

**STUDY OF THE
HISTORICAL COST OF PROCEEDINGS
BEFORE THE COMPETITION TRIBUNAL**

PRIVATE & CONFIDENTIAL

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March 26, 1999

Mr. Konrad von Finckenstein, QC
Commissioner of Competition
Competition Bureau
Place du Portage I
50 Victoria Street
Hull, Quebec
K1A 0C9

Dear Mr. von Finckenstein:

**RE: Study of the
Historical Cost of Proceedings Before the Competition Tribunal**

1. INTRODUCTION

Pursuant to the terms of our engagement, **Wise, Blackman** has prepared a report on the historical costs incurred by the Competition Bureau (“Bureau”) in investigating and prosecuting cases before the Competition Tribunal (Tribunal”),¹ for specified cases involving the respective provisions of either Section 75² or Section 77³ of the *Competition Act*⁴.

We understand that you have requested this report in connection with the Bureau’s legislative development, whereby amendments to the Act are being considered to allow limited private

(1) Prior to the creation of the Tribunal in 1986, the Restrictive Trade Practices Commission (“RTPC”) heard cases under the relevant provisions of the *Combines Investigation Act*, R.S.C. 1970, c. C-123.

(2) Refusal to deal. See Appendix I.

(3) Tied selling. All further references herein to Section 77 relate only to the tied-selling provisions of this section within the meaning of subsection 77(1) of the *Competition Act* (the “Act”). See Appendix I.

(4) R.S.C. 1985, c. C-34, as amended.

rights of access to the Tribunal for cases relating to the above-noted statutory provisions; however, we also understand that concerns have been raised by some stakeholders that private access may lead to an increased number of cases, which will be costly.

This report contains the results of our study (“Study”) of the average historical costs incurred by the Bureau in litigation before the Tribunal or the RTPC with respect to the following six cases (“Cases”), identified by the Bureau as involving (a) refusal to deal or (b) tied selling:

- *RTPC (Director of Investigation & Research) v. BBM Bureau of Measurement (“BBM”)* (1982), 60 CPR (2d) 26; (1985), 1 FC 173 — tied selling;
- *Canada (Director of Investigation & Research) v. Chrysler Canada Ltd. (“Chrysler”)* (1989), 27 CPR (3d) 1; aff’d (1991), 38 CPR (3d) 25 (Fed CA), leave to appeal to SCC refused (1992), 41 CPR (3d) v (note) (SCC) — refusal to deal;
- *Canada (Director of Investigation & Research) v. The NutraSweet Company (“NutraSweet”) (Reasons and Order)* (1990), 32 CPR (3d) 1 — tied selling;
- *Canada (Director of Investigation & Research) v. Xerox Canada Inc. (“Xerox”) (Reasons and Order)* (1990), 33 CPR (3d) 83 — refusal to deal;
- *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (“Tele-Direct”)* (1995), 62 CPR (3d) 560 — tied selling; and
- *Canada (Director of Investigation & Research) v. Warner Music Canada Limited (“Warner”)* (1997) 78 CPR (3d) 335 (TD)— refusal to deal.

The Study does not include costs undertaken by the Tribunal or the RTPC in conducting the Cases.

In the course of our conducting the Study, we held discussions with members of the Bureau's Amendments Unit, its Compliance and Operations Branch and its Civil Matters Branch, and other staff members as deemed appropriate, in order to establish the availability of data, and the requirements for data gathering. Bureau staff provided the data and documents which were used to estimate the historical costs. Additional cost information relating to the Cases was provided by the Competition Law Division of Industry Canada in order that we may obtain a more complete estimate of the costs of conducting the Cases.

Under the terms of our mandate, **Wise, Blackman** was also to provide an estimate of the respective average historical costs incurred by (i) respondents and (ii) intervenors, pursuant to a Protocol agreed to by the Task Force of the National Competition Law Section of the Canadian Bar Association ("Task Force") and the Assistant Deputy Commissioner of Competition, Amendments Unit, of the Bureau. (In accordance with the terms of the Protocol, firm-specific data would remain strictly confidential.) However, at the time of preparing this report, insufficient data had been provided by the respondents and intervenors to allow for a fair representation of the average historical costs incurred, and to preserve the confidentiality of firm-specific data. Subject to the availability of data, a report on these costs might be issued under separate cover at a later date.

1.1 Credentials of Accountants

Wise, Blackman is a nationally recognized independent firm of Chartered Accountants engaged exclusively in the valuation of businesses and securities, litigation support and forensic accounting and auditing. The firm, which has been serving as consultant to business and government for the past eighteen years, has performed an extensive number of business valuations and forensic accounting engagements for public and private enterprises throughout Canada and in the United States. Our principals have been recognized on numerous occasions as financial and business valuation experts by the courts across Canada and in the U.S.

Mr. Richard M. Wise, FCA, FCBV, ASA, MCBA, C.Arb., CFE, Managing Partner, and Ms. Sheri-Anne Doyle, CA, Consultant, were responsible for the preparation of the Study.

2. PHASES OF CONDUCTING CASES

Investigating and prosecuting Cases may be segregated among the following three phases:

- (a) prior to the filing of a Notice of Application (“Application”) with the Tribunal;
- (b) the pre-Hearing stage; and
- (c) during the Hearing.

Subsequent to the Hearing, the Bureau may also engage in enforcement and monitoring activities or participate in the appeals process, if applicable.

During the course of our Study, the estimated costs were not allocated by the three above-noted phases. Data were not available so as to permit a fair allocation of the costs without a high degree of imprecision. The estimated costs noted above are the aggregate costs incurred in all phases of conducting Cases⁵, including costs incurred during Appeals, if relevant.

The methodology applied by us in estimating the Bureau’s costs in conducting the Cases is explained in Section 3.1.

(5) Where it was possible to estimate the historical costs associated with monitoring and enforcement activities conducted by the Bureau, these costs were excluded as they were not considered relevant for purposes of our Study.

2.1 Assumptions and Limitations

Pursuant to the terms of our mandate, in estimating historical costs for the purpose of this Study, we would not adjust such costs in respect of:

- (a) changes in the Consumer Price Index;
- (b) changes in fee structures relating to lawyers' and experts' respective services; and
- (c) geographic considerations relating to professional fee levels.

Furthermore, the historical costs incurred by the Bureau in investigating and prosecuting the Cases were estimated based on the information and documents provided to us. As these were not subjected to audit or review procedures, no assurance is provided as to the accuracy or completeness of such information.

3. BUREAU'S HISTORICAL COSTS

3.1 Methodology

Our initial step in estimating the costs incurred by the Bureau to investigate and prosecute the Cases was to determine the historical cost data that were available. The data captured in the financial- and time-reporting systems of the Bureau and the Department of Justice constituted the primary sources of information; however, as a number of years have elapsed since several of the Cases were conducted, the data in many instances had been retained only in summary format.

We conducted interviews with representatives of the Bureau's Amendments Unit, Compliance and Operations Branch, and Civil Matters Branch. A lawyer from the Competition Law Division

of Industry Canada provided assistance in the gathering of information from the respective lawyers who litigated the Cases.

Interviews were also held with the Senior Commerce Officer or Commerce Officer (“Officer”) of the Bureau, who had been integrally involved in a particular Case. The involvement of an Officer generally begins at the early stages of assessing the merits of a Case, and continues through to the Hearing before the Tribunal (and to subsequent appeals, if applicable).

The individuals selected for interviews, and those who assisted in the data gathering, were either directly involved in investigating and/or prosecuting a Case or were familiar with the workings (including limitations) of the financial-reporting systems. The nature of each Case was discussed in general terms in order for us to (a) gain an understanding of the types of costs that would have been incurred by the Bureau in conducting the Cases, and (b) identify the most reliable sources of historical data, as same relate to the costs in question.

