data, produced by one other company in Canada, are also used to a very limited extent by some companies for market tracking purposes but are more appropriately dealt with under household panels.

(2) Household (or Consumer) Panels

A household panel, also called a consumer panel, is a sample of households across the country that routinely record information about their purchases. The panel is selected to be representative of the various regions or the country as a whole or both so that the recorded data on purchases can be projected to a larger consumer universe. Both Nielsen and ISL International Surveys Ltd. ("ISL") have offered services based on the household panel concept for some time in Canada.

Nielsen originally offered a service called the Nielsen Electronic Diary Service ("NEDS"). NEDS was based on a panel of 6,000 households, 2,000 in each of Montreal, Toronto and Calgary. The NEDS panels in each city were selected to match the demographics of that city but were not truly representative as participants tended to be clustered in certain areas. The NEDS panel results could not be projected to a larger market. Data were collected for the NEDS service from specific grocery supermarkets using an identification card methodology. At the check-out counter, the household member would present the card to the clerk who would scan the identification number prior to scanning the purchases. The consumer purchase information would later be transmitted to Nielsen by the store.

Nielsen launched a new consumer panel service, HomeScan, in late July 1994; the first report for the new service was produced in mid-October 1994. HomeScan replaced NEDS. This service is of particular interest because it represents the most up-to-date method of collecting consumer panel data.

Data for the HomeScan service are collected from a panel of 7,250 households across Canada. Of the total 7,250 households in the panel, only 6,000 are included in the "static" panel. The static panel represents the households that have participated in the panel for a certain minimum time.

Household demographic information is maintained in the HomeScan data base. In order to collect data on purchases, HomeScan panel members use a hand-held home-scanning unit. Upon arriving home with the purchases, the panel member must first enter the store name. Various store names and locations are pre-programmed into the unit to make this step simpler. Then, the panel member must indicate who in the household did the shopping on that trip and whether more than one person went. The bar code on the item must then be scanned. The unit will then ask the panel member to enter the price of the item if necessary. This step is unnecessary if the item was purchased at a retailer that already provides its scanner data directly to Nielsen for MarketTrack. In that case, the price information will be provided from the MarketTrack price files. The unit then asks how many of the scanned item were bought. Finally, it prompts the panel member to indicate whether the purchase was made on some kind of "deal", such as a manufacturer or store coupon and store or other sale. Once all purchases have been entered, the

panel member indicates the total amount spent on the shopping trip. The average time spent per week in scanning purchases is about 30 minutes per household. Once a week, the panel members must transmit the information that they have scanned into their unit to Nielsen. This is done over the telephone lines and generally takes between 30 seconds and a minute to transmit.

Although the panel members transmit information weekly, Nielsen "rolls up" or aggregates the data for a four-week period to produce a monthly report. The report is available for distribution approximately 21 days after the close of the four-week period.

The HomeScan service offers a variety of analytical modules.[32] The base package for HomeScan contains modules providing data on category and brand penetration rates, buying rates and levels, purchase frequency, demographic profiles of buyers, and loyalty/switching. These are consumer diagnostic services which allow the client to analyze consumer purchase behaviour in order to explain changes in its market share or volume. Other analytical modules designed to explain consumer behaviour are also available (for example, heavy/medium/light buyers, new product tracking, demographic segmentations, channel importance review, cross purchasing analysis, etc.).

HomeScan can provide basic tracking data in the form of volume and market share data for four-week intervals back to July 1994. HomeScan can also supply information on the relative importance of the various distribution channels (grocery, drug, mass merchandiser, warehouse) by product category or by brand. HomeScan data can also be used to determine if a retailer's share of volume for a product category is better or worse than its share of total volume. HomeScan data are available for various regional breaks, as with other Nielsen services, and for city splits for Montreal, Toronto and Vancouver.

ISL's Consumer Panel of Canada ("CPC") is a household panel with a net reporting sample of 4,500 households. Household participants in the CPC, however, record their purchases in a handwritten diary. The diary is pre-divided into product categories, those categories that ISL is interested in for the purposes of selling its services to manufacturers. The majority of these categories are consumer packaged goods. The households record their purchases under the appropriate category and add details for each purchase, including, for example, brand, price, and location where they bought the product. The households provide their diaries monthly to ISL and the data are then added to the data base, which also contains a regularly updated record of the characteristics (or demographics) of the individual households. ISL uses the data base to provide reports to its various clients.

The first type of report is the CPC report. This report focuses on consumer diagnostics. These include demographics, brand switching, repeat buying, brand loyalty, household penetration by a brand, etc. A typical report also provides some market share information at the national level,[33] such as share of market for each brand and various package sizes within a brand, volume sold by brand and package size, and share of market by dollars.[34] Information on average prices by manufacturer, brand and package size is also included. All data are presented on a monthly basis, for the current month of the report and the twelve previous months.

The second type of report produced by ISL from its CPC data base is called TradeTrack. Terrence Rawlings, President and Chief Executive Officer of ISL, described TradeTrack as follows:

> The key difference between TradeTrack and what we call the consumer panel data is that on TradeTrack we are reporting or providing information on retailers, not brands, and there's two levels of that information. It can be looking at what we call all-commodity, the performance of the retailers, how big they are, how their shares are trending, retailers at an all-commodity level or it could be doing the same thing for a specific category, but it wouldn't look at brands. . . . The TradeTrack type of reports dealing with retailer performance is what the sales departments [of manufacturers] and the retailers would typically look at.[35]

TradeTrack also reports on "outlet penetration" by retailers. It indicates the percentage of households that have bought one or more of the 69 product categories in the individual chain or the outlet type.

TradeTrack presents data on a monthly or a quarterly basis and year to year comparisons are also possible.

(3) Key Accounts

Key account data are retailer-specific tracking data. That is, if a manufacturer wishes to know how its products are performing in, for example, Provigo grocery stores in Quebec, then it can buy Provigo-specific tracking data. As key account data are product movement data, they will be scanner, consumer panel, warehouse shipment, or audit-based depending on the collection methodology used in the related tracking service.

The description of key account service in a recent Nielsen service request runs as follows:

> Each Nielsen Key Account Report will provide a comparison of all store product movement within a specified Nielsen territory or territories to product movement of the Key Account retailer. Total market data (as opposed to Key Account specific data) will be incorporated with Key Account reports provided that the Client is purchasing total market data through subscription to a Nielsen base service (e.g., MarketTrack).[36]

Thus, in a Nielsen report, the Provigo-specific information is presented along with the product movement information for all Quebec grocery supermarket banners for comparison purposes. Total market data are available if the manufacturer is also purchasing the broader MarketTrack service.

Up until 1990, ISL's consumer panel data were the only source of retailer-specific data in Canada as retailers did not release their own data. Since Nielsen did not have a nationally representative consumer panel at that time, it was unable to provide key account information. From 1991 on, retailers have permitted the release of their data to Nielsen and Nielsen presently provides a key account service based on the data acquired directly from the retailers. ISL still provides retailer-specific information based on its panel data only.

Retailers vary in their willingness to allow Nielsen to sell their key account data to manufacturers. Some do so readily and may, in fact, insist on the manufacturer having key account data so that the manufacturer and the retailer are using common data in their negotiations. Others are more reluctant. The retailer may have concerns about the confidentiality of the information, loss of bargaining power vis-à-vis the manufacturer or, in cases where the retailer is involved in private labels, unwillingness to provide this type of information to a competitor. During the testimony of the various witnesses, Loblaws, which markets a number of private labels, was frequently mentioned as a retailer that places restrictions on the release of its key account data by Nielsen.

B. Analysis and Conclusions

As is often true, the parties are divided on the breadth of the relevant product market. The applicant is of the view that the market in question is scanner-based market tracking services. The respondent's position is that the relevant product market is all market tracking services, which include market tracking services based on scanner, audit, warehouse withdrawal and consumer panel data.

Before embarking on the detailed analysis, it is convenient to deal in a preliminary fashion with one of the points raised by the respondent. Nielsen submits that the product market cannot be scanner-based market tracking services because Nielsen does not currently supply a tracking service that is based solely on scanner data in Canada. The ordinary meaning of the word "based" or "base" does not convey any sense of exclusivity.[37] A "scanner-based" market tracking service need not be composed only of scanner data if scanner data are the main or most important component. Nielsen itself described MarketTrack[38] to the trade in its product glossary as a "[s]canner based tracking service which provides detailed sales and causal information".[39]

It should also be noted that the application alleges that Nielsen controls the supply of scanner-based market tracking services. The Director alleges that Nielsen controls the key input into providing a scanner-based service. If the Director demonstrated satisfactorily that other suppliers were precluded from offering the service in question by Nielsen's control of the key input, with a resultant substantial lessening of competition, Nielsen could not escape the effects of the section simply by arguing that it was not itself producing a wholly scanner-based market tracking service. In determining whether the product market is scanner-based market tracking services, it is irrelevant whether at the time the Director commenced the application he believed that Nielsen supplied a tracking service in Canada based solely on scanner data.

The standard test for establishing whether products that are differentiated in one or more ways are close substitutes and therefore in the same product market is to determine whether small changes in relative price would cause buyers to switch from one product to another. Direct evidence of switching behaviour in response to small changes in relative price would provide proof of substitutability. Where price and quantity changes are not in evidence, as is true in the instant case, it is necessary to answer the question less directly by examining the evidence of both buyers and suppliers regarding the characteristics, the intended use and the price of the various types of market tracking services. As noted in NutraSweet,[40] the characteristics to be examined in establishing whether products are close substitutes will vary from case to case. In the instant case, the evidence focused on the timeliness, detail, accuracy, reliability and cost of collection of the data and the extent to which product movement data can be combined with causal data. These product characteristics are addressed in relation to each of the possible alternative data sources.

We examine first whether audit- and warehouse shipment-based market tracking services are close substitutes for scanner-based market tracking services and must therefore be included in the product market. The industry participants who testified before us, both purchasers and suppliers of the services, were of the common view that, where available, scanner data are undoubtedly superior to audit and warehouse shipment data and are the best source of data for tracking purposes. The witnesses included representatives of various consumer packaged goods manufacturers representing a variety of product types,[41] as well as representatives from both IRI and Nielsen. All the Director's witnesses, except one who was not asked about it, made comments to this effect, emphasizing the timing and detail of scanner data, their link to purchases rather than shipments and their close correlation with causal data. Of the respondent's witnesses, one, in the confectionery business, expressed some preference for some of the features associated with audits[42] when discussing Nielsen's change to scanner data for part of NFIC and the other was not asked about it.

Their evidence indicates that scanner data are superior to either audit or warehouse shipment data for several reasons. Scanner data are highly accurate. They are available quickly. They record consumer purchases directly rather than recording a surrogate of shipments to stores. They record actual retail prices by transaction. They track product movement out of the stores for frequent time periods (a week or possibly less). Scanner data also provide detail on each product down to the item level (for example, size and flavour).

The evidence of the buyers of the services highlights that a critical aspect of whether market tracking services based on other data are substitutes for market tracking services based on scanner data from retailers is the integration of causal data with data on consumer purchases. Retail promotion efforts generally last for a week at most. Since scanner-based market tracking services can provide weekly data on actual purchases, this allows a better correlation with the results of weekly marketing initiatives by manufacturers and retailers. Marketing initiatives may take the form of, for example, price reductions, coupons, end-of-aisle displays or advertising. These causal variables can be related to the scanner-measured sales on a weekly basis to determine their relative success. Although price may be recorded on the scanning tape at the checkout, most of the other causal data must be collected by in-store observation. As is apparent from the various contracts that were entered into evidence, the causal data are integrated into the data base and reported as part of Nielsen's MarketTrack service. In a recent

manufacturer contract, in Appendix II, which contains a description of MarketTrack Grocery, under the heading "Reported Data Types" various causal variables are listed, including regular price, reduced price, reduced price distribution, reduced price sales, co-op ads by size of ad, retail displays by size of display, media advertising and co-op ad distribution.[43] A footnote indicates that the first six data types listed, all key causal variables, are reported for the supermarket grocery channel only, the only channel providing primarily scanner data. Thus, in addition to the superior tracking ability that retail scanner data allow, buyers regard the services based on this source of data as superior because they integrate causal data much more successfully than services based on other data sources.

The only witness who disputed the superiority of scanner data for determining the effects of retail promotional efforts was the respondent's expert witness, Margaret Guerin-Calvert, an economist, who based her opinion on erroneous information regarding the types of causal information included in products derived from consumer panels. Ms. Guerin-Calvert asserted that ISL's TradeTrack service included a full range of causal variables, like pricing, discounts and in-store displays, and that information on these factors was collected not just from the panel diaries but from other sources. However, as Mr. Rawlings of ISL had already testified, there is no retail promotion information contained in the TradeTrack service, which does not even track individual brands but rather product categories or total volume by retailer. The CPC reports contain some limited promotional information, whether the purchase was on a "deal" or a "coupon".

As Mr. Rawlings said during examination in chief:

Q. Does the TradeTrack service that we have just been through, do you have ability through that to provide information on promotional activities or other activities carried on at the retail level?

A. No, we don't.[44]

And as he confirmed on cross-examination:

A. We cannot identify the specific promotion within a retail[er]. Consumers can tell us whether they bought something on deal, but we wouldn't know any retail specifics underlying that.

. . .

