

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 23, 2015 CT-2015-001	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 56

THE COMMISSIONER OF COMPETITION

Applicant

- and -

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

Respondents

RESPONDING MEMORANDUM OF ARGUMENT OF THE RESPONDENTS

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PART I - OVERVIEW

1 Pursuant to the direction of the Tribunal, this application, in which the Commissioner seeks from the Respondents administrative monetary penalties and compensation for consumers in excess of \$65 million in relation to alleged reviewable practices over a span of at least six years, is scheduled to proceed to trial on April 18, 2016.

2 In accordance with the Tribunal's direction, the Respondents and the Commissioner agreed to a timetable for the conduct of the application which provided for the parties to exchange documentary productions and Affidavits of Documents in under two and a half months from the close of pleadings. In that two and a half month period, the Respondents collected approximately 1.95 million documents, of which over 240,000 were individually reviewed, resulting in a total document production to the Commissioner of 59,567 documents, all listed in the respective Schedules "A" to the Respondents' Affidavits of Documents. At the same time, the Commissioner produced some 9,700 documents, of which over 7,000 were the Respondents' own documents produced by the Respondents to the Commissioner in response to an earlier order issued under Section 11 of the *Competition Act*¹ (**Act**).

3 Following the receipt of the Respondents' productions, the Commissioner served Requests to Admit on each of the Respondents requesting each to admit that all of the documents listed not only in that Respondent's Affidavit of Documents, but also in the Affidavits of Documents of the other Respondents, were in that Respondent's legal "possession" or on its "premises".

4 The clear intent of the Commissioner's Requests to Admit was to seek admissions from the Respondents in relation to each and every one of the Respondents' almost 60,000 productions in an attempt to make all of the Respondents' productions on discovery admissible

¹ RSC 1985, c C-34 [**Act**].

as evidence at trial in accordance with the Commissioner's interpretation of section 69 of the *Act*. The Respondents refused the Requests to Admit on the grounds that the admissions sought were not in relation to specific facts or the authenticity of particular documents, but rather blanket admissions that were conclusory and/or legal in nature, and that, in any event, such a Request to Admit in relation to all of the Respondents' 59,567 documents could not reasonably or practicably be responded to.

5 On this motion, the Commissioner does **not** allege that there are relevant documents of the Respondents that are missing from the parties' productions. This motion is not a motion for further documentary production. Instead, this motion relates exclusively to documents that have already been produced by one or more of the Respondents to the Commissioner or are included in the Commissioner's own productions. In particular, in addition to relief relating to issues with redacted documents that have been addressed by the Respondents since this motion was filed, the Commissioner seeks:

- (a) an Order compelling the Respondents to respond to the Commissioner's Requests to Admit with specific admissions or denials with respect to all of the Respondents' 59,567 documentary productions; and
- (b) an Order compelling certain of the Respondents to list in Schedule "C" of their Affidavits of Documents certain documents (the Commissioner has identified 240) that are already listed in Schedule "A" to the Affidavit of Documents of another Respondent or of the Commissioner.

6 The Commissioner's Requests to Admit are clearly inappropriate, overbroad and premature. They do not seek admissions of fact as the *Competition Tribunal Rules*² provide.

² *Competition Tribunal Rules*, Can Reg 2008-141.

Further, rather than narrowing the issues and enhancing litigation efficiency as the Commissioner asserts, the Commissioner seeks to use the Requests to Admit to deal with the admissibility of tens of thousands of documents, the vast majority of which will inevitably never be tendered into evidence in this proceeding. The factual inquiry and legal analysis that would be required for the Respondents to admit or deny “possession” or the location of the “premises” for each of almost 60,000 such documents would be an enormously expensive and time-consuming exercise with comparatively little practical benefit.

7 Section 69 of the *Act*, to the extent it has any application, relates to admissibility of documents at trial; it is not a discovery tool nor does it have any application to the Respondents’ documentary discovery obligations. The most expedient and efficient use of section 69 is not to seek its application on all of the Respondents’ 60,000 productions on discovery, but rather, to limit the associated factual and legal analysis to the documents that the Commissioner actually intends to tender at the hearing.

8 In any event, even if the Commissioner’s Requests to Admit appropriately related to “facts” that were reasonably capable of admission or denial, the Respondents are fully within their rights under the *Competition Tribunal Rules* to respond to the Requests to Admit with a refusal to admit. The Respondents are not required to respond to a Request to Admit with a specific admission or denial and there is no legal basis to compel them to make such an admission or denial. To the extent that the Respondents have improperly refused to admit facts that they ought to have admitted, the remedy pursuant to *Competition Tribunal Rules* is costs at the hearing, and even then, only if the facts that were refused are later proven to be true.

9 The Commissioner’s demand that one or more of the Respondents deliver a detailed Schedule “C” to their Affidavits of Documents is similarly misguided and unreasonable. Schedule “C” relates to documents that were in a party’s possession, power or control but are

no longer because they have been lost or destroyed. In the Respondents' case, electronic documents have been lost from time to time due to computer failures. The Respondents do not know specifically what documents were lost as a result of these computer failures and are therefore in no position to swear Affidavits of Documents that specifically list such documents in Schedule "C".

10 Although far from clear from the Commissioner's Notice of Motion and Memorandum of Argument, the Commissioner appears to assert that the Respondents have an obligation to identify documents that have been lost or destroyed from the productions of another party. In particular, the Commissioner demands that the Respondents list in Schedule "C" documents produced by the Commissioner, or documents produced by one Respondent which do not have corresponding productions in another Respondent's Affidavit of Documents.

11 There is simply no authority for any legal obligation on a party to analyze the productions of the other parties for documents that might have been in the party's possession, power or control at one time and then to list those documents in the party's Schedule "C". Nor is there any practical purpose for engaging in such a feckless exercise. The purpose of an Affidavit of Documents is to disclose potentially relevant documents to the other parties. In this case, the documents the Commissioner seeks to have listed in Schedule "C" are either produced in the Schedule "A" of another Respondent or in the Commissioner's own Affidavit of Documents.