Our interviews also assisted us to identify costs incurred by the Bureau in investigating and prosecuting the Cases, in situations where such costs would not have been allocated to a specific Case.⁶ In such situations, best estimates were developed based upon the information available. In the absence of evidence to the contrary, reported data were assumed to be complete. Accordingly, estimates were made only with respect to those Cases where there was no information reported, or in circumstances where reported data were determined to be incomplete.

During the conduct of a Case, related documents, memoranda and financial records are accumulated and filed in case files (“Case Files”). In order for us to obtain relevant historical cost data for the Study, an Officer reviewed the Case Files for evidence as to historical cost data which were not otherwise available; however, minimal evidence of such data was found therein.

(6) For example, during the entire period covered by the Study, document reproduction costs were not allocated by Case.

3.2 Scope of Review

The following lists (a) the historical cost categories which were identified as being the most significant in the investigation and prosecution of Cases before the Tribunal and (b) the sources of the information gathered to assist in the cost estimations. Any calculations or estimations which were specific to a particular Case are explained in the section referencing that Case.

It should be noted that the financial-reporting systems record costs using the accrual basis of accounting.⁷

3.2.1 *Salaries and Wages of Bureau Staff*

Different categories of employees within the Bureau were directly involved with various aspects of conducting the Cases. During the course of our Study, we noted the following categories, or groups, of Bureau staff members who were directly involved:

- Management Group;
- Commerce Group, including Senior Commerce Officers and Commerce Officers;
- Economics, Sociology and Statistics Group;
- Programme Administration Group;
- Clerical and Regulatory Group;
- Administrative Services Group;

(7) Under the accrual basis, expenditures are recognized in the accounting period in which the liability is incurred, if measurable, regardless of whether the expenditure has actually been paid.

- Printing Operations Group; and
- Students.

Various time-reporting databases included records of the total number of hours, coded to a particular Case by fiscal year⁸, aggregated for all staff who worked on the Case. Summarized time sheets, by employee, were available commencing in the 1994/1995 fiscal year, which provided a breakdown of the hours worked by staff category.

For purposes of our Study, the Bureau provided us with a schedule listing the total number of hours worked on each Case, by fiscal year, aggregated for all staff categories. This schedule was compiled by the Bureau from data contained in the following financial-reporting databases:

- Quarterly Project Reporting System (“QPRS”) for the period prior to 1986;
- Monthly Project Reporting System (“MPRS”) for 1986 through 1988;
- Monthly Project Time and Priority Report for 1989 through 1991; and
- Time Utilization Report/Tracker since 1992.

In addition, we were provided with the summarized time sheets relating to the following Cases:⁹

(8) For one of the earlier Cases, the hours coded to the Case were not allocated by fiscal year. The Bureau’s fiscal year end is March 31.

(9) *Tele-Direct* and *Warner* were the only Cases that were conducted in 1994/1995 and subsequent fiscal years. Summarized time sheets were not available prior to this period.

(a) *Tele-Direct*

- Time Report (by Project/Officer) for the fiscal year ended March 31, 1995;
- Time Report (by Project/Officer) for the fiscal year ended March 31, 1996;
- Time Expended Report for the fiscal year ended March 31, 1997; and
- Time Report (by Project/Officer) for the fiscal year ended March 31, 1998.

(b) *Warner*

- Time Expended Report for the fiscal year ended March 31, 1997; and
- Time Report (by Project/Officer) for the fiscal year ended March 31, 1998.

To assist us in determining the historical personnel cost, the Officers¹⁰ who had worked on the respective Cases allocated the recorded time prior to 1994/1995 by category¹¹ of employee. Any inaccuracies or omissions in such allocation were not expected to result in a material error, because the majority of the time expended on a particular Case was generally attributable to the Officer(s) assigned thereto. No information was available to permit a further refinement in allocating the hours by staff category.

During the course of our interviews with the Officers, it became apparent that overtime hours were not always recorded by the staff members working on a Case. However, we did not make an adjustment for potentially understated hours relating to unrecorded overtime, as any such adjustment would be arbitrary. Moreover, the hours recorded in the time-reporting system may be understated with respect to support-staff hours. Because of the number of years which have elapsed since the Cases were conducted, it was determined that any estimates which might

(10) In one Case, the Manager provided the estimate.

(11) Each employee is assigned a title, category and level (e.g., Officer, Category # and Level #). The category and level of the employee determines his or her salary range.

otherwise be provided by the support staff would not be reliable. As noted above, the majority of the time spent on a Case was incurred by the Officers; consequently, any understated support-staff time would not result in a material understatement of costs.

Generally, one member of the Executive or Management Group (“Manager”) supervised the investigation and prosecution of a Case. During our interviews with the Officers, we were informed that Managers would occasionally code their time to a Case if they participated in meetings or were involved in activities directly related to the Case. With respect to in-house discussions, supervisory and other general activities, the hours worked on the project would normally have been coded as “Case Management” or “Administrative Support”, and not allocated directly to the Case. The Officers involved in the Cases, with input from the Managers, as required, estimated the potential number of hours of unrecorded Manager time, which was then added to the total recorded hours.

Once the hours worked on the Cases were segregated by staff category and the appropriate adjustments to the recorded hours were made, the historical staff cost was determined by multiplying (a) the hours worked by (b) the estimated hourly salary, based on the category of employee who performed the services.

As a general rule, there are a disproportionate number of employees at the higher levels in any given employee category.¹² In order to fairly represent the hourly remuneration of staff by category, the hourly salaries in the third quartile of the range between the lowest and the highest hourly wages among all levels in a category were used. Staff benefits were then estimated as a percentage of the total cost¹³. The Bureau provided us with salary schedules which were ob-

(12) This is because promotions from one level to another within a given employee category are generally granted annually at the early levels, but not necessarily at the higher levels within a category. Furthermore, promotions from one employee category to another are relatively difficult to obtain. The result is a disproportionate number of employees being at the higher levels within a category.

(13) Employer-paid benefits vary by employee based upon their respective employee category, seniority and the particular benefits package. A rate of 14% of gross salary was used as an approximation of employer-paid benefits.

tained from the Treasury Board of Canada, to assist in determining the appropriate hourly rate to use in the calculation.

Because the effective dates of salary increases did not coincide with the fiscal year, there was generally a blend of rates in effect during any given fiscal year. The rates in force in the immediately preceding calendar year were used to calculate the cost of staff time expended on the Case.¹⁴

3.2.2 *Salaries and Wages of Justice Department Staff*

Generally, Department of Justice lawyers litigate Cases on behalf of the Bureau. With respect to all but one of the Cases, the data as to the number of hours worked, by category of lawyer¹⁵, were based on estimates, because no time-reporting information was available.¹⁶

The estimates were provided by the respective lawyers who worked on the Cases.¹⁷ Only one lawyer who had provided time estimates included time prior to the filing of the Application for a Hearing before the Tribunal.¹⁸ In all Cases for which estimates were provided, time spent in appeals and/or in relation to enforcement activities has been excluded, as the lawyers were unable

(14) For example, there was a salary increase for Officers effective December 22, 1987 and December 22, 1988. For Officers' hours recorded during the 1988/1989 fiscal year, the rates in force on December 22, 1987 were used to cost all of the hours recorded by such category in 1988/1989.

(15) Each lawyer is assigned a title, category and level. The category and level of the lawyer determines his or her salary.

(16) A lawyer from the Competition Law Division of Industry Canada provided schedules detailing, by Case, the estimated number of hours worked, by category of lawyer and the applicable salary ranges (as provided by the Treasury Board of Canada).

