File No.

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S. 1985, c.C-34, as amended, and the *Competition Tribunal Rules*, SOR/94-290, as amended (the "*Rules*");

AND IN THE MATTER OF an inquiry pursuant to paragraph 10(1)(b)(i) of the *Competition Act* relating to the promotion and marketing of certain business interests by Universal Payphones Systems Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for a temporary order pursuant to section 74.11 of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

UNIVERSAL PAYPHONE SYSTEMS INC.

Respondent

APPLICANT'S MEMORANDUM OF ARGUMENT

INTRODUCTION

1. This is an application by the Applicant pursuant to s. 74.11 of the *Competition Act* (the "Act"). The Applicant seeks an order requiring the Respondent to cease and desist from making false and/or misleading representations to the public in connection with its promotion and marketing of its payphone

business opportunity. In the words of the statute, the Applicant seeks an order directing the Respondent, its Directors, Officers, employees, or any person acting on behalf of the Respondent, not to engage in the reviewable conduct at issue or substantially similar reviewable conduct for a period of 14 days after the order becomes effective. The details of the conduct at issue are set out below.

THE LAW

2. Section 74.11 of the Act provides:

> 74.11 (1) Where, on application by the Applicant, a court finds a strong *prima facie* case that a person is engaging in reviewable conduct under this Part, the court may order the person not to engage in that conduct or substantially similar reviewable conduct if the court is satisfied that
>
> (a) serious harm is likely to ensue unless the order is issued; and
>
> (b) the balance of convenience favours issuing the order.
>
> (2) Subject to subsection (5), an order issued under subsection (1) shall have effect for such period as is specified in it, not exceeding fourteen days unless agreed to by the person against whom the order is sought or unless, on further application, the order is extended for an additional period not exceeding fourteen days.
>
> (3) Subject to subsection (4), at least forty-eight hours notice of an application referred to in subsection (1) or (2) shall be given by or on behalf of the Applicant to the person in respect of whom the order or extension is sought.
>
> (4) The court may proceed *ex parte* with an application made under subsection (1) where it is satisfied that subsection (3) cannot reasonably be complied with or that the urgency of the situation is such that service of notice in accordance with subsection (3) would not be in the public interest.

> (5) An order issued *ex parte* shall have effect for such period as is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (3), the order is extended for an additional period not exceeding twenty-one days.
>
> ***Competition Act,*** s. 74.11

ARGUMENT

3. The Applicant has commenced an inquiry under s. 10 of the Act respecting a possible application under s. 74.1 of the Act. On application by the Applicant, the Competition Tribunal (the "Tribunal") is empowered under s. 74.11 of the Act, subject to the satisfaction of certain conditions, to issue an order directing a person not to engage in the reviewable conduct at issue, or substantially similar reviewable conduct, for a period of up to 14 days after the order becomes effective. Those conditions are that the Tribunal finds that there is a strong *prima facie* case that a person is engaging in reviewable conduct contrary to Part VII.1 of the Act, and is satisfied that:

> (a) serious harm is likely to ensue unless the order is issued; and
>
> (b) the balance of convenience favours issuing the order.
>
> ***Competition Act***, s. 74.1 and 74.11

I. Strong *Prima Facie* Case

(a) What does it mean?

4. *Prima facie* means, literally, “at first sight”, or “ on the face of it”.

> ***Jowitt’s Dictionary of English Law***, (2nd ed) Sweet & Maxwell

5. Prior to the English Court of Appeal’s decision in *American Cyanamid* and its subsequent adoption in Canada, it was the practice of courts in Canada, in deciding whether to grant interlocutory or interim injunctive relief, to first consider whether a party seeking an injunction had demonstrated that it had a strong *prima facie* case or, in some instances, simply a *prima facie* case.

> ***Canadian Olympic Association v. Donkirk International Inc***., [1987] F.C.J. No. 941

6. It is submitted that where two parties have filed affidavit evidence, a *prima facie* case means, if a decision were to be made on the basis of that evidence, that decision would be in favour of the applicant. It is submitted therefore, that a “strong” *prima facie* case must mean something more than that. It is difficult to define with precision exactly “how much more” is necessary. However, it is submitted that, with the use of the word “strong” in s. 74.11 of the Act,

Parliament must have intended that, at least "on first sight", the case of the Applicant must be compelling or convincing.