12 Although the application timetable in this case provides for motions in relation to documentary productions to be brought at this time, the Commissioner's motion is entirely unnecessary and ought never to have been brought. This very complex case has involved significant effort by all parties to adhere to a relatively tight timetable and meet their respective obligations. To insist, as the Commissioner does, that the Respondents produce detailed lists of documents the Commissioner already has, or make admissions in relation to the admissibility of

tens of thousands of documents that will never be tendered into evidence, fails to take into consideration fundamental principles of proportionality in discovery and is directly contrary to the principles of efficiency and fairness that underlie this Tribunal's process.

PART II - THE FACTS

A. Procedural History

i. The Commissioner's History with the Respondents

13 The Commissioner of Competition (the **Commissioner**) made this application on March 11, 2015 (**Application**), having spent several years evaluating the Respondents' marketing practices.³ On October 19, 2012, the Commissioner launched an inquiry into the marketing practices of the Respondents under section 10 of the *Act*, which expanded on October 1, 2013 into an order under paragraph 11 of the *Act* for the production of documents and written returns by the Respondents (the **Section 11 Order**).⁴

14 In addition to the over 7,400 records supplied pursuant to the Section 11 Order,⁵ the Commissioner received documents from certain of the Respondents in 2010 as part of a supplementary information request issued under section 114(2) of the *Act* in relation to a proposed acquisition by Avis Budget Group, Inc. (**ABG**) of Dollar Thrifty Automotive Group Inc. (the **SIR Documents**).⁶

ii. The Application Schedule

15 The parties could not agree on a timetable for this Application, largely due to disagreement about the unusually short timeframe proposed by the Commissioner for the

³ Affidavit of Kristine Spence, sworn November 20, 2015 [**Spence Affidavit**] at para 6, Motion Record of the Respondents [**Responding Motion Record**], Tab 2 at pp 11-12.

⁴ Spence Affidavit at paras 2-5, Responding Motion Record, Tab 2 at p 11.

⁵ Spence Affidavit at para 5, Responding Motion Record, Tab 2 at p 11.

⁶ Spence Affidavit at paras 55-56, Responding Motion Record, Tab 2 at pp 25-26.

review and production of documents.⁷ Unlike in most other cases before the Competition Tribunal (**Tribunal**) where on average, documentary discovery concluded approximately five to six months after the close of pleadings, in this case, the Commissioner was proposing a timeframe of 24 days after the close of pleadings.⁸

16 In order to resolve the schedule, counsel for the parties attended a case conference before Chief Justice Crampton on June 16, 2015.⁹ Chief Justice Crampton conveyed the Tribunal's commitment to avoiding delays in proceedings, and directed the hearing of the Application to proceed as early as possible. The judicial member of the Tribunal presiding over the Application, Justice Barnes, was available for a multi-week hearing beginning on April 18, 2016, and the date for the hearing was set for that date.¹⁰

17 Working from the hearing date, the parties collaborated to prepare a timetable for the steps in the Application.¹¹ Although the Respondents' counsel took the view that documentary discovery for a case of this size would reasonably take four months or longer to complete, ultimately, Chief Justice Crampton's deadline for the hearing of the Application made it impossible to fit such a timeframe into the schedule.¹² The parties' collection, review, and production of documents was scheduled to be completed on September 25, 2015, less than two and a half months after the close of pleadings.¹³

18 The agreed-upon timetable was approved by Justice Barnes on July 7, 2015.¹⁴

⁷ Spence Affidavit at paras 10-12, Responding Motion Record, Tab 2 at pp 12-13.

⁸ Spence Affidavit at paras 11-12, Responding Motion Record, Tab 2 at pp 12-13.

⁹ Spence Affidavit at para 14, Responding Motion Record, Tab 2 at p 13.

¹⁰ Spence Affidavit at paras 14-15, Responding Motion Record, Tab 2 at pp 13-14.

¹¹ Spence Affidavit at para 17, Responding Motion Record, Tab 2 at p 14.

¹² Spence Affidavit at para 18, Responding Motion Record, Tab 2 at p 14.

¹³ Spence Affidavit at paras 18-19, Responding Motion Record, Tab 2 at pp 14-15.

¹⁴ Spence Affidavit at para 20, Responding Motion Record, Tab 2 at pp 15-16.

iii. Documentary Discovery

19 The Norton Rose Fulbright litigation and support teams focused immediately on preparing for the collection, review and production of documents in order to meet the milestones as provided in Justice Barnes' July 7, 2015 scheduling order.¹⁵ Approximately 1.95 million documents were collected and processed from the Respondents from 13 different document "custodians", all of whom are current or past employees of one or more of the Respondents. Of the documents collected, less than 1% were hard copy documents and the remaining 99% were electronic documents.¹⁶

20 Following an initial filtering using de-duplication, electronic search terms and other means consistent with standard e-discovery practice, approximately 255,800 of the 1.95 million documents collected and processed were individually reviewed by Norton Rose Fulbright lawyers and the lawyers provided by the Respondents' e-discovery support supplier.¹⁷

21 Due to various issues arising from the review, the Respondents sought and obtained the Commissioner's agreement to a phased production, assuring the Commissioner that 95% of the Respondents' Schedule "A" productions would still be produced on time on September 25, 2015.¹⁸ The Respondents intended at all times for the timetable as ordered by Justice Barnes to be affected as little as possible.¹⁹

22 The Respondents did produce over 95% by September 25, 2015 as promised, and delivered the remaining 5% of the production by October 9, 2015, together with their sworn Affidavits of Documents, as agreed with the Commissioner. The Affidavits of Documents

¹⁵ Spence Affidavit at para 21, Responding Motion Record, Tab 2 at p 16; Scheduling Order dated July 7, 2015, Exhibit "F" to the Spence Affidavit, Responding Motion Record, Tab 2F at p 120.

¹⁶ Spence Affidavit at paras 22-23, Responding Motion Record, Tab 2 at p 16.

¹⁷ Spence Affidavit at para 25, Responding Motion Record, Tab 2 at pp 16-17.

¹⁸ Spence Affidavit at paras 27-29, Responding Motion Record, Tab 2 at pp 17-19.