(17) In several instances, one lawyer provided the time estimates for the entire legal team which litigated the Case. In the *NutraSweet* Case, the Bureau Manager provided a time estimate for the lawyers, as his estimates were considered more reliable.

(18) In this Case (the *Chrysler* Case), the senior lawyer provided a breakdown of his time by the above-noted phases of activity (see Section 4 above), *viz.*, prior to the filing of the Application, time spent between the acceptance of the Application and the Hearing, and hours worked during the Hearing

to estimate the number of hours spent in such activities. Furthermore, the estimated hours provided by the lawyers were not segregated by fiscal year.

The lawyers' hours were allocated among the years during which a Case was conducted. This allocation was based on the assumption that the lawyers' workload in a fiscal year, as a percentage of total hours, was proportionate to the Officers' workload per fiscal year.¹⁹ The cost of the Justice Department's legal services was then determined by multiplying (a) hours worked by (b) the hourly salary based on the category of the lawyer who performed the services. As each category of lawyer has a salary range (based upon his or her level), the lawyers indicated whether salaries at the high-, mid- or low-range would be more appropriate for the relevant years. The employee benefits were then estimated based on a percentage of the total cost.²⁰

No estimates for support-staff hours were included in the Study. Considering the number of years which had elapsed since several of the Cases were conducted, it was determined that any estimates which might otherwise be provided by the support staff would not be reliable.

3.2.3 *Experts*

The Bureau often retains the services of outside experts to:

- (a) assist in evaluating the merits of a Case in the course of preparing for the Application and/or the Hearings,
- (b) appear as witnesses; and

(19) In *Chrysler*, the senior lawyer's hours were allocated to the fiscal years when the above-noted phases took place. The junior lawyer's time was then allocated to the years the Case was litigated on a pro-rata basis with the senior lawyer.

(20) Employer-paid benefits vary by lawyer based on their category, seniority and particular benefits package. A rate of 13.5% of gross salary was used as an approximation of employer-paid benefits.

- (c) provide expertise in other aspects of conducting the Cases.

The historical cost data with respect to experts were taken from departmental financial reports, *viz.*, Department of Supply and Services Reports (“DSS Reports”). While these reports contain summarized historical cost information, by fiscal year and by cost category,²¹ we identified limitations to the data contained therein:

- (a) The data are in summarized form and, consequently, it is not possible to verify the completeness or accuracy of the classification of the recorded costs. During our interview with a member of the Compliance and Operations Branch, we learned that various types of expenditures may have been recorded in the same cost classification, or may not have been coded to a Case (resulting in an incomplete record of the historical costs);
- (b) Travel and other disbursements incurred by experts have been aggregated and included in the “Professional Services” category. Considering that the required level of detail was not available to reallocate these costs to the appropriate cost category, the “Professional Services” classification is likely to be overstated with respect to such costs; and
- (c) The costs of external legal counsel were generally classified in the “Professional Services” category.

Notwithstanding the limitations of the DSS Reports, the reports often provided the best source of data for the historical costs of experts, considering that information on a more detailed level was not available to us and invoices rendered by the various experts were generally not available.

(21) In the DSS Reports, the financial data were classified into the following categories: (a) Professional Services, (b) Legal, (c) Travel and (d) Other.

In several instances, additional information was provided, allowing us to reallocate the costs as categorized in the DSS Reports. Tabs A through F contain a description of how historical experts' costs were estimated for a particular Case.

For the two most recent Cases (*Tele-Direct* and *Warner*), departmental cost tracking systems ("Civil Budget System Reports" or "CBS Reports") were available and were used by us to estimate the costs of experts, as the cost allocations were considered more accurate and provided a higher level of detail with respect to the nature of the historical costs.

3.2.4 External Legal Counsel

In three Cases included in the sample, external counsel were retained to provide legal services. In two of the Cases, copies of the lawyers' accounts were available, permitting us to calculate the historical cost to the Bureau of the services from those invoices. In the third Case, the legal costs were estimated by the Officer and the estimated cost was transferred from the "Professional Services" category in the DSS Reports to the "External Legal Counsel" cost category for purposes of our Study.²²

3.2.5 Travel

Travel expenses can be significant, depending on the nature and length of the Case. These costs were extracted from the DSS Reports, which summarized costs by fiscal year and by Case. The "Travel" category in these reports includes the travel costs of Bureau staff as well as costs incurred by the Department of Justice lawyers assigned to the Case. The Bureau pays travel costs

(22) The transfer of the estimated external legal counsel fees from "Professional Services" to "External Legal Counsel" was based on the assumption that these costs were included in the DSS Reports under "Professional Services".

for witnesses²³ who appear before the Tribunal; such costs would also be included in the “Travel” category in the DSS Reports. For the two Cases with respect to which the CBS Reports were available, the “Travel” costs were extracted from the reports.

As noted in Section 3.2.3, travel costs incurred by experts retained by the Bureau have been aggregated with Professional Services at the data capture stage in the DSS Reports.²⁴ The necessary detail is unavailable to permit a segregation of these costs in order to report professional travel costs separately.

3.2.6 *Other*

Historical cost data with respect to miscellaneous other expenditures were taken from the DSS Reports or the CBS Reports (where available). Included in this cost category are the cost of transcripts, postage, courier services, etc.

The cost of document reproduction was not included in the historical cost records. The Bureau provided an approximation of the number of photocopies that was made for each Case. To estimate the number of copies, an Officer of the Bureau reviewed the records of the number of documents filed with the Tribunal, and estimated the number of pages and the number of copies of each document that were made. Interviews with the Officers and Managers involved in the respective Cases as well as miscellaneous documents found in the Case Files assisted the Officer in estimating the number of photocopies made for each Case.

(23) The Bureau also pays travel expenses for its own witnesses.

(24) In the CBS Reports, travel costs incurred by professionals were separately identified.

The estimated number of photocopies was then multiplied by an approximate cost per copy,²⁵ yielding the cost to the Bureau of the documents reproduced in each Case.

Transcript costs can be significant, depending on the nature of the Case. Based on the magnitude of the amounts classified as “Other” costs in the DSS Reports, it is likely that transcript costs have not been included in the “Other” classification but, rather, as “Professional Services”. There was insufficient detail to permit a reallocation of transcript costs from “Professional Services” to “Other”. For Cases with respect to which CBS Reports were available (Cases conducted during and after the 1994/1995 fiscal year), transcript costs were properly classified as “Other” costs.

3.2.7 *Overhead*

Overhead costs are costs that cannot be identified specifically with, or traced to, cost objects²⁶ in an economically feasible manner. Because of the inherent difficulties in tracing overhead costs to cost objects, overhead is generally allocated to cost objects applying various allocation techniques. In one commonly-used method of assigning overhead, an appropriate overhead “pool” of costs is determined, which is then allocated to cost objects based on a reasonable “cost driver”,²⁷.

However, in attempting to determine the “pool” of overhead costs to allocate to the Cases, we encountered a number of difficulties, namely:

-
- (25) The Project Manager, Fee Service Standards, Compliance and Operations Branch of the Competition Bureau, informed us that a cost of 5¢ per copy was reasonable for the years encompassed by the Study.
- (26) The cost objects for the purpose of this Study are the respective Cases.
- (27) A “cost driver” is defined as any factor whose change causes a change in total cost of a related cost object (cost of conducting Cases). The number of hours conducting Cases has been identified as the cost driver of the quantum of overhead costs incurred.

- Although the activities relating to conducting Cases has remained substantially the same from one year to the next, Industry Canada, the Bureau and the Branches within the Bureau have undergone several significant reorganizations during the period encompassed by the Study and, consequently, the reported costs for the years in question are not always comparable;
- A process of “Program review” was undertaken in the mid-1990s to cut government costs and to streamline operations; as a result, the overhead costs subsequent to Program review were substantially different than in previous years;
- Although Industry Canada and the Bureau produce yearly budgets, the data are not generally segregated in a manner that permits the break-out of overhead costs from direct costs;
- Changes in data-reporting systems have rendered the retrieval of the required information difficult; and
- Data in the level of detail required for the analysis have often not been retained or are not easily obtainable.

