

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*.

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT November 12, 2015 CT-2015-001	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 50

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

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

Respondents

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

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**DEPARTMENT OF JUSTICE CANADA**  
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## PART I – OVERVIEW

1. This motion is necessary in order to address deficiencies in the Respondents' affidavits of documents and the productions attached thereto. Through this motion, the Commissioner of Competition (the "**Commissioner**") seeks to ensure that the examinations for discovery in this proceeding, scheduled for December 2015, proceed expeditiously and efficiently.
2. As described more fully below in this Memorandum of Argument:
  - a. Each Respondent has refused 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 (even though each Respondents' sworn affidavit of documents provides an oath to the contrary). Each Respondent does not deny that it has or had possession, however. Each Respondent regards an admission for the purposes of this proceeding as "unnecessarily duplicative". The Respondents' equivocation on what should be a non-contentious point is troublesome, unnecessary and should be remedied.
  - b. Each schedule "C" to each Respondents' affidavit of documents is required to include (but does not include):
    - i. a separate list of all relevant documents that were but are not longer in the possession, power or control of the relevant Respondent and for which no privilege is claimed; and
    - ii. a description of how the relevant Respondent lost possession, power or control of any document and its current location, as far as the relevant Respondent can determine.
  - c. At least 3,538 documents among the Respondents' productions contain redactions without a description of the basis for the redactions. Non-privileged relevant documents must to be produced in an unredacted form absent exceptional circumstances (we are aware of none in the present

case). Accordingly, the Respondents should explain the basis for each of its redactions and produce all non-privileged documents in an unredacted form.

- d. The Respondents' position regarding the conduct of the examinations for discovery is unknown. Depending on the Respondents' response to the Commissioner's inquiry, the Commissioner may seek an order for directions regarding the conduct of the examinations for discovery, including the deponents to be examined for discovery on behalf of each of the Respondents.

## PART II - FACTS

### A. Salient Procedural History

3. The Commissioner has commenced an application as against Aviscar Inc. ("**Aviscar**"), Budgetcar Inc. / Budgetauto Inc. ("**Budgetcar**"), Avis Budget Car Rental, LLC ("**ABC Rental**") and Avis Budget Group, Inc. ("**Avis Budget Group**") (collectively, the "**Respondents**"). The Commissioner seeks an order pursuant to section 74.1 of the *Competition Act* (the "**Act**"), in respect of conduct reviewable pursuant to paragraph 74.01(1)(a), section 74.05 and subsections 74.011(1) and (2) of the Act.<sup>1</sup>
4. The Respondents have defended the application.<sup>2</sup>
5. Pursuant to the current Scheduling Order in this proceeding, the parties have exchanged affidavits of documents and the productions attached thereto.<sup>3</sup>
6. Examinations for discovery are scheduled to take place in December 2015.<sup>4</sup>

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<sup>1</sup> Affidavit of Derek Leschinsky sworn November 12, 2015 ("**Leschinsky Affidavit**") at para. 2 and Exhibit "A" to the Leschinsky Affidavit.

<sup>2</sup> Leschinsky Affidavit at para. 2 and Exhibit "B" to the Leschinsky Affidavit.

<sup>3</sup> Leschinsky Affidavit at para. 2 and Exhibit "C" to the Leschinsky Affidavit.

<sup>4</sup> Leschinsky Affidavit at para. 2 and Exhibit "D" to the Leschinsky Affidavit.

**B. The Respondents' Affidavits of Documents**

7. Collectively, the Respondents have served three affidavits of documents:
  - a. Aviscar and Budgetcar have, together, served one affidavit of documents sworn by William Boxberger, the Vice-President and General Manager of Aviscar and Budgetcar;
  - b. Avis Budget Group has served an affidavit of documents sworn by Ted Kushner, a paralegal in the legal department of Avis Budget Group and ABC Rental; and
  - c. ABC Rental has served an affidavit of documents, also sworn by Ted Kushner.<sup>5</sup>
  
8. With respect to schedules "A" and "B", all three affidavits of documents contain the following oaths either from Mr. Boxberger or Mr. Kushner, where applicable:

I have listed in Schedule A to my affidavit the relevant documents that are or were in the corporation's possession, control or power for which no privilege is claimed.