¹⁹ Spence Affidavit at para 29, Responding Motion Record, Tab 2 at pp 18-19.

complied with the *Federal Courts Rules*, and mirrored the format used by the Commissioner for the Affidavit of Documents sworn by Sophie Beaulieu.²⁰

23 In total, the Respondents produced 59,567 documents in their Schedules “A” and listed 1,547 documents in their Schedules “B”.²¹ The Commissioner produced 9,717 documents in Schedule “A”, only approximately 2,500 of which were not duplicates of the productions made by the Respondents pursuant to the Section 11 Order.²²

24 Although the parties agreed to certain technical specifications for the documentary production, only the Respondents met these standards, after investing considerable time and effort to do so.²³ The Respondents continue to spend time in order to resolve the issues with the Commissioner’s productions so that the discovery may continue as scheduled.²⁴

iv. The Commissioner’s Expansive Requests to Admit

25 The Commissioner served a request to admit on each of the Respondents on October 20, 2015 (the **Requests to Admit**). The Requests to Admit were identical in substance, requesting each of the Respondents to admit the truth of the following:

- (a) that the particular Respondent, or its agent (meaning “agent of a participant” as defined in section 69(1) of the *Act*), has or had in their “possession” each of the documents listed in the Affidavit of Documents sworn by the affiant of that particular Respondent;

²⁰ Spence Affidavit at paras 33 and 36, Responding Motion Record, Tab 2 at p 20; Affidavit of Documents of Aviscar Inc. and Budgetcar Inc./Budgetauto Inc., sworn by W. Boxberger (excluding Schedules “A” and “B”), Exhibit “I” to the Spence Affidavit, Responding Motion Record, Tab 2I at p 127; Affidavit of Documents of Avis Budget Group Inc., sworn by T. Kushner (excluding Schedule “A” and “B”), Exhibit “J” to the Spence Affidavit, Responding Motion Record, Tab 2J at p 132; Affidavit of Documents of Avis Budget Car Rental, LLC, sworn by T Kushner (excluding Schedules “A” and “B”), Exhibit “K” to the Spence Affidavit, Responding Motion Record, Tab 2K at p 137.

²¹ Spence Affidavit at para 43, Responding Motion Record, Tab 2 at p 22.

²² Spence Affidavit at paras 33-34, Responding Motion Record, Tab 2 at p 20.

²³ Spence Affidavit at paras 40, 42, Responding Motion Record, Tab 2 at p 21.

²⁴ Spence Affidavit at para 42, Responding Motion Record, Tab 2 at p 22.

- (b) each of the documents listed in that particular Respondent's Affidavit of Documents are or have been "on premises" used or occupied by that particular Respondent;
- (c) that particular Respondent or its agent (meaning "agent of a participant" as defined in section 69(1) of the Act), has or had in their "possession" each of the documents listed in the other Respondents' Affidavits of Documents; and
- (d) each of the documents listed in the other Respondents' Affidavits of Documents are or have been "on premises" used or occupied by that particular Respondent.²⁵

26 The Respondents delivered their responses to the Requests to Admit on November 6, 2015, refusing to admit the information requested (**Responses**).²⁶ The reasons given for the refusal, as permitted by *Competition Tribunal Rule 57(2)*, included:

- (a) the Requests to Admit do not seek admissions of the truth of facts or the authenticity of particular documents, but rather ask the Respondents to agree with blanket statements that are conclusory and/or legal in nature; and
- (b) the admissions are sought in relation to all of the Respondents' 59,567 productions, and cannot practicably be responded to, let alone within 20 days.²⁷

²⁵ Spence Affidavit at para 57, Responding Motion Record, Tab 2 at p 26; The Commissioner's Requests to Admit, served on the Respondents on October 20, 2015, Exhibit T to the Spence Affidavit, Responding Motion Record, Tab 2T at pp 169-180.

²⁶ Spence Affidavit at para 58, Responding Motion Record, Tab 2 at p 26; Respondents' Responses to the Request to Admit, Exhibit U to the Spence Affidavit, Responding Motion Record, Tab 2U at pp 181-192.

²⁷ Spence Affidavit at para 26, Responding Motion Record, Tab 2 at p 17; Respondents' Responses to the Request to Admit, Exhibit U to the Spence Affidavit, Responding Motion Record, Tab 2U at pp 181-192.

v. The Respondents' Schedules "C"

27 The Respondents have previously experienced computer failures resulting in the loss of email and other electronic documents. One such event of which the Respondents are aware is a computer failure at Avis Budget Car Rental, LLC (**ABCR**) in or about 2013 that resulted in the loss of much of the past email correspondence of Patric Sinsicalchi, who was one of the ABCR custodians from whom documents were collected as part of the Respondents' production efforts.²⁸

28 Aviscar Inc. and Budgetcar Inc./Budgetauto Inc. (collectively, the **Canadian Respondents**) and ABCR do not have records of the specific emails and electronic documents that were lost as a result of these computer failures.

29 Moreover, because the proposed acquisition by ABG of Dollar Thrifty Automotive Group Inc. did not proceed, neither ABG nor its counsel at the time retained the SIR Documents.²⁹

30 Each having no record of the specific emails and electronic documents that were lost, the Canadian Respondents and ABCR were not in a position to give details of any such lost documents in Schedules "C" of their Affidavits of Documents. However, given the possibility that some of the email and other electronic documents that were lost may have been relevant documents that would otherwise have been included in Schedule "A" of the Respondents' Affidavits of Documents, the Canadian Respondents and ABCR provided the following description of such documents in Schedule "C" to their respective Affidavits of Documents:

"Communications including correspondence, e-mails, notes, reports and/or other documentation sent and received by me [sic] that were lost, destroyed and/or not archived, if any."³⁰

²⁸ Spence Affidavit at para 54, Responding Motion Record, Tab 2 at p 24.