Comparability among the various Cases would be obscured by assigning to each Case overhead costs which varied materially between fiscal periods depending on the organizational structure at that time. Furthermore, data were not available to permit an overhead calculation for each year of the Study. Finally, the Program review process resulted in the elimination of various activities which were considered unnecessary, redundant or excessive, while reorganizing other activities. Consequently, the overhead pool prior to Program review was not representative of costs accumulated subsequent to the review process, thus rendering comparisons difficult.

In 1996/97, the Comptroller’s Office of Industry Canada prepared costing tables which were used to develop Fee and Service Standards policy. These tables were based on 1995/96 actual financial results and reflect the cost-cutting and reorganizations of Program review. Further-

more, the costing tables segregate direct costs from overhead and shared service costs. We therefore used these tables as the basis for the cost pool from which overhead application rates were developed for all Cases, regardless of the years during which they were conducted. It was determined, upon consultation with the Bureau, that adopting this approach would provide comparability among the Cases, thus avoiding the distortions in costing which would result from applying costs to Cases from cost pools which varied materially from one year to the next. It should be noted, however, that as the data from which overhead application rates were developed related to the 1995/96 fiscal year, the overhead calculation provides only an approximation for all other years.

In determining the amount of overhead and shared service costs to allocate to the respective Cases, it was necessary to accumulate the costs in several stages.

First, the Bureau was allocated a share of Industry Canada's overhead and shared services costs. Industry Canada's overhead pool includes, among others, costs relating to Information Management and Accommodation service, Communications, Finance, Human Resources, Industry and Scientific Policy and Business Law and General Counsel.

Industry Canada overhead was allocated to the Bureau in the proportion that (a) the number of full-time equivalent personnel in the Bureau bears to (b) the total number of full-time equivalents in all programs within Industry Canada. The Bureau's shared services and overhead costs were then allocated to the Branches within the Bureau,²⁸ based on each Branch's proportionate share of full-time equivalents.

(28) The Civil Branch is responsible for conducting Cases before the Tribunal.

For purposes of allocating overhead to the individual Cases, the approximate number of hours worked by the full-time equivalents in the Civil Branch was determined by multiplying (a) the number of full-time equivalents by (b) the approximate number of hours worked in a year, excluding overtime.²⁹ The overhead pool, comprising the Civil Branch’s proportionate share of (a) Industry Canada’s overhead and (b) the Bureau’s overhead, was divided by the total estimated number of hours worked in a year. This calculation yielded the overhead cost per hour of work. Such hourly cost was then multiplied by the number of hours worked on a Case, yielding the amount of overhead that should be applied per Case.

4. RESULTS OF THE STUDY

The estimated historical costs incurred by the Bureau in investigating and prosecuting the Cases considered in our Study are summarized as follows:

<u>Case</u>	<u>Reference</u>	<u>Estimated Historical Costs</u>
<i>BBM</i>	Tab A	\$ 207,895
<i>Chrysler</i>	Tab B	455,392
<i>NutraSweet</i>	Tab C	1,449,195
<i>Xerox</i>	Tab D	556,573
<i>Tele-Direct</i>	Tab E	2,726,888
<i>Warner</i>	Tab F	<u>627,466</u>
Aggregate estimated historical costs		<u>\$6,023,409</u>
Average estimated historical costs		<u>\$1,003,902</u>

(29) Based upon information provided by the Bureau, there are 260.88 working days per annum, with 7.5 hours per day.

Each Tab provides a background summary of the respective Case as well as the source of the information gathered to assist in estimating the historical costs which were identified as being the most significant in the investigation and prosecution of the Case. Within the Tabs, we have summarized the estimated historical costs incurred by the Bureau and have included supporting schedules to provide additional details as to our calculations.

We remain available to explain or discuss any aspects of our study with you at your convenience.

Respectfully submitted,

WISE, BLACKMAN

Per: Richard M. Wise, FCA

Per: Sheri-Anne Doyle, CA

TAB A

***RTPC (DIRECTOR OF
INVESTIGATION & RESEARCH)
v.
BBM BUREAU OF MEASUREMENT***

TAB A — RTPC (DIRECTOR OF INVESTIGATION & RESEARCH) v. *BBM***A.1 Background Summary**

A complaint was filed with the Bureau against *BBM* in April 1977. The inquiry into the activities of *BBM* began in 1977 and an Application pursuant to Section 31.4(2)(a)(b) of the *Combines Investigation Act* was filed by the Director on October 30, 1981. In June 1977, searches took place at *BBM*'s head office in Toronto. Most of the witnesses in this Case were from Toronto.

The accused supplied radio and television viewing data. Its customers mainly comprised advertising agencies and television and radio station representatives. *BBM* was accused of inducing advertising agencies to acquire television viewing data from them by offering to supply the radio data on more favourable terms (a discount), if the said agencies agreed to acquire its television data. It was alleged that this constituted a tied sale of these products, as defined under subsection 31.4(1)(11) of the *Combines Investigation Act*.

BBM was prohibited by Order of the RTPC on December 18, 1981 from continuing to engage in tied selling of both radio and television audience measurement services. The respondent filed an application, pursuant to Section 28 of the Federal Court of Appeal, to review the Order on the grounds that this section was *ultra vires*. The Federal Court of Appeal rendered its judgment on March 6, 1984, dismissing the application.

BBM was the first tied-selling case undertaken by the Bureau. Because of the length of time which has elapsed since the Case was conducted, only limited recorded historical data were available.

A.2 Historical Cost Summary

The estimated historical costs incurred in investigating and prosecuting *BBM* are summarized as follows:

Salaries and wages of Bureau staff	\$ 64,377
Salaries and wages of Justice Department staff	14,067
Experts	12,750
External legal counsel	-
Travel	12,475
Other	2,925
Overhead	<u>101,301</u>
Aggregate estimated historical costs	<u>\$207,895</u>

A.3 Salaries and Wages of Bureau Staff

The total number of hours worked on the Case was preserved in summarized form in the time-reporting system; however, these hours were not segregated either by year or by category of employee.

Because of the lack of information, the Officer provided estimates of the hours worked by fiscal year, and an allocation of the annual hours by category of employee.

A.4 Salaries and Wages of Justice Department Staff

No historical information was available as to the amount of time lawyers from the Justice Department worked on the Case, nor were lawyers currently in the Department able to provide time estimates. Consequently, a Manager from the Bureau provided such an estimate. In addition, the Manager noted that the *BBM* Case was of comparable complexity to *Chrysler*.

A.5 Experts

No historical financial-reporting data were available with respect to the cost of outside experts retained by the Bureau to assist in the Case. The Officer who conducted the Case informed us that one expert (an economist) provided services prior to, and during, the Hearing. A copy of the

proposed contract between the Bureau and the economist was located in the Case Files. However, based upon the Officer's recollection of the extent of services provided, the amount stipulated in the contract appeared to be grossly understated and had most likely been modified as the Case progressed. The Officer, accordingly, provided an estimate of the amount that was ultimately paid to the economist.

A.6 External Legal Counsel

External counsel was not retained to assist in litigating the Case.

A.7 Travel

Travel costs were based on the Officer's estimate of the number of days spent searching the respondents' premises, conducting interviews and attending various hearings. The travel costs of witnesses were also estimated, based on an approximation of the number of witnesses involved in the Case and the assumption that the costs would include one airplane flight³⁰ and one day's expenses³¹, per witness. The number of days spent searching the respondents' premises was corroborated by a memorandum located in the Case Files, which described the search.

