

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended; and

IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and sections 74.05 and 74.011 of the *Competition Act*.

B E T W E E N:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT November 26, 2015 CT-2015-001	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 60

THE COMMISSIONER OF COMPETITION

Applicant

- and -

AVISCAR INC., BUDGETCAR INC. / BUDGETAUTO INC.,
AVIS BUDGET GROUP, INC. and AVIS BUDGET CAR RENTAL, LLC

Respondents

**REPLY MEMORANDUM OF ARGUMENT OF THE COMMISSIONER OF
COMPETITION**

DEPARTMENT OF JUSTICE CANADA

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PART I – OVERVIEW

1. Proceedings before the Competition Tribunal (the “**Tribunal**”) are dependent upon parties acting reasonably and in conformity with the procedural rules. The Scheduling Order in this proceeding directs counsel to complete examinations for discovery in December 2015 in preparation for a final hearing four months later on April 18, 2016. Proceedings before this Tribunal are meant to be dealt with as expeditiously as fairness permits. This matter has a tight timeline; the Scheduling Order in this proceeding directs counsel to complete examinations for discovery in December 2015 in preparation for a final hearing four months later on April 18, 2016. As such, parties are expected to act reasonably and in conformity with the procedural rules for this proceeding with a view to having a matter proceed to a hearing on the merits in a fair and timely fashion. The efforts of the Commissioner of Competition (the “**Commissioner**”) to narrow the issues for the hearing and to ensure that it has the information necessary to conduct examinations for discovery are entirely consistent with the expectations of the procedural rules, and ought not to be frustrated by the Respondents in this fashion.

2. As described more fully in this Memorandum of Argument:
 - (a) The Respondents should be ordered to deliver a proper response to the Question contained in the Requests to Admit. The Respondents’ affidavit evidence in this motion demonstrates that each Respondent can confirm with minimal time and effort that it (or any of its agents) has or had in their possession the documents listed in that Respondent’s own affidavit of documents. Significantly, the Respondents’ affidavit evidence in this motion is that approximately 99% of the Respondents’ 59,567 documents produced to the Commissioner were collected from the email accounts of 13 current or past employees of the Respondents (an employee of a Respondent is plainly an agent of that Respondent and an employee’s email plainly has been or is in his or her possession and, thus, in his or her employer’s possession). Each Respondent can therefore easily confirm possession of its own documents.

- (b) Each Respondent is required to produce a proper Schedule “C” (even if they think there is no practical utility in doing so). In any event, the Schedule “C”s are particularly important in this proceeding. The Respondents have pled that Aviscar Inc. (“**Aviscar**”) and Budgetcar Inc. / Budgetauto Inc. (“**Budgetcar**”) are independent from the Avis Budget Group, Inc. (“**Avis Budget Group**”) and Avis Budget Car Rental, LLC (“**ABC Rental**”) and had no involvement in the alleged representations in this proceeding. Accordingly, documents currently or formerly in the possession of Avis Budget Group and ABC Rental (particularly when these documents are currently in the possession of Aviscar and Budgetcar) are relevant to this proceeding. A proper Schedule “C” informs each Respondent’s role *vis-à-vis* the allegations in the Commissioner’s Amended Notice of Application and tests the Respondents’ defence to these allegations.
- (c) The Respondents have no basis for redacting information from the relevant documents they have produced to the Commissioner. Relevant documents should be disclosed unredacted (except in the case of privilege). Privacy legislation provides no impediment to doing so and the procedural rules provide appropriate protections to safeguard personal information that the Respondents may disclose to the Commissioner.
- (d) Matters relating to examinations for discovery remain outstanding as between counsel and may be spoken to at the hearing should the parties be unable to reach agreement.

PART II – SUBMISSIONS

A. The Validity of a Response to a Request to Admit can be Reviewed on an Interlocutory Basis

3. The validity of a Response to a Request to Admit can be reviewed on an interlocutory basis. Contrary to the Respondents' submissions, a determination of the issue of compliance or non-compliance with a Request to Admit is not solely a matter for the trial judge.¹
4. In their Response to the Requests to Admit, the Respondents refuse outright to answer the Request to Admit (as described more fully below) on the basis that all the questions therein (including the Question at issue in this motion) are not proper questions for a Request to Admit. In other words, the Respondents' objection is not based on the *operation* of Rule 56 of the *Competition Tribunal Rules* but the *applicability or scope* of Rule 56. As elaborated by Nordheimer J.:

In my view, however, there is a difference between objections raised as to the operation of the rule and objections raised as to the applicability or scope of the rule. While I agree that the former should generally be left to the trial judge, the latter is something which should be determined in appropriate cases as early in the proceeding as possible. In this case, the respondent says that the rule cannot be used for the purpose to which the applicant is trying to put it. That is a matter that I believe I am in as good a position to determine as a trial judge (or in the context of an application the judge ultimately hearing the application) and, given the impact not only on the application but also on the impending motion regarding standing, an early determination of the issue seems decidedly preferable to a later determination where, if the applicant's position is found to be correct, any benefit to the applicant may well be lost.²

5. Accordingly, the Respondents' refusal to answer the Question in the Request to Admit is reviewable at this motion pursuant to the Tribunal's powers.³

B. The Respondents Cannot Refuse to Confirm Possession of Their Own Documents

i. Overview

¹ *Glover (Litigation Guardian of) v. Gorski*, 2013 ONSC 6578; *Foundation for Equal Families v. Canada (Attorney General)*, (1999), 36 C.P.C. (4th) 201 (Ont. Sup. Ct.), leave to appeal granted [1999] O.J. No. 3119 (Sup. Ct). appeal stayed [2000] O.J. No. 1995 (Div. Ct.).

² *Foundation for Equal Families v. Canada (Attorney General)*, (1999), 36 C.P.C. (4th) 201 (Ont. Sup. Ct.), leave to appeal granted [1999] O.J. No. 3119 (Sup. Ct). appeal stayed [2000] O.J. No. 1995 (Div. Ct.) at para. 13.

³ *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), s. 8.

6. Pursuant to subsection 9(2) of the *Competition Tribunal Act*, proceedings before this Tribunal must be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.⁴
7. This proceeding is no exception. The Scheduling Order in this proceeding directs counsel to complete examinations for discovery in December 2015 in preparation for a final hearing four months later on April 18, 2016.⁵ Accordingly, parties are expected to refrain from obfuscation regarding non-contentious points with a view to having a matter proceed to trial on the merits in a fair and timely fashion.
8. Requests to Admit in advance of examination for discovery are encouraged because they reduce the time spent at the examinations on non-contentious issues and focus attention on the merits. As noted in the Ontario Bar Association's "Discovery Best Practices and General Guidelines for the Discovery Process in Ontario":

Guideline: Lawyers should use requests to admit and agreed statements of fact on non-contentious issues.

Commentary: Such steps help reduce the amount of time spent at oral examinations on non-contentious issues, allowing parties to focus on the real matters at issue in a case.⁶
9. Each Respondent refuses to admit that it (or any of its agents) has or had in their possession the very documents listed in that Respondent's *own* affidavit of documents and the very documents that that Respondent has *given* to the Commissioner. The bases for the refusal have changed over time (as described in the procedural history of this issue below) but are equally unhelpful.
10. Confirmation of this fact ought not to be a matter in dispute. The Commissioner sought confirmation of this fact having regard to section 69 of the *Competition Act*

⁴ Subsection 9(2), *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.).