A. What consumers can tell us is whether they perceive their purchase to have been bought "on deal", which might be a coupon, it might be a trade deal, it might be all kinds of things, but it is the consumers' perception of why or whether that purchase was "on deal" with a special offer of some kind.

. . .

Q. And is that information included in the TradeTrack report, or is that in Consumer Panel of Canada, or is that in another ISL service?

A. Certainly within the Consumer Panel of Canada reports. I am not sure whether the retailers would use that or not, I doubt it.

Q. So is the TradeTrack report primarily for retailers?

A. It is for retailers and the sales departments within manufacturers.[45]

The CPC reports do provide some pricing information but in the form of average prices only. While ISL offers a "price service" which provides details of the prices charged by retailers for grocery products based on price files from retailers, that pricing information cannot be integrated with the CPC data. As Mr. Rawlings stated, for insight into the success of retail promotion efforts, MarketTrack is the appropriate source, not the consumer panel which provides a different type of insight.[46]

Most importantly, both Derek Nelson, Vice-President and Product Development Manager for Nielsen Canada, and Albert Kretch, a retired senior officer of Nielsen with experience in Canada, the United States and elsewhere, agreed that scanner data are generally preferable to the other two data sources. Mr. Nelson stated that:

> Some of the things that scanning brings to a customer is that it's a weekly database, so it starts on a Sunday and ends on a Saturday, as opposed to an audit methodology, which can start and stop at staggered times throughout the bimonthly period.
>
> So it's discrete time-frames, it's a weekly database. You can go down to a far more collapsed time frame than 60 days.
>
> It tends to be, certainly in today's environment, better and more accurate than audit data because there are fewer opportunities for human error in terms of going through purchases and collecting the data and so on.
>
> Although the time-frames are fairly discrete for warehouse shipment, sales generally are preferred over overall shipment data.[47]

Mr. Kretch confirmed that:

> When all things are equal, the sample sizes, the participation of retailers, the integrity of the quality of data being sourced from the retailer, scanning data is preferred over audit data by the customers when all things are equal because the scanning data can, in a more cost-effective way, measure the promotion time interval of a retailer which, in Canada, is typically one week.[48]

This has clearly been Nielsen's position for some time. A Nielsen internal document detailing a "scanning update" presentation confirms that certainly by 1987 the company was fully aware of the benefits of scanner data. The document refers to a 1986 survey which rated scanning as the "most reliable data collection technology", a rating which was verified by all Nielsen international studies.[49]

In keeping with this widely-held opinion, Nielsen's objective, as set out in internal documents and reflected in the history of its product offerings, was to replace audit and warehouse shipment data with scanner data as scanner data became available. During examination for discovery, Nielsen's representative asserted that he was not aware of any occasion on which Nielsen had relied on either audit or warehouse withdrawal data where scanner data were available and useable.[50]

The evolution of data collection methodology from audit and warehouse withdrawal to scanner data also occurred in the United States. The uncontradicted evidence of Gian Fulgoni, Chairman and Chief Executive Officer of IRI, reveals that audit and warehouse withdrawal data have been almost completely displaced by scanner data in that country. In 1986, when IRI launched the first scanner-based market tracking service in the United States, Nielsen provided an audit-based tracking service and SAMI offered a warehouse withdrawal-based service. By 1990, SAMI was out of business. Today, there are only scanner-based services offered for the supermarket channel. In the drug channel, both IRI and Nielsen have moved to scanner-based services. IRI still offers a health and beauty care tracking service based on warehouse withdrawals but its business is gradually being "cannibalized" by the two scanner-based services and is declining at a rate of about 10 percent per year.

No evidence on the relative prices of an audit-based market tracking service and a scanner-based market tracking service was brought to our attention. We did note from the evidence of Linda Todd of Nestlé, whose firm buys Nielsen's NWSS service for one of its products, that NWSS is considerably cheaper than MarketTrack. Ms. Todd buys NWSS even though it is not the most "up-to-date" service because it is cheaper and the product in question is under extreme profit pressure.

The respondent's position with respect to the place of audit- and warehouse shipment-based services in the market definition is not clear. In its written outline of closing argument, the respondent claims

generally that "both scanner and non-scanner data methodologies are utilized for tracking purposes and may be viewed as substitutes". The substitutability of audit and warehouse shipment data for scanner data was not, however, pressed in oral argument. The argument was, rather, that these data methods could have been employed by would-be entrants to produce a market tracking service in channels of distribution where scanner data were and are not widespread. In adopting this approach the respondent appears to assume a conclusion regarding the relevant product market, that is, that audit, warehouse withdrawal and scanner-based market tracking services are in the same market, and then proceeds to apply it to the other elements of the section that are in issue. Absent any convincing evidence that audit- and warehouse shipment-based services are considered substitutes for scanner-based market tracking services, however, whether or not the former methods were and are open to potential competition is irrelevant for the purpose of market definition.

The other data source that is used to provide tracking information is consumer panel data. We are of the view that these data are sufficiently inferior to and different from scanner data for purposes of a market tracking service that the products based on panel data are not in the same market as those based on scanner data. One fact on which we rely for the conclusion that scanner data are superior to all other data sources (including audit and warehouse withdrawal) is the large payments that Nielsen made to retailers over the years since 1986 for scanner data. We note that the level of payments continues and has been increased even though Nielsen recently launched its own state-of-the-art consumer panel service, HomeScan. Nielsen's willingness to make large payments for the exclusive use of scanner data when it is also producing a product based on data that it argues are a close substitute for scanner data appears illogical and raises considerable doubt as to the substitutability of the two data sources. The remainder of the evidence confirms that, indeed, they are not close substitutes.

While both ISL's CPC report and Nielsen's HomeScan are capable of providing some tracking information, in the form of market share and volume data, it is clear from the evidence regarding sample size that for tracking purposes the scanner data are superior. The consumer panel used for HomeScan, for example, covers roughly 6,000 households. The sample of 450-odd grocery stores used by Nielsen in creating MarketTrack tracks the purchases of about two million households. For some purposes, such as opinion polls, a sample of 6,000 might produce powerful results. However, in the tracking of consumer products there are many brands of products that can be tracked and within each product line further details like flavour and package size are of interest to the manufacturers.

The limitations created by the size of a consumer panel are reflected first in the number of products that the service provider chooses to track. With its consumer panel, ISL does not attempt to cover all grocery purchases by the household panels. Mr. Rawlings indicated that the diary contains about 100 product categories which represent perhaps 25 percent of all grocery purchases by the consumers. Within those categories, the panel members are expected to record every purchase that they make; purchases which fall outside the defined categories are not tracked at all. While he did not know how many product categories were included in MarketTrack, Mr. Rawlings thought that it must be a "multiple number bigger" than the number included in the CPC.

Second, the size of the panel means that not all variables of interest can viably be tracked in combination based on data from the consumer panel sample. While ISL can provide tracking data on a national basis down to a particular package size for a particular brand, it cannot track to that level of detail by region and by retailer also, for example. When reviewing with respondent's counsel one of the tables in the CPC report entered in evidence[51] which provides market share information by brand, package size and month, Mr. Rawlings was adamant that ISL could not provide the data by brand, package size, month and retailer. He said that he would "never provide that information" as it "wouldn't stand up".[52] ISL's TradeTrack service presents the volume of sales through a particular retailer by broad product category only, not even by brand. No such limitations are present for scanner data.

Similarly, Mr. Rawlings described the limitations on the level of detail possible for retailer-specific, or key account, data sourced from the CPC:

Q. The level of detail and accuracy that you get from that source of information, how does that compare with information from the scanner records of the actual retailer?

A. From the Panel we cannot provide weekly data, we are talking about monthly data. In addition, we would not certainly within account report below the level of total brands, so when you want to look at the individual line of flavour by size we would not go down that far.

Q. Why wouldn't you go down that far?

A. Because the sample size that we have would not be big enough. Plus the method of data collection, data consumer information at that level of detail would be far less accurate than retail scanning.[53]

Scanner-based retailer-specific information (and comparative information) is available down to the item level.

Another significant limitation on the consumer panel data is that it is reported for an aggregate four-week period, both for all the ISL services and HomeScan, as compared to the weekly scanner data. As discussed above, timing has significant implications for the integration of causal variables into a tracking service.

Thus, from the perspective of functionality, the consumer panel data appear to be inferior. Notwithstanding that inferiority, do buyers of market tracking services regard a tracking service based on these data as an alternative or a substitute to a scanner-based market tracking service? Nielsen offers both a scanner-based tracking service, MarketTrack, and a consumer panel-based service, HomeScan, which is capable of providing tracking information. If a consumer packaged goods manufacturer buys the HomeScan service, and regards its tracking information as a substitute for MarketTrack, then one would not expect that manufacturer to continue buying both services. Yet, the evidence of Douglas Romain, the Nielsen employee in charge of HomeScan, was that the majority of the 25 HomeScan customers also purchase MarketTrack for the same product categories. He could only point to a single manufacturer client who had switched from MarketTrack to HomeScan and it is significant that the manufacturer in question distributes its products largely through drug channels where scanner data are not yet widely available.

Mr. Rawlings estimated that 60 to 70 percent of ISL's revenue base is comprised of customers who buy MarketTrack data from Nielsen as well as CPC data from ISL. The fact that customers are buying both assures us that they do not regard the market tracking component of HomeScan or the CPC data as a substitute for a scanner-based market tracking service like MarketTrack and, in fact, buy the consumer panel-based service for a different purpose altogether.

Speaking specifically about key account data, which he buys both from Nielsen (scanner-based) and from ISL (consumer panel-based), Charles Oliver of Lever explained:

> Our Key Account people, a large portion of their job is analyzing data from -- I should mention from both Nielsen and from ISL because the ISL data you can analyze Key Account data out of ISL on a different basis, it gives you different types of information. Historically, retailers have only been focused on their own scanning information because it is what they are comfortable with. I think as they have become more attuned and more familiar with panel data because it gives them a different aspect to their business, they've become more interested in receiving a broader range of information.
>
> So, Key Account people use both sets of data.[54]

The evidence of the manufacturers who testified before us was that they buy the services provided by the ISL CPC report, and now HomeScan, primarily for the information that they can provide on consumer diagnostics. As suppliers of consumer packaged goods, they are interested in facts such as the

demographic profile of their customers, purchase frequency and volume, brand loyalty and switching, and whether consumers make repeat purchases of a new product.

With respect to ISL's TradeTrack, the evidence is that it is used to track retailer performance across the 69 product categories that are covered. As Mr. Rawlings stated, it is directed at the retailers themselves and the sales departments of manufacturers. Manufacturers' marketing departments would not be as interested as TradeTrack does not track brands. The description of the service in the TradeTrack report is informative:

> This report enables a marketer to see the retail outlet profile for any of the 69 specific product categories and how the profiles for those specific categories differ from the total all commodity.
>
> For example -
>
> Is chain "R" in Ontario under-developed within product "Y"? Are non-grocery outlets growing in importance to product "F" at the same rate as they are to the total all commodity?[55]

Of the manufacturer witnesses, Jeffrey Hill of Coca Cola Foods provided the most extensive commentary on why he uses TradeTrack:

> At this time, we use ISL to track customer [retailer] market shares and not market sizes.
>
> . . .
>
> The TradeTrack service, the portion which I buy, is bought because of its ability to capture a very broad universe of outlets, including mass merchandisers, club stores, and other things.
>
> It serves a different need for me than MarketTrack.
>
> . . .
>
> I would stop buying ISL if the MarketTrack service provided me the same data on customer [retailer] market shares.[56]

The evidence regarding the ISL products and HomeScan is consistent with consumer panel data and products such as MarketTrack being supplements rather than substitutes. The thrust of the evidence of the manufacturers is that if budgets allow it is desirable to have both.

The respondent's position that tracking products derived from consumer panel data and those based on retailer scanner data are in the same product market is founded on the assertion that there are some buyers who rely on ISL for tracking services as well as for consumer diagnostics, on several internal Nielsen documents that discuss ISL as a competitor, and on the views of its expert witness. Before reviewing this evidence, it is important to underline that to conclude that two differentiated products are close substitutes, we must determine that a small change in relative price would cause buyers to switch from one product to the other, thus creating competition between the suppliers of those products. If scanner data are not available for a particular type of packaged good or for a specific channel of distribution, then clearly the manufacturer will have to use an alternative source of information to track its product. Likewise, if the manufacturer cannot afford to purchase a scanner-based service, then some alternative will be used. Neither of these extreme situations provides evidence that the products are close substitutes. In fact, if the non-scanner-based service is substantially cheaper, then this is some indication that the two products are not in the same market. The evidence of Paul Bloom of Campbell Soup was that using panel data for tracking purposes could be one-third less expensive than buying scanner data.

The respondent submitted in oral argument that two manufacturers and one retailer purchased ISL products in preference to Nielsen products but the evidence does not support this.[57] Mr. Hill of Coca Cola Foods purchases both MarketTrack and NEDS/HomeScan from Nielsen as well as TradeTrack from ISL. Mr. Oliver of Lever stated only that he thought that the ISL service "can" be used as a market tracking service; Lever currently buys from both ISL and Nielsen. Glenn McCurdy of the Overwaitea grocery chain buys TradeTrack from ISL but also receives reports from Nielsen as part of the exclusive contract for the supply of scanner data to Nielsen.