I have listed in Schedule B to my affidavit the relevant documents that are or were in the corporation's possession, control or power for which privilege is claimed by the corporation, including the grounds for each such claim.<sup>6</sup>

9. Schedule "C" to the affidavit of documents for Aviscar and Budgetcar and ABC Rental does not include (but is required to include) a separate list of all relevant documents that were but are not longer in the relevant Respondents' possession, power or control for which no privilege is claimed.<sup>7</sup> The schedule "C" also does not describe how the relevant Respondent lost possession, power or control of any

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<sup>5</sup> Leschinsky Affidavit at para. 3 and Exhibits "G", "H" and "I" of the Leschinsky Affidavit.

<sup>6</sup> Leschinsky Affidavit at Exhibits "G", "H" and "I" of the Leschinsky Affidavit.

<sup>7</sup> Rule 223(2)(a)(iii), *Federal Courts Rules*, SOR/98-106; Rule 60(2), *Competition Tribunal Rules*, SOR/2008-141.

document and its current location, as far as the relevant Respondent can determine.<sup>8</sup> The schedule "C" instead contains the following boilerplate statement:

Communications 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.<sup>9</sup>

10. Schedule "C" of the Avis Budget Group Affidavit of Documents, by contrast, simply states that there are no such documents.<sup>10</sup>
11. Further, certain productions in this proceeding make clear that at least some of the documents listed in schedule "A" of one Respondent were (but are apparently no longer) in the possession of another Respondent. The Respondents formerly in possession of these documents have not listed them in their schedules "C". For example, the affidavit of documents of Aviscar and Budgetcar contain relevant documents sent or received by an Executive Vice President of Avis Budget Group (who is also an employee of ABC Rental) that neither Avis Budget Group nor ABC Rental listed in their affidavits of documents.<sup>11</sup> The Commissioner has also listed other relevant documents in his affidavit of document that were sent or received by this same Executive Vice President which documents are not found in any of the Respondents' affidavits of documents.<sup>12</sup>

### C. The Commissioner's Requests to Admit

12. On October 20, 2015, the Commissioner served upon each Respondent a Request to Admit pursuant to Rule 56 of the *Competition Tribunal Rules* (the "**Requests to Admit**"). Each Request to Admit contains, among other questions, a question seeking confirmation that each Respondent has or had in its possession each of the documents listed in its *own* affidavit of documents (the "**Question**").<sup>13</sup>

<sup>8</sup> Rule 223(c), *Federal Courts Rules*, SOR/98-106; Rule 60(2), *Competition Tribunal Rules*, SOR/2008-141.

<sup>9</sup> Exhibits "G" and "I" of the Leschinsky Affidavit.

<sup>10</sup> Exhibit "H" of the Leschinsky Affidavit.

<sup>11</sup> Exhibits "G", "H" and "I" of the Leschinsky Affidavit

<sup>12</sup> Exhibits "G", "H" and "I" of the Leschinsky Affidavit

<sup>13</sup> Leschinsky Affidavit at para. 5 and Exhibit "J" of the Leschinsky Affidavit:

13. On November 6, 2015, each Respondent served duplicative responses to the Requests to Admit refusing to answer the Question outright. Each Respondent noted, in part:

... further, the request to admit seeks, in part, the admission of facts already set out in [the Respondent's] Affidavit of Documents such that it is "unnecessarily duplicative" ...<sup>14</sup>

**D. The Respondents' Redactions**

14. The Respondents have collectively produced at least 3538 documents (and possibly more) that contain redactions.<sup>15</sup>
15. The Respondents have not indicated the basis for each redaction made to its documents.<sup>16</sup>

**E. Examinations for Discovery**

16. As noted, examinations for discovery are scheduled to take place in December 2015. On November 6, 2015, the Commissioner's counsel wrote to the Respondents' counsel regarding the conduct of the examinations for discovery, including the deponents to be examined at the examinations for discovery. The Respondents' counsel has yet to respond.<sup>17</sup>

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- Question 1 of the Request to Admit served upon Aviscar (pg. 150 of the Commissioner's Motion Record)
  - Question 1 of the Request to Admit served upon Budgetcar (pg. 153 of the Commissioner's Motion Record)
  - Question 3 of the Request to Admit served upon Avis Budget Group (pg. 157 of the Commissioner's Motion Record)
  - Question 3 of the Request to Admit served upon ABC Rental (pg. 160 of the Commissioner's Motion Record)

<sup>14</sup> Leschinsky Affidavit at para. 6 and Exhibit "K" of the Leschinsky Affidavit.

<sup>15</sup> Leschinsky Affidavit at para. 7 and Exhibit "L" of the Leschinsky Affidavit.