⁵ Exhibit "F" to the Affidavit of Derek Leschinsky, affirmed November 12, 2015 ("**Leschinsky Affidavit**"), Motion Record of the Commissioner.

⁶ Ontario Bar Association, "Discovery Best Practices and General Guidelines for the Discovery Process in Ontario", 2003.

in order to narrow issues of dispute before the examinations for discovery begins so that the examination process can proceed expeditiously and efficiently.⁷

ii. Section 69 of the Competition Act

11. Section 69, and paragraph 69(2)(c) in particular, is an evidentiary provision, much like the common law business records rule and section 30 of the *Canada Evidence Act*, which facilitates the admissibility of documentary evidence upon certain statutory conditions being met.⁸ Subsection 69(2) of the Act does not preclude the trial judge to weigh the documents admitted into evidence.⁹
12. In essence, section 69 extends the “possessory principle” available against individuals to companies. For example, where documents are found in the actual or constructive possession of an accused person, the possessory principle is a common law rule that permits the trier-of-fact to presume the accused had knowledge of the document and its contents.¹⁰ Accordingly, Parliament’s objective in passing section 69 of the Act was, *inter alia*, to enable the effective enforcement of competition matters against corporations by allowing for the rules of evidence that apply to natural persons to apply equally to corporations.
13. With the advent of electronic evidence, section 69’s facilitation of the trial process is even more significant given the significant amount of electronic evidence typically listed and produced in litigation before the Tribunal, including in this proceeding.

iii. The Evolution of the Respondents’ Bases for Refusing to Admit Possession of Their Own Documents

The Question in the Requests to Admit

⁷ Section 69, *Competition Act*, R.S.C., 1985, c. C-34.

⁸ *Canada Evidence Act* (R.S.C., 1985, c. C-5).

⁹ *R v. Rolex Watch Co. of Canada Ltd* (1980), 50 C.P.R. (2d) 222, 1980 CarswellOnt 1263 at paras 8-9 (ONCA).

¹⁰ John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis, 2014), at p 1247.

14. The Commissioner served upon each Respondent the Request to Admit that contained, among other questions, the Question at issue in this motion (and the only question in the Request to Admit at issue in this motion), namely confirmation that each Respondent (or an agent of that Respondent – e.g. employees) has or had in their possession each of the documents listed in that Respondent’s own affidavit of documents.¹¹

The Respondents’ Formal Response to the Requests to Admit

15. Each Respondent served duplicative Responses to the Requests to Admit. Each Respondent refused to answer the Question outright. Each Respondent noted the following:

The Respondent...(r)efuses to admit the truth of fact numbered: 1-4 for the following reasons:

- (a) The request to admit dated October 20, 2015 does not seek admissions of the truth of facts or the authenticity of particular documents, but rather, seeks blanket legal and/or conclusory admissions in relation to all of the documents listed not only in [Respondent’s] Affidavit of Documents, but also in the Affidavit of Documents of its co-respondents, without specifying particular documents subject to the request. In light of the number of documents listed in these Affidavit of Documents, [Respondent] cannot practically answer the request to admit;
- (b) further, the request to admit seeks, in part, the admission of facts already set out in [Respondent’s] Affidavit of Documents such that it is unnecessarily duplicative; and
- (c) to the extent the request to admit seeks information that is not already contained in [Respondent’s] Affidavit of documents, the information sought is not properly the subject of a request to admit.¹²

16. Item (a) of the aforesaid response is inaccurate for three reasons. First, the Question seeks confirmation that each Respondent (or any of its agents) have or had in their possession the documents listed in that Respondent’s own affidavit of documents. This is plainly a question of fact. It is also a question of fact that has

¹¹ Exhibit “J” to the Leschinsky Affidavit.

¹² Exhibit “K” to the Leschinsky Affidavit.

been asked of (and properly answered by) Respondents before this Tribunal in the past.¹³

17. Second, the Question does not seek blanket legal and/or conclusory admissions. The Respondents seem to be saying that a request to admit cannot seek admissions of fact that involve issues of mixed fact and law, namely an admission of fact that would necessarily involve an admission of the legal effect or consequence of that fact. But it can. As Nordheimer J. notes:

On a plain reading of these rules, a Request to Admit is only available to seek an admission as to facts or an admission as to the authenticity of documents. What then happens, as is the case here, where a party wishes to obtain admissions of matters that involve mixed fact and law? Can a Request to Admit be used for that purpose? I have concluded that it can.

A strict and narrow reading of these rules would clearly lead one to the conclusion that as soon as you step outside facts or authenticity of documents, you step outside the procedure available under the rules. However, as noted above, the rules mandate that a "liberal" interpretation is to be applied to the rules and, as a consequence, it is my view that a liberal interpretation of the rules regarding requests to admit ought to allow that procedure to be used where what is sought is an admission of an issue of mixed fact and law. It seems to me that as long as one element of the admission sought is factual in nature, a liberal interpretation of the rules should permit that matter to be the subject of a request to admit. Put another way, I do not see any reason why a party who seeks to obtain an admission of fact should be precluded from so doing because the requested admission would necessarily involve an admission of the legal effect or consequence of that fact.¹⁴

[Emphasis added]

18. Accordingly, the Respondents cannot refuse to admit that it has or had possession of the documents listed in its own affidavit of documents because that admission has a legal effect under section 69 of the *Competition Act*.

¹³ *The Commissioner of Competition v. The Toronto Real Estate Board* CT-2011-003. The Commissioner's Reply Brief of Authorities encloses an extract from the transcript arising from the hearing (pgs. 101-124) where the Commissioner's Request to Admit (a request to admit akin to the Requests to Admit at issue in this motion) was addressed. A copy of the entire transcript has not been enclosed to the Commissioner's Reply Brief of Authorities. The entire transcript can be provided upon request.

¹⁴ *Foundation for Equal Families v. Canada (Attorney General)*, (1999), 36 C.P.C. (4th) 201 (Ont. Sup. Ct.), leave to appeal granted [1999] O.J. No. 3119 (Sup. Ct). appeal stayed [2000] O.J. No. 1995 (Div. Ct.) at paras. 20-21.

19. Third, the Request to Admit *does specify* the particular documents subject to the Request to Admit. The Request to Admit asks for an admission that the relevant Respondent (or any of its agents) has or had in their possession *each of the documents listed* in that Respondent's affidavit of documents. An affidavit of documents (by its very nature) *specifies* each relevant document using a *list*. The Request to Admit makes clear that it is seeking an admission regarding each document *on the list* (that is, each document on the list of documents in the relevant Respondent's schedules "A" and "B"). As further explained in the cover letter that accompanied the Requests to Admit:

As you will read, the Requests to Admit refer to each of the documents listed in the affidavits of documents sworn by Mr. William Boxberger and Mr. Ted Kushner. Accordingly, the Responses to the Requests to Admit must address each of the documents listed in the applicable affidavit of documents. In order to avoid the service of a voluminous document upon you, however, we have not listed in the enclosed Requests to Admit each document listed in the Respondents' various affidavits of documents.