Such evidence as there is on the circumstances and motivation of buyers who use ISL for tracking came from Ms. Todd of Nestlé. Nestlé uses ISL, and not MarketTrack, for two beverage categories to provide business performance, or share, information as well as consumer diagnostics. Ms. Todd confirmed, however, that with panel data the emphasis was on the consumer diagnostic function, whereas where Nestlé uses MarketTrack it does so for business performance information and input into category management. What is highlighted by this evidence is the difference between MarketTrack and the ISL product rather than their similarity. Ms. Todd indicated that Nestlé was under severe budget constraints and had cancelled a number of the product categories for which it used to purchase MarketTrack. Significantly, Nestlé did not switch to ISL for any of those product categories.

There is evidence on the record that during recent negotiations with Nielsen Mr. Oliver of Lever threatened to discontinue buying from Nielsen and use only ISL. Lever already had a contract with ISL that still had a number of months until end of term. Mr. Oliver was of the view, as indicated above, that the ISL service "can" be used as a tracking product to show market shares and growth and decline and he maintained that his threat to Nielsen was a serious one. He did admit, however, that while Lever could have "coped" with only ISL, the situation would not have been ideal. He agreed that scanner data are preferred for product movement while panel data are best used for diagnostics. In our view, Mr. Oliver regarded panel data and scanner-based market tracking services as supplements for each other, as both being necessary to create a complete package of services needed for marketing and sales purposes. His goal in negotiating Lever's recent purchase of services was to work with one supplier capable of providing both types of data. Mr. Oliver entered into discussions with ISL as a sole supplier because it was rumoured to be joining forces with IRI to add a market tracking service to its existing product offerings.

As evidence of switching behaviour between Nielsen products and ISL products, the respondent relies on various Nielsen internal documents which refer to ISL as a competitor and which record instances where Nielsen clients moved to ISL and vice versa. These documents provide us with little insight on whether scanner-based market tracking services and consumer panel-based services are substitutes as only one postdates the introduction of MarketTrack in 1992. The remaining documents date from 1987 to 1990 and relate to Nielsen's audit- and warehouse shipment-based tracking products and to NEDS, its original consumer panel product offered for a few cities. We are not called upon to decide whether tracking services based on methodologies other than scanner data are substitutes for a consumer panel-based service, nor is it necessary to decide if ISL's consumer panel and NEDS were in the same market.

The single document which postdates the introduction of MarketTrack is dated March 1993.[58] The document contains various charts listing ISL client losses, client gains and Nielsen client losses along with a list of ISL TradeTrack customers. On its face, the document shows that one Nielsen client apparently went to ISL while several ISL clients moved to Nielsen and that, in Nielsen's view, ISL had a bad year overall in 1992. This, however, provides very little useful information as we do not know what services those clients were buying, what products or distribution channels they were concerned with or their reasons for changing or cancelling a service. We can only observe that Nielsen monitors ISL's progress and that, in 1992, ISL lost more business than it gained despite reported heavy price discounting on its part. We cannot conclude, without more, that this is evidence of switching behaviour by purchasers of market tracking services. The evidence is also consistent, for example, with other evidence that MarketTrack is a superior product to any consumer panel-based tracking service and that therefore

ISL lost clients (a one-way switch) when it was introduced or with a scenario in which HomeScan was taking business from the CPC.

Ms. Guerin-Calvert referred to this document as support for her conclusion that customers of ISL and Nielsen switched back and forth between the two companies or bought information for different product categories from the two companies at the same time. As indicated above, this document alone certainly cannot be said to support such a conclusion. Ms. Guerin-Calvert did not specifically refer to any other documentary evidence in her affidavits or in her testimony. Nor did counsel in argument refer to other documents or testimony that might provide support for her conclusion.

Several other expert witnesses gave evidence regarding the relevant product market. Ralph Winter, an economist called by the Director, is of the opinion that the market definition used in the application, scanner-based market tracking services, is an appropriate one since there are no close substitutes. His opinion is derived from an analysis of the characteristics of audit, warehouse shipment and panel data, which is borne out by the other evidence presented to us.

Franklin Mathewson, another economist who appeared on behalf of the respondent, concluded that scanner-based market tracking services was an excessively narrow market definition. He did not, however, provide any analysis regarding the substitutability of other products in support of this opinion.

The intervenor, IRI, also called three economists as expert witnesses, two of whom filed a joint affidavit. All three were of the opinion that there are no close substitutes for scanner-based market tracking services. Andrew Rosenfield and John Gould raised in their joint affidavit an additional consideration that may frequently arise in alleged abuse of dominance cases, namely that at monopoly prices the appearance of apparent substitutes is likely to be misleading since the appropriate price level to measure whether products are in the same market is at competitive prices. The logic behind this so-called "cellophane fallacy"[59] is the well-known proposition in economics that in order to maximize profits a firm with market power will price at a level where the demand for its product is elastic, that is, where higher prices would cause revenue to decline as the result of the diversion of purchases to other products. Drs. Gould and Rosenfield conclude that if prices were forced down to competitive levels in Canada other tracking methods that appear as apparent substitutes would disappear. In the United States, where there are two highly competitive suppliers of scanner-based market tracking services, audit and warehouse withdrawal services had been displaced to a far greater extent than in Canada and consumer panel data are not used for tracking purposes, only for consumer diagnostics. In our view, the evidence in this case does not show that the other data sources are even "apparent" substitutes for scanner data in producing market tracking services. Therefore, we do not need to consider the "cellophane fallacy" further.

The evidence overwhelmingly favours the conclusion that market tracking services based on information derived from audit, warehouse shipment or consumer panel data are not in the same market as market tracking services based on scanner data. Accordingly, we find that the relevant product market for this application is scanner-based market tracking services, as alleged by the Director.

IV. THE GEOGRAPHIC MARKET

The Director alleges that the relevant geographic market is Canada, in the sense that it is Canadian data as opposed to data from the United States or other countries that are relevant to the provision of market tracking services in Canada. This is not disputed by the respondent.

Geography also adds a dimension to the product characteristics of scanner-based market tracking services, which may be purchased for the entire country and/or for various regional and metropolitan areas or "breaks". The existence of such choices as well as the possibility of purchasing tracking data for a single retailer is a central feature of the differences between the parties on the effect of the alleged anti-competitive acts on entry conditions and will be revisited below under the heading Substantial Lessening

or Prevention of Competition.

V. CONTROL

In NutraSweet, the Tribunal equated "control", as used in paragraph 79(1)(a) with market power.[60] It described the process of identifying market power as follows:

> Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period. While this is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.[61]

Thus, where the evidence does not allow the definition to be applied directly, as in the instant case, structural and other variables that can provide relevant information are used as proxies.

It is the Director's position that Nielsen has control of scanner-based market tracking services by virtue of the fact that it is the sole supplier of such services in Canada and has entered into exclusive contracts with retailers that deny the necessary inputs to any other potential supplier. The respondent denies that the contracts in question foreclose entry into scanner-based market tracking services. It also argues that "control" of the scanner data rests with the retailers who produce it, many of whom are large companies with significant regional market shares. Nielsen further submits that its customers, the manufacturers of consumer packaged goods, are large, sophisticated buyers who can offset any alleged market power on the part of Nielsen.

As stated in Laidlaw, a prima facie determination of whether a firm likely has market power can be made by considering its market share. If the share is very large, the firm will likely have market power although, of course, other considerations must be taken into account.[62] In the Laidlaw case, these included the number of competitors in the market and their market shares, any excess capacity and how easily a new firm could establish itself as a competitor. In the case at bar, there is no dispute that Nielsen is the sole supplier in the relevant market and thus has a 100 percent market share. We are prepared to find that, prima facie, Nielsen has market power, or control, in the relevant market absent some evidence that there are no barriers to entry. The exact conditions of entry in the instant case cannot be definitively established without considering the effects of the alleged anti-competitive acts engaged in by Nielsen. It can, however, be noted at this point that although the respondent denies that its practices foreclose entry, it does not even attempt to argue that entry is easy.

The bargaining strength of the retailers vis-à-vis Nielsen as a buyer of their data has little, if any, bearing on the advantage that Nielsen obtains from its position as the sole supplier of scanner-based market tracking services. The Tribunal agrees with Dr. Winter that the sole relevance of the market position of the retailers lies in their ability to command a share of any monopoly returns that Nielsen may be able to obtain by virtue of its dominance in the market for scanner-based market tracking services. The position of the retailers does not detract from Nielsen's ability to exercise any market power it may hold in the market for its services.

As acknowledged by Dr. Mathewson for the respondent, none of the three conditions that might allow the manufacturers to limit Nielsen's market power as a sole supplier are present in this case. There are neither multiple sellers (the first condition) nor a single buyer (the second condition). There is absolutely no indication in the record that the manufacturers are interested in or are in a position to integrate backwards and provide their own scanner-based market tracking services (the third condition).

Further, there is evidence on the record that, in fact, Nielsen's manufacturer customers are concerned about their position vis-à-vis Nielsen as a sole supplier. Nicholas Jennery, Senior Vice-President, Trade Relations for the Grocery Product Manufacturers of Canada ("GPMC"), appeared as a witness for the Director in these proceedings on the mandate of the association members. As a result of the proceedings

in this case, Mr. Jennery conducted a quick survey of 117 members. The questionnaire, which was approved by the association executive, reads as follows:

> I am asking for your support that GPMC be a witness for
>
> the Bureau, and make the following points:
>
> 1. increased competition in the area of market research is good for Canadian manufacturers in that it will help to drive down costs and support current industry cost reduction initiatives.
>
> 2. better information and technology is available in the U.S. versus Canada.
>
> 3. there is evidence to suggest that manufacturers pay less for market research data in the U.S. than they do in Canada.[63]

Of 103 responses, 99 expressed approval for the three points, two disapproved and two refused to comment but acknowledged that they had received the questionnaire. Mr. Jennery also noted that he had received several phone calls from members who expressed some concern about the comparisons between performance in the United States and Canada because it was difficult to make allowances for general differences in the two countries.

In our view, what is worthy of note is not the precise contents of the questionnaire but the fact that so many of Nielsen's customers were in agreement that a pro-active course was warranted. If the manufacturers were confident that Nielsen did not have market power and they could look after their own interests, it is surprising that they so overwhelmingly supported the course suggested by Mr. Jennery given their interest in maintaining good relations with an important supplier.

VI. PRACTICE OF ANTI-COMPETITIVE ACTS

In the notice of application, the Director alleges that the following actions by Nielsen constitute a practice of anti-competitive acts within the meaning of section 78 and, in particular, paragraphs 78(e) and 78(h) of the Act:

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 UPC scanned data on a long-term exclusive basis, thus precluding any potential competitors from acquiring such data;

B. Nielsen has paid significant financial inducements to retailers to acquire and maintain exclusive access to their scanner data; and

C. while the market has been foreclosed to potential competitors through their inability to access scanner data, Nielsen has contracted and attempted to contract with manufacturers of consumer packaged goods to provide market tracking services for terms of three years or more, with conditions requiring substantial notice of termination, and imposing penalties for early termination.

In NutraSweet, the Tribunal stated that "a practice may exist where there is more than an ìsolated act or acts'."[64] As set out above, the Director alleged that the acts engaged in by Nielsen formed a "practice". The respondent did not dispute that position. We therefore find that the allegedly anti-competitive acts engaged in by Nielsen constitute a practice within the meaning of paragraph 79(1)(b) of the Act.

The more important question is whether those acts are anti-competitive. The two previous decisions of the Tribunal in abuse of dominance cases, have, in keeping with the language of section 78, established that the list of anti-competitive acts in that section is not exhaustive.[65] Those decisions have also established, and it was not challenged before us, that in evaluating whether allegedly anti-competitive

acts fall within section 78, the Tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market."[66] The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition.[67] The decision in Laidlaw makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of a respondent. The respondent will be deemed to intend the effects of its actions.[68]

A. Facts

Nielsen currently holds contracts with all major grocery retailers and with several drug retailers, including the largest, for exclusive access to their scanner data. Nielsen has had exclusive contracts with the major grocery retailers since 1986; it began entering into exclusive agreements with the drug retailers more recently.

Although the exact wording of the relevant clause varies somewhat from contract to contract, all the exclusivity provisions provide essentially that the retailer undertakes not to provide the data covered by the contract to anyone other than Nielsen. In most of the contracts, the exclusivity clause is broad enough on its face to cover both scanner data and other data that might be required to produce a competitive scanner-based market tracking service, such as those that might be used in tracking causal variables or in supplementing scanner data where they are unavailable or inadequate. There is no evidence that Nielsen ever sought to preclude a retailer from supplying other data.

Two of the agreements are of recent vintage (1994) and contain, in addition to the standard exclusivity clause, certain other provisions altering the payments to the retailer should it nevertheless sell its data to a third party. These contracts are structured so that there is one level of payments as long as Nielsen retains its "preferred supplier" status and a lower level of payments if the data are provided to others. Unlike the earlier contracts, these contracts do provide the opportunity for a would-be entrant to obtain the data. However, the contracts are so structured that any would-be entrant must at least match the reduction in payments that would result if a retailer chose to provide the data to the would-be entrant. The would-be entrant must also reimburse the retailer for the up front payments that the retailer is required to pay back to Nielsen should it sell its data elsewhere.

The standard term for these exclusive contracts is five years. Four of the contracts are somewhat different in that, while the nominal term is five years in all cases, various notice provisions are included which might, if exercised, shorten the term.