(30) Estimated cost of a return flight was \$325. This amount was based on the assumption that the majority of the witnesses were from the Toronto region, and that \$325 is a reasonable approximation of the cost of an economy-fare round trip.

(31) It was estimated that one day's expenses, including meals and accommodations, would be approximately \$175.

A.8 Other

No financial-reporting data were available with respect to any other costs. Document reproduction costs were estimated and included in “Other” costs as described in Section 3.2.6.

A.9 Overhead

Overhead costs were estimated as described in Section 3.2.7.

Schedule A-1

RTPC (DIRECTOR OF INVESTIGATION & RESEARCH.

v.

BBM BUREAU OF MEASUREMENT

SALARIES AND WAGES OF BUREAU STAFF

Title	Category	Estimated Hours Conducting the Case								Total Hours	Salaries & Wages
		1977	1978	1979	1980	1981	1982	1983	1984		
Manager	1	17	13	13	26	2	2	-	2	75	\$2,515
Officer	2	<u>680</u>	<u>529</u>	<u>529</u>	<u>1,047</u>	<u>76</u>	<u>75</u>	<u>10</u>	<u>75</u>	<u>3,021</u>	<u>61,862</u>
		<u>697</u>	<u>542</u>	<u>542</u>	<u>1,073</u>	<u>78</u>	<u>77</u>	<u>10</u>	<u>77</u>	<u>3,096</u>	<u>\$64,377</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule A-2

RTPC (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

BBM BUREAU OF MEASUREMENT

SALARIES AND WAGES OF JUSTICE DEPARTMENT STAFF

Title	Category	Estimated Hours Conducting the Case								Total Hours	Salaries & Wages
		1977	1978	1979	1980	1981	1982	1983	1984		
Counsel	2A	87	67	67	133	10	10	1	10	385	\$ 8,524
Junior Counsel	1	<u>87</u>	<u>67</u>	<u>67</u>	<u>133</u>	<u>10</u>	<u>10</u>	<u>1</u>	<u>10</u>	<u>385</u>	<u>5,543</u>
		<u>174</u>	<u>134</u>	<u>134</u>	<u>266</u>	<u>20</u>	<u>20</u>	<u>2</u>	<u>20</u>	<u>770</u>	<u>\$ 14,067</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule A-3

RTPC (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

BBM BUREAU OF MEASUREMENT

EXPENDITURES

	<u>Professional Fees</u>	<u>Travel</u>	<u>Other</u>	<u>Total</u>
Experts	\$ 12,750	\$ -	\$ -	\$ 12,750
External Legal Counsel	-	-	-	-
Bureau and Justice Travel	-	12,475	-	12,475
Other	<u>-</u>	<u>-</u>	<u>2,925</u>	<u>2,925</u>
Total Expenditures	<u>\$ 12,750</u>	<u>\$ 12,475</u>	<u>\$ 2,925</u>	<u>\$ 28,150</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

TAB B

***CANADA (DIRECTOR OF
INVESTIGATION & RESEARCH)
v.
CHRYSLER CANADA LTD.***

**TAB B — CANADA (DIRECTOR OF INVESTIGATION AND RESEARCH) v.
CHRYSLER****B.1 Background Summary**

In December 1988 the Director brought an Application on behalf of a customer which Chrysler Canada had terminated for refusing to comply with contractual restrictions on the sale of auto parts in export markets. In October 1989 the Tribunal ordered that Chrysler resume supply on normal trade terms. Chrysler's appeal against the Order failed. After lengthy interlocutory proceedings concerning the scope of the Tribunal's contempt powers, a motion by the Director that Chrysler show cause why it should not be found in contempt was dismissed by the Tribunal in September 1992. The Order was rescinded on consent in December 1993 after Chrysler and the customer reached an agreement which resolved their outstanding differences.

B.2 Historical Cost Summary

The estimated historical costs incurred in investigating and prosecuting the Case are summarized as follows:

Salaries and wages of Bureau staff	\$134,141
Salaries and wages of Justice Department staff	71,117
Experts	56,778
External legal counsel	40,000
Travel	21,985
Other	1,145
Overhead	<u>130,226</u>
Aggregate estimated historical costs	<u>\$455,392</u>

B.3 Salaries and Wages of Bureau Staff

The Officer allocated the total number of hours recorded in the Bureau's time-reporting system to the categories of employees who performed the work. A description of how the cost relating to the salaries and wages of Bureau staff was developed is set out in Section 3.2.1.

B.4 Salaries and Wages of Justice Department Staff

The senior Justice Department lawyer provided an estimate of the number of hours he worked on the Case, broken down into three above-noted phases.

The hours were then classified by fiscal year, based on the approximate dates spanning each of the three phases (to assist in determining the appropriate hourly salary). The time estimated, as provided by the junior lawyer, was not segregated by year or by activity; consequently, his hours were allocated among the fiscal years during which the Case was conducted, based on the assumption that the number of hours he worked in a given fiscal year was proportionate to the work performed in that year by the senior lawyer.

B.5 Experts

The historical costs relating to outside experts retained by the Bureau were extracted from the DSS Reports, net of estimated external legal counsel fees (see Section B.6).

B.6 External Legal Counsel

One lawyer was retained to provide legal services to the Bureau in connection with this Case. The Officer provided an estimate of the legal fees incurred, because the DSS Reports contained only summarized cost data and invoices were not available.

Based on the Officer's estimate, the approximate cost of external legal counsel was transferred from the "Professional Services"³² category in the DSS Reports to "External Legal Counsel" costs.

B.7 Travel

Travel costs were extracted from the DSS Reports.

B.8 Other

No financial-reporting data were available with respect to any other costs. Document reproduction costs were estimated and included in "Other" costs, as described in Section 3.2.6.

B.9 Overhead

Overhead costs were estimated as described in Section 3.2.7.

(32) No costs were classified as "Legal" costs in the DSS Reports; consequently, it was assumed that the cost of the external legal counsel's service was included in the "Professional Services" category in the DSS Reports.

Schedule B-1

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

CHRYSLER CANADA LTD.

SALARIES AND WAGES OF BUREAU STAFF

Title	Category	Estimated Hours Conducting the Case							Total Hours	Salaries & Wages
		1987/88	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94		
Manager	1	-	141	246	23	2	7	6	425	\$ 18,238
Officer	3	438	377	821	230	43	131	129	2,169	79,167
Officer	2	-	377	492	-	-	-	-	869	27,518
Programme Administrator	1	-	189	328	-	-	-	-	517	9,218
		<u>438</u>	<u>1,084</u>	<u>1,887</u>	<u>253</u>	<u>45</u>	<u>138</u>	<u>135</u>	<u>3,980</u>	<u>\$134,141</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule B-2

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

CHRYSLER CANADA LTD.

SALARIES AND WAGES OF JUSTICE DEPARTMENT STAFF

Title	Category	Estimated Hours		Total Hours	Salaries & Wages
		1988/89	1989/90		
General Counsel	3A	176	402	578	\$ 30,588
Counsel	2A	<u>297</u>	<u>678</u>	<u>975</u>	<u>40,529</u>
Total		<u>473</u>	<u>1,080</u>	<u>1,553</u>	<u>\$ 71,117</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule B-3

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

CHRYSLER CANADA LTD.

