CT-2007-006

COMPETITION TRIBUNAL

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

AND IN THE MATTER of an inquiry under subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Premier Career Management Group Corp. and Minto Roy;

AND IN THE MATTER of an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act*;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

PREMIER CAREER MANAGEMENT GROUP CORP.

and

MINTO ROY

Respondents.

AMENDED WRITTEN REPRESENTATIONS

Reviewable conduct contrary to paragraph 74.01(1)(a)

1) On May 8, 2007, the Applicant filed a Notice of Application against the Respondents, as it appears from the file.

2) The Respondents' names and addresses are as follows:

a) Premier Career Management Group Corp. (hereafter "PCMG")
1199 West Hastings, 6th Floor
Vancouver, BC
V6E 3T5

b) Mr. Minto Roy
21575 Thornton Ave
Maple Ridge, BC
V4R 2G8

Affidavit of Ian Spence, Tab 3, paragraph 6.

3) PCMG is incorporated under the laws of British Columbia.

Affidavit of Ian Spence, Tab 3, paragraph 4.

4) PCMG started its business operations in or about October 2004, and has conducted them up to the present time.

Affidavit of Ian Spence, Tab 3, paragraph 4.

5) PCMG has its office in Vancouver.

Affidavit of Ian Spence, Tab 3, paragraph 6.

6) Minto Roy is the director of PCMG and its principal shareholder.

Affidavit of Ian Spence, Tab 3, paragraph 5.

7) The Respondents generally advertise PCMG's services as "career management services". They promote these services verbally in sales meetings with prospective clients, by way of advertisements and features published on the Internet and in print media and during programs broadcasted on radio.

Affidavit of Ian Spence, Tab 3, paragraphs 7 to 10.

8) In 2006, PCMG entered into contracts with 147 new clients.

Supplementary affidavit of Ian Spence, Tab 4, paragraph 4.

9) Clients pay approximately between $5,000 to $7,000, plus taxes, for PCMG's services.

Affidavit of Tanya Threatful, Tab 5, paragraphs 19.

Affidavit of Johan de Vaal, Tab 6, paragraph 13.
Affidavit of Bruce Nickson, Tab 7, paragraph 8.
Affidavit of William Warren, Tab 8, paragraph 13.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraph 13(b).
Affidavit of Steve Wills, Tab 10, paragraph 20.
Affidavit of Raffaele Rocca, Tab 12, paragraphs 21 and 32.

10) Clients are usually persons who are unemployed and/or who are actively looking for work.

Affidavit of Tanya Threatful, Tab 5, paragraph 4.
Affidavit of Johan de Vaal, Tab 6, paragraph 4.
Affidavit of Bruce Nickson, Tab 7, paragraph 4.
Affidavit of William Warren, Tab 8, paragraphs 5 and 6.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraph 6.
Affidavit of Steve Wills, Tab 10, paragraph 11.

The representations to the public

11) Starting in the fall of 2004 and for the purpose of promoting their services to prospective clients, the Respondents made the following representations that were false or misleading.

12) First, the Respondents made representations that conveyed the general impression that they screen prospective clients and that they accept only those whom they consider to be highly qualified and who have a lot of potential to succeed.

Affidavit of Tanya Threatful, Tab 5, paragraph 6.
Affidavit of Johan de Vaal, Tab 6, paragraph 9(c).
Affidavit of Bruce Nickson, Tab 7, paragraph 7(a).
Affidavit of William Warren, Tab 8, paragraph 9.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraph 12(k).
Affidavit of Steve Wills, Tab 10, paragraph 16.
Affidavit of Raffaele Rocca, Tab 12, paragraph 15.

13) However, contrary to the representations made, the Respondents had no formal process for screening or selecting clients. Accordingly, these representations were false or misleading.

Affidavit of Steve Wills, Tab 10, paragraphs 16 and 17.

14) Second, the Respondents made representations to prospective clients that conveyed the general impression that they have an extensive network of personal contacts, or "links" with senior level executives of companies that have job openings. The Respondents made representations that they will use this network to provide contacts and/or arrange job interviews with such senior level executives for clients who enter into contract with PCMG.