Nielsen's initial 1986 contracts with retailers were also for five years and would thus have expired within a few months of each other in 1991. As the result of the 1989 takeover of Woodward's by Canada Safeway, Nielsen was able to renegotiate the Canada Safeway contract and establish a new five-year term which expired in 1994. The Steinberg contract was also renegotiated in 1989.

The origin of these exclusive arrangements is of some interest, in that both IRI and Nielsen were involved. In brief, in 1984 or 1985, the Retail Council of Canada ("RCC"), a retailer trade association, approached IRI to discuss a project to develop and use retailer scanner data. Nielsen and SAMI were apparently also approached by the RCC. IRI proposed, and the RCC agreed to endorse, a joint venture arrangement to establish a tracking service based on scanner data. Under the terms of the proposal, IRI would be responsible for actually signing up individual retailers and those agreements were to be exclusive. This was the first time that exclusives were proposed to be used in market tracking services in Canada. The retailers would provide the data free of charge; IRI would contribute the technology and up-front capital. IRI would recover its operating costs and then any revenues would be shared equally with the retailers. IRI retained the option of withdrawing from the venture should it be unable to sign sufficient retailers. When Nielsen learned of the initiative, it signed one of the most important grocery retailers in British Columbia and Alberta, Canada Safeway, to an exclusive. IRI abandoned its efforts and Nielsen went on to sign exclusive agreements with all the major grocery retailers in the country.

With respect to Nielsen's contracts with manufacturers, it is not in dispute that in 1992-93 Nielsen re-signed virtually all its manufacturer-customers to new contracts. Prior to that time the contracts were "evergreen", the original minimum commitment period having long since expired, and were subject to termination in accordance with a stated notice period. Based on the only older contracts in evidence the standard minimum term was two years while the standard notice period was eight months. Any discounts were forfeited upon giving notice and liquidated damages were payable for termination other than pursuant to the terms of the agreement. The "new" contracts have varying minimum commitment periods but eight months is still apparently the most common notice period. Similar loss of discount and liquidated damages provisions are also included.

B. Analysis and Conclusions

Paragraphs (e) and (h) of section 78 include as "anti-competitive acts":

> (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market; . . .
>
> (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; . . .

Counsel for the Director acknowledges that the third anti-competitive act alleged, relating to contracts for scanner-based market tracking services between Nielsen and the manufacturers of consumer packaged goods, does not appear in section 78 but argues that it can be included by analogy if an "exclusionary, predatory or disciplinary" purpose is proven. To determine if Nielsen's actions are anti-competitive acts, as alleged by the Director, we must look to whether the purpose of those acts is to withhold scarce resources from the market, to prevent a competitor's entry into the market or to achieve some other exclusionary purpose.

(1) Exclusive Retailer Contracts

The unquestionable effect of the standard exclusivity provisions is to exclude all potential competitors from obtaining the retailer scanner data. Nielsen can be presumed to have intended this effect. In addition, although not necessary to the determination of the purpose of the provisions, there is also ample evidence on the record that Nielsen entered into and maintained the contracts for scanner data with the expressed goal of excluding would-be competitors and, in particular, IRI. Various internal documents set out this strategy. There can be little doubt that the reason that Nielsen entered into these contracts was to ensure that the data were and are unavailable to other potential suppliers.

Nielsen's proven strategy of staggering contract renewals further reinforces that the purpose of the exclusive retailer contracts was and is to exclude potential competitors. After the new contract with Canada Safeway was signed in 1989, G.F. Finlay, then President of Nielsen Canada, commented that:

> This signing is a major hurdle and it means that it would not be possible for a competitor to come in and sign contracts sufficient to produce a national product. It will also improve our negotiating position immensely in the next few years.[69]

Both themes, the effect on would-be competitors and Nielsen's bargaining position vis-à-vis retailers reappear in documents from 1990 and 1991 which set out a strategy of staggering contract renewals. The 1990 document focuses on retail concentration.[70] In the 1991 document, Mr. Finlay refers to the concern about entry:

> After we did our retailer deals five years ago, we recognized that we were vulnerable because virtually all of these agreements expired around the same time. We set ourselves a goal then to pursue a practice that would result in our retailer and distributor contracts expiring at different times. This would make it much more difficult for any competitor to set up a service unless he was prepared to invest in significant payments before he had a revenue stream.[71]

Mr. Finlay was not called to testify although he was the President of Nielsen in Canada from 1986 to 1993. Mr. Kretch stated that the major concern was not potential entry but the possibility of the retailers combining to demand higher payments. The concern referred to by Mr. Kretch was undoubtedly present but the Tribunal finds it unlikely that Mr. Finlay would have expressed himself as he did unless he was also addressing an important consideration. Moreover, insofar as Nielsen was concerned with staggering the contracts in order to minimize the payments to retailers, it must be remembered that the payments in question were not just for the retailers' data but for exclusive access to them. Without exclusivity and the concomitant strong market position in the end-product market of the acquirer of the data, the retailers lose much of their bargaining power vis-à-vis the purchaser of their data.

To ascertain the purpose of the "preferred supplier" clauses, we must determine their likely effect on a potential entrant. One obvious effect of these clauses is to place in Nielsen's hands the ability to control the level of payments that a would-be entrant would have to make in order to obtain scanner data. Nielsen can do this through the amounts that it agrees to pay. For reasons discussed more fully in the section dealing with the alleged substantial lessening or prevention of competition and, in particular, Dr. Winter's model, we are of the view that the provisions in question allow Nielsen to set its payments at a level that would make entry by a rational would-be entrant unprofitable. The provisions achieve the same effect of exclusivity by a more indirect route. We therefore find that their purpose is the same as the more straightforward exclusivity provisions -- to exclude potential competitors.

With respect to the four retailer contracts which contain a notice provision, we do not accept the characterization of these agreements as "non-exclusive". They clearly provide for exclusive access to Nielsen during their term. The length of the relevant term is all that is affected by the notice provisions. Unless the retailer receives at least an equal amount of money for its data it will not be in the retailer's interest to give notice.

In determining whether the various exclusive agreements have the necessary anti-competitive purpose, we considered that Nielsen might have had a valid "business justification" for its actions. However, the arguments advanced by Nielsen, which are reviewed in detail below, did not persuade us that there was any credible efficiency or pro-competitive business justification for the exclusives. We do not accept that self-interest constitutes such a justification. We note that Nielsen's experts also failed to provide any efficiency rationale for the exclusives.

Throughout the course of the proceedings counsel for Nielsen returned again and again to the origin of the present exclusive arrangements and the role of IRI to argue that, because IRI "initiated" the practice of exclusives, Nielsen's use of exclusives cannot be anti-competitive. Nielsen's position was that it was forced to adopt exclusives in order to protect its legitimate business interests against the threat of being locked out of the emerging technology and to safeguard its existing tracking services.

In the view of the Tribunal, retaining or obtaining a dominant position in order to defend against another firm potentially becoming dominant is not an acceptable business justification. If IRI had succeeded in its project with the retailers and continued to use exclusives even when scanner data supplanted other data sources, it would have been a candidate for the status of respondent in an application launched by the Director. That is the position in which Nielsen now finds itself.

Further, it was not explained to us why it was necessary for Nielsen to obtain exclusives with all the retailers if its objective was simply to prevent IRI from obtaining a stranglehold on scanner data. It is clear from the documentary evidence that Nielsen was of the view that no firm could produce a national scanner-based market tracking service without access to Canada Safeway's scanner data. The fact that it proved very easy to attract the remaining retailers once Canada Safeway had been signed and IRI had

abandoned its attempt to enter the industry is hardly an adequate answer. Even on its own terms, the supposed rationale for Nielsen's initial exclusive contracts with all the retailers does not withstand close scrutiny. Further, Nielsen's actions since 1985 certainly cannot be characterized as a defence against another firm obtaining sole access to scanner data.

There is little evidence in support of the proposition that exclusives were justified because of the time, energy and resources that had to be expended to exploit a new technology. To even begin to justify the exclusives on this basis, Nielsen's investments would have to be related to creating benefits that other firms could then appropriate, for example, improving retailer scanner penetration or data quality and useability. There is little evidence of a substantial commitment of resources to investments of this nature. The only evidence on the record relates to the production of a video by Nielsen to encourage retailers to improve the quality of their scanner data and a form letter to the same effect, both relatively minor expenses. In fact, the theme of various Nielsen documents is concern about the high cost to Nielsen of purchasing the data from the retailers, not concern about the magnitude of the resources being committed to developing the new technology. The cost of the data is not related to the development of a scanner-based market tracking service but to securing exclusive access to the scanner data.

Even if Nielsen had been able to establish that there was some justification for the exclusives in the early stages of development, it would have been necessary to weigh the justification in light of any anti-competitive effects to establish the overriding purpose of the exclusives. Moreover, any such justification for exclusives in the early stages of development would not have been applicable to the current exclusives.

Nor do retailer preferences explain why exclusives must be included in the contracts. We acknowledge that retailers are concerned about issues of confidentiality and transparency with respect to their scanner data. Neil Everett of Shoppers Drug Mart stated that he would have some qualms about providing scanner data to two firms because it would not be clear who was to blame for any leak. Nielsen treats Saskatchewan and Manitoba as a regional unit in providing tracking information in order to ensure that the sales figures from individual retailers cannot be identified. Retailers like Loblaws who market their own brands retain control over the release of key account data so as not to reveal their sales to competing manufacturers. Nevertheless, if the retailers wish to deal with a single purchaser of their data because of these concerns, they will do so even in the absence of an exclusivity provision. They will simply contract with one purchaser rather than several. The difference from the existing situation is, of course, that the payment to the retailer will reflect the value of the data alone, rather than the data plus exclusivity.

Further, there is no evidence that these retailer concerns actually led to the existing exclusive arrangements. Other than Shoppers Drug Mart, which requested bids on both an exclusive and non-exclusive basis in 1994, there is no evidence of any retailer requesting exclusivity.[72] The witnesses from the Provigo and Overwaitea grocery chains stated that the initiative for the exclusivity provision did not originate with their firms. Further, while Mr. Everett expressed a preference for dealing with a single tracking firm, he also stated that the main reason Shoppers Drug Mart decided to grant exclusive access to Nielsen was the price that Nielsen was willing to pay for it, not the other reasons.

(2) Inducements to Exclusivity

Scanner data are worth more to Nielsen when it has exclusive access than when those data are, or might be, shared with competing suppliers of market tracking services. The benefits of excluding competition are reflected in the price that Nielsen was and is willing to pay for the data.

Mr. Kretch confirmed that Nielsen's plan in 1986 was to make substantial payments to the retailers in order to secure exclusive access to the scanner data, even though it knew that it would not be able to utilize the data for some time. An internal document reveals that there was indeed an increase in payments to retailers of over 500 percent when the exclusive contracts for scanner data were entered into in 1986.[73] The fact that Nielsen knew it would not be able to make use of the scanner data for

several years negates the possibility that the increase in payments reflected only the value of scanner data as compared to the previous data sources. The withholding of data from others was the major consideration.

Beyond 1986, the inducements for exclusivity are not as easily identifiable because the amounts paid to retailers are lump sums; they are not broken down into a payment for the data as such and a payment for exclusive access to the data. We can, however, look to a recent contract negotiation in which the retailer was provided with proposals on both an exclusive and non-exclusive basis for an indication of what Nielsen is willing to pay for exclusivity. We recognize these proposals were likely affected by strategic considerations related to the ongoing litigation in this matter and, therefore, are not a wholly accurate benchmark. Nevertheless, given that the base annual payment on an exclusive basis (calculated by taking the total payments and dividing by the term) is about twice as much as the non-exclusive payment, there is an unmistakable inducement to exclusivity contained in the higher payment.[74] It was also the uncontradicted evidence of the retailer in question that it was the level of the payment for exclusivity that decided it in favour of granting exclusive access to Nielsen.

(3) Manufacturer Contracts

A number of Nielsen documents refer to a strategy of trying to "lock up" as much business as possible in the face of possible entry by IRI. The references start in 1986, for example: "Shift as much of our business as possible to long-term agreements (3-5 years)."[75] In July 1992, when IRI was again perceived as a threat, Nielsen resolved at an "IRI Competitive Strategy Meeting" that:

> All U.S. IRI customers will be focussed on, and action
>
> will be taken to do the following:
>
> -- Sign customers to high value long-term agreements
>
> (three or more years).[76]

This approach was again articulated in a memorandum dated June 3, 1993 to D.G. Easter, Nielsen's Vice-president of Marketing and Operations, from P.C. Gardiner, who was in the marketing department, in anticipation of possible entry by IRI.[77] In an August 1993 report entitled "IRI Review" likely points of entry by IRI into Canada are considered, including IRI's U.S. customer base. A Nielsen customer strategy of "new, long-term, high value contracts" is proposed. A list of IRI U.S. customers is attached, divided into two groups: those "... Recently Servicing New Long Term Agreements With Nielsen Canada" and those "... Not Recently Signed-Up On New Agreements In Canada".[78] An earlier memorandum, dated February 22, 1993, to all sales/service personnel stated the need to protect Nielsen's business from an IRI launch in Canada and recommended going for "longer term contracts, a minimum three years." A list of major IRI U.S. customers was attached.[79]

We were not given any reason to question the plain meaning of the Nielsen documents. The only Nielsen witness who gave evidence on this question, Mr. Nelson, confirmed that signing customers to new long-term contracts and targeting IRI U.S. customers were indeed part of Nielsen's strategy. We therefore conclude that Nielsen regarded IRI as a potential entrant and adopted a strategy of signing long-term customer contracts generally, and with IRI U.S. customers specifically, as a means of preventing IRI's entry.