> ***Canadian Broadcasting Corporation v. CKPG Television Ltd.***, 64 B.C.L.R. (2d) 96 at 104

7. However, it is submitted that it must be recalled that s. 74.11 of the Act contemplates a "temporary order" to preserve the status quo for a limited time and that the use of the word "strong" should be read in that context. It is submitted that on a an application under s. 74.11 of the Act, that the Applicant need not present all the evidence necessary to decide the case.

8. In *Canadian Olympic Association*, the Federal Court addressed the question of the standard of proof on an injunction application. It had been submitted by the defendant that the evidence adduced by the plaintiff was "too general" in that it failed to indicate specifically how the trademarks at issue in that case had been used by the plaintiff. The defendant argued that the plaintiff's affiant's "bald" statements should be considered "valueless." In respect of that argument, the Court stated as follows:

> This submission by counsel for the Defendant might have merit if I were deciding the issues on its merits. For the present purpose, a request for an interlocutory injunction, I need only determine if sufficient evidence is made, on a *prima facie* basis, that there was adoption and usage by the Plaintiff ...".

> ***Canadian Olympic Association v. Donkirk International Inc***., *supra*

9. In *Church & Dwight v. Sifto Canada Inc.*, the plaintiff sought an injunction to stop the defendant from making false and misleading advertising claims, intended to create the impression that the plaintiff's product was inferior to the defendant's. After reviewing the advertising "copy", the Court stated as follows:

> As I have indicated, I am satisfied that a strong *prima facie* case has been established. The offending copy can only have the effect of creating a misapprehension in the minds of consumers as to the nature of the plaintiff's product, and in particular as to its purity and naturalness. The copy is artfully drafted to create the impression that other baking sodas are not pure and that they contain "chemical additives". While this statement may be technically true in chemical engineering terms, it would have the effect of creating the impression in the market that the use of these other products would be less than healthy.
>
> ***Church & Dwight v. Sifto Canada Inc.***, 20 O.R. (3d) 483 at 488-489

10. It is submitted that the facts before the Tribunal in the present application establish a strong *prima facie* case that the Respondent has engaged and continues to engage in reviewable conduct contrary to s. 74.01 of the Act. In the words of the Court in *Church & Dwight v. Sifto Canada Inc.*, it is submitted that the Respondent's representations, "can only have the effect of creating a misapprehension in the minds of consumers".

(b) Section 74.01 of the Act

11. S. 74.01 of the Act, in part, provides as follows:

> **74.01 (1)** A person engages in reviewable conduct who, 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;

Competition Act, s. 74.01

12. Breaking s. 74.01 into its constituent elements, in order for conduct to be reviewable, there must be:

(1) a representation to the public (2) that is false or misleading in a material respect (3) which representation was made for the purpose of promoting, directly or indirectly, any business interest.

(i) "representation to the public"

13. It is submitted that the Respondent has made numerous representations to the public regarding its payphone business opportunity, both in the form of newspaper and radio advertisements.

Affidavit of Larry Bryenton, paras. 14 - 17
R v. Westfair Foods Ltd., (1985), 3 C.P.R. (3d) 174

14. Pursuant to para. 74.03(1)(e) of the Act, for purposes of section 74.01 of the Act, a representation that is "contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public, is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained." The *Interpretation Act* provides that in any enactment of Parliament, "'person', or any word or expression descriptive of a person, includes a corporation".

Competition Act, para.74.03(1)(e)

Interpretation Act, R.S. 1985, c. I-21, s.s. 35(1)

15. In view of para. 74.03(1)(e) of the Act and s.s. 35(1) of the *Interpretation Act*, it is submitted that the representations contained in materials within the Promotional Package sent by the Respondent to prospective investors (the "Promotional Package") constitute "representations" within the meaning of s. 74.01 of the Act. These materials include a brochure entitled, "Connecting You to Bell and Profits - Millennium 2000" (the "Brochure") and a Video describing the Respondent and the business opportunity it is offering (the "Video").