Affidavit of Tanya Threatful, Tab 5, paragraphs 9 and 10.
Affidavit of Johan de Vaal, Tab 6, paragraphs 9(b) and 9(e).
Affidavit of Bruce Nickson, Tab 7, paragraphs 7(c).
Affidavit of William Warren, Tab 8, paragraphs 8(b), 8(c), 8(e) and 12.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraphs 12(e), 12(f) and 13(a).
Affidavit of Steve Wills, Tab 10, paragraphs 13 to 17.
Affidavit of Raffaele Rocca, Tab 12, paragraphs 10 to 25.

15) However, contrary to the representations made, the Respondents did not provide those contacts and/or did not arrange such job interviews with senior level executives. Accordingly, the representations were false or misleading.

Affidavit of Tanya Threatful, Tab 5, paragraphs 23 and 25.
Affidavit of Johan de Vaal, Tab 6, paragraphs 16 to 22.
Affidavit of Bruce Nickson, Tab 7, paragraphs 12 and 13.
Affidavit of William Warren, Tab 8, paragraphs 17 to 19.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraphs 20 to 22.
Affidavit of Steve Wills, Tab 10, paragraph 13 to 17.
Affidavit of Raffaele Rocca, Tab 12, paragraphs 38, 39 and 40.

16) Finally, the Respondents made representations that conveyed the general impression that potential clients will almost certainly find work quickly with their help, typically within 90 days, and at a position with salary and benefits equal to or better than their previous job.

Affidavit of Tanya Threatful, Tab 5, paragraph 11.
Affidavit of Johan de Vaal, Tab 6, paragraphs 9(d) and 9(f).
Affidavit of Bruce Nickson, Tab 7, paragraphs 7(c) and 7(d).
Affidavit of William Warren, Tab 8, paragraph 8(c), 8(d) and 12.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraphs 12(c) and 12(d).
Affidavit of Steve Wills, Tab 10, paragraphs 13 to 16.
Affidavit of Raffaele Rocca, Tab 12, paragraphs 10, 13 and 14.

17) However, contrary to the representations made, this was not the case for many clients. Accordingly, the representations were false or misleading.

Affidavit of Tanya Threatful, Tab 5, paragraphs 23 and 25.
Affidavit of Johan de Vaal, Tab 6, paragraph 16 to 22.
Affidavit of Bruce Nickson, Tab 7, paragraphs 12 and 13.
Affidavit of William Warren, Tab 8, paragraphs 17 to 19.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraphs 20 to 22.
Affidavit of Steve Wills, Tab 10, paragraphs 13 to 16.
Affidavit of Raffaele Rocca, Tab 12, paragraphs 42 and 43.

18) Prospective clients were influenced by one or more of the representations set out above in deciding to enter into contract with PCMG.

Affidavit of Tanya Threatful, Tab 5, paragraphs 16 to 20.
Affidavit of Johan de Vaal, Tab 6, paragraphs 10 to 13.
Affidavit of Bruce Nickson, Tab 7, paragraph 8.

Affidavit of William Warren, Tab 8, paragraph 13.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraph 13(i).
Affidavit of Raffaele Rocca, Tab 12, paragraphs 19 and 33.

Reviewable conduct

19)Subparagraph 74.01(1)(a) of the *Competition Act* provides as follows:

> *74.01(1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,*
>
> *(a) makes a representation to the public that is false or misleading in a material respect;*

20)Paragraph 74.01(6) of the *Competition Act* provides as follows:

> *74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.*

21)The Applicant refers to the following comments of Justice Blanchard in *The Commissioner of Competition vs. Gestion Lebski Inc. et al.*, CT-2005-007, September 8, 2006, in regards to the relevant principles of law:

> *[152] The Commissioner has the burden of proof on a balance of probabilities, since this is a civil proceeding.*
>
> *[153] Commissioner of Competition v. Sears Canada Inc., 2005 Comp. Trib. 2, Justice Dawson first examined the criminal case law under the present and previous Acts to determine the meaning of the expression "*false or misleading in a material respect*". She concluded, at paragraph 325, that an impression will be false or misleading in a material respect if it "*. . . readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered*". In this case the ordinary citizen is standing in for the reasonable person. On that point, Justice Dawson quoted the following paragraph from R. v. Kenitex Canada Ltd. et al. (1980), 51 C.P.R. (2d) 103 (Ontario County Court), at paragraph 326:*

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

*[154] Justice Dawson also referred, at paragraph 335 of Sears, to R. v. Kellys on Seymour Ltd. (1969), 60 C.P.R. 24 (Vancouver Magistrate's Court, B.C.), in which the Court held that the word "*material*" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase.*

[155] In another case about false or misleading representations in a material respect, Mr. Justice Delong of the Alberta Provincial Court, in R. v. Envirosoft Water Inc. (1995), 62 C.P.R. (3d) 365, stressed the importance of the context in which the representations are made and the public to which the advertising is directed; he wrote, at page 373:

> As Clement J.A. stated in R. v. Imperial Tobacco Products Ltd. (1971), 3 C.P.R. (2d) 178 at p. 195,22 D.L.R. (3d) 51,4 C.C.C. (2d) 423 (Alta. C.A.):
>
> > *The learned trial Judge adopted as his, a phrase appearing in Aronberg et al. v. F. T. C. (1943), 132 F. 2d 165 at p. 167. The paragraph in which that phrase occurs is in these terms:*
> >
> > *"The law is not made for experts but to protect the public, -- that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.*
> >
> > *Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal."*

*[156] In R. v. Corp. Immobilière Cote St-Luc, [I983] C.S. 12, the Quebec Superior Court concluded that the words "*in a material respect*" mean something that is relevant, that affects a constituent or fundamental element. In the view of that Court, the usable floor space of a house is a fundamental element when someone is buying a house. Accordingly, any false representation regarding the usable floor space of a house is a misleading representation in a material respect.*

[157] In Canada (A.G.) v. Beurre Hoche du Canada Inc., J.E. 97-435 (C.Q.), the accused were charged with violating paragraph 52(1)(a) of the Act by advertising that their butter contained 85 percent less cholesterol than ordinary butter. The Court found that this information was false or misleading in a material respect because saturated fat is the determining factor in the formation of cholesterol. The evidence was that Hoche butter contained as much saturated fat as all other brands of butter sold by competitors. The advertising stating that Hoche butter contained 85 percent less cholesterol was therefore misleading because it was shown that based on that representation, consumers tended to believe that Hoche butter contained less saturated fat. In fact, contrary to what consumers might think, Hoche butter did not protect them against cholesterol any more than other brands of butter.

[158] R. v. Contour Slim Ltd. (1972), C.C.C. (2d) 982 (Ont. Prov. Ct.), 9 C.P.R. (2d) 107, Judge Beaulne found the accused guilty of misleading advertising under section 37(1)(b) of the Combines Investigation Act, the applicable provision at the time. In that case, the accused company had advertised a method consisting of applying hot algae and a skin cream, which produced weight loss and reduced body measurements. The expert witness stated that what was lost was water, not fat, and that any weight lost would be regained in the next few days with a normal consumption of liquids. The advertisement said: "Lose: Unwanted Fat in only 90 Minutes ..." and promised the loss of fatty tissue without effort, without dieting and without any method other than a relaxing algae bath.

[159] The judge concluded that these were misleading representations, because the expert evidence showed that the weight loss was only temporary. He expressly rejected the defence that the issue was loss of weight and not loss of fat. The expression "lose unwanted fat" was clear and unambiguous, in the judge's eyes, and meant more than a temporary weight loss resulting from water loss.

(...)