Although he did not deny Nielsen's intentions vis-à-vis IRI, Mr. Nelson did attempt to place Nielsen's activities in signing customers to new contracts in the context of the introduction of MarketTrack, which was not covered by the existing agreements. We accept that Nielsen found it useful and perhaps necessary to enter into new agreements when it introduced MarketTrack. However, it is far from clear that long-term contracts would be desirable to Nielsen in the absence of feared entry by IRI. Nielsen

operated for years with "evergreen" contracts whose minimum commitment period had long expired without apparent concern for whatever value long-term contracts might provide.

Proof of the existence of a business motive for long-term contracts that was unrelated to an anti-competitive purpose would undoubtedly be relevant to an evaluation of an allegation of anti-competitive acts. The mere proof of some legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.

For the purposes of this litigation, the respondent had a number of charts prepared that itemize the lengths of its contracts for all its products and the revenues generated from each of the clients associated with the contracts.[80] One of the charts deals only with the contracts entered into by Nielsen with companies that deal with IRI in the United States.

The distribution of contracts of various lengths with respect to all customers confirms that Nielsen succeeded in "locking up" a large percentage of customers with long-term contracts. Although counsel for the respondent referred to a prior contract that had a minimum commitment period of two years as providing a standard against which the distribution of current contracts should be measured, the evidence is that "evergreen" contracts terminable on notice were in fact the standard for prior contracts. In comparison with the prior situation where virtually all the contracts were terminable on eight months notice, the current contracts are for considerably longer terms.

With respect to the length of contracts with manufacturers that are IRI customers in the United States, the charts compiled by the respondent support the other documentary evidence and the Director's position that Nielsen made a special effort to sign these customers to long-term contracts. Whereas 29 percent of Nielsen's 1994 total manufacturer revenues was subject to contract lengths of three years or more, the comparable percentage for Nielsen revenues from manufacturers who are customers of IRI in the United States was at least 43 percent. The latter percentage may be understated because Nielsen is already providing service to another large IRI U.S. customer that would be subject to a contract of three years or more but the contract had not yet been signed at the time of the hearing.

The Director takes the position that the nature and purpose of Nielsen's actions regarding the manufacturer contracts cannot be assessed independently of Nielsen's other anti-competitive acts. We agree that alleged anti-competitive acts must be considered in their full context. We conclude that Nielsen intended its long-term manufacturer contracts, along with the exclusives and inducements to exclusivity, to exclude potential competitors generally and IRI specifically. All three actions constitute anti-competitive acts under section 78 of the Act.

VII. SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION

The final element that must be proven for the Tribunal to make an order under section 79 of the Act is that the practice of anti-competitive acts described in the preceding pages has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market for scanner-based market tracking services. We have found that Nielsen intended by its actions to exclude potential competitors, specifically IRI. We must now consider the degree of success it achieved or is likely to achieve, if any. The central issue to be decided in determining whether the Director has satisfied this third element is the effect of the exclusives with retailers and the long-term contracts with customers on the conditions of entry into the market. Or, to paraphrase the words of the Tribunal in NutraSweet, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen preserve or add to Nielsen's market power.[81]

First, we must establish what the conditions of entry would be without the exclusives and, then, determine how the anti-competitive acts altered the prospects for economically feasible entry. The evidence of the IRI witnesses regarding the necessary inputs to produce a scanner-based market tracking service was uncontradicted. One such input is the technology and know-how required to put

together a representative sample and to collect, process and analyze a large volume of data. While there may be a number of firms that could develop these skills and systems, at the present time only IRI has the necessary skills and the demonstrated commercial interest. A second required input is a dictionary that translates the product UPCs into detailed descriptions useful to the buyers of the tracking service. A dictionary would have to be specially developed for Canada to conform to the particular product offerings in this country. A third input is a "field force" to collect causal data from the stores. The last element is the scanner data required for the tracking service.

IRI is currently missing three of the four required inputs. Both the dictionary and the assembly of a field force are relatively minor inputs in terms of expense, although it could take a number of months to develop the dictionary. Clearly, the principal deterrent to being able to provide a tracking service in Canada is the lack of scanner data, both current data and historical data for approximately one year. The historical data are required by customers for comparison purposes with current data and must, at a minimum, extend to the previous year to take into account seasonal variations in product sales.

Once in a position to provide a tracking service, another requirement for successful entry is the availability of customers. The costs associated with data acquisition and the other attendant costs of entry must be incurred regardless of the number of customers to whom the end product will be sold. The revenue base available must be sufficient to cover these costs or entry will not be feasible.

Given the critical nature of the input, the scanner data, tied up by Nielsen's exclusives with retailers, the exclusives constitute a prima facie barrier to entry. If the data necessary to produce a scanner-based market tracking report on either a national or a regional basis are tied up by an exclusive, the would-be entrant is not able to provide the service in question. In contrast, in the absence of exclusives the retailers would be free to provide their data to more than one firm. Under normal circumstances they would have the incentive to do so since the cost of providing the data to a second firm is virtually nil and the retailer is in a position to demand payment in keeping with its relative bargaining strength based on its importance in the retail market. As has been noted earlier, a retailer may well have concerns about confidentiality and transparency with respect to its data. Those concerns would simply become part of its negotiating position with the prospective purchasers of its data.

Nielsen and its experts have advanced the view that the exclusives have not resulted in a substantial prevention or lessening of competition because it was and is open to IRI to "compete" with Nielsen for the exclusives each time they come up for renewal. Thus, the argument proceeds, in 1986 and in 1991 IRI could have outbid Nielsen and secured for itself exclusive access to the scanner data and can do so upon expiry of the current agreements. This, it is argued, results in a competitive market. The respondent does not, however, provide any evidence or, indeed, any argument as to how or why this type of "competition" for exclusives would produce the results that one looks to competition for, namely lower prices and better products.

Dr. Winter describes what occurred in 1986 with respect to the retailers' scanner data as "competition for the market", in contrast to competition within the market, the market in question being the supply of a national scanner-based market tracking service. The winner becomes the sole supplier of the service for the duration of the exclusives. As noted by Dr. Winter, the most likely effect of this type of competition for exclusives is higher prices to retailers for their data which would be incorporated into the price charged for the market tracking service based on the data. The only possible benefit of competition for exclusives was raised by Dr. Mathewson who suggested that there was a possibility that the payment received by the retailers might get passed on to their customers. While raised as a possibility, there was no reason given as to why this might be expected to happen and no evidence was before us relating to the possibility. We believe that the more likely outcome is that the payments received for exclusive access are simply reflected in the retailers' bottom line profits since it is difficult to see how the payments would enter into the retailers' pricing decisions.

Dr. Mathewson and Ms. Guerin-Calvert also advanced the view that there has been no substantial lessening or prevention of competition because IRI is already in the market for scanner-based market

tracking services. It is an undeniable fact that IRI does not offer a product in Canada. The argument appears to be based on the circumstances of IRI having on occasion approached various retailers in Canada, discussed obtaining their scanner data and, possibly, submitted a proposal, albeit an unsuccessful one. Even if IRI went as far as making a bid for data, that action cannot be characterized as "entry". The Tribunal in Laidlaw, and also in Southam Inc., stated that entry is to be understood as sustainable or viable entry.[82] In evaluating whether entry into a market is easy it is necessary to consider not only whether it is easy for a newcomer to place a foot in the door but also whether it is likely that the firm will survive. We cannot accept that IRI has entered the Canadian market without access to a key input and thus without the slightest possibility of providing a scanner-based market tracking service. We underline that there is no evidence of IRI having offered any type of market tracking service in Canada. This argument is totally devoid of merit.

The main issue that must be addressed with respect to the identification of any likely prevention of competition in the supply of scanner-based market tracking services in Canada is whether it was possible for a firm such as IRI to bid for individual retailers' data as the Nielsen exclusive contracts expired and enter the market gradually. Nielsen argues that such entry would have been profitable for IRI because it could then have sold its exclusive data as key account data or, if it acquired several retailers' data, on a regional basis. Further, the respondent submits, IRI would then have in its control a necessary piece of the national picture, which it could use to bargain with Nielsen to acquire access to the remaining portions. The situation in Australia was referred to as a model of how the market in Canada could operate if IRI chose to try to enter piecemeal.

A critical part of the respondent's argument in this respect is its view that IRI is using the machinery of the Act for its own purposes and, by implication, that the Director is IRI's unwitting pawn in the process. The Nielsen exclusives have been in place for nearly a decade. During that time IRI has not entered on a piecemeal basis. In general, the fact that a firm with a demonstrated interest in entering an industry has not done so indicates that, for one reason or another, the firm would not find it profitable to enter.

Clearly, IRI's participation in this proceeding is not an act of charity. It has a strong interest in the outcome since it wishes to conduct business in Canada. Its business interests led it to file a complaint with the Bureau of Competition Policy and to support the Director's position before the Tribunal. Nielsen's business interests led it to take the opposing position. Knowing and accepting these facts does not help us to resolve the issues before us. Our concern is to identify whether there has been a substantial prevention or lessening of competition in this case and, if there has, to rectify it to the extent possible. Other considerations are irrelevant.

That having been said, the evidence does not support the contention that IRI has been purposefully delaying its entry in order to buttress the Director's case before the Tribunal. One evident weakness with the conjecture is that IRI was kept out of the market tracking industry in Canada for a number of years before it made its complaint to the Director. In our view, the evidence does not support the argument that IRI has been purposely refusing to try and enter the Canadian market since 1986, when such entry would otherwise be profitable, in order to lend its complaint greater weight and possibly affect a 1994-95 proceeding before the Tribunal.

The interaction between IRI and Loblaws in 1991, as Loblaws' first exclusive with Nielsen was expiring, was referred to as evidence that IRI believed as a rational, profit-maximizing firm that it could enter with only Loblaws data. This is said to prove that entry was possible and therefore that the exclusives have never been a barrier.

We do not adopt this interpretation of the 1991 events. It is clear that Mr. Fulgoni of IRI entered into some discussions with Loblaws in 1991. It is not clear that IRI ever actually submitted a firm bid for the scanner data; the relevant documentation refers to being "prepared to submit a bid" for the exclusive purchase of Loblaws' data.[83] Mr. Fulgoni testified as to his doubt that any proposal of IRI would be taken seriously, given that Loblaws was on the verge of re-signing with Nielsen. Loblaws did not, in fact, respond to the initial IRI "proposal". When Mr. Fulgoni learned, through a third party, of Loblaws' decision

to sign with Nielsen, he wrote another letter referring to a sum of money that IRI "had been planning on presenting" as an offer.[84] Again, Loblaws did not respond. We accept Mr. Fulgoni's explanation that he hoped that "what might happen is that [Loblaws] might use this number to up their Nielsen payments, and that I could at least cause Nielsen to make less money in Canada and thereby use less profits to prevent our geographical expansion in other countries."[85]

Even if we were to consider the IRI initiative with Loblaws in 1991 as a firm and serious "bid" for its scanner data, the fact that Loblaws turned it down to sign with Nielsen contradicts rather than supports the respondent's hypothesis. If, as Nielsen argues, IRI was making a rational effort to enter, then the fact that it did not succeed supports the view that such entry cannot succeed rather than the opposite.

Another piece of evidence that was relied on as proof that IRI failed to take advantage of existing opportunities to enter the market was a statement attributed to an employee of IRI during discussions in January 1994 with Shoppers Drug Mart. Mr. Everett of Shoppers Drug Mart testified that, when asked if IRI would consider submitting both an exclusive and a non-exclusive proposal, Ron Larocque, the general manager of IRI's Canadian software operation, responded that he could not do so because it might jeopardize the case before the Tribunal. As Mr. Everett was aware, Mr. Larocque's responsibilities related primarily to IRI's software business; Mr. Daboll, who was also present, was identified as "spearheading" any data acquisition. We have taken due note of the fact that the statement was made. Given, however, the overwhelming weight of the remainder of the evidence that it would not have been profitable, or even feasible, for IRI to bid on a single exclusive, we are not inclined to give much weight to an offhand remark by an IRI employee without any apparent prior involvement in data acquisition decisions and who was certainly not in a position of responsibility regarding that aspect of IRI's business.

We were also invited to draw an adverse inference regarding IRI's intentions from its refusal, in June 1994, to respond to an invitation to bid on the Canada Safeway data. In light of the complete absence of any other evidence that would support the proposition that it was rational for IRI to submit a proposal, we see no reason to draw the suggested inference.

We will now turn to the remainder of the evidence regarding the potential for piecemeal entry and the possibility of a market configuration like that in Australia developing in Canada. First, some background on the Australian situation is necessary. One of the respondent's witnesses, Mr. Kretch, was directly involved in the Australian market from 1982 to 1986 and remained familiar with it up until 1993. He described how some Australian retailers make use of "data agency" agreements in selling their product movement data. Pursuant to a data agency agreement, the retailer gives the exclusive re-marketing rights to its data, both product movement and causal data, to a single company. That company is permitted to market and sell the data to the manufacturing community. Other retailers sell their data directly to the manufacturers. The movement data in question was initially electronic warehouse shipment data and only later scanner data.