Affidavit of Larry Bryenton, paras. 19, 20

(ii) "that is false or misleading in a material respect"

A. The meaning of "false or misleading"

16. Part VII.1 of the Act, in which s. 74.01 and 74.11 are found, came into force on March 18, 1999. Though s. 74.01 of the Act is a new provision, the phrase "false or misleading" is not new to the Act. The former s. 52 of the Act contained that phrase. In addition, the former *Combines Investigation Act* provided that it was an offense to make "materially misleading representations to the public" regarding the prices at which goods were offered for sale. That Act also made it an offense to publish advertisements which were "untrue, deceptive or misleading". The former s. 52 of the Act and the provisions in

the *Combines Investigation Act* were in the nature of criminal or quasi-criminal provisions and therefore, in order to obtain a conviction under those sections, all elements of the offense had to be proven beyond a reasonable doubt.

> S.C. 1999, c. 2, s. 22, brought into force by SI/99-25, *Can. Gaz.* Part II, March 31, 1999
> ***Competition Act***, s. 52
> ***Combines Investigation Act***, R.S.C. 1970, c.-23, as am. s. 36, s. 36 and 377

17. Notwithstanding the fact that Part VII.1 provides for civil remedies and thus, it is submitted, requires proof on a balance of probabilities, it is submitted that the cases decided under the predecessor sections of the Act and the *Combines Investigation Act* remain useful in providing guidance regarding the meaning of the phrase "false or misleading" and the general purpose of the legislation.

18. It is submitted that the purpose of s. 74.01 of the Act is to protect the public at large from, among other things, false and misleading advertising or representations generally. In *R v. Simpsons Sears Ltd.*, the court considered the purpose of s. 37(1)(a) of the *Combines Investigation Act*, which prohibited advertising which was misleading or deceptive. Regarding the purpose of that section, the Court stated as follows:

> I readily adopt the statements contained in the reasons for judgement in the various authorities cited by counsel for the Crown as to the scope and purpose of the legislation. Those statements, as I read them and understand them, are to the effect that the legislation is perhaps, in part, of a social

> nature designed to protect the public at large. It is not designed to protect just those members of the public who for some particular reason, be it training, education, experience or scepticism, are especially wary of advertisements and read them with great care and thoroughness. Nor is it designed to protect just those members of the public who may lack such training, education, experience or scepticism, or who may be naive, unthinking, or credulous and not to careful in reading advertisements.
>
> Similarly, I understand the statements to be to the effect that the maxim *caveat emptor* no longer flourishes for the benefit of those who deceive or who publish advertisements which have a capacity or tendency to deceive or in respect of which there is a likelihood or fair probability that read those advertisements will be misled.
>
> ***R v. Simpsons Sears Ltd.*** (1977), 28 C.P.R. (2d) 249

19. Guidance as to the meaning of the phrase "false or misleading" may be found in s.s. 74.01(6) of the Act, which provides as follows:

> (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.
>
> ***Competition Act***, s.s. 74.01(6)

20. It is submitted that in determining the general impression conveyed by a representation or, as in this case, a series of representations, it is not necessary to "dissect" the representations one by one so as to consider and weigh each one separately. In *R. v. Imperial Tobacco Products Ltd.*, the Alberta Supreme Court, Appellate Division, referred with approval to the following passage from *F.T.C. v. Sterling Drug, Inc.*, a decision of the United States Court of Appeals, Second Circuit:

> 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.
>
> ***R. v. Imperial Tobacco Products Ltd.,*** (1971), 4 C.C.C. (2d) 423 at 441
>
> ***F.T.C. v. Sterling Drug, Inc.*** (1963), 317 F. 2d 669 at 674
>
> see also ***R v. Muralex Distributions Inc.***, 15 B.C.L.R. (2d) 151

21. It is further submitted that the fact that, with a careful reading of all the representations, it could be determined that the general impression conveyed by a representation or series of representations was false or misleading, does not serve to exculpate the person who made the false or misleading representation(s). In *R. v. Viceroy Construction Co.*, a case involving a prosecution under s. 37 of the *Combines Investigation Act*, in which the Ontario Court of Appeal cited the foregoing passage from *Imperial Tobacco/Sterling Drug* with approval, the court also stated as follows:

> If the catalogue conveys, by the words used, the impression to the average person to whom it is directed, and who in the ordinary course would read it, that the home in question is a two-storey house, when in fact it is a one-storey house, then the advertisement is deceptive and misleading, notwithstanding that such impression might be dispelled by a careful examination of the specification sheet, together with the quoted price list

> and the architectural symbols used in relation to the floor plan of the"proposed lower level" by a person who possessed the necessary competence and experience to interpret such material.
>
> ***R. v. Viceroy Construction*** Co. (1976), 29 C.C.C. (2d) 299 at 303

22. Moreover, it is submitted that any attempts to correct misimpressions created by false or misleading representations which are made after those representations have been made to the public, cannot cure the initial false or misleading nature of those representations.

R. v. Impala Agencies Ltd. (1976), 28 C.P.R. (2d) 42

B. Are the Representations made by the Respondent false or misleading?

23. The representations made by the Respondent which form the basis of this application fall into 4 categories: representations relating to the Respondent itself; representations relating to the payphones marketed by the Respondent as part of its business opportunity; representations relating to profitability; and, representations relating to the “turnkey” nature of the opportunity being promoted by the Respondent. Each of those representations is dealt with in turn below.

Representations relating to the Respondent Itself

24. It is submitted that the Respondent has made at least three representations to the public regarding itself which are false or misleading.

25. First, it is submitted that the statement found the Brochure that, "[f]or the past 16 years at Universal Payphone Systems Inc., we have prided ourselves in providing the most effective, well-structured, entrepreneurial programs on the market" is misleading, in that it creates the impression that the Respondent has been in existence for 16 years and has been in the payphone business for that time. However, the Respondent was incorporated on January 28, 1999.

Affidavit of Larry Bryenton, paras. 13, 24

26. On the Video, prospective investors are introduced to Universal. At that point, the video image is of a modern "glass-wall" office tower which appears to be approximately 20 stories in height. Printed on the screen beneath the building are the words, "North American Headquarters, Toronto, Canada." The audio component of this shot states, " From their North American Headquarters in Toronto, Canada, [Universal] provides the most effective...". The clear impression created is that the office tower shown is Universal's North American Headquarters. The impression is false. The Respondent's Canadian address, as set out in the Brochure and as revealed by its Articles of Incorporation, is Unit C1, 1585 Britannia Road East, Mississauga, Ontario. 1585 Britannia Road East in Mississauga is a single story multi-unit industrial park.

Affidavit of Larry Bryenton, para.s 13, 25, 26

27. The Promotional Package provided by the Respondent to prospective investors contains certificates from three accreditation agencies: the Canadian Business

Bureau, the American Business Bureau and North American Business Opportunity Services. The certificate from the Canadian Business Bureau certifies that the Respondent "has fulfilled all the registration requirements established" by that organization and has "pledged to conduct its business activities in an ethical manner". The two other certificates are similar in nature.

Affidavit of Larry Bryenton, paras. 27-29

28. Beneath each of the certificates is a second certificate which describes the functions carried out by the respective organizations. Each of these certificates indicates, among other things, that the said organizations are independent entities dedicated to, among other things, the protection of the consumer. The certificates also indicate that these organizations do not recommend or endorse any business opportunity.

Affidavit of Larry Bryenton, para 28

29. It is submitted that the documents from the accreditation agencies contain false or misleading representations. First, it is submitted that the representation in the documents that the agencies are independent organizations, dedicated to the protection of consumers, is false. It is submitted that evidence before the Tribunal indicates that the accreditation agencies are not independent from the Respondent and are in all likelihood, a sham created by the Respondent as part of its effort to market it pay telephone business opportunity or other business opportunities.

Affidavit of Larry Bryenton, paras. 31 - 37

30. In addition, it is submitted that documents from accreditation agencies included in the Promotional Package create the misleading impression that the Respondent is a corporation with no "consumer" or other complaints against it. In fact, the Better Business Bureau report with respect to the Respondent states, among other things, that the company has an unsatisfactory rating, "due to their unauthorized use of the Canadian Counsel logo and their lack of response to Bureau and consumer complaints."