As a practical matter, if a Respondent's response to a particular fact is identical, then that Respondent may provide one answer that applies to all the documents captured by that fact. For example, Aviscar Inc. is requested to admit, for the purposes of this proceeding only, the truth of the following fact:

"Aviscar Inc., or an agent of Aviscar Inc., has or had in their possession each of the documents listed in the Affidavit of Documents sworn by William Boxberger on October 9, 2015."

If Aviscar Inc.'s answer to foregoing is "yes" for all the documents listed in the Affidavit of Documents sworn by William Boxberger on October 9, 2015, then Aviscar Inc. need only indicate that the answer is "yes" with respect to each of the documents listed in the Affidavit of Documents sworn by William Boxberger on October 9, 2015. If a Respondent's response varies by document, the response to the request to admit will obviously need to identify the Respondent's answer with respect to each document. In this regard, and for the sake of efficiency, please identify each document using the Bates number associated with each document.¹⁵

20. Item (b) in the aforesaid response is partially correct. The Question does seek the admission of a fact set out in each Respondent's affidavit of documents. Each Respondent's affidavit of documents provides an oath that the relevant

¹⁵ Exhibit "J" to the Leschinsky Affidavit.

Respondent has listed in its affidavit of documents the relevant documents that are or were in that Respondent's possession, control or power.

21. However, the Question is not *unnecessary*. The Respondent's equivocation on this point demonstrates that the Question is, in fact, *necessary* to provide assurance to the Commissioner that the Respondents' affidavits of documents are complete and accurate.
22. Item (c) of the aforesaid response is also incorrect because the Question seeks information that is already contained in each Respondent's affidavit of documents.

The Respondents Raise a New Argument

23. The Respondents raised a new argument after receiving the Commissioner's Motion Record by way of a letter from their counsel, which notes in part:

For greater clarity, and as is already stated in the Affidavits of Documents served by our clients, each of our clients admits that each document listed in its own Affidavit of Documents is or was in the power, possession or control of the respondent(s) on whose behalf the Affidavit of Documents was sworn.

To the extent that the Requests to Admit seek admissions as to which documents were specifically in each party's "possession", as opposed to only within their power or control, the request is over-broad. Possession in the sense you are seeking to confirm is a legal concept - it is not a "fact" as contemplated by Rule 57. Determining possession requires a legal analysis, conducted on a document by document basis, which would be onerous and disproportionate to any benefit in light of the volume of our clients' productions. Further, in light of the electronic nature of the majority of the productions, and given that an electronic document can exist in various forms at different times in different locations (including on computer servers "in the cloud" or those owned and operated by third party e-mail and internet service providers) the inquiry required in order to admit or deny possession for over 60,000 such documents goes well beyond the scope of a reasonable request to admit. Similar difficulties arise in relation to ascertaining, for each document, the "premises" on which such an electronic document resides or has resided.¹⁶

24. The Respondents have not amended their formal Responses to the Requests to Admit to include this argument.

¹⁶ Exhibit "V" to the Affidavit of Kristine Spence, sworn November 20, 2015 ("**Spence Affidavit**") at paras. 24, 26, Responding Motion Record of the Respondents.

25. This new argument suggests that there could be documents – documents listed in a Respondent’s own affidavit of documents and documents given by that Respondent to the Commissioner – over which each Respondent (or an agent of that Respondent) has control or power but never possession, either past or current. This argument is not only practically inconceivable but contradicted by the Respondents’ own affidavit evidence filed in this motion.
26. The Respondents’ sworn evidence is that they have spent in excess of \$500,000 on the collection, review and production of documents, which included the engagement of an e-discovery supplier to process the data and documents collected and administer review tools to expedite the data collection process.¹⁷
27. The Respondents’ collection and review resulted in the production of 59,567 documents to the Commissioner, compartmentalized as follows:
- (a) 58,446 schedule “A” documents and 1,106 schedule “B” documents from Aviscar and Budgetcar;
 - (b) 117 schedule “A” documents from Avis Budget Group and no schedule “B” documents; and
 - (c) 162 schedule “A” documents and 1,556 schedule “B” documents from ABC Rental.¹⁸
28. Parties are required to keep careful records of their collection process, which encompasses a chain of custody for each document produced. For example, the Ontario Bar Association’s E-Discovery Implementation Committee’s Annotated E-Discovery Checklist directs the following under the “Collecting Relevant Records” section:
- Keep careful records of the collection process: Make sure that the parties engaged in collecting the records maintain careful records of all collection steps, and maintain chain of custody documentation.¹⁹

¹⁷ Spence Affidavit at paras. 24, 26.

¹⁸ Spence Affidavit at paras. 21, 26, 37 and 38.

29. The Respondents' sworn evidence demonstrates that they have (or their e-discovery provider has) kept these records.
30. The Respondents' sworn evidence also provides that:
- approximately 1.95 million documents were collected and processed leading to the production of 59,567 documents;
 - the 1.95 million documents were collected and processed from 13 different document "custodians" (i.e. 13 people), all of whom are current or past employees of more than one or more of the Respondents; and
 - of the 1.95 million documents collected, less than 1% were hard copy documents and the remaining 99% were electronic documents, the vast majority of which were collected from the email accounts of the 13 custodians.²⁰
31. The Respondents' sworn evidence demonstrates two key conclusions:
- (a) each Respondent can confirm with minimal time and effort that it (or any of its agents) has or had in their possession the documents listed in that Respondent's own affidavit of documents; and
 - (b) in any event, approximately 99% of the Respondents' 59,567 documents were collected from the email accounts of 13 current or past employees of the Respondents. An employee of a Respondent is plainly an agent of that Respondent. An employee's email plainly has been or is in his or her possession and, thus, in his or her employer's possession (i.e. that Respondent's possession).
32. Accordingly, the Respondents should be ordered to deliver a proper response to the Question contained in the Requests to Admit.

¹⁹ Ontario Bar Association, *Annotated E-Discovery Checklist Version 2.1*, (2010) at p. 18.

²⁰ Spence Affidavit at paras. 22-23.

C. Each Respondent Should Provide a Proper Schedule “C” to its Affidavit of Documents

33. There should be no dispute that the schedule “C” to an affidavit of documents must contain a separate list of all relevant documents that were but are no longer in the possession, power or control of the party and for which no privilege is claimed and a description of how the party lost possession, power or control of any document and its current location, as far as the party can determine.²¹
34. As noted in the Commissioner’s moving factum, at least some relevant documents listed in the affidavit of documents of Aviscar and Budgetcar were also in the possession of Avis Budget Group and ABC Rental but have not been disclosed in those latter Respondents’ affidavits of documents. These documents ought to be listed in either the latter Respondent’s schedule “A” or “C”. Currently, they are in neither.
35. In fact, because the Respondents’ Schedule “C”s contain boilerplate language (i.e. without any lists whatsoever), the Commissioner sought clarification in his Requests to Admit of what documents listed in a Respondent’s affidavit of documents were also in or formerly in the possession of other Respondents. The Respondents refused outright to answer those questions as well.²²
36. The Respondents do not dispute that there are documents (including those produced in this proceeding) that are in the possession of one or more Respondents that were but are no longer in the possession other Respondents. Nevertheless, the Respondents refuse to produce a proper Schedule “C” on the following basis:

Most of the documents that the Commissioner asserts must be itemized in Schedule “C” are documents that are already listed in Schedule “A” of one or more of the Respondents’ Affidavits of Documents and produced to the

²¹ Rule 223(2), *Federal Courts Rules*, SOR/98-106; Rule 60(2), *Competition Tribunal Rules*, SOR/2008-141.