The identity of the participants in the Australian market changed somewhat during the time period about which we heard evidence. At the beginning of the period (in 1984 or 1985), Nielsen had an exclusive data agency agreement with Franklin's, the third largest grocery chain;[86] a second company, Morgan Research, had agreements with some of the smaller chains and warehouses. The remaining retailers, including the top two chains, sold their data directly to the manufacturers. Nielsen and Morgan Research sold retailer-specific data for the retailers they had contracted with to the manufacturers. Nielsen, Morgan Research, and the manufacturers that were buying data directly and wanted to produce their own national report, contracted with each other to obtain the missing data elements and each then produced a national report. Nielsen and Morgan Research sold their national reports to manufacturers who did not produce their own report.

Morgan Research was then acquired by Nielsen. From 1986 to 1988, IRI held an exclusive data agency agreement with Woolworth's, the second largest chain but apparently never produced an integrated national report. By 1993, there were only two significant players which, as far as we know, remains the case today. South & Walker/Infohouse, a company formed by an ex-Nielsen employee who

had previously been negotiating with Coles on Nielsen's behalf, has a data agency agreement with Coles, the number one chain. Nielsen has exclusive arrangements with the majority of the remaining retailers and will actively pursue Coles when its contract with South & Walker expires. A few retailers are still selling their data directly to the manufacturers. Both Nielsen and South & Walker sell key account data for their contracted retailers and produce integrated national reports. According to Mr. Kretch, Nielsen had the majority of the data integration business in 1993. The proportion of manufacturers who integrated the data themselves in-house was only about 10 percent and was declining.

Two questions are raised by the evidence on the Australian experience: first, does it provide any lessons regarding the effect of exclusives on entry conditions in the Canadian market; and second, does it suggest a desirable result in comparison with the existing Canadian situation and the situation which would likely result from ending exclusives.

At the outset, we note that the data agency agreements in Australia are not the same as the exclusive arrangements of Nielsen in Canada. Payment arrangements under data agency agreements in Australia vary. In Nielsen's case there is an up front payment to the retailer by Nielsen and sharing of revenue from sales to manufacturers between the retailer and Nielsen. Nielsen's Canadian exclusives provide for set payments by Nielsen, with the minor exception of revenue sharing for key account data once a certain level of sales have been achieved. An entrant into the Canadian market would almost certainly have to offer fixed payments rather than revenue sharing, particularly since the retailers would recognize that doing business with the entrant was riskier than remaining with the incumbent. In addition, the two largest retailers appear to have set the parameters for the market tracking industry in Australia, retaining a far greater degree of control than has occurred in Canada. Thus, the respective roles of retailers and firms that provide market tracking services has been very different in Australia than it has in Canada. A more important difference is the fact that there have been national reports provided in Canada by a supplier with direct access to all data. A would-be entrant would have to overcome a significant credibility gap if it were bidding on an exclusive basis for individual retailers and counting on bargaining with Nielsen to obtain the remaining data for a national report. For these reasons, the prospects for a division of retailer exclusives between two or more suppliers are fewer in Canada than in Australia.

Further, as the evidence shows, the Australian market has become increasingly concentrated over the period in question, rather than the reverse. The number of suppliers of market tracking services in Australia has declined, as has the number of manufacturers integrating data on their own. If Nielsen succeeds in signing Coles upon expiry of its current contract, Nielsen may well become the sole supplier in that country. Mr. Kretch also referred to New Zealand, where a similar data agency concept is used. In New Zealand, Nielsen is the sole agency involved and the sole service provider.

The analysis of Dr. Winter is particularly appropriate for addressing the prospects of piecemeal entry by IRI as Nielsen's contracts with individual retailers expire and for addressing any lessons from the Australian experience. Dr. Winter draws on the principle that the earnings of a monopolist are likely to be greater than the combined earnings of two firms because competition between the two firms drives down prices and increases costs without a compensating increase in sales. This proposition is not challenged by the respondent's experts.

As Dr. Winter recognizes, this principle only holds when the firms in question produce very similar products. Dr. Winter concludes that the condition is satisfied in this case for the scanner-based market tracking services offered by Nielsen and IRI (based on its U.S. product). Although Dr. Mathewson did not profess to have studied the matter, he was of the view that two pieces of evidence supported the premise that Nielsen and IRI produce significantly different products.

The first is an April 1994 letter from Mr. Daboll of IRI to a Canadian retailer discussing the potential outcome of this case and stating that "the amount you will receive for your scan data is certain to be higher in a competitive environment than in the current monopoly environment."[87] A similar letter was sent to other major Canadian retailers. The second is evidence that Mr. Fulgoni gave an assurance in the same vein, to apply in an environment of non-exclusives.

Mr. Daboll testified that he sent the letters to try "to manage what we felt was a fear of the unknown among Canadian retailers who may not be familiar with who we are and what we do. We didn't want them to think that they were somehow entangled up in this litigation."[88] Mr. Fulgoni said: "I am concerned that the retailers have been led to believe that if these exclusives are struck down, they stand to lose a lot of money. I would imagine that that is a concern that they would have. I think it is critical that we alleviate their concerns in that regard."[89] We are of the view that the documents referred to provide little support for product differentiation. The direct evidence from manufacturers who buy or bought from IRI and Nielsen in the United States does not support a conclusion that their offerings are significantly different, but rather indicates that competition between the suppliers has resulted in falling prices and improved products which are very similar.[90]

Dr. Winter applies the principle regarding the combined profitability of duopolists relative to a monopolist to conclude that, in a world of exclusives for scanner data, there will be a tendency for a single supplier of scanner-based market tracking services to emerge and remain. The single supplier can always afford to bid more for the data than can a firm that knows that it will be one of two suppliers of competing services.

Dr. Winter goes on to discuss what would in his view occur in the unlikely event that an entrant won one or more exclusives. As he points out, a situation would be created in which two firms hold data that are complementary to each other for purposes of producing a national report (or possibly regional reports, depending on the data each controls). As he notes, firms that are producing complementary products are producing highly differentiated products. The two firms would be competing only in the provision of services to manufacturers for combining data acquired by the manufacturers from the two firms. In this scenario, Dr. Winter's analysis of why a monopolist will always outbid an entrant causes the Tribunal some difficulty. The reason for reduced profits where there are two firms is attributed by Dr. Winter to the fact that industry profits are highest when there is a single firm and that competition forces down prices and reduces profits. This reasoning applies only where the firms are producing substitutes.

The Australian experience, however, indicates that Dr. Winter's conclusion nevertheless applies. The increasing concentration in the supply of market tracking services in Australia, and also the existence of a sole provider of this service in New Zealand, is consistent with the conclusion that bidding for exclusives, or for the market, is likely to result in a single supplier. What the Australian evidence suggests is that the reason for this is that overall profits are likely to be lower where two or more firms each control different data because, in addition to competing to create a national data set, having to integrate the complementary data sets results in an inferior product at higher cost.

The evidence of Mr. Kretch regarding Australia revealed that integrating scanner data from various sources is complicated by the fact that these data are sample-based. Thus, anyone who purchases data for, for example Coles, must rely on the sample created by South & Walker in collecting that data as being representative of Coles and must integrate the data into a national or regional report based on that original sample. Since the end user of the data is the manufacturer, it does have some means of checking the credibility of the data with respect to its own products by checking them against its records. However, there are undeniably difficulties involved.

Irrespective of sampling concerns, there are other difficulties in integrating data collected by different organizations if each uses a different dictionary to translate the UPC into detailed product descriptions. The company integrating the data must be able to sort out the appropriate brand and category totals by controlling these descriptions. This probably does not entail major costs, but is an indication of more costly operations when firms do not have control of sampling and data collection within their own organizations. As Mr. Kretch admitted, Nielsen itself would prefer to have direct access to the Coles' data and, indeed, to all data of all Australian retailers. Nielsen considers the Australian situation an "anomaly" or, at least, hopes that it is.

In the light of the above, we conclude that it is highly unlikely that IRI would outbid Nielsen for any single retailer's data as long as both behave rationally and have reasonably good information. There is

no reason to believe that these conditions are not met. Further, even in the event that miscalculation resulted in IRI winning an exclusive, the long-run tendency to a single provider would still be operative. Thus, even taking the most optimistic view of the prospects for successful piecemeal entry into Canada, that is where the entrant was able to sell, at a profit, the individual retailer data that it had acquired, the likelihood is that Nielsen as the incumbent would outbid the would-be entrant in the next round.

In fact, the evidence regarding Canada shows that the prospects of profitably selling key account data alone are not good. Total sales of key account data[91] accounted for only 9 percent of Nielsen's 1994 revenues; MarketTrack Grocery accounted for 36 percent.[92] Nielsen also had the added advantage of being able to offer national and regional data to its purchasers of key account data. Hardly any customers buy key account data alone. A Nielsen document reveals that, in 1993, only three of 76 purchasers of key account data bought that data without the related tracking service.[93] Key account data are most valuable when they can be compared to the national or regional picture.

Moreover, Nielsen's total revenue from the sale of key account data is hardly sufficient to justify a would-be entrant bidding anywhere near the level of payments that Nielsen currently makes to retailers. Payments to retailers in 1993 for scanner data were about 1.8 times total key account revenue in that year, which includes sales of non-scanner data.[94] Further, on the cost side, this comparison only takes into account up front lump sum payments (averaged over the life of the contract) and annual payments. It does not allow for payments per store and revenue-sharing payments to retailers for key account sales. Piecemeal entry that relies on the sale of key account data is not a viable entry strategy.

In her oral testimony, Ms. Guerin-Calvert speculated that ISL still has the "lion's share" of the key account revenues available in Canada, as it did prior to 1991. Since we have already determined that consumer panel-based services such as ISL's are not within the product market, her speculation is irrelevant. We do note, however, that Ms. Guerin-Calvert did not refer to any evidence to support her statement. Even if we had found that consumer panel data were a substitute for scanner data, the evidence we do have, which indicates that Nielsen's 1993 revenues from key account data alone were over half of ISL's total revenues from the CPC and TradeTrack together for the year ended September 1994, would tend to discredit Ms. Guerin-Calvert's supposition.

The prospect of IRI acquiring enough exclusive contracts to provide regional data is, of course, even more remote than the prospect of it successfully acquiring a single retailer. If it did happen, however, the evidence relating to Nielsen's short-lived Ontario ScanTrack product reveals that the sale of regional-only data is no more likely to be profitable than the sale of key account data alone. Another Nielsen document reveals that, in 1993, only 20 customers bought regional data alone, while over 100 bought national data or a combination of regional and national data.[95]

Considerable evidence was introduced regarding the situation in the United States, where IRI and Nielsen acquire data from retailers on a non-exclusive basis and compete vigorously in the provision of scanner-based market tracking services. Comparing this evidence with that from Australia and the existing Canadian situation, we conclude that it is manifest that the only prospects for competition in the market for scanner-based market tracking services are found where there are no exclusives. Nielsen's exclusive contracts and the inducements that led to them have resulted in the prevention or lessening of competition substantially in the Canadian market for scanner-based market tracking services. Its long-term contracts with its customers also prevent competition by significantly reducing the volume of business available to a would-be entrant. This latter consideration, however, assumes importance only in a context where the barriers resulting from the exclusive contracts with retailers have been eliminated. If an entrant cannot get access to the necessary input for providing a scanner-based market tracking service, namely the scanner data, it is irrelevant at that point that the entrant would also be precluded by long-term contracts from obtaining sufficient customers to survive.

VIII.REMEDIES

Having made the findings set out above under paragraphs (a), (b) and (c) of subsection 79(1), the Tribunal is authorised by the closing words of that subsection to make an order prohibiting the respondent from engaging in the practice found to be a practice of anti-competitive acts. In addition to or instead of an order under subsection (1), the Tribunal may make an order under subsection 79(2) which goes beyond simple prohibition of the practice of anti-competitive acts if it finds that an order under subsection (1) is not likely to restore competition in the market. Under subsection (2), the Tribunal may order the respondent to "take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market." In making an order under subsection (2), subsection (3) requires the Tribunal to make the order in terms that will, in the Tribunal's opinion, "interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order."

Both subsections (1) and (2) provide that the Tribunal "may" make an order. The word "may" allows the Tribunal some residual discretion to refuse to issue an order despite its findings, although the occasions when the exercise of that discretion is appropriate will surely be rare. We do not consider that the circumstances of this case justify our declining to issue an order. We agree with the respondent that there is a possibility that, even if we prohibit Nielsen from using exclusive retailer contracts, retailers will choose to offer their data to only one purchaser. We do not accept the respondent's position that the Director must, in effect, prove that the order will be effective for the Tribunal to act. While we cannot say with certitude that the order will ensure competition in the supply of scanner-based market tracking services in Canada, we have found that without the order there is and can be no effective competition. We would be remiss if we declined to issue an order simply because the Director cannot guarantee its success. In any event, we are of the view that it is unlikely that the retailers will insist on de facto exclusives once Nielsen is prevented from offering them incentives to exclusivity. The future conduct of IRI in this regard is also critical and is dealt with under the heading IRI Undertaking below.

The Director submitted an initial draft order at the outset of oral argument and filed a revised version after the close of argument. The respondent and the intervenors had the opportunity to make submissions on the terms of both drafts. These reasons will focus on the main issues that were in dispute and the major changes to the Director's draft that flow from our conclusions. First, we will deal with the identification of the persons subject to the order and the IRI undertaking, then examine the issues arising from the requested relief with respect to the retailer contracts, the manufacturer contracts and, finally, historical data.