[161] In Commissioner of Competition v. P. V.I. International Inc., 2002 Comp. Trib. 24 (affirmed by the Federal Court of Appeal, [2004] F.C.J. No. 876), the only other decision by the Tribunal concerning paragraph 74.01(1)(a), the Tribunal cited other decisions in which the importance of the overall aspect of the advertising message was stressed, at paragraph 24:

> Both parties suggested that the applicable law is set out in *F. T. C. v. Sterling Drug, Inc.* (1963) 317 F. 2d 669 at 674, which is cited with approval by the Alberta Supreme Court, Appellate Division, in R. v. Imperial Tobacco Products Ltd., (1971), 4 C.C.C. (2d) 423 at 441:
>
> > *It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.*
>
> The Court in Sterling Drug also stated, before this passage:
>
> > *... since the purpose of the statute is not to punish the wrongdoer but to protect the public, the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader.*

[162] It is therefore important, in analyzing the meaning of the representations made to the public, to consider the general impression conveyed by the advertising. For example, exaggeration is not in itself a "false or misleading representation in a material respect", if it occurs within a particular context. In R. v. Big Mac Investment (1988), Man. R. (2d) 150 (Man. Prov. Ct.), the trial judge had held that the representation that 30 minutes of electrical stimulation was equivalent to 900 sit-ups was an exaggeration that the public would be able to interpret as a figure of speech, and not take literally. That judgment was upheld on appeal.

[163] I take from the case law that a representation in advertising that induces a purchase by misleading on a constituent or fundamental element will be held to be "false or misleading in a material respect".

22)The Applicant submits that the evidence shows that the Respondents made false or misleading sales representations to prospective clients. These representations were to lure them into entering into contract with PCMG. As such, the false or misleading representations were material.

23)Accordingly, the Applicant submits that the Respondents have engaged in reviewable conduct contrary to paragraph 74.01(1)(a) of the *Competition Act*.

Minto Roy's personal liability

24)In *The Commissioner of Competition vs. Gestion Lebski Inc. et al.*, CT-2005-007, Justice Blanchard also wrote as follows:

> *[258] The remaining question is whether Mr. Leblanc must also be held liable for making the representations to the public as alleged by the Commissioner.*
>
> *[259] The respondents submit that Mr. Leblanc cannot be held liable for the acts of Tamalia, a duly constituted legal person. The respondents rely on the rule that a company is distinct from its shareholders, who cannot be held liable for the debts or faults of the company. The respondents submit that the rule is codified in article 309 of the Civil Code of Quibec, S.Q., 1991, c. 64 (the "Civil Code"), which reads as follows:*
>
> > 309. Legal persons are distinct from their members. Their acts bind none but themselves, except as provided by law.
>
> *[260] The respondents submit that in order for Mr. Leblanc to be held liable for the acts of Tamalia, there would have to be evidence that he created the company for a fraudulent purpose or in an attempt to contravene a rule of public order. Because there is no evidence on that point, Mr. Leblanc cannot, in the respondents' submission, be held liable for representations made by Tamalia. The respondents cite article 317 of the Civil Code, which reads as follows, on this point:*
>
> > 317. In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order.
>
> *[261] The Commissioner submits that Mr. Leblanc, as a director of Tamalia, is liable under article 1457 of the Civil Code, which deals with extra-contractual fault, and which reads as follows:*

> 1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

[262] The Commissioner also argues that article 317 may apply, because Mr. Leblanc is setting up his company's juridical personality to deny his liability for contravening a rule of public order.

[263] While the principles of company law may perhaps be applied to the legal analysis in this case, I am of the opinion that they are of only tangential assistance. In my view, the analysis of the question of whether Mr. Leblanc is liable here must begin with interpretation of the Act, which sets out the circumstances in which liability may arise. As I interpret subsection 74.01(1) of the Act, I am bound by the principles stated by the Supreme Court of Canada in Rizzo & Rizzo Shoes Ltd. (Re), [l998] 1 S.C.R. 27: the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[264] The purpose of the Act is to maintain and encourage competition in the Canadian market. The Act is clearly public law, not private law. Section 74.01 appears in Part VII. 1 of the Act, Deceptive Marketing Practices, the purpose of which is to ensure the quality and accuracy of commercial information and to prevent deceptive marketing practices. The legislative intention of the government in enacting those provisions was clear: to create a civil regime for the protection of the public, with a more flexible process than criminal proceedings. Earlier, we quoted what the Hon. John Manley said when he introduced Bill C-20 in the House at second reading, regarding the government's desire to create a civil regime to foster "quick and efficient compliance" with the Act.