Affidavit of Larry Bryenton, para. 30

31. Finally, is submitted that documents from the accreditation agencies are designed and use art work such as would create the general impression in the minds of prospective investors that the certificates originate with well known and nationally recognized accreditation agencies such as the Better Business Bureau ("BBB"). This impression is misleading in that none of the accreditation agencies whose certificates are contained within the Respondent's Promotional Package are in any way associated with the BBB or any other nationally recognized accreditation agency.

Affidavit of Larry Bryenton, paras. 30, 36

32. The representations described in paras. 26 to 30 above are intended to create in the mind of prospective investors a picture of a company that has been in the payphone business for 16 years, is housed in a large and prosperous-looking office tower and have the approval of ostensibly independent accreditation agencies.

33. These representations are material because, it is submitted, one of the things which any person contemplating an investment is likely be influenced is the length of time the company offering that investment has been in business, the apparent prosperity of the company and whether previous investors have had problems with the company.

Representations regarding payphones offered for sale by Respondent

34. It is submitted that the Brochure and Video contained in the Respondent's Promotional Package are misleading with respect to the phone being sold by the Respondent as part of its payphone business opportunity.

35. Throughout the Brochure, the payphone featured appears to be identical in appearance to the payphones commonly used by Bell Canada at its payphone locations in Canada (i.e. the Nortel Inc. ("Nortel") Millennium payphone). Throughout the Video, there are numerous shots of people speaking on Bell Canada payphones. Moreover, on the Video, when the Respondent's "Millennium 2000" is "introduced", there is a brief close-up shot of a woman's hand dialing a keypad. Immediately thereafter, there is a wider shot of what appears to be the same woman, speaking on a Bell Canada payphone.

Affidavit of Larry Bryenton, paras. 38 - 42

36. It is submitted that the juxtaposition of these two shots, along with the many other video images of what are clearly Bell payphones, create the impression

that the payphones which will be provided to investors by the Respondent are the same phones which are used by Bell Canada at its payphone locations (i.e. Nortel's "Millennium" phone). This impression is false.

37. The payphone provided by the Respondent is not the same as or the same in appearance as the payphones used by Bell Canada at its payphone locations throughout Canada. The payphone supplied by the Respondent does not bear a manufacturer's name or CSA certification.

Affidavit of Larry Bryenton, paras. 43 - 44

38. It is submitted that the representation that the payphones to be provided by the Respondent are the same as those used by Bell Canada is material in that Bell Canada's payphones are a "known quantity" in Canada. It is submitted that a prospective investor, in assessing the risks associated with an investment would take some comfort in believing that the phones he or she was to receive were the same those used by Bell Canada. It is submitted that a prospective investor might well believe that as such phones are already nationally recognized by the consuming public, that one of the obstacles to the start up of any business venture, product acceptance in the market, would be diminished or removed.

Representations regarding the "turnkey" nature of the business opportunity

39. It is submitted that the Promotional Package contains a number of representations which create the general impression that the investment being marketed by the Respondent is in the nature of a turnkey operation (i.e. the Respondent will do all that is required to get the investor's business "up and running"). For example, page 15 of the Brochure reads, "We acquire all locations (with your final approval), and completely set up your business for you." Similarly, the Video states "everything you need to get started is included in your investment".

Affidavit of Larry Bryenton, para. 46

40. These representations and the resulting general impression are misleading. It is submitted that the opportunity offered by Universal is not turnkey in nature. It is submitted that investors are required to perform a number of tasks in order to get their business "up and running". These tasks include:

- registering with the CRTC and, as part of that registration exercise, ensuring that their business complies with the requirements set out in CRTC Decision 98-8;
- negotiating and entering into a contract with a long distance carrier;
- negotiating and entering into a contract for operator services ;
- negotiating and entering into a contract for credit card processing;
- arranging and paying for and payphone access line installation; and
- negotiating and entering into a contract with the owner of the premises where their payphones are located.