²² Exhibit “K” to the Leschinsky Affidavit.

Commissioner by one or more of the Respondents. It would serve no practical purpose to itemize such documents in Schedule “C” of another Respondent.²³

[emphasis added]

37. The Respondents’ argument should be rejected for at least two reasons.
38. First, the Respondents’ assertion that they cannot identify the “*full range of materials which should be listed*”²⁴ in Schedule “C” of their affidavits of documents does not relieve them of their obligation to list the documents of which they *are* aware and *can* identify. The Respondents cannot pick and choose which procedural rules to comply with, especially when the required information is known and available to them. Fundamentally, all parties must comply with the rules governing this proceeding.
39. Second, and in any event, documents currently or formerly in the possession of Avis Budget Group and ABC Rental (particularly when these documents are currently in the possession of Aviscar and Budgetcar) are relevant to this proceeding. The Respondents know this. Significant portions of the Respondents’ Response in this proceeding are devoted to Avis Budget Group and ABC Rental’s alleged independence from the work of Aviscar and Budgetcar.²⁵ For example, the Respondents plead:
 - (a) “Avis and Budget are Independent of U.S. Respondents” (paragraph 25);
 - (b) “The U.S. Respondents do not work jointly with Avis and Budget to supply passenger vehicles and associated products to consumers in Canada” (paragraph 25);
 - (c) “U.S. Parent Companies do Not Operate in Canada” (paragraph 21);

²³ Response of the Respondents to the Commissioner of Competition’s Notice of Motion, Respondents’ Motion Record, para.(l).

²⁴ Respondents’ Responding Memorandum of Argument, paragraph 62.

²⁵ Exhibit “C” to the Leschinsky Affidavit, Response of the Respondents to the Amended Notice of Application, paragraphs 2, 3, 4, 21, 22, 23, 24, 25, 26 and 27.

- (d) “ABG and ABCR are incorporated and based in the U.S. and do not operate in Canada. Moreover, the U.S. Respondents do not advertise in Canada and do not direct or control the representations made by the Canadian Respondents to Canadian consumers” (paragraph 21); and
- (e) “Furthermore, the U.S. Respondents do not have control of or direction over the marketing or pricing activities of Avis and Budget, and were not directly involved in the representations that are the subject of this Application. Accordingly, there is no basis for this Application as against the U.S. Respondents” (paragraph 27).

40. Accordingly, documents (including those produced in this proceeding) that either are or were but are no longer in the possession of each of the Respondents is relevant to this proceeding. A proper Schedule “C” informs each Respondent’s role *vis-à-vis* the allegations in the Commissioner’s Amended Notice of Application and tests the Respondents’ defence to these allegations.

D. The Respondents should provide unredacted copies of relevant documents to the Commissioner

41. Through his motion, the Commissioner is asking the Respondents to disclose unredacted versions of documents that they have already produced on the basis of relevance. The Respondents have acknowledged that some of their initial redactions were inappropriate,²⁶ but seek to maintain other redactions on the basis that they would reveal “personal information” about their customers.²⁷

42. Paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (“**PIPEDA**”) permits the Respondents to disclose personal information to comply with rules relating to the production of records in legal proceedings.²⁸ The rules for this proceeding (60 and 65 of the *Competition Tribunal Rules*), require the Respondents to disclose relevant documents to the

²⁶ Spence Affidavit at paras. 47 and 64.

²⁷ Respondents’ Memorandum of Argument, para.74.

²⁸ *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5) at para. 7(3)(c).

Commissioner.²⁹ As such, the Respondents are permitted – and indeed required – to disclose relevant documents to the Commissioner, regardless of whether those documents contain personal information.

43. By virtue of the General Rule set out in *Canada (Commissioner of Competition) v. VISA Canada Corp.*, “the law is clear that even irrelevant information” found in otherwise relevant documentation “is to be disclosed unless exceptional circumstances are found”.³⁰ Even “clearly irrelevant” information may not be redacted unless the disclosure of the redacted information would cause specific embarrassment or harm.³¹ Only then is it appropriate to consider whether the withheld information also meets the test of being “clearly irrelevant”.³² A Respondent must satisfy both criteria – exceptional circumstances and clear irrelevancy –for its redactions to be upheld.³³
44. The Respondents’ redactions for personal information satisfy neither of these requirements.
45. First, the Respondents have not identified any harm that would be associated with the disclosure of personal information to the Commissioner. They have remained silent on this point because no harm will result from disclosing unredacted documents to the Commissioner.
46. In addition and recognizing that sensitive information of various sorts often needs to be disclosed as part of the discovery phase of Competition Tribunal proceedings, the *Competition Tribunal Rules* provide an appropriate framework to allow disclosures to safely occur without jeopardizing underlying confidentiality interests. Subrule 62(2) of the *Competition Tribunal Rules* deems that all parties and their counsel to undertake not to use information obtained from discovery for any purpose other than those of the proceeding in which the evidence was

²⁹ See rule 65 of the *Competition Tribunal Rules* and *BMG Canada Inc. v. Doe*, 2005 FCA 193 at paras. 25, 41 and 42 and *Voltage Pictures LLC v. Jane Doe*, 2011 FC 1024.

³⁰ *Canada (Commissioner of Competition) v. VISA Canada Corp.*, [2011] Comp. Trib.19 at para. 24.

³¹ *Ibid.* at paras. 16.

³² *Ibid.*

³³ *Ibid.* at para. 20.

obtained. Rules 65 and 66 also expressly provide that the exchange of discovery productions may take place under the further assurance of a confidentiality order, which the Tribunal has issued in this case. The Tribunal's Direction to Counsel respecting the confidentiality order issued in this proceeding contemplates that personal information may be sealed and that the Tribunal will deal with issues relating to personal information on a case-by-case basis.³⁴

47. Second and contrary to the Respondents' submissions, personal information is relevant in *Competition Act* proceedings, particularly in deceptive marketing proceedings like the present case. For example, the Respondents' productions disclose that their customers have complained to them about the representations they make to promote their products and their Non-Optional Fees. Such complaints are evidence of consumer confusion and indicia of deceptive marketing practices and may allow the Commissioner to obtain information from consumers with an interest in this proceeding who have complained to the Respondents. Addresses on or associated with representations promoting the Respondents' products (e.g., mail marketing campaigns) are relevant to whether representations originating from the Respondents' facilities in the United States are being made to consumers in Canada. Addresses are also relevant to conduct reviewable under section 74.05 as subsection 74.05(3) provides:

For the purpose of this section, the market to which an advertisement relates is the market that the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.³⁵

48. In any event, disclosure of the unredacted documents to the Commissioner is contemplated and permitted by the Respondents' Canadian privacy policies, which state:

We may be legally required to disclose your personal information to third parties. ... We may disclose your personal information to the following entities: ...

³⁴ Rules 62, 65 and 66 of the *Competition Tribunal Rules* (SOR/2008-141).

³⁵ Subsection 74.05(3) of the *Competition Act* (R.S.C., 1985, c. C-34).