[265] As well, the words of Part VII. 1 clearly show that Parliament intended that violations of the provisions of that Part would be sufficient to prove liability, without the need to prove intent.

Reviewable conduct is, in this sense, comparable to a strict liability offence. Having considered the intention of Parliament and the object of the Act, and I shall now turn to the words of the Act.

(...)

[267] Determining the meaning of the word "person" ("quiconque" in French [in para.74.01(1)(a)]*) is an exercise in statutory construction. As noted earlier, the words of the Act are to be read in their grammatical and ordinary sense, in the entire context. There is no ambiguity in the words of subsection 74.01(1). It covers any person who makes representations to the public. The Act provides for monetary penalties and allows for a due diligence defence. The Act clearly covers anyone who is liable, be it a natural person, a legal person, or both. The Act further provides for different monetary penalties in each case. In my opinion, the company and the natural person who are respondents in this case are both in the same position: their liability is direct, and does not arise from the attribution of the misconduct of others to it or him. This concept of direct liability was described in the decision of the Supreme Court of Canada in R. v. Canadian Dredge & Dock Co. ([l 9851 1 S.C.R. 662, at page 674:*

> As in the case of an absolute liability offence, it matters not whether the accused is corporate or unincorporate, because the liability is primary and arises in the accused according to the terms of the statute in the same wav as in the case of absolute offences. It is not dependent upon the attribution to the accused of the misconduct of others. It is so when the statute, properly construed, shows a clear contemplation by the Legislature that a breach of the statute itself leads to guilt, subject to the limited defence above noted. In this category, the corporation and the natural defendant are in the same position in both cases liability is not vicarious but prime law. [Emphasis added]

[268] A too narrow interpretation of the words "a person . . . who . . . makes a representation to the public" would result in liability being assigned solely to the person who expressly made the representations, and in my opinion this would be contrary to the object of the Act and particularly the Part of the Act in which the impugned provisions appear. Having regard to the intention of Parliament and the context of the scheme created by the Act, I am of the opinion that these provisions should be interpreted more

broadly. A person who makes representations to the public may also be the person who planned, directed and was, ultimately, essential to the representations being made, even if that person did not make them expressly himself or herself. I therefore find that paragraph 74.01(1)(a) covers any person who is "effectively" responsible for the representations made to the public.

[269] I now turn to the facts of this case. The evidence is that the corporate advertising was orchestrated by the franchisor, Tamalia. Mr. Leblanc was responsible for that advertising, and decided on the concept of the advertising, the places where the advertising would be placed and how the national advertising would be paid for by the franchisees. The franchisees discussed the advertising at the annual meetings. Mr. Leblanc presented them with advertising montages that had been prepared in advance and asked them which they preferred. At the meetings, it was Mr. Leblanc who proposed the advertising concepts he had developed himself for the print media or television, to promote Centres de sante minceur. The evidence is that the franchisees voted on the annual advertising budgets. For example, they had to choose the proposal they preferred from the various budget proposals associated with a particular advertising program, and vote for it.

[270] It is beyond question that Mr. Leblanc was the prime mover behind Tamalia and Centres de sante rninceur, that he was the person who made the decisions about the approach to be taken in marketing the products and apparatuses. In his testimony, he clearly said that he chose the products and apparatuses marketed by Centres de sante minceur. It is clear, from the testimony of the franchisees and of Mario Turcotte, who produced infomercials for Centres de sante minceur, that Mr. Leblanc was involved in all stages of the corporate advertising.

[271] The evidence is that Mr. Leblanc was the prime mover behind the development and publication of the representations in issue. I find that he is effectively responsible for making those representations to the public. He is therefore directly liable, on the same basis as Tamalia, for engaging in reviewable conduct as provided in paragraph 74.01(l)(a) of the Act.

25) For the same reasons that those stated in the *Gestion Lebski Inc.* case and because he personally made the false or misleading representations, the Applicant submits that the Minto Roy's personal liability must be found in the present matter.