<sup>16</sup> Leschinsky Affidavit at para. 7.

<sup>17</sup> Leschinsky Affidavit at para. 11 and Exhibit "P" of the Leschinsky Affidavit.

### PART III – ISSUES

17. The following are the issues before this Tribunal:
- a. In view of each Respondents' refusal to admit for the purposes of this proceeding that it has or had possession of the documents listed in its own sworn affidavits of documents and advisement that confirmation of this fact is "unnecessarily duplicative", should this Tribunal order each Respondent to:
    - i. deliver a proper response to the Question in the Requests to Admit;
    - ii. in the alternative, produce further and better schedules "A" and "B" to its affidavits of documents; or
    - iii. in the further alternative, 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?
  - b. Should this Tribunal order each Respondent to produce a further and better schedule "C" to its affidavits of documents?
  - c. With respect to the Respondents' redactions, should this Tribunal order:
    - i. the Respondents indicate the basis for each redaction made to its documents; and
    - ii. require the Respondents to produce their non-privileged relevant documents in an unredacted form?
  - d. If necessary, should this Tribunal order directions regarding the conduct of the examinations for discovery, including the appropriate person to be examined on behalf of each of the Respondents?



## PART IV – SUBMISSIONS

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

18. Proceedings before this Tribunal must be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.<sup>18</sup>
19. A prerequisite for an expeditious proceeding before this Tribunal is service of an accurate and complete affidavit of documents that can be relied upon by all the parties and the trier of fact in a proceeding. As noted by Prothonotary Tabib, quoting, in part, Justice Hugessen of the Federal Court:

... "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 and that is why provision is made in the Rules for a solicitor to instruct and advise the person preparing the affidavit as to his or her obligations". I would add that since the affiant must be authorized by the party to make the affidavit and that the full explanations given by the solicitor must include the possible consequences of failing to make full disclosure (see Rule 224), these statements stand as a solemn statement that:

(a) further relevant documents than those listed do not exist, *or if they do*;

(b) that they are not likely to assist the other party or hurt the disclosing party's case AND that the disclosing party has made the decision that it will not rely on that document at trial.<sup>19</sup>

[emphasis added]

20. With respect to schedules "A" and "B", all three affidavits of documents contain an oath that listed in schedule A and B to each Respondents' affidavit of documents is the relevant documents that are or were in the Respondent's possession, control or power.<sup>20</sup>

<sup>18</sup> Subsection 9(2), *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.).

<sup>19</sup> *Apotex Inc. v. Sanofi-Aventis Canada Inc.* 2010 FC 77, 2010 CF 77 at para. 14; *Poitras v. Sawridge Band*, 2001 FCT 456, at para. 4.

<sup>20</sup> Leschinsky Affidavit at para. 4 and Exhibits "G", "H" and "I" of the Leschinsky Affidavit.

21. When each Respondent was asked to confirm by way of the Requests to Admit that it has or had in its possession each of the documents listed in its own affidavit of documents, each Respondent refused to admit (but did not deny) that it has or had possession. Each Respondent noted, in part, that it does not need to formally admit that it has or had possession because doing so is “unnecessarily duplicative”.<sup>21</sup> In other words, each Respondent submits that a formal admission is unnecessary because it has already done so through its affidavit of documents.
22. The Respondents’ equivocation is troublesome and unnecessary; their *pro forma* refusal here frustrates rules 56 and 57 of the *Competition Tribunal Rules* and the purpose behind them. It is therefore appropriate for the Tribunal to review the Respondents’ refusals to answer the Commissioner’s Requests to Admit and order that they deliver proper responses.<sup>22</sup>
23. Confirmation that each Respondent has or had in its possession each of the documents listed in its own sworn affidavit of documents ought not to be a matter in dispute. The Commissioner sought confirmation of this fact having regard to section 69 of the *Competition Act* in order to narrow issues of dispute before the examinations for discovery begins so that the examination process can proceed expeditiously and efficiently.<sup>23</sup>
24. By refusing to confirm that it has or had possession of each of the documents listed in its own affidavit of documents, each Respondent has, in effect, removed any assurance that its affidavit of documents is accurate and complete (i.e. that each Respondent has, in fact, listed in its schedules “A” and “B” all relevant documents that it has or had in its own possession).
25. In other words, the Respondents “can’t have it both ways”. Each Respondent must either formally admit that it has or had in its possession each of the documents listed in its own affidavit of documents or produce a further and better Schedule “A” and “B” to its affidavit of documents.