To government, regulatory and law enforcement agencies where the disclosure is required or authorized by law, and otherwise as we believe is necessary or appropriate to satisfy any law, regulation or other governmental request, to operate our websites properly, or to protect or defend our rights or the rights or well-being of our employees, users or others or if you are involved (or are suspected by governmental authorities or our security functions to be involved) in any illegal activity, even without a subpoena, warrant or court order.³⁶

49. Accordingly, it is appropriate for the Tribunal to direct the Respondents to produce their non-privileged relevant documents to the Commissioner in an unredacted form.

E. Discovery Arrangements

50. The Commissioner is hopeful that issues in dispute regarding the conduct of the examinations for discovery can be resolved in advance of the hearing of the motion.

F. Other Matters

51. For the purposes of clarifying the record, the Respondents' affidavit evidence contains a series of issues or exchanges between counsel.³⁷ The Commissioner's counsel's letter to the Respondents' counsel dated November 18, 2015 was not included in the Respondents' Motion Record but is attached as schedule "1" to this Reply Memorandum of Argument to clarify the record.³⁸ The Respondents have confirmed that the omission of this letter in their Motion Record was an inadvertent oversight.

PART III – ORDER SOUGHT

52. The Commissioner requests that the Tribunal issue:

³⁶ Available online at: https://www.avis.ca/car-rental/html/global/en/terms/privacy_policyCN.html and <https://www.budget.ca/en/customer/privacy>.

³⁷ Spence Affidavit at paras. 42, 44, 52, 59-60 and 65-68.

³⁸ Schedule "1", Reply Memorandum of Argument.

- (a) an order directing each Respondent to deliver a proper response to the Question contained in the Commissioner's Requests to Admit;
- (b) in the alternative to paragraph (a), or if any Respondent denies that it has or had possession of its own documents, an order requiring that Respondent to produce further and better schedules "A" and "B" to its affidavit of documents;
- (c) in the further alternative to paragraphs (a) and (b), an order requiring the affiants for the Respondents' affidavits of documents to attend and be cross-examined with respect to each Respondent's affidavit of documents at a date and time to be determined but no later than 7 days before the commencement of the examinations for discovery;
- (d) an order directing each Respondent to produce a further and better schedule "C" to its affidavit of documents;
- (e) an order requiring that the Respondents produce their non-privileged relevant documents in an unredacted form;
- (f) an order for directions, if necessary, regarding the conduct of the examinations for discovery, including the appropriate person to be examined on behalf of each Respondent;
- (g) costs; and
- (h) such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2015.

A handwritten signature in blue ink, appearing to read "Antonio Di Domenico", is written over a horizontal line.

DEPARTMENT OF JUSTICE CANADA

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Lawyers to the Commissioner of Competition

SCHEDULE A: LIST OF AUTHORITIES

1. *BMG Canada Inc. v. Doe*, 2005 FCA 193
2. *Canada (Commissioner of Competition) v. VISA Canada Corp.*, [2011] Comp. Trib.19
3. *Glover (Litigation Guardian of) v. Gorski*, 2013 ONSC 6578
4. *Foundation for Equal Families v. Canada (Attorney General)*, (1999), 36 C.P.C. (4th) 201 (Ont. Sup. Ct.)
5. John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis, 2014)
6. Ontario Bar Association, *Discovery Best Practices and General Guidelines for the Discovery Process in Ontario*, 2003
7. Ontario Bar Association, *Annotated E-Discovery Checklist Version 2.1* (2010)
8. *R v. Rolex Watch Co. of Canada Ltd.* (1980), 50 CPR (2d) 222
9. *The Commissioner of Competition v. The Toronto Real Estate Board*, CT-2011-003 (Transcript of September 10, 2012)
10. *Voltage Pictures LLC v. Jane Doe*, 2011 FC 1024

SCHEDULE B: LEGISLATION

1. *Canada Evidence Act*, (R.S.C., 1985, c. C-5), section 30
2. *Competition Act*, R.S.C., 1985, c. C-34, section 69 and subsection 74.05(3)
3. *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), section 8 and subsection 9(2)
4. *Competition Tribunal Rules*, SOR/2008-141, rules 56, 60, 62, 65 and 66
5. *Federal Courts Rules*, SOR/98-106, rule 223
6. *Personal Information Protection and Electronic Documents Act*, (S.C. 2000, c. 5), paragraph 7(3)(c)

1. Canada Evidence Act, (R.S.C., 1985, c. C-5), section 30

Business records to be admitted in evidence

30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

Inference where information not in business record

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

Copy of records

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Where record kept in form requiring explanation

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Court may order other part of record to be produced

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Court may examine record and hear evidence

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Notice of intention to produce record or affidavit

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has,

at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

Not necessary to prove signature and official character

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Examination on record with leave of court

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

Evidence inadmissible under this section

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy;
or

(c) any transcript or recording of evidence taken in the course of another
legal proceeding.

Construction of this section

(11) The provisions of this section shall be deemed to be in addition to and not in
derogation of

(a) any other provision of this or any other Act of Parliament respecting the
admissibility in evidence of any record or the proof of any matter; or

(b) any existing rule of law under which any record is admissible in
evidence or any matter may be proved.

Definitions

(12) In this section,

“business”
« affaires »

“business” means any business, profession, trade, calling, manufacture or
undertaking of any kind carried on in Canada or elsewhere whether for profit or
otherwise, including any activity or operation carried on or performed in Canada
or elsewhere by any government, by any department, branch, board, commission
or agency of any government, by any court or other tribunal or by any other body
or authority performing a function of government;

“copy” and “photographic film”

« copie » et « pellicule photographique »

“copy”, in relation to any record, includes a print, whether enlarged or not, from a
photographic film of the record, and “photographic film” includes a photographic
plate, microphotographic film or photostatic negative;

“court”

« tribunal »

“court” means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

“legal proceeding”
« procédure judiciaire »

“legal proceeding” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

“record”
« pièce »

“record” includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

2. Competition Act, R.S.C., 1985, c. C-34, section 69 and subsection 74.05(3)

Definitions

69. (1) In this section,

“agent of a participant”

« agent d’un participant »

“agent of a participant” means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

“document”

“document”[Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 40]

“participant”

« participant »

“participant” means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

Evidence against a participant

(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a

participant shall be admitted in evidence without further proof thereof and is prima facie proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

Sale above advertised price

74.05 (1) A person engages in reviewable conduct who advertises a product for sale or rent in a market and, during the period and in the market to which the advertisement relates, supplies the product at a price that is higher than the price advertised.

Saving

(2) This section does not apply

(a) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained in it are subject to error if the person establishes that the price advertised is in error;

(b) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement;

(c) in respect of the supply of a security obtained on the open market during a period when the prospectus relating to that security is still current; or

(d) in respect of the supply of a product by or on behalf of a person who is not engaged in the business of dealing in that product.

Application

(3) For the purpose of this section, the market to which an advertisement relates is the market that the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.

3. *Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), subsection 9(2)*

Jurisdiction

8. (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the Competition Act and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

Powers

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

Power to penalize

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

Court of record

9. (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Interventions by persons affected

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the Competition Act, to make representations relevant to those proceedings in respect of any matter that affects that person.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the Competition Act, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

4. Competition Tribunal Rules, SOR/2008-141, rules 56, 60, 62, 65 and 66

Requests for admissions

56. A party may, after pleadings have been closed but not later than 25 days before the commencement of the hearing, request that another party admit a fact or the authenticity of a document by serving a request to admit, in form 255 of the Federal Courts Rules, on that party, with any modifications that the circumstances require.