26) Specifically:

a) As discussed above, Minto Roy is the director and principal shareholder of PCMG. He had the powers to control all of its essential commercial operations;

b) Minto Roy personally engaged in making the impugned public representations to prospective clients, and was responsible for the development and implementation of PCMG's business model and the dissemination of the impugned representations;

Affidavit of Steve Wills, Tab 10, paragraphs 12 to 26.

c) Minto Roy directed and trained PCMG employees to make the impugned representations to prospective clients;

Affidavit of Steve Wills, Tab 10, paragraphs 12 to 26.

d) Minto Roy had a direct interest in persuading clients to enter into contracts with PCMG, considering his functions and personal interests as a shareholder in the company;

e) Minto Roy knew or should have known that these representations were false or misleading in a material respect;

f) When meeting with prospective clients, Minto Roy used his own name and purported network of personal contacts to convince clients to retain the services of PCMG;

Affidavit of Tanya Threatful, Tab 5, paragraph 9.
Affidavit of William Warren, Tab 8, paragraph 8(e).
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraph 12(e).

Service of the Notice of Application

27) On May 9, 2007, the Applicant served the Notice of Application on Minto Roy.

Affidavit of Ian Spence, Tab 3, paragraphs 16 and 18 to 23.

28) On May 10, 2007, the Applicant served the Notice of Application on PCMG.

Affidavit of Ian Spence, Tab 3, paragraph 17.

29) Accordingly, the Notice of Application has been served on the Respondents in accordance with the *Competition Tribunal Rules*.

Service of the Applicant's Disclosure Statement

30) On May 22, 2007, the Applicant served the Applicant's Disclosure Statement on PCMG.

Affidavit of Ian Spence, Tab 3, paragraph 24.

31) On May 23, 2007, the Applicant served the Applicant's Disclosure Statement on Minto Roy.

Affidavit of Ian Spence, Tab 3, paragraphs 25 to 28.

32) Accordingly, the Applicant's Disclosure Statement has been served on the Respondents in accordance with the *Competition Tribunal Rules*.

Time periods for the filing of responses

33) Because the Applicant's Disclosure Statement was served on PCMG on May 22, 2007, and because service and filing of its response had to be done within 45 days after that date pursuant to Rule 5(2), the time delay for such service and filing of PCMG's response expired at the end of business day on July 6, 2007.

34) Because the Applicant's Disclosure Statement was served on Minto Roy on May 23, 2007, and because service and filing of his response had to be done within 45 days after that date pursuant to Rule 5(2), the time delay for such service and filing of Minto Roy's response expired at the end of business day on July 9, 2007.

35) The Respondents are now out of time for the filing of their responses.

36) The Applicant asks that the Tribunal render an order in default of response against the Respondents.

Aggravating factors – subsection 74.1(5)

15) Should the Competition Tribunal determine that the Respondents have engaged in reviewable conduct by making one or more false or misleading representations in a material respect to the public, the Applicant submits the following elements constitute aggravating factors that the Tribunal should take into account in determining the amount of the administrative monetary penalty

that should be paid by PCMG and/or Minto Roy personally, the whole in conformity with subsection 74.1(5) of the *Competition Act*:

a) As discussed above, the Respondents advertised PCMG's services to the public through various means that could reach a large audience (i.e. Internet, radio, advertisements in newspapers and in a magazine) (paragraph 74.1(5)(a));

b) The impugned conduct continued in spite of the fact that PCMG and Minto Roy were well aware of complaints from clients concerning the false or misleading representations (paragraph 74.1(5)(h));

Johan de Vaal, Tab 6, paragraph 20.
Affidavit of William Warren, Tab 8, paragraph 19.
Affidavit of Rene Navarro-Gonzalez, Tab 9, paragraphs 12 and 13.
Affidavit of Raffaele Rocca, Tab 12, paragraphs 10, 15, 19 and 38 to 40.

c) As discussed above, PCMG's typical clients were persons who were unemployed and/or who were actively looking for work. They were therefore more susceptible to the representations (paragraph 74.1(5)(c));

d) The Respondents were specifically interested in targeting new immigrants. In his affidavit, the former employee of PCMG says as follows:

> *Minto Roy told me on several occasions that he was adamant that new immigrants would be a major component of PCMG's success. He frequently spoke at ESL schools (i.e. English as a second-language school). He also tailored his advertisements to target new immigrants by, for example, stating in his advertisements that "no Canadian experience required".*

Affidavit of Rene Navarro-Gonzalez, Tab 9, Exhibit "A".
Affidavit of Steve Wills, Tab 10, paragraph 29.
Affidavit of Raffaele Rocca, Tab 12, paragraph 24.

e) As discussed above, the impugned representations were highly material to prospective clients because they were the main reasons why clients decided to retain the services of PCMG (paragraph 74.1(5)(d));

f) Considering the seriousness and duration of the conduct, self-correction by PCMG and Minto Roy is unlikely (paragraph 74.1(5)(e));

g) Considering the typical fees paid and the number of new clients each year, the requested administrative monetary penalty is minimal in comparison to the amount PCMG and Minto Roy would have made in revenues on a yearly basis (paragraph 74.1(5)(h));

h) Finally, the seriousness of the conduct justifies the payment by PCMG and Minto Roy of the maximum monetary penalty allowed under the *Competition Act*.

Order in default of response

37) Rule 7 of the *Competition Tribunal Rules* pertains to orders in default of response. It states in part as follows:

> *7.(1) Where a person served with a notice of application has not filed a response within the period set out in subsection 5(1) or (2) or has not served a disclosure statement within the period set out in subsection 5.1(1), the Commissioner may by motion request that the Tribunal issue the order sought in the notice of application against the person.*
>
> *(2) On a motion pursuant to subsection (1), the Tribunal shall, if it is satisfied that the notice of application was served in accordance with these Rules and it has heard such evidence as it may require, make such order as it deems appropriate.*
>
> (Emphasis added)

38) By order dated July 31, 2007, Madam Justice Sandra J. Simpson ordered as follows:

> *[6] The Applicant is to prepare a revised motion record containing submissions and affidavit evidence showing (1) that the Respondents failed to serve and file a response; and (2) that paragraph 74.01(1)(a) of the Act has been breached by the Respondents' representations to the public and that remedy sought is appropriate.*
>
> *[7] The revised motion record is to be served and filed by the Applicant on or before, Friday September 14, 2007. The Applicant is to personally serve the Respondent Minto Roy with the revised motion record or leave the revised motion record with an adult at Mr. Roy's place of residence and send it to Mr. Roy at that address by registered mail. The Applicant is to send the revised motion record to the Respondent Premier Career Management Group Corporation by registered mail.*

39)For the reasons stated above, the Applicant submits that the evidence proves that the Respondents have failed to serve and file a response, and that they have breached paragraph 74.01(1)(a) of the *Competition Act*.

Warren vs. PCMG and Minto Roy

40)In support of the Notice of Application, the Applicant also refers to the decision dated March 8, 2007 of Justice Pendleton of the Provincial Court of B.C. in the matter of *Warren vs. PCMG and Minto Roy*.

Affidavit of Walliam Warren, Tab 8, Exhibit "C".

41)In this matter, the court allowed in part the claim of Mr. Warren against Premier Career Management Group Corp. and denied the personal claim filed against Minto Roy.

42)The issues discussed in Justice Pendleton's decision are similar to the issues raised by the Applicant in the present matter. Mr. Justice Pendleton rejected the testimony of Minto Roy on the contentious issues and found in favor of Mr. Warren.

43)The Applicant submits that the Tribunal should adopt the reasoning of Justice Pendleton.

44)Further, for the reasons stated above by Justice Blanchard in the *Gestion Lebski Inc.* case, the Applicant submits that Minto Roy's personal liability should be found because paragraph 74.01(1)(a) of the *Competition Act* in the present matter is at issue.

Dissolution of PCMG

45)On June 18, 2007, PCMG was dissolved for failure to file required documents.

Affidavit of Ian Spence, Tab 3, paragraph 30.

46)However, PCMG continues to do business.

Affidavit of Ian Spence, Tab 3, paragraph 31.