²⁹ Spence Affidavit at paras 55-56, Responding Motion Record, Tab 2 at pp 25-26.

vi. Redactions

31 The Respondents applied redactions to approximately 3,487 of their Schedule “A” productions as follows:³¹

- (a) approximately 3,027 documents were redacted for personal information of the Canadian Respondents’ consumers residing in various provinces across Canada. The types of personal information that were redacted include consumer names, addresses, telephone numbers, mail addresses, and other contact information;³²
- (b) approximately 339 documents were redacted for privilege;³³ and
- (c) approximately 130 documents were redacted for trade secrets, which redactions were removed and the unredacted versions of those documents were supplied to the Commissioner.³⁴

32 Throughout the document review process, each of the documents that was redacted was coded by members of the review team to indicate the reason for the redaction. It was always the Respondents’ intention to provide that coding to the Commissioner with their productions.³⁵

33 Unfortunately, through inadvertence, the coding indicating the reason for the redactions was not included with the Respondents’ productions. The Respondents first learned of this

³⁰ Spence Affidavit at para 54; Affidavit of Documents of Aviscar Inc. and Budgetcar Inc./Budgetauto Inc., sworn by W. Boxberger (excluding Schedules “A” and “B”), Exhibit “I” to the Spence Affidavit, Responding Motion Record, Tab 2I at p 130; Affidavit of Documents of Avis Budget Car Rental, LLC, sworn by T. Kushner (excluding Schedules “A” and “B”), Exhibit “K” to the Spence Affidavit, Responding Motion Record, Tab 2K at p 140.

³¹ Spence Affidavit at para 62, Responding Motion Record, Tab 2 at pp 28-29. This number does not double-count those documents that were redacted for more than one purpose as listed below.

³² Spence Affidavit at para 49, Responding Motion Record, Tab 2 at pp 23-24.

³³ Spence Affidavit at para 50, Responding Motion Record, Tab 2 at p 24.

³⁴ Spence Affidavit at para 64, Responding Motion Record, Tab 2 at p 29.

³⁵ Spence Affidavit at para 51, Responding Motion Record, Tab 2 at p 24.

oversight from the Commissioner's motion record on November 12, 2015.³⁶ Upon becoming aware of the oversight, the Respondents provided the Commissioner with a detailed index setting out the identity of, and the reasons for redacting, each redacted document in their productions.³⁷

vii. No Concern Raised by the Commissioner Prior to this Motion

34 Prior to serving this motion, the Commissioner did not raise any of the issues specified in the Commissioner's Memorandum of Argument with counsel to the Respondents.³⁸ Between September 25, 2015 and the service of the Commissioner's motion on November 12, 2015, the Commissioner's counsel did not send any communication to counsel for the Respondents to indicate that there were issues regarding the form of the Respondents' Affidavits of Documents, or the scope of the Respondents' productions.³⁹

35 The day after receiving the Commissioner's motion materials, counsel to the Respondents responded to the concerns raised therein in a three-page letter stating, in part, that:

- (a) each of the Respondents admits that each document listed in its own Affidavit of Documents is or was in the power, possession or control of the Respondent on whose behalf the Affidavit of Documents was sworn;
- (b) the Affidavits of Documents served on the Commissioner comply with the form prescribed by the Federal Court and mirror the format used by the Commissioner;

³⁶ Spence Affidavit at para 52, Responding Motion Record, Tab 2 at p 24.

³⁷ Spence Affidavit at para 63, Responding Motion Record, Tab 2 at p 29.

³⁸ Spence Affidavit at para 59, Responding Motion Record, Tab 2 at p 27.

³⁹ Spence Affidavit at para 44, Responding Motion Record, Tab 2 at p 22.

- (c) the Respondents always intended to provide the Commissioner with reasons for each redaction and only inadvertently neglected to provide such information, which would be rectified; and
- (d) the Respondents had incurred significant additional time delay and expense because the Commissioner's productions were not delivered in conformance with the standards applied to the Respondents' productions.⁴⁰

PART III - ISSUES

- 36 Are the Commissioner's Requests to Admit appropriate?
- 37 Is the Commissioner entitled to different Responses to the Requests to Admit?
- 38 Has the Commissioner demonstrated the need for a further and better Affidavit of Documents from any of the Respondents?
- 39 Is there a basis for the Tribunal to order the disclosure of personal information belonging to the Respondents' customers?

PART IV - SUBMISSIONS

A. The Requests to Admit are Inappropriate

40 The Requests to Admit themselves are unclear, unnecessary, and premature. The admissions sought are neither admissions of fact nor admissions of the authenticity of documents, which is the purpose of a request to admit as provided in the *Competition Tribunal Rules*. Rather, it appears that the Commissioner is seeking the Respondents' confirmation that

⁴⁰ Spence Affidavit at para 60, Responding Motion Record, Tab 2 at pp 27-28; Letter dated November 13, 2015, Exhibit V to the Spence Affidavit, Responding Motion Record, Tab 2V at p 193.

each Respondent has or had possession, as distinguished from power or control, of its own documents, as well as those listed in the other Respondents' Affidavits of Documents.

41 The Commissioner is not entitled to this level of delineation, either in an Affidavit of Documents or as a response to a Request to Admit, particularly in light of the tens of thousands of documents listed in the Respondents' Affidavits of Documents. The Respondents have provided and affirmed their Affidavits of Documents in which they swear that the documents listed in Schedule "A" are in their "possession, power or control", as required by *Federal Courts Rule 223(2)* and the *Competition Tribunal Rule 60(2)*. The Respondents later re-affirmed this position in a letter from counsel dated November 13, 2015:

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.⁴¹

42 Notwithstanding this clear statement, the Commissioner asserts that the Respondents are equivocal about the contents of their Affidavits. This is a disingenuous attempt to characterize the present dispute as being amenable to judicial intervention when it clearly is not. There is no requirement under the *Competition Tribunal Rules* for a party to specify for each document listed in its Affidavit of Documents whether it was in the "possession" of the party as opposed to being in the party's power and/or control. Similarly, there is no requirement for an Affidavit of Documents to set out which documents are located on the party's "premises".

43 A Request to Admit may not be used to obtain information that is not a fact or the authenticity of a document. In *1679752 Ontario Ltd v Muskoka Lakes (Township)*,⁴² a Request to Admit sought confirmation that a party did not have certain types of documents in its power, possession, or control. The Court rejected this purpose as inappropriate for a Request to Admit:

⁴¹ Exhibit V to the Spence Affidavit, Responding Motion Record, Tab 2V at p 193.

