

Court File No. CT-2015-001

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	# 58

THE COMMISSIONER OF COMPETITION

Applicant

- and -

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

Respondents

**RESPONSE OF THE RESPONDENTS TO THE COMMISSIONER OF COMPETITION'S
 NOTICE OF MOTION**

(Rule 85 of the *Competition Tribunal Rules*)

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Lawyers for the Respondents

PART I - OVERVIEW

1 The Respondents have reviewed the motion made by the Commissioner of Competition (the **Commissioner**), dated November 12, 2015.

2 The Respondents oppose the Commissioner's motion on the following grounds:

Requests to Admit Improper

- (a) The requests to admit served by the Commissioner on October 20, 2015 (**Requests to Admit**) are improper. The admissions sought by the Commissioner are neither admissions of fact nor admissions of the authenticity of documents;
- (b) The Requests to Admit seek admissions with respect to each and every one of the 59,567 documents listed in Schedule "A" of the Respondents' Affidavits of Documents as to whether each such document is or was in the "possession" of each of the Respondents or "on the premises" of each of the Respondents as contemplated by section 69 of the *Competition Act*;
- (c) The Respondents properly refused to admit the purported facts in the Requests to Admit for the reasons stated in the Respondents' Responses to the Requests to Admit, specifically that:
 - (i) the admissions sought were legal and/or conclusory in nature and not facts; and
 - (ii) given the number of productions involved, the Respondents could not practicably answer the Requests to Admit;

- (d) Rule 57(2) of the *Competition Tribunal Rules* allows a party to refuse to admit the truth of a fact or the authenticity of a document in response to a Request to Admit so long as a reason is given for the refusal;
- (e) Even if the Commissioner's Requests to Admit were appropriate and related to facts that were demonstrably true or false, there is no legal basis to compel the Respondents to respond to the Request to Admit with a specific admission or denial. The remedy for an improper refusal is costs, and then only if the facts refused to be admitted are proven at the hearing of the application;
- (f) The Respondents have provided 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)*;
- (g) There is no requirement under the *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 in the party's power and/or control, nor is there any requirement for a party to indicate whether each document in its Affidavit of Documents was located on its "premises";
- (h) The Commissioner will have ample opportunity to examine, and subsequently seek the admission into evidence of, any particular Respondent's production(s) upon which the Commissioner seeks to rely by way of examinations for discovery, a motion on undertakings and refusals, further Requests to Admit, and agreements in accordance with the applicable evidentiary and procedural rules prior to the hearing; and

- (i) The Commissioner's request for blanket admissions with respect to all of the Respondents' 59,567 productions, without regard to whether the Commissioner intends to rely on such documents, ignores the principles of proportionality in discovery that have been recognized by the both the Tribunal and the Federal Court and verges on an abuse of process.

Further and Better Affidavits of Documents Unnecessary

- (j) The Respondents should not be ordered to revise Schedule "C" of their Affidavits of Documents;
- (k) A party cannot swear to knowledge it does not possess, nor is it appropriate to do so in an affidavit that purports to represent a complete list of items within the party's knowledge; and
- (l) 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 Commissioner by one or more of the Respondents. It would serve no practical purpose to itemize such documents in Schedule "C" of another Respondent.

Redaction of Personal Information

- (m) The *Personal Information Protection and Electronic Documents Act* (PIPEDA) generally prohibits the Respondents from using or disclosing personal information without the knowledge and consent of the individual;¹

¹ PIPEDA, Schedule 1, clause 4.3.

- (n) PIPEDA provides for an exemption to the prohibition on disclosure without the knowledge or consent of the individual if the disclosure is required to comply with rules of court relating to the production of records;²
- (o) Rules 60 and 65 of the Tribunal Rules require the respondents to produce documents that are “relevant to any matter in issue” in the Application;
- (p) The personal information of the Respondents’ customers is not relevant to any matter at issue in the Application;
- (q) Accordingly, the exemption to the prohibition on disclosure of personal information without the knowledge or consent of the individual as set out in section 7(3)(c) of PIPEDA does not apply and the Respondents are prohibited from disclosing that information to the Commissioner;
- (r) Pursuant to the Respondent’s non-disclosure obligations under PIPEDA, the Respondents redacted the personal information of their customers from 3,027 documents in their productions. The Respondents redacted this personal information from their productions solely to comply with privacy legislation and for no other purpose.
- (s) 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. To the extent that the Commissioner seeks an Order of the Tribunal requiring the Respondents to disclose their customer’s personal

² PIPEDA, section 7(3)(c).

information by producing unredacted versions of their productions containing such personal information, the Respondents will not oppose it.

Disclosure of Reason for Redactions

- (t) In addition to redacting customers' personal information, the Respondents redacted 339 of their productions for privilege;
- (u) The Respondents had intended to provide the Commissioner with the reason for the redaction for each document that had been redacted for privilege or personal information. However, through inadvertence, the Respondents omitted this information from their productions to the Commissioner;
- (v) The Respondents did not become aware of this oversight until the Commissioner raised the issue in the Notice of Motion served on the Respondents on November 12, 2015; and
- (w) The Respondents have since corrected this oversight and provided the Commissioner with an index of the redacted productions identifying the reason for the redaction in each such production.

Discovery Arrangements

- (x) The Respondents request that the Competition Tribunal provide guidance and direction in relation to the conduct of examinations for discovery in this case, so that the process may proceed expeditiously and efficiently.

Further Grounds

- (y) *Competition Act*, RSC 1985, c C-34, section 69;

- (z) *Federal Courts Rules*, SOR/98-106, sections 223, 231;
- (aa) *Competition Tribunal Rules*, SOR/2008-141, sections 56-58, 60, 72;
- (bb) *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c 5, section 7(3)(c); and
- (cc) Such further and other grounds as counsel may advise and the Tribunal may permit.

3 For the foregoing reasons, the Respondents seek the following Order:

- (a) Granting leave to extend the time for service and filing of the Respondents' materials;
- (b) Dismissing the Commissioner's motion;
- (c) Striking out the Requests to Admit;
- (d) Awarding the Respondents their costs of this motion;
- (e) Providing directions as to the conduct of the examinations for discovery; and
- (f) Such further and other relief as the Respondents may request and this Tribunal will allow.

4 **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) The Affidavit of Kristine Spence, sworn November 20, 2015; and

- (b) Such further and other material as counsel may advise and this Tribunal may permit.

DATED AT TORONTO, ONTARIO, this 20th day of November, 2015.



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**RESPONDING MEMORANDUM OF ARGUMENT
OF THE RESPONDENTS**

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