Except with respect to historical data, we felt that the issues were thoroughly canvassed in argument before us and, therefore, an order dealing with the remaining issues will be issued simultaneously with these reasons but under separate cover. The order will be effective upon issuance.

With respect to historical data we would like the benefit of further submissions from counsel. To that end, we have included a preliminary draft of a provision to deal with historical data in these reasons. We ask that counsel consult together and inform the Tribunal whether they wish to make submissions in writing or re-appear in person or both. Any written submissions should be served and filed by September 15, 1995 so that any further oral argument may take place during the week of September 18, 1995. An order regarding historical data will be issued as soon as possible following the additional argument and will be retroactively incorporated into the original order and will take effect as of the date of the original order.

A. Persons Subject to the Order

We prefer that the order refer to the respondent only, rather than "the respondent, its affiliates, officers and agents" as suggested in the Director's draft. We wish to make it clear that we are not attempting to limit or narrow the scope of the order by doing this. Simply put, we are of the view that the listed words are unnecessary since if someone other than the respondent itself violates the order with the authority or

on the instructions of the respondent, then the respondent is in breach of the order.

B. IRI Undertaking

We do not have the authority to order IRI, which is not a party before us, to do anything. We acknowledge the undertaking given by Mr. Fulgoni on behalf of IRI to the Tribunal, stating that IRI will agree not to enter into exclusive arrangements with retailers if Nielsen is prohibited from doing so. We confirm for the record that we took it into account in fashioning the remedies. As the remainder of our reasons will show, we have certainly, among other things, prohibited Nielsen from entering into exclusives. We are confident that IRI, as a reputable public company, will comply with its undertaking. While we are not prepared to include the undertaking as a paragraph in the order, we have included it as part of the preamble to the order.

C. Retailer Contracts

There are two aspects to the relief with respect to the retailer contracts -- possible future contracts and the existing contracts. We have prohibited Nielsen from entering into any future contracts which restrict or preclude a retailer from supplying its scanner data and causal data necessary for the provision of a scanner-based market tracking service to someone other than Nielsen and from offering a retailer inducements to restrict or preclude access in that way. The order covers both straightforward exclusivity clauses, such as are found in the majority of Nielsen's current retailer contracts, and any other clauses which, like the "preferred supplier" clauses reviewed above, indirectly achieve the same effect and, likewise, all inducements to exclusivity, whether direct or indirect.

We have also prohibited Nielsen from entering into contracts which contain what has been referred to as a "most favoured nation" ("MFN") clause for a period of 24 months from the date of the order. Under the MFN clause the retailer agrees not to provide its data to a third party on terms more favourable than those it has granted to Nielsen. A clause of this type is found in two recent retailer contracts.

We did not deal with these clauses as part of our discussion of anti-competitive acts because, given that the contracts in question also contain "preferred supplier" clauses, the MFN clauses are at present redundant. Competition will not be restored in the market for the supply of scanner-based market tracking services, however, if Nielsen is permitted to use this type of clause in future contracts. The effect of an MFN clause is that Nielsen determines what would-be competitors will have to pay for scanner data. MFN clauses could thus be used by Nielsen to induce exclusivity because they allow Nielsen to set the price for data higher than it thinks a rival will pay.

There is, however, no reason to object to MFN clauses once a second supplier of scanner-based market tracking services has established itself in the market. It would be unfair to force Nielsen to face a rival who was free to use MFN clauses while Nielsen was prohibited indefinitely from doing so. A time-limited order would be sensitive to the requirement under subsection 79(3) of not going farther in our order than necessary to solve the problem. Accordingly, we have placed a time limit on this provision.

We have included causal data in the various paragraphs of the order that relate to retailer contracts because the evidence unequivocally shows that access to causal data is essential to produce a scanner-based market tracking service and, therefore, to restore competition in the market. It would be irresponsible for us to fail to ensure that this information, along with scanner data, is freed from the exclusive control of Nielsen. The exclusivity clauses in Nielsen's current retailer contracts are, in general, broad enough to restrict the supply of causal data. Since scanner data were also unavailable, it is not surprising that there was no evidence of Nielsen having attempted to prevent retailers from providing causal data to third parties. Nielsen's interests in enforcing such provisions would undoubtedly change once there was a possibility of a competitive struggle with another supplier of scanner-based market tracking services.

We have explicitly restricted the order to scanner and causal data. The draft order submitted by the Director is worded broadly and could be interpreted to prohibit exclusives over not only these data but also warehouse withdrawal and audit data that might be used to "fill in the gaps" in a scanner-based market tracking service. It may be that audit and warehouse withdrawal data are required to produce a scanner-based market tracking service in Canada given the current level of scanner penetration. However, the inclusion of these data in an order cannot fairly be considered to have been in issue in this case. The original application did not refer to data other than scanner data. When the Director presented a motion to amend his application, he referred only to the need for an order to cover causal data as well as scanner data. If he was of the view that audit data and warehouse data also had to be included he should have made this clear. The respondent was not then, or subsequently, provided with notice that audit and warehouse withdrawal data were in issue.

The Director's draft order refers generally to "a supplier of retailer scanner data" throughout the provisions relating to retailer contracts. We have restricted our order to suppliers of retailer scanner data in the grocery or drug channels of distribution. One of the key premises of this application was that Nielsen had prevented entry into the market for the supply of scanner-based market tracking services by restricting access to scanner data produced by grocery and drug retailers, through exclusivity and inducements to exclusivity. There was no allegation and no evidence that Nielsen has exclusive arrangements in the mass merchandiser or other channels. We cannot prohibit Nielsen from doing this since no anti-competitive act has been alleged or proven. Since no submissions were made to us regarding the role of other channels once the exclusives are lifted from the grocery and drug channels, we do not have a basis to proceed under subsection 79(2).

With respect to the existing retailer contracts, we have prohibited Nielsen from enforcing the provisions in those contracts which restrict or preclude a retailer from supplying its scanner data and causal data necessary for the provision of a scanner-based market tracking service to someone other than Nielsen. It is somewhat more difficult to deal with the issue of inducements to exclusivity in the current contracts. The majority of Nielsen's contracts contain a single payment for the data and for exclusive access to them. The Director has not asked us to deal with the implicit inducements to exclusivity in the current retailer contracts and, indeed, it would be difficult to do so given the blended nature of the payments.

Once our order makes the existing exclusivity clauses unenforceable, it is not clear what will be the legal status of the payment terms and of the remainder of the contracts. This is a matter to be dealt with in other forums. We do recognize, however, two problems that may result from striking the exclusivity clauses without touching the current payments, with the result that Nielsen may choose, or may be required by contract law, to continue to make those payments to retailers.

The first problem is that while the retailers would be able to increase their revenues in the short run by selling their data to IRI while also accepting the current level of payments from Nielsen, they could choose to forgo the additional payments from IRI if they believe that dealing with IRI could reduce their earnings in the long run. The result would be at least some de facto exclusives. Yet, the Director has not asked for the payment clause to be struck. The Director and IRI appear confident that the retailers will respond positively to the financial incentives that IRI will offer. Under the circumstances, we have not gone beyond the requested relief.

The second problem is that Nielsen might have to continue its current level of payments, without receiving the benefits of exclusivity the payments were intended to secure, while its competitor makes payments at a lower level. We make no comment on whether or not this was a valid concern for the Tribunal to address as we received no submissions on the point. Counsel for Nielsen stated that his client's preference was that the Tribunal not attempt to deal with the payment clauses and we did not do so.

D. Manufacturer Contracts

Nielsen's contracts with manufacturers become germane in a situation where the sources of scanner data and causal data have been freed from exclusives and it is at least possible for another firm to become a supplier of scanner-based market tracking services. The new supplier must then find sufficient business to justify its investments in the data and in the infrastructure to process them and sell a market tracking service. We have determined that Nielsen's conduct in signing a number of its customers to contracts of three or more years constitutes an anti-competitive act. In lieu of prohibiting this conduct alone under subsection 79(1), we have decided that the existing circumstances in the market for the supply of scanner-based market tracking services warrant dealing with all Nielsen's customer contracts, whatever their term, under subsection 79(2). We do not believe that focusing on those customer contracts of three years or more only will likely restore competition in the market.

At this point, Nielsen, as the incumbent, has a clear advantage over a new entrant attempting to establish itself as a provider of market tracking services. If we dealt only with the contracts of three years or more in our order, that portion of the revenue base which is tied up in one- or two-year contracts, a significant portion, would remain in Nielsen's control. Nielsen would be in a better position than IRI to obtain a renewal of those contracts, as it is with all its current contracts, when they came due. Nielsen has had a long relationship with customers as the sole supplier of market tracking services. Nielsen holds the existing contracts and knows exactly when each contract is due to expire and can time its renewal efforts accordingly. The business subject to shorter term contracts must be made available for IRI to bid on, along with the business tied up in the longer term contracts, to increase the likelihood that it will be able to enter successfully. We have, therefore, returned all Nielsen's manufacturer contracts to the "evergreen" status that existed before Nielsen set out to sign customers to contracts of maximum length.

In the only prior contracts brought to our attention during the proceedings, customers could discontinue their purchases on eight months notice. We accept that eight months notice is necessary to allow Nielsen to make whatever adjustments are necessary when a customer decides to discontinue buying a particular service. Accordingly, our order provides that all existing customers have the option of discontinuing their purchases of scanner-based market tracking services from Nielsen on eight months notice. To prevent customers from being induced to continue with their contracts, the order also provides that the giving of notice will not result in the loss of discounts.

With respect to the other side of the coin, possible future manufacturer contracts, counsel for the Director confirmed that the Director's proposed draft order dealt only with the existing contracts. The Director's position was that it was not necessary to deal with future contracts in the order because once an order barring exclusives was issued IRI would be in a position to start marketing its product. Significantly, IRI itself is not certain that it will immediately have the credibility necessary to convince the manufacturers to wait several months and then give notice so that they can go with IRI once it is up and running. IRI fears that the manufacturers will not be willing to wait for IRI but will instead sign long-term contracts with Nielsen. Counsel for IRI suggested that the order provide that all manufacturer contracts entered into by Nielsen for 18 months following the date of the order be subject to termination, at the option of the manufacturer, on eight months notice. He admitted that he could not say for sure that IRI would be unable to enter the market without such a measure but argued that, given the proven Nielsen strategy of signing its customers to long-term contracts to keep IRI out and Nielsen's current position as the sole supplier, the Tribunal should err in favour of creating a favourable climate for entry.

It should be noted that no one was arguing that long-term manufacturer contracts should be forever barred. Once two suppliers are active in the market, such contracts will simply reflect bargaining between the supplier and the manufacturer and will have no detrimental competitive effect.

The Director does not adopt IRI's position based on an apparent belief that IRI will have instant credibility with manufacturers once our order issues, with the result that competitive conditions will prevail very quickly. We do not agree. We believe that, while IRI will have some credibility once the order issues, it will still be at a significant disadvantage vis-à-vis Nielsen in initially competing for customers. Over the months following the order, IRI's credibility will increase, if all goes well, and its disadvantage will decrease correspondingly. We agree with counsel for IRI that there is a distinct possibility that Nielsen

could use IRI's initial disadvantage to tie up enough customers to cause IRI's attempt at entry to fail. In our view, this is a very significant concern.

On the other hand, if the Director turns out to be correct and an order relating to future contracts is proven unnecessary, the only harm that will occur is that manufacturers will have to wait some time before they can extract the full benefit of a long-term contract from Nielsen. We do not see that a provision relating to future manufacturer contracts causes any unnecessary hardship for Nielsen. Although Nielsen will not be free to offer longer-term contracts immediately, it will be able to meet competition from IRI by offering service and price benefits to its customers. This result is in accordance with the purpose of the order.

We note the argument of the respondent that the intervenor cannot seek "new" remedies not requested by the Director. We do not dispute the words of the Tribunal in NutraSweet:

> In formulating an appropriate order the tribunal is of the view that it must confine itself essentially to the kind of orders requested by the Director in his original application with such modifications as may fairly be considered to have been in issue in the case. While other possible remedies were discussed during argument, no amendment was sought to the application in this regard. It is a matter of fairness that the respondent not now be faced with a remedy of which it had no formal notice. Further, although Tosoh [the intervenor] suggested various other remedies, it is not a party and cannot define the issues including that of the remedies being sought.[96]

We are of the view, however, that all aspects of Nielsen's manufacturer contracts for scanner-based market tracking services have clearly been in issue since the outset. There is no question of unfairness to the respondent. IRI was granted leave to intervene to make representations in part because its involvement in this industry means that it has a unique perspective, different from that of the Director, that makes its representations particularly useful. In this instance, the Tribunal has been persuaded by those representations that the remedy sought by the Director is lacking in its treatment of manufacturer contracts. The Tribunal must maintain the flexibility to modify the remedies proposed to it in order to achieve an order that it believes will be effective. Since we are proceeding under subsection 79(2) regarding the manufacturer contracts, this means an order that in our opinion will "overcome the effects of the practice" in the market. We would be remiss, given the concerns expressed above, if we did not attempt to fashion an order which deals with those concerns. We also note that there were other remedies proposed by IRI that we refused to consider because they go beyond the matters in issue.

Accordingly, we have applied the eight month notice provision in our order not only to existing manufacturer contracts but also to manufacturer contracts entered into by Nielsen during the 18 months following the order.