Affidavit of documents

60. (1) The applicant and each respondent who has filed a response shall, within the time prescribed at a case management conference, serve an affidavit of documents on each other party.

Content

(2) An affidavit of documents shall include

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

Application of deemed undertaking

62. (1) This rule applies to evidence obtained during documentary, written and oral discovery and information obtained from that evidence.

Deemed undertaking

(2) All parties and their counsel are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

(3) Subrule (2) does not prohibit

(a) a use to which the person who disclosed the evidence consents;

(b) the use, for any purpose, of

(i) evidence that is filed with the Tribunal,

(ii) evidence that is given or referred to during a hearing; or

(iii) information obtained from evidence referred to in subparagraph (i) or (ii),

(c) the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding, or

(d) the use of evidence or information in a subsequent Tribunal proceeding.

Non-application

(4) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the Tribunal may, on motion, order that the deemed undertaking referred to in subrule (2) does not apply to the evidence or to information obtained from it, and may impose any terms and give any directions that are just.

Access to documents

65. Subject to any confidentiality order under rule 66, a party who has served an affidavit of documents on another party shall allow the other party to inspect and make copies of the documents listed in the affidavit, unless those documents are subject to a claim for privilege or are not within the party's possession, power or control.

Confidentiality order

66. (1) The Tribunal may order that a document or information in a document be treated as confidential and make any order that it deems appropriate,

- (a) upon the motion of a party who has served an affidavit of documents; or
- (b) upon the motion of a party or intervenor who has filed or will file the document.

5. Federal Courts Rules, SOR/98-106, rule 223

Time for service of affidavit of documents

223. (1) Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.

Contents

(2) An affidavit of documents shall be in Form 223 and shall contain

(a) separate lists and descriptions of all relevant documents that

(i) are in the possession, power or control of the party and for which no privilege is claimed,

(ii) are or were in the possession, power or control of the party and for which privilege is claimed,

(iii) were but are no longer in the possession, power or control of the party and for which no privilege is claimed, and

(iv) the party believes are in the possession, power or control of a person who is not a party to the action;

(b) a statement of the grounds for each claim of privilege in respect of a document;

(c) a description of how the party lost possession, power or control of any document and its current location, as far as the party can determine;

(d) the identity of each person referred to in subparagraph (a)(iv), including the person's name and address, if known;

(e) a statement that the party is not aware of any relevant document, other than those that are listed in the affidavit or are or were in the possession, power or control of another party to the action; and

(f) an indication of the time and place at which the documents referred to in subparagraph (a)(i) may be inspected.

Document within party's power or control

(3) For the purposes of subsection (2), a document shall be considered to be within a party's power or control if

- (a) the party is entitled to obtain the original document or a copy of it; and
- (b) no adverse party is so entitled.

Bundle of documents

(4) A party may treat a bundle of documents as a single document for the purposes of an affidavit of documents if

- (a) the documents are all of the same nature; and
- (b) the bundle is described in sufficient detail to enable another party to clearly ascertain its contents.

6. *Personal Information Protection and Electronic Documents Act, (S.C. 2000, c. 5)*

Collection without knowledge or consent

7. (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if

(a) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way;

(b) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province;

(b.1) it is contained in a witness statement and the collection is necessary to assess, process or settle an insurance claim;

(b.2) it was produced by the individual in the course of their employment, business or profession and the collection is consistent with the purposes for which the information was produced;

(c) the collection is solely for journalistic, artistic or literary purposes;

(d) the information is publicly available and is specified by the regulations; or

(e) the collection is made for the purpose of making a disclosure

(i) under subparagraph (3)(c.1)(i) or (d)(ii), or

(ii) that is required by law.

Use without knowledge or consent

(2) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may, without the knowledge or consent of the individual, use personal information only if

- (a) in the course of its activities, the organization becomes aware of information that it has reasonable grounds to believe could be useful in the investigation of a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, and the information is used for the purpose of investigating that contravention;
- (b) it is used for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual;
 - (b.1) the information is contained in a witness statement and the use is necessary to assess, process or settle an insurance claim;
 - (b.2) the information was produced by the individual in the course of their employment, business or profession and the use is consistent with the purposes for which the information was produced;
- (c) it is used for statistical, or scholarly study or research, purposes that cannot be achieved without using the information, the information is used in a manner that will ensure its confidentiality, it is impracticable to obtain consent and the organization informs the Commissioner of the use before the information is used;
 - (c.1) it is publicly available and is specified by the regulations; or
- (d) it was collected under paragraph (1)(a), (b) or (e).

Disclosure without knowledge or consent

- (3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is
- (a) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organization;
 - (b) for the purpose of collecting a debt owed by the individual to the organization;
 - (c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;
 - (c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law,

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province, or

(iv) the disclosure is requested for the purpose of communicating with the next of kin or authorized representative of an injured, ill or deceased individual;

(c.2) made to the government institution mentioned in section 7 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act as required by that section;

(d) made on the initiative of the organization to a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

(d.1) made to another organization and is reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation;

(d.2) made to another organization and is reasonable for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud;

(d.3) made on the initiative of the organization to a government institution, a part of a government institution or the individual's next of kin or authorized representative and

(i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,

(ii) the disclosure is made solely for purposes related to preventing or investigating the abuse, and

(iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse;

(d.4) necessary to identify the individual who is injured, ill or deceased, made to a government institution, a part of a government institution or the individual's next of kin or authorized representative and, if the individual is alive, the organization informs that individual in writing without delay of the disclosure;

(e) made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure;

(e.1) of information that is contained in a witness statement and the disclosure is necessary to assess, process or settle an insurance claim;

(e.2) of information that was produced by the individual in the course of their employment, business or profession and the disclosure is consistent with the purposes for which the information was produced;

(f) for statistical, or scholarly study or research, purposes that cannot be achieved without disclosing the information, it is impracticable to obtain consent and the organization informs the Commissioner of the disclosure before the information is disclosed;

(g) made to an institution whose functions include the conservation of records of historic or archival importance, and the disclosure is made for the purpose of such conservation;

(h) made after the earlier of

(i) one hundred years after the record containing the information was created, and

(ii) twenty years after the death of the individual whom the information is about;

(h.1) of information that is publicly available and is specified by the regulations; or

(h.2) [Repealed, 2015, c. 32, s. 6]

(i) required by law.

Use without consent

(4) Despite clause 4.5 of Schedule 1, an organization may use personal information for purposes other than those for which it was collected in any of the circumstances set out in subsection (2).

Disclosure without consent

(5) Despite clause 4.5 of Schedule 1, an organization may disclose personal information for purposes other than those for which it was collected in any of the circumstances set out in paragraphs (3)(a) to (h.1).

