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



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**MEMORANDUM OF ARGUMENT IN RESPONSE TO THE COMMISSIONER'S REVISED MOTION RECORD FOR AN ORDER IN DEFAULT OF RESPONSE**

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## *I. Overview: The Respondents Oppose This Motion and Request an Order*

1. The Respondents Premier Career Management Group Corp. ("PCMG") and Minto Roy (collectively, the "Respondents") oppose all the grounds of relief requested in the Notice of Motion for an Order in Default of Response dated September 13, 2007.

2. The Respondents respectfully request an order that:

   (a) default not be granted;

   (b) leave be granted to the Respondents to file a Response;

   (c) the Commissioner of Competition (the "Commissioner") produce to the Respondents all documents previously served on Minto Roy;

   (d) the Commissioner produce to the Respondent all relevant documents related to this matter; and

   (e) after a reasonable period of time for the Respondent to review the documents, a case management conference be held to determine the dates for future steps in the proceeding, including a date for the filing of the Response.

## *II. Background*

3. On May 8, 2007, the Commissioner of Competition (the "Commissioner") filed a notice of application alleging that the Respondents made representations to the public that were false or misleading in a material respect, and that the Respondents therefore engaged in reviewable conduct contrary to paragraph 74.01(1)(a) of the *Competition Act*.

4. Specifically, the Commissioner alleges that the Respondents engaged in reviewable conduct by making representations that:

   (a) conveyed the impression that they screen prospective clients and accept only those whom they consider to be highly qualified and who have potential to succeed, when in fact they had no formal screening process for selecting clients;

(b) conveyed the impression that they have an extensive network or links with senior executives of companies and that they will use this network to provide contacts and arrange job interviews for their clients, when in fact they did not provide those contacts and/or arrange for job interviews with senior level executives;

(c) conveyed the impression that potential clients would almost certainly find work within 90 days, and at a position with salary and benefits equal to or better than their previous job, when in fact this was not the case.

5. The Commissioner had problems effecting service of the notice of application on Minto Roy. On May 16, 2007, the Tribunal ordered that service on Minto Roy was deemed to have been effected on May 9, 2007 by leaving the notice of application with his wife.

6. The notice of application was served on PCMG by leaving a copy with Ray Williams on May 10, 2007.

7. On May 22, 2007, the Commissioner effected service of its disclosure statement on PCMG. On June 6, 2007, the Tribunal ordered that the Commissioner had successfully effected service of its disclosure statement on Minto Roy on May 23, 2007 by leaving the disclosure statement with his wife.

8. Pursuant to Rule 5(2), the Respondents had 45 days following the date of service of the disclosure statement to file a response. It is admitted that the Respondents failed to file a response within that time period.

9. On July 31, 2007, the Tribunal heard an application of the Commissioner for (1) an order that the motion for an order in default be heard ex parte, (2) directions about the evidence the Tribunal wished to receive on the merits of the application, and (3) following the application, an order in default. The Tribunal refused to order that the motion be heard ex parte, and ordered the Commissioner to prepare a revised motion record and serve it on the Respondents by September 14, 2007. The order then states:

> The Respondents shall, within 20 days after being served with the revised motion record, serve and file a responding motion record, failing which the motion for a default order will proceed without further notice.

10. The Respondents were served with the Commissioner's Revised Motion Record for an Order in Default of Response (the "Commissioner's Revised Motion Record") on September 13, 2007. The Respondents' Motion Record in Response to the Commissioner's Revised Motion Record was filed on October 3, 2007. The Respondents therefore respectfully submit that they have met the terms of the order and should receive notice of any and all future proceedings.

## ***III. The Applicable Statutory Framework***

11. The Commissioner bases its application for default on Rules 7 and 72(1) of the *Competition Tribunal Rules* (the "Rules") and Rule 210 of the *Federal Courts Rules*.

12. Rule 7 of the *Rules* provides:

> 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.
>
> (3) The Registrar shall, forthwith after an order is made pursuant to subsection (2), serve the order on the person described in subsection (1) and on each party.

13. Rule 72(1) of the *Rules* provides:

> Where, 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 Court Rules, C.R.C. 1978, c. 663, shall be followed, with such modifications as circumstances require.

14. Rule 210 of the *Federal Court Rules* provides:

> (1) Where a defendant fails to serve and file a statement of defence within the time set out in rule 204 or any other time fixed by an order of the Court, the plaintiff may bring a motion for judgment against the defendant on the statement of claim.
>
> (2) Subject to section 25 of the Crown Liability and Proceedings Act, a motion under subsection (1) may be brought ex parte and in accordance with Rule 369.
>
> (3) A motion under subsection (1) shall be supported by affidavit evidence.
>
> (4) On a motion under subsection (1), the Court may (a) grant judgment; (b) dismiss the action; or (c) order that the action proceed to trial and that the plaintiff prove its case in such a manner as the Court may direct.

## ***IV. Default Judgment Should Not Be Granted***

### ***A. Minto Roy was Served by Substitutional Service***

15. Rule 7 requires the Tribunal to be satisfied that a notice of application was served in accordance with the *Rules* prior to making an order for default.

16. Rule 53 governs the service of a notice of application. Rule 53(1) does not allow for service by leaving a copy of a document with a person's spouse. However, Rule 53(2) states that where a person is unable to serve a notice of application in a manner set out in (1), the person may apply to a judicial member for an order setting out another manner of effecting service.