EXPENDITURES

	Professional Fees	Travel	Other	Total
Experts	\$ 56,778	\$ -	\$ -	\$ 56,778
External Legal Counsel	40,000	-	-	40,000
Bureau and Justice Travel	-	21,985	-	21,985
Other	<u>-</u>	<u>-</u>	<u>1,145</u>	<u>1,145</u>
Total Expenditures	<u>\$ 96,778</u>	<u>\$ 21,985</u>	<u>\$ 1,145</u>	<u>\$ 119,908</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

TAB C

***CANADA (DIRECTOR OF
INVESTIGATION & RESEARCH)
v.
THE NUTRASWEET COMPANY***

**TAB C — CANADA (DIRECTOR OF INVESTIGATION & RESEARCH) v.
NUTRASWEET**

C.1 Background Summary

The Director filed an Application against NutraSweet on June 1, 1989 at the instigation of a potential competitor attempting to enter the Canadian aspartame market. The Director alleged that NutraSweet’s practices constituted abuses of its dominant market position. The Tribunal was asked to consider various provisions of the Act, with tied selling constituting only one of several allegations. The Hearings, which lasted fifteen days, began in January 1990 and ended in July of that year. The Tribunal issued a prohibition Order on October 4, 1990; however, no finding was made with respect to tied selling. In April 1994, the Director began investigations regarding NutraSweet’s compliance with the Order, which terminated upon NutraSweet agreeing to send explanatory letters to customers.

C.2 Historical Cost Summary

The estimated historical costs incurred in investigating and prosecuting this Case are summarized as follows:

Salaries and wages of Bureau staff	\$ 234,776
Salaries and wages of Justice Department staff	7,453
Experts	170,919
External legal counsel	691,369
Travel	67,364
Other	52,070
Overhead	<u>225,244</u>
Aggregate estimated historical costs	<u>\$1,449,195</u>

C.3 Salaries and Wages of Bureau Staff

The Manager allocated the total number of hours which had been recorded in the Case to the categories of employees who performed the work. Section 3.2.7 provides a description of how the cost relating to the salaries and wages of Bureau employees was developed.

C.4 Salaries and Wages of Justice Department Staff

Lawyers from the Justice Department played a supporting role in the litigation; an outside law firm was retained to provide the majority of the legal services. Two Justice Department lawyers worked on the Case. One of the lawyers was unable to provide an estimate of his time. The second lawyer recalled only a minimal amount of time spent. The Manager from the Bureau recalled that at least one Justice Department lawyer was present throughout the Hearing. The Manager therefore made an upward adjustment to the lawyers' estimate to include the approximate time spent at the Hearing.

C.5 Experts

The costs relating to experts were extracted from the DSS Reports.

C.6 External Legal Counsel

An outside law firm was retained to litigate on behalf of the Bureau. The firm's invoices provided us with documentary evidence as to the historical cost to the Bureau of external legal counsel as well as related travel costs and other disbursements.

C.7 Travel

Travel costs were extracted from the DSS Reports. This category in the DSS Reports includes travel costs incurred by Bureau and Justice Department lawyers.

As the information with respect to outside counsel's travel was available in this Case (these items being separately identified in the legal invoices), these costs were separately tabulated and included in the "Travel" category, along with Bureau and Justice Department travel costs.

C.8 Other

Any other costs relating to the Case were extracted from the DSS Reports. In addition, document reproduction costs were estimated and included in "Other" costs, as described in Section 3.2.6.

C.9 Overhead

Overhead costs were estimated as described in Section 3.2.7.

Schedule C-1

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

THE NUTRASWEET COMPANY

SALARIES AND WAGES OF BUREAU STAFF

Title	Category	Estimated Hours Conducting the Case					Total Hours	Salaries & Wages
		1987/88	1988/89	1989/90	1990/91	1991/92		
Manager	2	-	49	25	12	1	87	\$ 4,085
Manager	1	-	400	300	150	15	865	37,073
Officer	3	369	923	1,299	431	210	3,232	116,970
Officer	2	-	340	1,299	431	210	2,280	62,444
Economist	6	-	-	210	-	-	210	7,546
Economist	5	-	-	210	-	-	210	6,658
		<u>369</u>	<u>1,712</u>	<u>3,343</u>	<u>1,024</u>	<u>436</u>	<u>6,884</u>	<u>\$ 234,776</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule C-2

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH
v.
THE NUTRASWEET COMPANY

SALARIES AND WAGES OF JUSTICE DEPARTMENT STAFF

Title	Category	Estimated Hours Conducting the Case					Total Hours	Salaries & Wages
		1987/88	1988/89	1989/90	1990/91	1991/92		
Counsel	2A	<u>13</u>	<u>46</u>	<u>94</u>	<u>31</u>	<u>16</u>	<u>200</u>	<u>\$7,453</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule C-3

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

THE NUTRASWEET COMPANY

EXPENDITURES

	<u>Professional Fees</u>	<u>Travel</u>	<u>Other</u>	<u>Total</u>
Experts	\$ 170,919	\$ -	\$ -	\$ 170,919
External Legal Counsel	691,369	42,484	50,973	784,826
Bureau and Justice Travel	-	24,880	-	24,880
Other	<u>-</u>	<u>-</u>	<u>1,097</u>	<u>1,097</u>
Total Expenditures	<u>\$ 862,288</u>	<u>\$ 67,364</u>	<u>\$ 52,070</u>	<u>\$ 981,722</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

TAB D

***CANADA (DIRECTOR OF
INVESTIGATION & RESEARCH)
v.
XEROX CANADA INC.***

TAB D — CANADA (DIRECTOR OF INVESTIGATION AND RESEARCH) v. XEROX**D.1 Background Summary**

In October 1988, the Bureau received a complaint against Xerox. The complainant alleged that its business was substantially affected because of the inability to obtain an adequate supply of specified copier parts from Xerox. The Bureau initiated a formal inquiry in March 1989.

On November 16, 1989, a refusal-to-supply Application was filed against Xerox by the Director. Hearings took place on June 11 through 20 and July 19 and 20, 1990. On November 2, 1990, the Tribunal rendered its judgement and ordered Xerox to resume supply to the complainant of Xerox brand copier parts for models introduced between 1983 and 1989.

A complaint was filed in July 1992 alleging that Xerox was not complying with the Tribunal's Order. A new project was initiated by the Director, which was subsequently discontinued after a change in policy by Xerox.

Costs incurred on this project are not included in the Historical Cost Summary.

D.2 Historical Cost Summary

The estimated historical costs incurred in investigating and prosecuting the Case are summarized as follows:

Salaries and wages of Bureau staff	\$163,974
Salaries and wages of Justice Department staff	94,882
Experts	119,178
External legal counsel	-
Travel	17,283
Other	1,419
Overhead	<u>159,837</u>
Aggregate estimated historical costs	<u>\$556,573</u>

D.3 Salaries and Wages of Bureau Staff

As in several other Cases, the hours recorded in the time-reporting system were not identified by the category of employee who performed the services. The Officer who conducted the Case recalled the individuals who assisted him and concluded that an allocation of all of the hours to a category two Officer was reasonable for purposes of calculating the approximate cost of work performed by Bureau staff.³³

D.4 Salaries and Wages of Justice Department Staff

The cost to the Bureau of the Justice Department’s involvement in the Case was determined as described in Section 3.2.2.

D.5 Experts

The historical cost of outside experts who were retained to assist the Bureau in conducting Cases was extracted from the DSS Reports. Cost of experts included the respective services of a public accounting firm and economists. The invoices from the accounting firm were available and,

(33) Various categories of employees worked on this Case. The net effect of their hourly salaries was best approximated by a category 2 Officer salary.

based on our review thereof, accountants' fees represented approximately one-half of the expenditures for expert services.

D.6 External Legal Counsel

The Justice Department's lawyers litigated the Case on behalf of the Bureau; external counsel were not retained.