Schedule 1



Ministère de la Justice
Canada

Department of Justice
Canada

Cote de sécurité – Security classification

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Services juridiques

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Legal Services

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18 November 2015

VIA EMAIL

Michael Brown
Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, ON M5J 2Z4

Dear Mr Brown:

Re: *Commissioner of Competition (“Commissioner”) vs Aviscar Inc., Budgetcar Inc. / Budgetauto Inc. and Avis Budget Group, Inc. and Avis Budget Car Rental, LLC - CT-2015-001*

Thank you for your letter dated November 13, 2015 and for our discussion on November 17, 2015. We appreciate you working with us to try to narrow the issues in dispute for the motion returnable December 1-2, 2015 before Justice Barnes and, if possible, to try to resolve all matters in dispute in the motion.

For ease of reference, we deal below with each issue in turn.

The Respondents' Response to the Commissioner's Request to Admit

With respect to this issue, our respective clients do not agree. Accordingly, this issue will need to be argued before Justice Barnes during the motion unless the parties can resolve the issue in advance.

We are disappointed (and very surprised) that each Respondent refuses outright to admit for the purposes of this proceeding that it has or had possession of the documents listed in its *own* affidavit of documents and produced to the Commissioner. This ought not to be a matter in dispute. The Respondents' unnecessary equivocation on this point prevents the discovery process from proceeding expeditiously and efficiently.

Further, the relief the Commissioner is seeking is properly before Justice Barnes by way of the interlocutory motion returnable December 1-2, 2015 (see, for example, *Glover (Litigation Guardian of) v. Gorski*, 2013 ONSC 6578 and *Foundation for Equal Families v. Canada (AG)* (1999), 36 C.P.C. (4th) 201).

We urge each Respondent to reconsider its position and deliver a proper response the Commissioner's Request to Admit.

Respondents' Schedule "C"

With respect to this issue, our respective clients do not agree. Accordingly, this issue will need to be argued before Justice Barnes during the motion unless the parties can resolve the issue in advance.

Each Respondent served a Schedule "C" to its affidavit of documents. However, schedule "C" to an affidavit of documents (by its very nature) must contain a separate list of all relevant documents that were but are not longer in the possession, power or control of the party and for which no privilege is claimed, as well as a description of how the party lost possession, power or control of any documents and its current location, as far as the party can determine. Aviscar Inc., Budgetcar Inc. / Budgetauto Inc. and Avis Budget Car Rental, LLC's schedule "C" only contains the following boilerplate statement: "(c)ommunications including correspondence, e-mails, notes, reports and/or other documentation sent and received by me that were lost, destroyed and/or not archived, if any."

We urge each Respondent to reconsider its position and deliver a proper Schedule "C".

Respondents' Redactions

With respect to this issue, we are hopeful that this issue can be resolved in part or entirely in advance of the motion.

We are happy that the Respondents are now prepared to tell us the basis of all redactions made to their productions (as noted, at least 3,538 of the Respondents productions are redacted without any explanation).

Based on our call, we understand that:

- Each Respondent is now prepared to voluntarily produce unredacted versions of all non-privileged documents that were previously produced in a redacted form (not including documents redacted on the basis of "PIPEDA/related provincial privacy legislation", which is dealt with below). If this is not correct, please advise.
- We understand that these unredacted documents will be arriving on November 18, 2015. If this is incorrect, please advise.
- We understand that you will tell us (on November 18) which documents (among all of the Respondents' redacted documents) the Respondents will voluntarily produce in an unredacted form (using the Bates numbers you have assigned to each document). If this is incorrect, please advise.

You have noted that the Respondents have redacted documents "to protect information under PIPEDA and related provincial privacy legislation". As we noted during the call, we would appreciate a detailed explanation regarding the basis of these redactions having particular regard to Justice Barnes' Confidentiality Order in this proceeding and the relevant case law. Unless you can present a compelling basis for the Respondents' actions in this regard, this issue will need to be addressed by Justice Barnes at the motion.

Examinations for Discovery

The Respondents' Affiants

Based on your letter and what you told us during the call, we understand that Mr. Siniscalchi is retired. We were surprised to hear this because Avis' website describes Mr. Siniscalchi as president of Latin America/Asia Pacific, overseeing the Avis and Budget car rental businesses in the Caribbean, Central and South America, Asia, Australia and New Zealand (https://www.avis.ca/car-rental/content/display.ac?contentId=exec-bios-siniscalc-US_en-000669)

Accordingly, we would appreciate it if you would confirm whether the information in the aforesaid web link is correct and what relationship Mr. Siniscalchi has had, or currently has, with Avis Budget Car Rental, LLC and Avis Budget Group, Inc. Further, please advise who has taken over Mr. Siniscalchi's responsibilities.

You have proposed Andre Meesschaert as the affiant. We understand Mr. Meesschaert is a Senior Vice-President Operations of Avis Budget Car Rental, LLC (if not, please advise). We would appreciate it if you would tell us whether Mr. Meesschaert held a position with Avis Budget Car Rental, LLC prior to the year 2015. If so, please tell us what those position(s) were, the responsibilities associated with those position(s), and the dates in which he held them. As we mentioned during the call, we just want to ensure that Mr. Meesschaert has sufficient knowledge of the matters at issue in this proceeding on behalf of Avis Budget Car Rental, LLC.

You have proposed Bryon Koepke, an officer of Avis Budget Group, Inc., as the affiant to be examined on behalf of Avis Budget Group, Inc. We would appreciate it if you would tell us why Mr. Koepke (who we understand is the Senior Vice President, Chief Securities Counsel at Avis Budget Group, Inc.) is being put forward to be examined on behalf of Avis Budget Group, Inc. as opposed to, for example, Scott Deaver (the Executive Vice President and Chief Marketing Officer for Avis Budget Group). We just want to ensure that Mr. Koepke has sufficient knowledge of the matters at issue in this proceeding on behalf of Avis Budget Group, Inc.

Timing of the Examinations for Discovery

We are prepared to begin the examinations for discovery earlier in December 2015. As a practical matter, however, the Commissioner is awaiting further productions from the Respondents (i.e. the unredacted documents). The motion arising from affidavits of documents and/or productions and/or in respect of the scope of the examinations for discovery is returnable on December 1-2, 2015 (as you know, these motion dates were moved from November 9-10 to December 1-2 because full production of the Respondents' affidavits of documents and the productions attached thereto was delayed from September 25, 2015 to October 9, 2015). Accordingly, the examinations for discovery cannot practically begin on November 30, 2015.

Assuming the Respondents' remaining productions arrive soon, and based on the availability constraints described in your letter, we are prepared to set aside the week of December 7 as well as December 14 and 15 for the examination for discovery of Mr. Boxberger on behalf of two respondents, namely Aviscar Inc. and Budgetcar Inc. / Budgetauto Inc. We are also prepared to set aside December 16 and 17 for the examination for discovery of Mr. Meesschaert (assuming we are satisfied that Mr. Meesschaert is an adequate deponent on behalf of Avis Budget Car Rental, LLC) and December 18 for the examination for discovery of Mr. Keopke (assuming we are satisfied that Mr. Keopke is an adequate deponent on behalf of Avis Budget Group, Inc.).

We are fine with Ms. Beaulieu's examination for discovery taking place on December 22, 2015 in Gatineau. Thank you for confirming that you will request a translator.

The Commissioner's Productions

Your letter expresses concern about the quality of the Commissioner's productions. We were surprised to hear these concerns as you have not expressed concerns regarding the quality of the Commissioner's productions in the past. The only communications between counsel regarding the Commissioner's productions were exchanged by email on October 22-23, 2015, a copy of which we attach for ease of reference.