17. In this case, the Commissioner applied for and was granted an order that service could be effected on Minto Roy by leaving the notice of application with his wife. This is an order for substitutional service.

18. Rule 211 of the *Federal Court Rules* states that judgment shall not be given against a defendant who is in default where service was effected pursuant to an order for substitutional service, unless the Court is satisfied that it is just to do so in all the circumstances.

19. The Respondents respectfully submit that the Commissioner has not met this burden. The Respondents have a reasonable explanation for the delay and a meritorious defence, and the evidence the Commissioner has presented is not sufficient support for an order in default. It would not be just in these circumstances to issue an order for default.

***B. The Respondents have a reasonable explanation for the delay***

20. The Respondents have a reasonable explanation for the delay. In the Affidavit of Minto Roy, he explains that the delay in response occurred [redacted]

21. He attempted to retain counsel in the beginning of June 2007, and again in the beginning of September 2007. The counsel he attempted to retain in September was unfortunately on vacation for that month. After receiving the Commissioner's Revised Motion Record

on September 13, 2007, Minto Roy retained alternate counsel as soon as possible (paras. 14-17).

22. In these circumstances, where the Respondents were unable to respond to the documents sent by the Commissioner [redacted] and the Respondents took reasonable steps to retain counsel, default judgment should not be granted.

***C. The Respondents Have A Meritorious Defence and the Commissioner has failed to present sufficient evidence***

23. The Respondents submit that they have a meritorious defence to the allegations made in the notice of application. Even in cases where there has been a long delay and it is very late in the day, default judgment should not be granted if it appears that the respondent has even mere elements of a meritorious defence.

*Tandoori-King Restaurant Ltd. v. Bestway Restaurant Ltd.*,
2003 FCT 151 at paras. 10 and 11

24. Moreover, an order for default should not be made unless the evidence in support of the motion makes it possible to grant the order sought.

*McInnes Natural Fertilizsers Inc. v. Bio-Lawncare Services Inc.*,
2004 FC 1027 at para. 3

25. The Respondents respectfully submit that the evidence presented in support of the Commissioner's application falls far short of this requirement. The Commissioner alleges that the Respondents made representations that conveyed the impression that potential clients would almost certainly find work within 90 days, and at a position with salary and benefits equal to or better than their previous job, when in fact this was not the case. It is clear from the affidavits contained in the Commissioner's Revised Motion Record that that many of the complaining PCMG clients did not even participate in the

PCMG program for a full 90 days. Therefore, these affidavits cannot be proper evidence as to whether this alleged statement was false or misleading in a material respect.

26. The Affidavit of Tanya Threatful states that she began the PCMG program in December 2004, and took another position unconnected with PCMG in January 2005 (paras. 21 and 23). Since she only participated in the PCMG program for one or two months, her affidavit cannot be evidence that a statement regarding what normally occurs by the end of a 90 day period was false or misleading.

27. Likewise, Johan De Vaal's evidence is that he began the PCMG program in December 2004, and became dissatisfied with it several weeks into the program, near the end of January (paras. 11, 12, 13 and 16). It is not clear from the affidavit whether he in fact continued to participate in the PCMG program after the end of January.

28. The evidence of Bruce Nickson also shows that he participated in the PCMG program for less than 90 days. His evidence is that he began the program in the middle of December 2004. He then states, "Approximately 5 or 6 weeks after starting with PCMG, I abandoned PCMG's services as I saw no results" (paras. 8 and 11).

29. The affidavit of William Warren is unclear as to whether he continued his participation in the PCMG program for 90 days.

30. Such a manifest defect in the evidence supporting one of the three allegations levied against the Respondents renders the evidence insufficient to justify an order for default.

31. The Respondents note that the Commissioner's Revised Motion Record contains neither the Notice of Application nor the Disclosure Statement (the Notice of Application was found on the Competition Tribunal website). The Respondents also note that they have

no record or summary of the deposition of Minto Roy which took place in February 2007 (save for a one page excerpt in the Commissioner's Revised Motion Record), nor any other documents other than those in the Commissioner's Revised Motion Record which relate to the lengthy investigation the Competition Bureau launched in relation to the Respondents. Operating with this lack of information and the significant time constraints imposed by the order of Madam Justice Simpson of July 31, 2007, the Respondents have been unable to draft full submissions regarding the merits of their defence, but submit that they have a meritorious defence to the allegations and should be given the opportunity to put it forward, particularly in light of the obvious deficiencies of the Commissioner's evidence.

## *V. Conclusion*

32. The Respondents respectfully submit that default judgment should not be granted in this case. Minto Roy was served by substitutional service. Accordingly, default should not be granted unless the Commissioner can show it is just in all the circumstances to make the order. The Commissioner has not met this burden.

33. Moreover, the Tribunal must be satisfied that it has heard such evidence as it may require prior to making an order for default, and the evidence must constitute a sufficient basis for the order. On at least one of the three allegations, the evidence falls far short of this threshold.

34. Also, the Respondents have a reasonable explanation for the delay as well as a meritorious defence to the allegations which they intend to raise once full disclosure has been received.

Dated: October 3, 2007

Harper Grey LLP

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(Per Michael G. Thomas)
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