⁴² 2011 ONSC 1997 [*Muskoka*].

... this approach is not in keeping with the anticipated use of the rule. A request to admit the existence and a party's possession of a particular type of document is not a request to admit "the truth of a fact or the authenticity of a document" for purposes of the proceeding. As no particular document is specified in the request, this is not a matter of admitting authenticity so as to ease the use of the document in trial. The only "truth of a fact" that is conceivably being admitted is the truth of the existence or nonexistence of a document relating to the specified claim. However this is not the type of fact the request to admit procedure is meant to elicit.⁴³

44 Furthermore, the Affidavits of Documents confirm that the Respondents have possession, power or control of their own documents and there is no need to re-affirm these sworn statements if in fact the Commissioner is seeking to confirm the same information as has already been provided. If, however, the Commissioner seeks affirmation of something different from what is contained in the Affidavits, then it is not true that the Respondents are trying to deny their sworn statements or "have it both ways". They are simply refusing to admit what are in substance legal conclusions in respect of almost 60,000 documents, and not facts in relation to specific identified documents.

i. Inappropriate and Inefficient Use of Section 69

45 Although not entirely clear from the Requests to Admit on their face, it appears to the Respondents that the Requests to Admit were prepared in order to provide the foundation for the Commissioner to rely upon the expansive – and substantive – presumptions set out by section 69 of the *Act*. In particular, the Respondents are concerned that the Requests to Admit will be used specifically for the purposes of applying section 69(2)(c):

(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,

⁴³ *Muskoka*, at para 34.

(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. [emphasis added]

46 Section 69 of the *Act* does not apply to the discovery process. Rather, this section relates to the admission of documents into evidence at the hearing. This is clear from the *Competition Tribunal Rule 72*, which provides that the Commissioner shall provide a list of documents to be admitted in evidence without further proof in accordance with section 69 of the *Act* at least 45 days before the hearing.

47 In effect, the Commissioner is attempting through the Requests to Admit to obtain admissions from the Respondents to allow for the admission of all of the Respondents' 59,567 productions into evidence at the hearing without further proof or regard to their contents or value to the Commissioner's case. In this respect, the Commissioner's intended use of the Requests to Admit and section 69 is improper, disproportionate, and unnecessary.

48 The Commissioner asserts that he served the Requests to Admit in order to "narrow the issues in the dispute" so that the discovery process can "proceed more expeditiously and efficiently". In fact, the Commissioner's Requests to Admit have exactly the opposite effect. Far from narrowing the issues, the Commissioner seeks to deal with the admissibility of tens of thousands of documents, the vast majority of which will inevitably never be tendered into evidence in this proceeding.

49 Further, although the Requests to Admit likely took little effort on the Commissioner's part, fully answering them as the Commissioner demands would put an enormous burden on

the Respondents. In light of the electronic nature of the vast majority of the Respondents' 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 providers⁴⁴), the factual inquiry and legal analysis required in order to admit or deny "possession" or the location of the "premises" for each of almost 60,000 such documents would take several weeks, if not months, to complete, at significant expense.

50 As section 69 of the *Act* applies to admissibility of documents at trial, the most expedient and efficient use of section 69 is not to seek its application to all of the Respondents' productions on discovery, but rather, to limit the associated factual and legal analysis to the documents that the Commissioner actually intends to tender at the hearing.⁴⁵

51 The Commissioner will have every opportunity to make any factual and legal inquiries that the Commissioner believes might be required to take advantage of section 69, including through examinations for discovery, a motion on undertakings and refusals, further (and more focussed) Requests to Admit, and agreements in accordance with the applicable evidentiary and procedural rules prior to the hearing.

B. No Basis to Force Admissions

i. The Relief Sought is Unwarranted

52 The relief sought in this motion is beyond the statutory jurisdiction of the Tribunal. The Commissioner seeks to force the Respondents to revise their response to the Requests to Admit. There is no basis for the Tribunal to grant such relief. The *Competition Tribunal Rules*

⁴⁴ Letter dated November 13, 2015, Exhibit V to the Spence Affidavit, Responding Motion Record, Tab 2V at p 193.

⁴⁵ Indeed, Rule 72 provides the mechanism for achieving that precise purpose.

clearly allow a respondent to refuse “to admit the truth of a fact or the authenticity of a document” as long as a reason is given for that refusal.⁴⁶

53 There is a robust framework already provided for requests to admit. Rules 57 and 58 of the *Competition Tribunal Rules* create:

- (a) a deemed admission if a response to the request to admit is not served within 20 days denying the request (Rule 57(1));
- (b) a deemed admission unless a party’s response specifically denies, or refuses to admit, with reasons, the truth of a fact or the authenticity of a document (Rule 57(2)); and
- (c) the potential for an adverse costs finding after a party denies or refuses to admit the truth of a fact or the authenticity of a document, but only if a requested fact or the authenticity of a document is proved at the hearing (Rule 58).

54 The Respondents’ answers to the Requests to Admit do not engage the cases cited by the Commissioner. For example, unlike in *Glover (Litigation Guardian of) v Gorski*,⁴⁷ the Requests to Admit in this case did not seek confirmation of facts that were easily answered based on the Respondents’ knowledge. Rather, the Commissioner asked for blanket confirmation of the possession and physical location of nearly 60,000 documents across two countries and four corporate entities. The refusal to admit this “fact” was not a baseless denial as in the *Glover* case, where the plaintiff in a personal injury case refused to admit a relatively uncontroverted fact that she crossed the road.

⁴⁶ *Competition Tribunal Rules*, Can Reg 2008-141 s 57(2).

⁴⁷ 2013 ONSC 6578 [*Glover*].