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<sup>21</sup> Leschinsky Affidavit at para. 6 and Exhibit “K” of the Leschinsky Affidavit.

<sup>22</sup> *Glover (Litigation Guardian of) v. Gorski*, 2013 ONSC 6578 at paras. 17-32.

<sup>23</sup> Section 69, *Competition Act*, R.S.C., 1985, c. C-34.

**B. Each Respondent Should Provide a Proper Schedule C to its Affidavits of Documents**

26. Schedule "C" to an affidavit of documents 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 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.<sup>24</sup>
27. The Tribunal has found affidavits of documents that lack detailed schedules to be deficient and has ordered parties to provide itemized lists.<sup>25</sup> In granting such orders, the Tribunal has indicated that parties can and should take a practical approach to complying with the listing requirement for affidavits of documents but cannot, in doing so, obscure or otherwise undermine the notice function of the listing and description requirement:

It should be noted that when one party comes to the Tribunal challenging the adequacy of the description provided by the other party, the Tribunal is in an awkward position. Without examining the documents themselves, which we would be reluctant to do, not the least because it would be very time-consuming, we can only fall back on the words of the rule and, in cases of doubt as to adequacy, require strict compliance by the listing and description of each and every document.<sup>26</sup>

28. The courts have also relied on the listing obligation in applicable procedural rules to require parties to provide a detailed list in schedule C of affidavits of documents.<sup>27</sup>
29. The schedules "C" for each of the Respondents' affidavits of documents are deficient in that they fail to contain a separate list and description of all relevant documents that were but are not longer in the possession, power or control of the

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<sup>24</sup> Rule 223(2), *Federal Courts Rules*, SOR/98-106; Rule 60(2), *Competition Tribunal Rules*, SOR/2008-141.

<sup>25</sup> *Commissioner of Competition v. Tele-Direct (Publications) Inc.*, [1995] C.C.T.D. No. 9.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*; *Romcan Ltd. (c.o.b. Kingsville Retirement Centre) v. AXA Pacific Insurance Co.*, [2009] O.J. No.6260 (Ont. S.C.J.) at para. 37.

party and for which no privilege is claimed. The affidavit of documents for Aviscar and Budgetcar and ABC Rental only contains the following ambiguous statement:

“Communications 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**” [Emphasis added].<sup>28</sup>

30. Schedule “C” of the Avis Budget Group Affidavit of Documents, by contrast, simply states that there are no such documents.<sup>29</sup>
31. The schedules “C” of the Aviscar and Budgetcar and ABC Rental Affidavit of Documents are deficient on their face in that their boilerplate statement neither confirms nor denies whether the Respondent had but no longer has documents relevant to this proceeding. These schedules are also deficient on their face in that the statement is confined to documents that were in the personal possession of the affiant – i.e., sent and received by the affiant – rather than the Respondent, on whose behalf the affidavit of documents was sworn.
32. Further, and irrespective of the precise statements the affiants make in the Respondents’ affidavits of documents, 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 Car Rental but have not been disclosed in those latter Respondents’ affidavits of documents.<sup>30</sup>
33. The Commissioner has also listed other relevant documents in his affidavit of documents that Avis Budget Group provided to him in a different context, which documents were not disclosed in the Respondents’ affidavit of documents.<sup>31</sup>
34. Through his Requests to Admit, the Commissioner sought admissions from the Respondents about which documents listed in one Respondent’s affidavit of documents had been in the possession of another Respondent. The Commissioner did so for the purpose of narrowing the issues in the proceeding

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<sup>28</sup> Leschinsky Affidavit at para. 4 and Exhibits “G” and “I” of the Leschinsky Affidavit.

<sup>29</sup> Leschinsky Affidavit at para. 4 and Exhibit “H” of the Leschinsky Affidavit.

<sup>30</sup> Leschinsky Affidavit at para. 9.

<sup>31</sup> Leschinsky Affidavit at para. 10.

and so that matters, including the examinations for discovery, could proceed expeditiously. The Respondents each refused to answer the Commissioner's questions.<sup>32</sup>

35. The Respondents should be required to deliver detailed schedules "C"s to the Commissioner as (a) the Aviscar and Budgetcar and ABC Rental affidavits of documents are deficient on their face and (b) the Respondents have not disclosed which of the documents (including those produced in this proceeding) were but no longer are in their possession, power or control.