D.7 Travel

The DSS Reports provided the historical Travel costs. The Officer who conducted the Case informed us that one of the lawyers who litigated the Case was based in Toronto; consequently, travel costs between Toronto and Ottawa would have been incurred, over and above the costs for approximately ten witnesses.³⁴

D.8 Other

Document reproduction costs were estimated and included in the "Other" cost category as described in Section 3.2.6.

D.9 Overhead

The overhead costs were estimated as described in Section 3.2.7

(34) The Officer estimated that the Bureau had nine or ten witnesses in this Case.

Schedule D-1

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

XEROX CANADA INC.

SALARIES AND WAGES OF BUREAU STAFF

<u>Title</u>	<u>Category</u>	<u>Estimated Hours Conducting the Case</u>				<u>Total Hours</u>	<u>Salaries & Wages</u>
		<u>1988/89</u>	<u>1989/90</u>	<u>1990/91</u>	<u>1991/92</u>		
Manager	1	73	164	279	10	526	\$ 23,314
Officer	2	<u>732</u>	<u>1,635</u>	<u>1,862</u>	<u>130</u>	<u>4,359</u>	<u>140,660</u>
		<u>805</u>	<u>1,799</u>	<u>2,141</u>	<u>140</u>	<u>4,885</u>	<u>\$ 163,974</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule D-2

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

XEROX CANADA INC.

SALARIES AND WAGES OF JUSTICE DEPARTMENT STAFF

Title	Category	<u>Estimated Hours Conducting the Case</u>				<u>Total Hours</u>	<u>Salaries & Wages</u>
		<u>1988/89</u>	<u>1989/90</u>	<u>1990/91</u>	<u>1991/92</u>		
General Counsel	3A	164	385	417	29	995	\$ 50,944
Counsel	2A	<u>164</u>	<u>365</u>	<u>417</u>	<u>29</u>	<u>975</u>	<u>43,938</u>
		<u>328</u>	<u>750</u>	<u>834</u>	<u>58</u>	<u>1,970</u>	<u>\$ 94,882</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule D-3

**CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)
v.
XEROX CANADA INC.**

EXPENDITURES

	<u>Professional Fees</u>	Travel	Other	Total
Experts	\$ 119,178	\$ -	\$ -	\$ 119,178
External Legal Counsel	-	-	-	-
Bureau and Justice Travel	-	17,283	-	17,283
Other	<u>-</u>	<u>-</u>	<u>1,419</u>	<u>1,419</u>
Total Expenditures	<u>\$ 119,178</u>	<u>\$ 17,283</u>	<u>\$ 1,419</u>	<u>\$ 137,880</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

TAB E

***CANADA (DIRECTOR OF
INVESTIGATION & RESEARCH)
v.
TELE-DIRECT (PUBLICATIONS) INC.
AND
TELE-DIRECT (SERVICES) INC.***

**TAB E — CANADA (DIRECTOR OF INVESTIGATION & RESEARCH) v.
*TELE-DIRECT***

E.1 Background Summary

Tele-Direct provided advertising space in a published directory as well as advertising services. On December 22, 1994, the Director filed an Application under the abuse-of-dominance, tied-selling and refusal-to-deal provisions of the Act against Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., two subsidiaries which publish telephone directories for Bell Canada. The Director alleged that the respondents had engaged in tied selling, in that they required or induced customers seeking advertising space in telephone directories to acquire another product, *viz.*, telephone directory advertising services.

In this Case, the pre-Hearing proceedings were completed within eight months. The Hearing lasted a total of seventy days. The Tribunal's decision was rendered eleven months later.

The Tribunal ordered Tele-Direct to cease engaging in the practice of discriminatory anti-competitive acts against consultants and Tele-Direct customers choosing to use consultants. With respect to the tied-selling remedy, the Tribunal ordered that, in certain markets, the sale of advertising space not be tied to the purchase of advertising services. The Tribunal offered an explanation for the unusual delay in rendering its decision. It noted that "there is no doubt that this has been the most complex Case presented to the Tribunal since its inception". It consisted of five cases, each involving a multitude of sub-issues. The record tallied almost 15,000 pages of transcripts taken over seventy days; over 600 pages of written argument were submitted and oral argument took eleven days. The Tribunal's decision was not appealed.

E.2 Historical Cost Summary

The Bureau was involved in several issues with respect to this file. The issues were not separately identified by Case number and, consequently, the hours and costs recorded in the Bureau’s system do not relate entirely to the investigation and prosecution of violations under Section 75 of the Act. Consequently, we attempted to identify the fiscal period in which the work was being coded to the *Tele-Direct* matter, as it substantially related to the issue of tied selling. The Officer who conducted the Case provided an estimate of the timing of the work on the tied-selling Case.

The estimated historical costs incurred in investigating and prosecuting the Case are summarized as follows:

Salaries and wages of Bureau staff	\$ 918,098
Salaries and wages of Justice Department staff	255,740
Experts	383,949
External legal counsel	42,530
Travel	134,850
Other	135,242
Overhead	<u>856,479</u>
Aggregate estimated historical costs	<u>\$2,726,888</u>

E.3 Salaries and Wages of Bureau Staff

As in a number of other Cases, time sheets were not available prior to 1994/1995; consequently, we allocated the recorded time among the categories of employees who worked on the Case, based on estimates provided by the Officer. In subsequent years, our access to time sheets allowed for a more precise allocation of employee time. Based on our review of these time sheets, the Officer’s time accounted for over 90% of the recorded time.

E.4 Salaries and Wages of Justice Department Staff

The cost to the Bureau of the Justice Department's involvement in the Case was determined as described in Section 3.2.2. The Case was litigated by Justice Department lawyers, with some involvement from external legal counsel.

E.5 Experts

For costs incurred during and subsequent to the 1994/95 fiscal year, CBS Reports were available and the historical cost of experts retained by the Bureau was extracted therefrom. Within the CBS Reports, dates, fees, travel expenses and other disbursements were categorized by expert and by fiscal year. CBS Reports were not available prior to the 1994/1995 fiscal year; consequently, the expenditures reported in the DSS Reports under the "Professional Services" category were used as an estimate of the cost of these services.

E.6 External Legal Counsel

The Case was litigated by Justice Department lawyers; however, one outside lawyer provided substantial legal services. We obtained the cost of his services from the CBS Reports, which we corroborated by invoices. Expenditures relating to travel and other disbursements incurred by the lawyer were tabulated from the invoices and were classified separately according to the nature of the expenses.

E.7 Travel

The CBS Reports provided a detailed breakdown of travel costs. The reports identified the individual who travelled, the amount of the disbursements, and whether these disbursements related purely to transportation or to other travel expenses. The historical costs in the reports provided the source for the cost estimates for the 1994/1995 and subsequent fiscal years. The costs taken from the DSS Reports were used for fiscal years prior to 1994/1995. Travel costs were high, because there were numerous witnesses in the Case, as well as many interviews.

E.8 Other

The CBS Reports provided a detailed breakdown of miscellaneous costs incurred in conducting the Case. The historical costs in the reports provided the source of the cost estimates for the 1994/1995 and later subsequent years. Prior to 1994/1995, the costs were taken from the DSS Reports. Transcript costs were the most material category included in “Other” costs. In addition, document reproduction costs were estimated and added to the reported “Other” costs.

E.9 Overhead

The overhead costs were estimated as described in Section 3.2.7.