47)Further, PCMG is incorporated under the laws of B.C. Pursuant to the following provisions of the *B.C. Business Corporations Act*, SBC 2002,

Chapter 57, court actions can continue against dissolved companies if a legal proceeding is commenced before dissolution:

Dissolved companies deemed to continue for litigation purposes

346. (1) Despite the dissolution of a company under this Act,

(a) a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and

(b) a legal proceeding may be brought against the company within 2 years after its dissolution as if the company had not been dissolved.

(2) Unless the court orders otherwise, records related to a legal proceeding referred to in subsection (1) may be

(a) delivered to the company at its address for delivery in the legal proceeding, or

(b) if the company does not have an address for delivery in the legal proceeding, served on the company

(i) by personal service of those records on any individual who was a director or senior officer of the company immediately before the company was dissolved, or

(ii) in the manner ordered by the court.

Liabilities survive

347. Subject to sections 348 (2) and (4) and 350 (3), the liability of each director, officer, shareholder and liquidator of a company that is dissolved continues and may be enforced as if the company had not been dissolved.

Liability of shareholders of dissolved companies

348. (1) If it appears to the court in a legal proceeding referred to in section 346.(1) that some or all of a company's assets were distributed, in anticipation of, during or as a result of the company's liquidation or dissolution, to one or more persons who were shareholders of the company, the court may, subject to subsections (2) and (4) of this section,

(a) add those persons as parties to the legal proceeding,

(b) determine, for each of those parties, the amount for which that party is liable and the amount that that party must contribute towards satisfaction of the plaintiff's claim, and

(c) direct payment of the amounts so determined.

(2) A shareholder is not liable under subsection (1) unless the shareholder is added as a party within 2 years after the date on which the company is dissolved.

(3) If a judgment is obtained in a legal proceeding against a dissolved company before or after its dissolution and it appears that some or all of the company's assets were distributed, in anticipation of, during or as a result of the company's liquidation or dissolution, to a person who was a shareholder of the company,

(a) the judgment creditor may, within 2 years after the date on which the company is dissolved, bring a legal proceeding against the shareholder to enforce the liability referred to in paragraph (b) of this subsection, and

(b) the shareholder is liable to the judgment creditor if the court is satisfied that

(i) the person was a shareholder of the company at the time of the distribution,

(ii) some or all of the company's assets were distributed to the shareholder in anticipation of, during or as a result of the company's liquidation or dissolution,

(iii) the shareholder has had an opportunity to raise any reasonable defences to the judgment creditor's claim against the company that were not considered in a trial or summary trial in the legal proceeding in which judgment against the company was obtained, and

(iv) the amount is justly due and owing by the company to the judgment creditor.

(4) The liability of a shareholder under subsection (1) or (3) continues despite the dissolution of the company but is limited to the value that the assets received by the shareholder on that distribution had on the date of that distribution.

48)Furthermore, dissolution of companies can be reversed with simple filing of the requested documents.

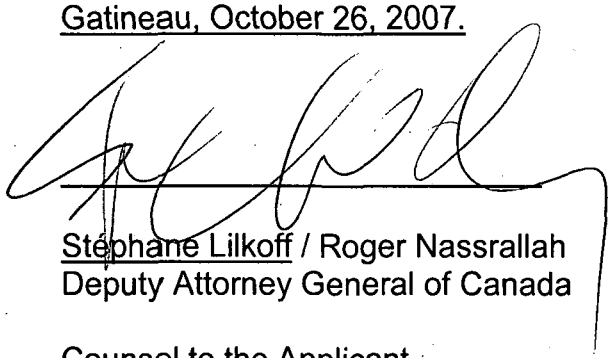
49)For these reasons, because the Notice of Application was filed on May 8, 2007 before the dissolution of PCMG, the Applicant submits that the requested order can also be rendered against PCMG.

Order sought against the Respondents

50)The Applicant respectfully asks that the Tribunal issue the order sought at Tab 11 of the present Revised Motion Record.

51)The Applicant further asks the full costs against the Respondents, jointly.

Gatineau, October 26, 2007.



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