55 There is no basis upon which to compel a different response to the Requests to Admit in this case. Indeed, this type of relief was expressly rejected in *Atlantic Prudence Fund Corp v Canada (Minister of Citizenship & Immigration)*,⁴⁸ where the applicants moved for an order that the respondent be compelled to admit or deny based on a document. In respect to Requests to Admit relating to previously disclosed documents, the Court held:

While I do not exclude the possibility that there may come a case where the Court will be persuaded that the ends of justice require that a party to an application be made to admit or deny some document which could not otherwise be put to the opponent's deponent on cross-examination, and that the power to make such an order exists either as an adjunct to the Court's inherent right to control its process...I do not think that this is such a case. Manifestly, the applicants have a copy of the document on which they seek the respondent's admission in their possession. They have apparently obtained it on an Access to Information request so the proof of its provenance should not present them with any difficulty. And...no reason has been suggested why respondent's deponent could not be cross-examined on it so as to obtain the necessary admission.⁴⁹

56 Even if the Tribunal has the jurisdiction to review the responses to the Requests to Admit, it cannot direct the Respondents to admit the facts at issue. The Respondents' answers are not a matter for substantive review at this stage of the proceeding. Rather, if the facts (to the extent they are discernible as such) that the Respondents have refused to admit are later proven to be incorrect, the Respondents face potential costs consequences.

C. No Basis for Further and Better Affidavits of Documents

57 In essence, the Commissioner is seeking further and better Affidavits of Documents from the Respondents, chiefly on the basis that approximately 240 documents, representing 0.4% of the total productions, all of which are already in the productions and have been listed in at least one of the Affidavits of Documents, do not appear in one of the Respondents' Affidavits of Documents.

⁴⁸ [2000] FCJ No 1156 [*Atlantic Prudence*].

⁴⁹ *Atlantic Prudence*, at para 9.

58 The Commissioner has not demonstrated entitlement to further and better Affidavits of Documents from the Respondents. The standard for such relief is high:

The parties are *ad idem* as to the law applicable to motions for further and better affidavits of documents, and it need not be set out at length here. Essentially, it is accepted that the moving party on such a motion has the burden of showing that the affidavit of documents, as delivered, is inadequate or deficient. That is, the moving party must show that further documents likely exist, that these documents would either advance its own case or hurt its opponent's and that the opposing party either has them in its power, possession or control (see Rule 223(2)(a)(i) and (ii)), or is aware that they are in some other third party's power, possession or control (see Rule 223(2)(a)(iv)).⁵⁰

59 The Commissioner has not met the standard for a further and better Affidavit of Documents. The Commissioner is not seeking further documentary production in this case. There is no allegation that there are further relevant documents in existence that the Commissioner does not already have.

60 The Commissioner's only complaint is that certain documents ought to have been listed in multiple Affidavits of Documents. In particular, the Commissioner points to certain documents in the Affidavit of Documents of the Canadian Respondents or in the Commissioner's own Affidavit of Documents and asserts that those documents ought to have also been listed in the Affidavit of Documents of ABCR.⁵¹ There is no legal basis to support an obligation on the Respondents to identify documents that have been lost or destroyed from the productions of another party, even if that party is a related entity.

i. Insufficient Basis to Revise Schedule "C"

61 The Respondents should not be ordered to revise Schedule "C" of their Affidavits of Documents. Preparing a Schedule "C" in the format sought by the Commissioner will not

⁵⁰ *Apotex Inc. v Sanofi-Aventis Canada Inc.*, 2010 FC 77 at para 11 [**Apotex**].

⁵¹ Affidavit of Derek Leschinsky, affirmed November 12, 2015 [**Leschinsky Affidavit**] at paras 9-10, Motion Record of the Commissioner [**Motion Record**], Tab 2 at p 12.

achieve greater disclosure, as is the Commissioner's stated goal, because it will not be complete.

62 Contrary to the Commissioner's characterization of "boilerplate" language being used in certain of the Respondents' Schedules "C", the language selected by the Respondents was chosen because it reflects the fact that:

- (a) there have been previous computer failures resulting in a loss of emails and electronic documents which may have been relevant to this proceeding; and
- (b) the Respondents are unable to trace precisely what was lost as a result of these failures.⁵²

For the Commissioner to complain that this language is inadequate because it is not an itemized list of documents precisely misses the point that the Respondents cannot identify the full range of materials which should be listed.

63 The Commissioner demands that the Respondents list in Schedule "C" documents produced by the Commissioner, or documents produced by one Respondent which do not have corresponding productions in another Respondent's Affidavit of Documents. The Commissioner cites as examples emails between employees that are listed in one Respondent's Schedule "A" but not in the Schedule "A" of other Respondents.

64 There is no practical purpose to itemizing the documents that the Commissioner has identified as being missing. These documents are either produced in the Schedule "A" of another Respondent or are already known to the Commissioner. Therefore, the ultimate goal of

⁵² Spence Affidavit at paras 53-54, Responding Motion Record, Tab 2 at pp 24-25.

disclosing information that the other party does not have is not served by this aspect of the Commissioner's motion.

65 To the extent that there are other documents which have been lost that the Commissioner cannot identify, the Respondents are in no better position than the Commissioner to discern the precise scope and identity of such material. Moreover, the Affidavits of Documents sworn in this proceeding state that the affiant is "not aware of any other relevant documents that are or were in the corporation's possession, power or control other than those listed or described in this affidavit."⁵³ If Schedule "C" contained a list of documents that was known to be incomplete, then this statement would be false.

66 Schedule "C" is meant to identify documents that the party has independent knowledge are in fact no longer in the parties' possession, power or control. An affiant swears to what s/he knows has been lost,⁵⁴ rather than to what the affiant conjectures has been lost by cross-referencing to the other parties' Affidavits of Documents. This confounds the purpose of an Affidavit of Documents, of a Schedule "C" list, and is ultimately a futile exercise in form over substance.

67 The Commissioner's authorities do not support granting the relief sought in these circumstances. The context for the Tribunal's decision in *Commissioner of Competition v Tele-Direct (Publications) Inc.*⁵⁵ was a dispute about the listing of documents over which privilege was claimed, rather than a case involving Schedule "C". This distinction is meaningful, as the documents for which privilege was claimed were presumably extant and identifiable. In contrast, the list in Schedule "C" is meant to identify those documents, or bundles of documents, that the affiant is aware are no longer in the possession, power or control of the party on whose behalf

⁵³ Affidavit of Documents of Aviscar Inc. and Bugetcar Inc./Budgetauto Inc., sworn by W. Boxberger (excluding Schedules "A" and "B") at para 6, Exhibit "I" to the Spence Affidavit, Responding Motion Record, Tab 2I at p 128.