**C. The Respondents Cannot Redact Their Non-Privilege Documents and, in any event, Refuse to Advise of the Basis of their Redactions**

36. Parties that have served an affidavit of documents make the documents listed in the affidavit available to the all parties in the proceeding unless those documents are subject to a claim for privilege or are not within the party's possession, power or control.<sup>33</sup>
37. As noted, at least 3,538 documents among the Respondents' productions contain redactions without a description of the basis for the redactions.<sup>34</sup>
38. Assuming the documents are not redacted on the basis of privilege, the law is clear that non-privileged relevant documents are to be produced in their entirety absent exceptional circumstances.<sup>35</sup> As noted by this Tribunal:

The General Rule remains that, absent exceptional circumstances, non-privileged relevant documents are to be produced in their entirety. In other words, redactions of irrelevant material are not permitted.<sup>36</sup>

39. Accordingly, the Respondents must produce all their non-privileged relevant documents in an unredacted form.

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<sup>32</sup> Leschinsky Affidavit at paras. 5-6.

<sup>33</sup> Rule 65, *Competition Tribunal Rules*, SOR/2008-141.

<sup>34</sup> Leschinsky Affidavit at para. 7.

<sup>35</sup> *Commissioner of Competition v. Visa Canada Corp.*, 2011 Comp. Trib. No. 19 at paras. 11 and 24. *O.I. Group of Companies v. Canada (Minister of National Revenue)*, 2006 FCA 234 (CanLII) at para. 22.

<sup>36</sup> *Ibid.*, at para. 23.

**D. The Parties May Require Further Direction Concerning the Examinations for Discovery**

40. As noted, the Commissioner's counsel wrote to the Respondents' counsel regarding the conduct of the examinations for discovery, including the deponents to be examined at the examinations for discovery. The Respondents' counsel has yet to respond.<sup>37</sup>
41. Depending on the Respondents' response, if any, the Commissioner may seek an order for directions regarding the conduct of the examinations for discovery.

**PART V – ORDER SOUGHT**


42. The Commissioner requests that the Tribunal issue:
- 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 each Respondent to describe the basis for each redaction made to the documents it has produced in this proceeding;

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<sup>37</sup> Leschinsky Affidavit at para. 11 and Exhibit "P" of the Leschinsky Affidavit.

- f. an order requiring that the Respondents produce their non-privileged relevant documents in an unredacted form;
- g. 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;
- h. costs; and
- i. such further and other relief as the Commissioner may request and this Tribunal may consider appropriate.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12th day of November, 2015.



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**SCHEDULE A: LIST OF AUTHORITIES**

1. *Apotex Inc. v. Sanofi-Aventis Canada Inc.* 2010 FC 77, 2010 CF 77
2. *Commissioner of Competition v. Tele-Direct (Publications) Inc.*, [1995] C.C.T.D. No. 9
3. *Commissioner of Competition v. Visa Canada Corp.*, 2011 Comp. Trib. No. 19
4. *Glover (Litigation Guardian of) v. Gorski*, 2013 ONSC 6578
5. *O.I. Group of Companies v. Canada (Minister of National Revenue)*, 2006 FCA 234
6. *Poitras v. Sawridge Band*, 2001 FCT 456
7. *Romcan Ltd. (c.o.b. Kingsville Retirement Centre) v. AXA Pacific Insurance Co.*, [2009] O.J. No.6260 (Ont. S.C.J.)



**SCHEDULE B: LEGISLATION**

1. *Competition Act*, R.S.C., 1985, c. C-34, section 69
2. *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), subsection 9(2)
3. *Competition Tribunal Rules*, SOR/2008-141, rules 60(2) and 65
4. *Federal Courts Rules*, SOR/98-106, rule 223, subsection 9(2)

**1. Competition Act, R.S.C., 1985, c. C-34, section 69**

*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.

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

*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.

**3. Competition Tribunal Rules, SOR/2008-141, rules 34, 56, 57, 60, 64 and 65**

*Questions as to practice or procedure*

34. (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the Federal Courts Rules may be followed.

*Tribunal may direct*

- (2) If a person is uncertain as to the practice or procedure to be followed, the Tribunal may give directions about how to proceed.

*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.

*Deemed admissions*

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.

*Admissions for purposes of the proceedings*

- (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.

#### *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.

#### *Examination for discovery*

64. (1) Examination for discovery shall occur as of right.

#### *Power of the Tribunal*

(2) The Tribunal may, in case management, make rulings to deal with the timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.

#### *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.

**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.

**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

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

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**DEPARTMENT OF JUSTICE CANADA**

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