In any event, we do not agree with your characterizations of the Commissioner's productions. For example, contrary to your letter, date and family coding were provided in the Commissioner's productions. If we (including our IT Team) can be of technical assistance in this regard, please let us know.

The Motion Returnable December 1-2, 2015

Pursuant to the Justice Barnes' Scheduling Order, the December 1-2, 2015 motion dates have already been set aside to deal with disputes arising from affidavits of documents and/or productions and/or in respect of the scope of the examinations for discovery. A further case conference before Justice Barnes regarding these issues is unnecessary.

We are surprised that the Commissioner's motion (and his position described therein) is a surprise to the Respondents. While we do not think it would be helpful to debate this issue with you, the Respondents' refusal outright to properly respond to the Commissioner's Request to Admit left the Commissioner no choice but to bring the motion. Further, we have previously conveyed concern to you over the redaction of information other than on the basis of privilege.

In any event, we are prepared to work with you to try to narrow issues in dispute in the motion and, if possible, try to resolve all matters in dispute in the motion.

Yours very truly,



Antonio Di Domenico

Cc: Derek Leschinsky / Jean-Sebastien Gallant / Katherine Rydel
Department of Justice Canada, Competition Bureau Legal Services
Kevin Ackhurst/Christine Kilby, Norton Rose Fulbright

Encl.

Rydel, Katherine (IC/IC)

From: Kilby, Christine <christine.kilby@nortonrosefulbright.com>
Sent: October-26-15 10:58 AM
To: DiDomenico, Antonio (IC/IC); Leschinsky, Derek (IC/IC); Rydel, Katherine (IC/IC)
Cc: Sessler, Sam; Brown, Michael (Toronto); Ackhurst, Kevin; Spence, Kristine
Subject: RE: Validation Issues with your Production [OR-EDRMS.FID6247239]

Thanks, Tony.

Although it will be more time-consuming for us to manually process the native documents in order to retrieve their text, we can do so. If there are any further questions, I will let you know.

Christine

Christine Kilby
Associate

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christine.kilby@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

From: DiDomenico, Antonio (IC/IC) [mailto:antonio.didomenico@canada.ca]
Sent: October-23-15 3:21 PM
To: Kilby, Christine; Leschinsky, Derek (IC/IC); Rydel, Katherine (Katherine.Rydel@bc-cb.gc.ca)
Cc: Sessler, Sam; Brown, Michael (Toronto); Ackhurst, Kevin; Spence, Kristine
Subject: RE: Validation Issues with your Production [OR-EDRMS.FID6247239]

Christine:

We have looked into the issues identified in your email to us yesterday. Our comments regarding each issue are below.

OCR Files (1,073 files)

All but 10 of the 1,073 files you have identified are either Excel, AVI or MP4 files. Excel files, as native files, are already searchable and accordingly need not be OCR'd. AVI and MP4 files are videos and accordingly cannot be OCR'd.

With respect to the 10 files (9 imaged PDFs and 1 Word document), these were produced in their native format. Our IT Team has extracted the OCR text from these 10 documents, a copy of which we attach.

The 1,073 files you have identified are listed in the attached excel spreadsheet (the document types for each of the 1,073 files are also specified in the excel spreadsheet). For your reference, the excel spreadsheet includes a filter that should assist your IT Team to search for the different file types it contains.

Images (1,487 images)

The 1,487 images you have identified are not missing from the Commissioner's production. They are contained in the file system and in the load file provided (we note that these documents are mostly Excel files, video files (AVI and MP4)

and images with the file extension .PNG). Attached is a cross-referenced list of the files provided and their document ID (generated from the Missing-Images-by-ID.txt list.xlsx). This should assist your IT team in locating these images.

Extraneous Natives (306 files)

The 306 files identified in your email are individual pages contained within a document (for example, the first item in your list below, MKFF0002_00000830, is the second page of a document MKFF0002_00000829; MKFF0002_00000831 is the third page of the document MKFF0002_00000829). Metadata is attached to each document and not individual pages.

The 306 pages are listed in the load file (3107303 Disclosure Round 1.DII) and are accordingly not extraneous. For example, with respect to MKFF0002_00000829, the entry in the load file is as follows:

```
; Record 8106
@T MKFF0002_00000829
@C ENDDOC# MKFF0002_00000835
@C PGCount 7
@C DOCID MKFF0002_00000829
@D @I\Bureau_Files\MKFF\MKFF0002\
MKFF0002_00000829.png
MKFF0002_00000830.png
MKFF0002_00000831.png
MKFF0002_00000832.png
MKFF0002_00000833.png
MKFF0002_00000834.png
MKFF0002_00000835.png
```

As the above example demonstrates, all pages are defined and all files were verified to be in the file system. In any event, we attach a spreadsheet that lists the 306 pages and identifies the Document ID to which each page belongs.

We trust this email addresses your concerns. If your IT Team would like to speak with ours, please let us know and we will arrange a call.

Thanks,
Tony

Antonio Di Domenico

Conseiller juridique | Counsel

Services juridiques du Bureau de la concurrence | Competition Bureau Legal Services

Ministère de la Justice | Department of Justice Gouvernement du Canada | Government of Canada

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Email: antonio.didomenico@cb-bc.gc.ca

From: Kilby, Christine [mailto:christine.kilby@nortonrosefulbright.com]

Sent: October-22-15 11:07 AM

To: DiDomenico, Antonio (IC/IC); Leschinsky, Derek (IC/IC); Rydel, Katherine (Katherine.Rydel@bc-cb.gc.ca)

Cc: Sessler, Sam; Brown, Michael (Toronto); Ackhurst, Kevin; Spence, Kristine
Subject: Validation Issues with your Production [OR-EDRMS.FID6247239]

Dear Tony, Derek, and Katherine,

In the process of loading your productions, we have found that there are various discrepancies with the material such that we are unable to validate the production set. The specific details of the discrepancies are set out below and in the attached.

We would be grateful for your immediate attention to this issue so that we may continue to prepare for examinations for discovery and indeed, so that we may be in a position to assess whether any motions may be required in accordance with the revised schedule. We expect that to maximize efficiency, it may be necessary for you to reproduce your productions in their entirety.

We look forward to hearing from you,
Christine

Missing OCR files - 1,073 files - (list attached)

It is unclear if the missing text files which would make these documents searchable were due to the fact that no text could be extracted from these documents or if they were excluded by error.

Missing images by ID – 1,487 images - (list attached)

The attached list of documents are missing images.

Extraneous Natives - 306 files - (list attached)

There is not metadata that links these native files to any record produced. Further clarification on what these natives represent and if they should be linked back to a record or not.

Christine Kilby
Associate

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THE COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; and

IN THE MATTER OF an application for orders pursuant to section 74.1 of the Competition Act for conduct reviewable pursuant to paragraph 74.01(1)(a) and sections 74.05 and 74.011 of the Competition Act.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

AVISCAR INC., BUDGETCAR INC. / BUDGETAUTO INC., AVIS BUDGET GROUP, INC. and AVIS BUDGET CAR RENTAL, LLC

Respondents

**REPLY MEMORANDUM OF ARGUMENT OF THE
COMMISSIONER OF COMPETITION**

DEPARTMENT OF JUSTICE CANADA
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau, Quebec, K1A 0C9

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Competition**