⁵⁴ See, e.g., *Reis v CIBC Mortgages Inc.*, 2011 ONSC 2309 at paras 28-29.

⁵⁵ [1995] CCTD No 9 [*Tele-Direct*].

the Affidavit of Documents is sworn. The party cannot list documents the existence of which is unknown. In this case, the Respondents listed a bundle, or category, of documents falling into this group.

68 Similarly, *Apotex* does not assist the Commissioner. In that case, the issue was the implication of alleged deficiencies in the parties' Affidavit of Documents, rather than the Schedule "C" language used. What is applicable, however, is the statement in that case, relied on by the Commissioner, that "an affidavit of documents is a very solemn document. It is an affidavit and, unless and until the contrary is shown, it is to be taken as setting out what it alleges accurately and fairly...".⁵⁶ The purpose of Schedule "C", in the context of a sworn affidavit, is to represent the knowledge of the party. A party cannot swear to knowledge it does not possess, nor is it appropriate to do so.

69 Finally, the Commissioner indicates that the Schedule "C" language in ABCR's Affidavit of Documents is deficient because it refers to the affiant personally rather than the company. This is a typographical error which can be corrected, and which could have been clarified with the Commissioner had he raised the issue prior to bringing this motion.

D. Redaction of Personal Information is Justified in the Circumstances

i. Legal Requirement not to Disclose Personal Information

70 The Commissioner cites *Commissioner of Competition v Visa Canada Corp.*⁵⁷ to argue that there is a "General Rule" that non-privileged irrelevant information may not be redacted absent exceptional circumstances. In this case, however, the redactions complained of have not been applied on the basis of the irrelevance of the underlying information, but rather, on the basis of the Respondents' legal obligations.

⁵⁶ *Apotex*, at para 14, citing *Poitras v Sawridge Band*, 2001 FCT 456 at para 4.

⁵⁷ 2011 Comp Trib 19 [*Visa*].

71 The *Personal Information Protection and Electronic Documents Act (PIPEDA)*⁵⁸ prohibits the Respondents from disclosing their customers' personal information without their knowledge or consent,⁵⁹ with limited exceptions. Under section 7(3)(c) of *PIPEDA*, the Respondents may disclose their customers' personal information without their knowledge or consent if the disclosure is required to comply with rules of court relating to the production of records.⁶⁰

72 *Competition Tribunal Rules* 60 and 65 do not found an exemption from the Respondents' obligation to protect customer personal information. These rules require the Respondents to list and produce "documents that are relevant to any matter in issue" in the application. Customers' personal information is not relevant to any matter at issue in this application. Accordingly, the exemption to the prohibition on disclosure of personal information without the knowledge or consent of the individual set out in section 7(3)(c) of *PIPEDA* does not apply and the Respondents are prohibited from disclosing that information to the Commissioner. As a result, the Respondents have redacted customer personal information in approximately 3,027 of their productions, solely to comply with privacy legislation and for no other purpose.

73 The *Visa* case relied on by the Commissioner is not applicable to these circumstances. In any case, and contrary to the Commissioner's position, there is support in *Visa* for the redactions applied in this situation:

When it comes to redacting portions of text within a disclosed part or section of a document, redactions may also be permissible but the following considerations should apply: The redacted portion should be clearly irrelevant to the issues in dispute and would clearly not assist in properly understanding those parts of the documents which are relevant. Redactions should also only be resorted to where important confidentiality concerns exist.

⁵⁸ (SC 2000, c 5) [*PIPEDA*].

⁵⁹ *PIPEDA*, Schedule 1, clause 4.3.

⁶⁰ *PIPEDA*, s 7(3)(c).

In my view, this passage is describing a special circumstance and I agree that if a compelling confidentiality issue exists, irrelevance must be considered and found before a redaction will be permitted....⁶¹

74 Regardless of the interaction of the Tribunal discovery rules with the exceptions in *PIPEDA*, *Visa* allows the type of redactions that are at issue on this motion. There is a compelling confidentiality issue in this case, in light of the Respondents' obligations not to disclose customer personal information. The redacted information in the documents identified by the Commissioner is irrelevant in the context of the documents and its redaction does not interfere with the proper understanding of the unredacted portions of those documents.

75 Although the Respondents submit that their documentary production obligations do not provide an exemption from *PIPEDA* in this case, section 7(3)(c) of *PIPEDA* further provides for an exemption to the prohibition on disclosure of personal information where such disclosure is required to comply with an order made by a court, person or body with jurisdiction to compel the production of information. The Respondents have redacted the personal information solely to comply with their legal obligations. To the extent that the Commissioner seeks an Order of the Tribunal requiring the Respondents to disclose customer personal information by producing unredacted versions of their productions containing such personal information, the Respondents will not oppose.

ii. Additional Redaction Issues Resolved

76 In addition to the redactions applied to customer information, the Respondents redacted approximately 339 of their Schedule "A" productions for privilege. These redactions are identified in the index supplied to the Commissioner.

⁶¹ *Visa*, at paras 18-19, citing *Eli Lilly Canada Inc. v Sandoz Canada Inc.*, 2009 FC 345 at para 14.

E. This Motion Disregards Proportionality in Discovery

77 This motion ignores the principle of proportionality relating to discovery, which has been recognized by the Competition Tribunal in *Commissioner of Competition v Reliance Comfort Limited Partnership*.⁶²

...Certain Federal Court decisions have held that when examining the propriety of any question on discovery or a request for a production of a document, the Court must weigh, in particular, the probability of its usefulness with the time, trouble, expense and difficulty involved in obtaining it [citations omitted]. **This means that "[w]here on the one hand both the probative value and the usefulness of the answer to the examining party would appear to be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer"...**[emphasis added]⁶³

78 The relief sought on this motion is largely concerned with form over substance, and the enforcement of procedural rules in isolation from the broader context. This case has involved significant effort by all parties to adhere to the application timetable and meet their respective obligations. To insist, as the Commissioner does, that the Respondents produce detailed lists of documents the Commissioner already has, or to admit something that is not presented as either a fact or a matter of authenticity, fails to take into consideration the principles of proportionality and the circumstances of this case.