E. Historical Scanner Data

(1) Analysis and Conclusions

In order to enter the market for the supply of scanner-based market tracking services in Canada, a potential competitor of Nielsen needs not only access to current and future scanner data but also to historical scanner data. In our view, an order for the provision of historical data by Nielsen where the data are not available directly from the retailers is essential to restore competition in the market. The Director has asked for a clause that would require Nielsen to provide 15 months of historical data to IRI when a retailer has not stored the historical data and the retailer asks Nielsen to provide it to IRI. Manufacturers who buy these market tracking services testified that at least a year of historical data are necessary in order for them to account for seasonal fluctuations in the sales of their products. Since IRI is willing to pay retailers for 15 months of data, we have no difficulty in accepting that historical data covering this length of time are required.

In wording this portion of our order, we are concerned about ensuring that its terms do not unnecessarily cause hardship to Nielsen. We note that there was no dispute that historical scanner data are required by a supplier of a scanner-based market tracking service. We also note that there is nothing in the proposed order that would give IRI a "free ride" at Nielsen's expense. IRI will have to compensate the retailers for any historical data that it obtains from them or from Nielsen with their consent.

Nielsen expressed two concerns regarding the provision of historical data to IRI. At the outset, we note that this situation will only arise if the retailer itself has not retained its own historical data and the retailer directs Nielsen to provide the retailer's data to IRI.

Nielsen's first concern is that it should not be required to give its "work product" to IRI or to anyone else. Once Nielsen receives the tapes of scanner data from the retailers, the data undergo further processing or "cleaning up". Therefore, the historical data which are available now may not be raw data from the retailers but rather may be "clean" data. A Nielsen document describes in detail the steps that are taken during the "scanning data input process" upon receipt of the retailer scanner data.[97] These include data receipt, data usability, coding, price checking and quantity checking.

Nielsen's second concern is that giving copies of the tapes received from the retailers to IRI would result in disclosure of its sample design for that retailer. Nielsen regards its sample design as proprietary and a "significant trade secret". The stores whose data are included on the tape are those stores that constitute Nielsen's representative sample for that retailer. This was confirmed by the representatives from Overwaitea and Provigo. The experience of A & P in the United States reveals that the sample design for a particular retailer may be different for Nielsen and IRI. Gerald Good testified that A & P does not send identical tapes to the two service providers in the United States.

We agree that any documented costs incurred by Nielsen in cleaning up the data it received from the retailers should be shared by IRI. These costs are almost certain to be minor relative to the total costs of providing a scanner-based market tracking service. In our view, it is reasonable for IRI to pay 50 percent of the documented costs Nielsen incurred in cleaning up the data in question. As originally proposed by the Director, IRI remains fully responsible for 100 percent of any additional costs, such as copying tapes, that Nielsen may incur solely in the process of providing the data to IRI.

It is highly unlikely that Nielsen's entire sampling frame will end up being revealed to IRI, although portions with respect to particular retailers may be. The entire sampling frame will not be disclosed unless none of the retailers have maintained historical data. The evidence before us was that at least some retailers routinely keep data for two years. In any event, we do not see how IRI could gain any competitive advantage by knowing the identity of some stores in the Nielsen sample. Any possible advantage it might acquire would be reciprocal since Nielsen would also know that IRI was forced to include the same stores in its sample.

Based on its record in the United States, IRI clearly is capable of formulating its own sampling frame and, indeed, its president disclaims any desire to learn what Nielsen's sampling frame is. Moreover, the uncontradicted evidence of Mr. Daboll of IRI is that it should be possible for Nielsen to mask its sample design when transmitting the data. To allow for the possibility that Nielsen may choose to do so and that some costs would be entailed we consider that it would be appropriate to provide for recovery of those costs in the order.

A final matter with regard to this issue relates to the point in time from which to measure the 15 months of historical data that must be provided. IRI's position is that it will take six to nine months after a favourable Tribunal order for IRI to complete the steps necessary for its entry into the Canadian market. We have concluded that the order should be drafted to allow for a delay of up to nine months while IRI completes its preparations. We regard nine months as reasonable in the circumstances. Therefore, the order should provide that IRI can get 15 months historical data from the date of its request to Nielsen, if data are unavailable from the retailer, as long as the request is made within nine months of the order.

(2) Preliminary Draft Order

Counsel are asked for their comments on the following proposed provision:

Historical Scanner Data

(1) This paragraph shall have effect for nine months

from the date of this order.

(2) Subject to subparagraph (3), upon the request of IRI and if directed to do so by a supplier of retailer scanner data which has not retained its own historical scanner data for the relevant period, the respondent shall provide to IRI the historical scanner data which it has for that supplier of retailer scanner data for the fifteen months prior to the request by IRI, whether the data is in the form originally received from the retailer or otherwise. The respondent shall be entitled to take reasonable steps to clean up its historical data in order to protect its sample design and related proprietary data.

(3) The respondent need not comply with the request by IRI if IRI does not agree:

(a) to pay 50 percent of any reasonable, documented costs already incurred by the respondent in cleaning up the historical scanner data where the data is no longer in its original form;

(b) to pay 100 percent of the respondent's reasonable expenses of providing the data to IRI; and

(c) to pay 100 percent of any reasonable, documented costs incurred by the respondent in manipulating or reformatting the historical scanner data in order to mask its sample design prior to providing the data to IRI.

(4) In the event of a disagreement regarding the terms of this paragraph, the Director or the respondent may apply to the Tribunal for further directions.

FOR THESE REASONS, the Tribunal makes the order attached under separate cover.

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

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

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

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1 R.S.C. 1985, c. C-34.

2 (1990), 32 C.P.R. (3d) 1, [1990] C.C.T.D. No. 17 (QL).

3 Consumer and Corporate Affairs Canada, Competition Law Amendments: A Guide (Supply and Services Canada, December 1985) at 21.

4 3d ed. (Oxford: Clarendon Press, 1973) at 345, 2067.

5 Exhibit J-8, tab 331 at 346.

6 Exhibit J-8, tab 330; Exhibit J-7, tab 272 at 19.

7 (1992), 40 C.P.R. (3d) 289 at 325, [1992] C.C.T.D. No. 1 (QL) (Comp. Trib.).

8 Supra, note 2 at 28.

9 Ibid. at 10.

10 Ibid.

11 Ibid. at 31-32.

12 (1953), 20 C.P.R. 107, 109 C.C.C. 1, 18 C.R. 357 (Que. Q.B., Appeal).

13 NutraSweet, supra, note 2 at 32-33.

14 Ibid. at 33.

15 Ibid.

16 Supra, note 7 at 295.

17 (1976), 15 O.R. (2d) 360 (H.C.).

18 Ibid. at 371.

19 Ibid. at 372.

20 Ibid. at 406ff.

21 Canada, House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91 (April 29, 1986) at 3:8.

22 R.S.C. 1970, c. C-23.

23 Competition Law Amendments: A Guide, supra, note 3 at 22.

24 Ibid.

25 R.J. Roberts, "Abuse of Dominant Position: From Bork to Bain and Back Again (But This Time With Extraterritoriality)" in R.S. Khemani & W.T. Stanbury, Canadian Competition Law and Policy at the Centenary (Halifax: Institute for Research on Public Policy, 1991) 337 at 344-48.

26 Ibid. at 347.

27 Ibid. at 345.

28 For example, where a product had both a North American and a European market, a European firm could be abusing its dominant position in Europe to the detriment of a Canadian firm which also operated there. If paragraph (a) referred to control of a "market", the Director could bring an application to the Tribunal to deal with the European situation.

29 It was confirmed that Valdi and Loeb stores do not scan. Valdi is now only open for business on a limited basis, having gone bankrupt. The names of two other retailers (Knob Hill Farms and Fortino's) that may not scan were also mentioned. There was no indication that these were particularly large or important retailers.

30 NFIC tracked drug products in food stores.

31 Confidential Exhibit CJ-10, tab 443.

32 Based on March 1994 documentation: Confidential Exhibit CJ-10, tab 439.

33 Regional breakdowns are not available.

34 Based on Confidential Exhibit CA-41.

35 Transcript at 7:944-45 (25 October 1994).

36 Confidential Exhibit CR-94, tab 3 at Appendix IV.

37 The first definition for "base" set out in The Concise Oxford Dictionary, 7th ed. (Oxford: Clarendon Press, 1982) at 72, reads "that on which anything stands or depends; support, foundation, (lit. or fig.); principle, starting-point; main or important ingredient of mixture; . . . ."

38 Unless otherwise specified, "MarketTrack" means MarketTrack Grocery, the primary grocery product tracking service and not any of the more specialized MarketTrack services.

39 Exhibit A-70 at 9.

40 Supra, note 2 at 10, quoted at page 12 of these reasons.

41 Including Campbell Soup (soups, spaghetti sauce, frozen dinners, vegetable juice), E.D. Smith (pie fillings, jams, spreads, sauces, ketchup), Procter & Gamble (wide range of products from soaps and dish detergents to stomach relievers to frosting), Coca Cola Foods (juice and juice beverages), Gerber (baby food, baby care products, baby apparel), Nestlé (chocolate bars, boxed chocolates, coffee and whitener, pet food, infant formula, Carnation milk, iced tea mix, frozen entrées, canned pasta and beans), Hershey (chocolate bars, boxed chocolates, candy, peanuts, chocolate chips) and Lever (laundry detergents, fabric conditioners, dishwashing liquids and powders, soap, household cleansers).

42 Mr. Sark, formerly of Hershey, said he was concerned that scanner data only told him how much of his product was sold and that he no longer knew how much was in distribution but not sold, and that no inventory measurement was provided with scanning.

43 Confidential Exhibit CA-26.

44 Transcript at 7:950 (25 October 1994).

45 Transcript at 8:955-57 (26 October 1994).

46 Transcript at 7:931 (25 October 1994)

47 Transcript at 16:1685-86 (10 April 1995).

48 Transcript at 17:1882-83 (11 April 1995).

49 Exhibit J-5, tab 213 at 404.

50 Transcript of examination for discovery of S. Churchill (16 August 1994) at 98-99.

51 Confidential Exhibit CA-41, table entitled Per Cent of Kilograms.

52 Transcript at 8:1001 (26 October 1994).

53 Transcript at 8:1032-33 (26 October 1994).

54 Transcript at 20:2259-60 (18 April 1995).

55 Exhibit J-8, tab 321 at 8.

56 Transcript at 5:647, 666-67 (21 October 1994).

57 See transcript at 5:617-18 (21 October 1994); transcript at 20:2225 (18 April 1995); Confidential Exhibit CJ-1, tab 25 at s. VII.

58 Confidential Exhibit CJ-6, tab 260.

59 Named in reference to the decision of the Supreme Court of the United States in United States v. E.I. duPont de Nemours & Co. (1956), 351 U.S. 377.

60 Supra, note 2 at 28.

61 Ibid.

62 Supra, note 7 at 325.

63 Exhibit A-51.

64 Supra, note 2 at 35.

65 NutraSweet, supra, note 2 at 34; Laidlaw, supra, note 7 at 331-32.

66 Laidlaw, ibid. at 333. See, to the same effect, NutraSweet, ibid. at 34.

67 Laidlaw, ibid.

68 Ibid. at 342-43.

69 Exhibit J-6, tab 237 at 165.

70 Confidential Exhibit CJ-6, tab 240 at 219.

71 Confidential Exhibit CJ-6, tab 246 at 362.

72 Neither Mr. Fulgoni nor Peter Daboll of IRI could recall whether a second retailer asked them for both types of proposals in 1994, although they did acknowledge that it was possible.

73 Confidential Exhibit CJ-5, tab 210.

74 Confidential Exhibit CJ-7, tabs 275 and 276.

75 Exhibit J-5, tab 195 at 259.

76 Confidential Exhibit CJ-6, tab 252 at 391.

77 Confidential Exhibit CJ-6, tab 269 at 519.

78 Exhibit J-6, tab 270 at 529-30, attachments (confidential).

79 Confidential Exhibit CI-80.

80 Confidential Exhibit CR-95.

81 Supra, note 2 at 47.

82 Laidlaw, supra, note 7 at 330; Director of Investigation and Research v. Southam Inc. (1992), 43 C.P.R. (3d) 161 at 280, [1992] C.C.T.D. No. 7 (QL).

83 Exhibit J-8, tab 311 at 61.

84 Exhibit J-8, tab 313.

85 Transcript at 4:517 (20 October 1994).

86 The Australian retail market is even more concentrated than its Canadian counterpart, with the top two companies accounting for over 50 per cent of the business.

87 Confidential Exhibit CJ-11, tab 482.

88 Confidential transcript at 9:512 (27 October 1994).

89 Confidential transcript at 4:110 (20 October 1994).

90 It might be inferred from the comments of the IRI executives that prices to retailers might rise following the elimination of exclusives with possible negative implications for product prices, however, we are persuaded on the basis of other evidence that under a free market this is a highly unlikely result.

91 Sales of key account data are not broken down by data collection methodology in Nielsen's documents, therefore, the total shown overstates earnings from scanner-based key account sales.

92 Based on Confidential Exhibit CR-95, tab 4A.

93 Confidential Exhibit CJ-9, tab 362.

94 Based on the signed retailer contracts entered in evidence and Confidential Exhibit CJ-10, tab 440.

95 Confidential Exhibit CJ-9, tab 363.

96 NutraSweet, supra, note 2 at 57-58.

97 Confidential Exhibit CJ-11, tab 487 at 240-41.

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