Schedule E-1

**CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)
v.
TELE-DIRECT (PUBLICATIONS) INC. AND TELE-DIRECT (SERVICES) INC.**

SALARIES AND WAGES OF BUREAU STAFF

Title	Category	Estimated Hours Conducting the Case							Total Hours	Salaries & Wages
		1991/92	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98		
Manager	1	137	224	175	218	121	38	24	937	\$ 44,608
Officer	3	411	1,118	1,049	1,742	1,850	283	262	6,715	267,088
Officer	2	2,194	3,129	2,273	3,041	2,329	289	132	13,387	473,469
Officer	1	-	-	-	1,060	3,777	-	-	4,837	126,441
Economist	6	-	-	-	7	-	-	-	7	301
Economist	4	-	-	-	73	-	-	-	73	2,380
Programme Administrator	1	-	-	-	-	33	-	13	46	928
Administrative Services	1	-	-	-	-	30	-	-	30	630
Printing Operator	2	-	-	-	-	72	-	-	72	1,197
Clerical and Regulatory	3	-	-	-	-	62	-	-	62	931
Student	-	-	-	-	-	-	10	-	10	125
Total		<u>2,742</u>	<u>4,471</u>	<u>3,497</u>	<u>6,141</u>	<u>8,274</u>	<u>620</u>	<u>431</u>	<u>26,176</u>	<u>\$ 918,098</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule E-2

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)
v.
TELE-DIRECT (PUBLICATIONS) INC. AND TELE-DIRECT (SERVICES) INC.

SALARIES AND WAGES OF JUSTICE DEPARTMENT STAFF

Title	Category	Estimated Hours Conducting the Case							Total Hours	Salaries & Wages
		1991/92	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98		
General Counsel	3A	306	498	390	685	933	67	46	2,925	\$ 167,945
Counsel	2A	<u>204</u>	<u>332</u>	<u>260</u>	<u>457</u>	<u>622</u>	<u>45</u>	<u>31</u>	<u>1,951</u>	<u>87,795</u>
Total		<u>510</u>	<u>830</u>	<u>650</u>	<u>1,142</u>	<u>1,555</u>	<u>112</u>	<u>77</u>	<u>4,876</u>	<u>\$ 255,740</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule E-3

**CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)
v.
TELE-DIRECT (PUBLICATIONS) INC.
AND TELE-DIRECT (SERVICES) INC.**

EXPENDITURES

	Professional Fees	Travel	Other	Total
Experts	\$ 383,949	\$ 12,232	\$ 4,411	\$ 400,592
Bureau and Justice Travel	-	121,796	-	121,796
External Legal Counsel	42,530	822	27,615	70,967
Other	<u>-</u>	<u>-</u>	<u>103,216</u>	<u>103,216</u>
Total Expenditures	<u>\$ 426,479</u>	<u>\$ 134,850</u>	<u>\$ 135,242</u>	<u>\$ 696,571</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

TAB F

***CANADA (DIRECTOR OF
INVESTIGATION & RESEARCH)
v.
WARNER MUSIC CANADA LIMITED***

TAB F — CANADA (DIRECTOR OF INVESTIGATION & RESEARCH) v. WARNER
F.1 Background Summary

On September 30, 1997, an Application under Section 75 of the Act was filed with the Tribunal against Warner and its two U.S. affiliates. It was alleged that the respondents were refusing to supply licences to the complainant, thereby preventing it from marketing Warner recordings in Canada through its mail-order record club. The Application requested the Tribunal to order Warner to supply their music reproduction and sales licences to the complainant.

On October 27, 1997, Warner sought to have the Application dismissed on a jurisdictional challenge. After a two-day Hearing, on December 18, 1997, the Tribunal issued an Order striking down the Application on the basis that the Tribunal lacked the jurisdiction to grant the remedy sought by the Director. The Tribunal concluded that the *Copyright Act* places no limit on the sole and exclusive right to licence, and that Section 75 of the Act did not grant the Tribunal the jurisdiction to issue the Order sought.

F.2 Historical Cost Summary

The estimated historical costs incurred in investigating and prosecuting the Case are summarized as follows:

Salaries and wages of Bureau staff	\$221,575
Salaries and wages of Justice Department staff	23,692
Experts	145,176
External legal counsel	-
Travel	24,730
Other	11,359
Overhead	<u>200,934</u>
Aggregate estimated historical costs	<u>\$627,466</u>

F.3 Salaries and Wages of Bureau Staff

As time sheets were available for the entire period during which the Case was conducted, the allocation of the hours among the level of staff who performed the services was based upon actual, rather than estimated, figures.

F.4 Salaries and Wages of Justice Department Staff

A time-reporting system was in place during the years the Case was being conducted. The hours recorded, however, were not segregated by category of lawyer or by year. Four lawyers were involved in the Case. A member of the legal team estimated that approximately 60% to 70% of the time recorded was that of the senior lawyer. The legal time was allocated to the years the Case was conducted in proportion to the time spent by the Officer.

F.5 Experts

The CBS Reports provided us with the details of the historical costs of experts retained to assist with various aspects of this Case. Within the reports, the travel expenses and other disbursements have been segregated from professional fees.

F.6 External Legal Counsel

All legal services were provided by Justice Department lawyers; no outside legal counsel rendered services.

F.7 Travel

Travel costs incurred throughout the Case were tracked by the CBS Reports, which were used as an estimate of total travel costs. The reports segregated transportation from other travel-related expenditures and identified the individual who submitted the expenses. Travel included several return trips to Toronto and to the United States, among other travel costs.

F.8 Other

The CBS Reports provided the details of other miscellaneous expenditures incurred in conducting the Case. These included the costs of transcripts³⁵, couriers and other miscellaneous items. Document reproduction costs were estimated and added to the “Other” cost category as described in Section 3.2.6.

F.9 Overhead

The overhead costs were estimated as described in Section 3.2.7.

(35) Transcript costs were minimal because there was no Hearing. The costs included transcripts of the pre-Hearing before the Tribunal.

Schedule F-1

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)

v.

WARNER MUSIC CANADA LIMITED

SALARIES AND WAGES OF BUREAU STAFF

Title	Category	Estimated Hours		Total Hours	Salaries & Wages
		1996/1997	1997/1998		
Manager	1	187	9	196	\$ 9,340
Officer	3	369	577	946	38,403
Officer	2	1,495	2,064	3,559	127,520
Economist	5	665	377	1,042	39,522
Programme Administrator	1	110	124	234	4,724
Student	-	-	164	164	2,066
		<u>2,826</u>	<u>3,315</u>	<u>6,141</u>	<u>\$ 221,575</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule F-2

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)
v.
WARNER MUSIC CANADA LIMITED

SALARIES AND WAGES OF JUSTICE DEPARTMENT STAFF

Title	Category	Estimated Hours		Total Hours	Salaries & Wages
		1996/97	1997/98		
Senior General Counsel	3B	108	152	260	\$ 16,366
Counsel	2A	54	76	130	5,922
Junior Counsel	1	<u>18</u>	<u>25</u>	<u>43</u>	<u>1,404</u>
Total		<u>180</u>	<u>253</u>	<u>433</u>	<u>\$ 23,692</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

Schedule F-3

CANADA (DIRECTOR OF INVESTIGATION & RESEARCH)
v.
WARNER MUSIC CANADA LIMITED

EXPENDITURES

	<u>Professional Fees</u>	Travel	Other	Total
Experts	\$ 145,176	\$ 9,654	\$ -	\$ 154,830
External Legal Counsel	-	-	-	-
Bureau and Justice Travel	-	15,076	-	15,076
Other	<u>-</u>	<u>-</u>	<u>11,359</u>	<u>11,359</u>
Total Expenditures	<u>\$ 145,176</u>	<u>\$ 24,730</u>	<u>\$ 11,359</u>	<u>\$ 181,265</u>

NOTE: This schedule forms part of, and should be read in conjunction with, the accompanying report.

APPENDIX I

EXCERPTS OF PROVISIONS OF THE *COMPETITION ACT*

REFUSAL TO DEAL

‘75. (1) Where, on application by the Director, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.”

TIED SELLING

‘77. (2) Where, on application by the Director, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.”

...

“(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.”