79 Any benefit which the Commissioner seeks by way of the Requests to Admit and the motion to compel responses to them is disproportionate to the corresponding burden placed on the Respondents. Irrespective of whether the Commissioner intends to rely on them for the hearing of this application, the Commissioner is attempting to obtain blanket admissions with respect to every one of the Respondents' 59,567 productions. As discussed above, this step is

⁶² 2014 Comp Trib 9 at paras 24-25 [*Reliance*].

⁶³ *Reliance*, at para 24.

not necessary or practical at this stage of the application, and it completely ignores the principles of proportionality in discovery recognized in the case law.

80 Moreover, the admission into evidence of every document listed in an Affidavit of Documents is inconsistent with *Federal Courts Rule 231*:

231. The disclosure of a document or its production for inspection does not constitute an admission of its authenticity or admissibility in the action.

81 Indeed, even the manner in which the Commissioner has brought the present motion is the least effective, most costly, and least transparent way of addressing his concerns regarding the Respondents' productions.

82 The Commissioner did not raise any of the concerns articulated in this motion with the Respondents prior to serving his motion record, at the last possible opportunity provided in the timetable for this application. The Commissioner chose not to contact counsel for the Respondents directly in an attempt to raise his concerns for possible resolution.

83 The Respondents have unsuccessfully attempted to resolve, or narrow, the issues in this motion. Contrary to the Commissioner's assertion that the Respondents "refuse to advise of the basis of their redactions",⁶⁴ on the day after receiving the Commissioner's motion materials, the Respondents offered to correct an oversight by removing trade secret redactions and delivering an index setting out the basis for redactions applied to their productions. Indeed, the Commissioner need only have asked for this to be done.

i. Discovery Arrangements

84 As set out in the Affidavit of Kristine Spence, the Respondents have put forward suitable representatives for examination by the Commissioner who will inform themselves as required.

⁶⁴ Heading "C" of the Memorandum of Argument of the Commissioner of Competition, p 11.

85 In order to expedite matters, and to achieve efficiency in the conduct of the examinations, the Respondents request that the Tribunal provide some advanced guidance in relation to the conduct of examinations for discovery in this case.

PART V - ORDER SOUGHT

86 The Respondents seek an Order:

- (a) Dismissing the Commissioner's motion;
- (b) Striking out the Requests to Admit;
- (c) In the alternative to (b), striking out those portions of the Requests to Admit whereby admissions are sought from the Respondents in relation to one another's productions;
- (d) Awarding the Respondents their costs of this motion;
- (e) Directions from the Tribunal, if necessary, regarding the conduct of the examinations for discovery; and
- (f) Such further and other relief as the Respondents may request and this Tribunal will allow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of November, 2015.


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SCHEDULE A: LIST OF AUTHORITIES

- 1 *Apotex Inc. v Sanofi-Aventis Canada Inc.*, 2010 FC 77.
- 2 *Atlantic Prudence Fund Corp. v Canada (Minister of Citizenship & Immigration)*, [2000] FCJ No 1156.
- 3 *Commissioner of Competition v Visa Canada Corp.*, 2011 Comp Trib 19.
- 4 *Commissioner of Competition v Reliance Comfort Limited Partnership*, 2014 Comp Trib 9.
- 5 *Muskoka Lakes (Township) v 1679753 Ontario Ltd.*, 2011 ONSC 1997.
- 6 *Postras v Sawridge Band*, 2001 FCT 456.
- 7 *Reis v CIBC Mortgages Inc.*, 2011 ONSC 2309.

SCHEDULE B: LEGISLATION

Competition Act, RSC, 1985, c C-34

10. (1) The Commissioner shall

(a) on application made under section 9,

(b) whenever the Commissioner has reason to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII,

(ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, or

(c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

(2) The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.

(3) All inquiries under this section shall be conducted in private.

11. (1) If, on the ex parte application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

(2) Where the person against whom an order is sought under paragraph (1)(b) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is

satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the Criminal Code.

(4) An order made under this section has effect anywhere in Canada.

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;

(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.

114. (2) The Commissioner or a person authorized by the Commissioner may, within 30 days after receiving the prescribed information, send a notice to the person who supplied the information requiring them to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction.

Competition Tribunal Rules, SOR/2008-141

57. (1) A party who is served with a request to admit is deemed to admit the truth of a fact or the authenticity of a document set out in the request to admit unless that party serves a response to the request in form 256 of the Federal Courts Rules within 20 days after service of the request and denies the admission, setting out the grounds for the denial, with any modifications that the circumstances require.

(2) A party is deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request, unless the party's response

(a) specifically denies the truth of a fact or the authenticity of a document mentioned in the request; or

(b) refuses to admit the truth of a fact or the authenticity of a document and sets out the reason for the refusal.

58. If a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or authenticity of the document is subsequently proved at the hearing, the Tribunal may take the denial or refusal into account in exercising its discretion respecting costs.

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.

(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.

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.

72. The Commissioner shall provide a list of the documents to be admitted in evidence without further proof in accordance with section 69 of the Act at least 45 days before the commencement of the hearing.

Federal Courts Rules, SOR/98-106

223. (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.

231. The disclosure of a document or its production for inspection does not constitute an admission of its authenticity or admissibility in the action.

Personal Information Protection and Electronic Documents Act, SC 2000, c 5

7. (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

(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;

SCHEDULE I, 4.3 PRINCIPLE 3

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

Note: In certain circumstances personal information can be collected, used, or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent. When information is being collected for the detection and prevention of fraud or for law enforcement, seeking the consent of the individual might defeat the purpose of collecting the information. Seeking consent may be impossible or inappropriate when the individual is a minor, seriously ill, or mentally incapacitated. In addition, organizations that do not have a direct relationship with the individual may not always be able to seek consent. For example, seeking consent may be impractical for a charity or a direct-marketing firm that wishes to acquire a mailing list from another organization. In such cases, the organization providing the list would be expected to obtain consent before disclosing personal information.

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

**RESPONDING MEMORANDUM OF ARGUMENT
OF THE RESPONDENTS**

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