Affidavit of Larry Bryenton, paras. 47 - 48

41. It is submitted that the representation that the opportunity offered by the Respondent is turnkey in nature is material in that the amount of work required by an investor to get a business up and running and the time before an investment can begin generating returns, would likely be one of the factors a prospective investor would consider in deciding whether or not to invest.

Representations relating to profitability

42. In the Brochure and on the Video, the Respondent makes a series of "profit projections". It is submitted that the projections are false or misleading in at least two ways. It is submitted that they are false or misleading in that they significantly overstate the gross revenues that a payphone could reasonably be expected to generate. It is submitted that they are also false or misleading in that they fail to identify expenses which a person operating a payphone under the scheme created by the Respondent would have to pay.

43. The Respondent's radio advertisements indicate that the payphone business opportunity it is promoting has the potential to earn investors $250,000 per year. The profit projections contained in the Brochure and Video suggest that a single payphone could generate gross revenues of between $10,495.80 and $31,487.40 per year.

44. There is a “fine print” disclaimer at the bottom of each “Profit Projection” page in the Brochure which indicates, *inter alia*, that the projections are “strictly in the nature of possibilities and are not to be construed as a promise of fulfilment.” However, there is no corresponding disclaimer in the Video. Moreover, it is submitted, that Universal’s disclaimer must be viewed in context with the overall impression created by all of the materials in the Promotional Package. For example, the Brochure states as follows:

- Brochure Cover, in large bold face print, - “**Connecting You to Bell and Profits**”;
- Brochure p. 4, in large bold face print, “**Welcome to the World of Cash**”;
- Brochure pps. 9 - 13, stacks of gold coins provide the backdrop for profit projections; and
- Brochure p. 15, in capital letters, “ONE OF THE GREATEST MONEY-MAKING MACHINES EVER INVENTED”.

Affidavit of Larry Bryenton, para. 49

45. It is submitted that the evidence discloses that the Respondent’s profit projections are unrealistic and, as such, are false or, at a minimum, misleading. The evidence indicates that it is difficult to make generalized profit projections concerning payphone revenue as it is dependant on the location of the payphone. However, it is submitted that, on average, it would require approximately 100 phones to generate $250,000 per annum in gross revenues. In other words, one phone would, on average, generate $2,500 per annum.

Affidavit of Larry Bryenton, paras. 51 - 52

46. It is submitted that, even accepting that gross revenue projections are difficult to make with any degree of precision with respect to payphone revenues, that the Respondent's representations are false or misleading in that they are substantially beyond any realistic estimate for payphone revenues.

47. It is submitted that the Respondent's profit projections are also misleading in a second way. In particular, the projections fail to disclose certain expenses that a person operating a payphone business would be required to pay.

48. The profit projections in the Brochure are all presented in the same format. Gross revenues are projected based on the number of calls made per phone per day. From this amount, 20 percent is deducted, which amount the Brochure indicates is to be paid to the owner of the premises where the phone is located. To the amount remaining, an amount for "third party collect credit card" calls is added to obtain "total net" revenues.

Affidavit of Larry Bryenton, paras. 53

49. Even if the Respondent's projections regarding gross revenues were accepted as not false or misleading, it is submitted that the Respondent's net profit projections are overstated as they do not include the following calculations:

- Line Charges: a deduction from gross revenues to reflect the "line charge" payable to the company providing the transmission lines for the payphones; and

- Long Distance Deduction: The calculations in the Brochure and Video deduct 20 percent from local call gross revenues and then add collect credit card revenues to the remaining figure to obtain net profits. However, the standard agreement provided by the Respondent to investors contemplates that a certain percentage of total gross profits, including those derived from long distance calls, is to be paid to the owner of the premises where the payphone is located.

Affidavit of Larry Bryenton, paras.53 - 54

50. One of the Respondent's investors, having executed a copy of the aforementioned contract, is obliged to pay the owners of the locations where her payphones are located 20 percent of total gross revenues.

Affidavit of Larry Bryenton, para.55, s.s. XXVI

51. It is submitted that by failing to disclose that 20 percent of all gross revenues would have to be paid to premises' owners, based on the Respondent's own profit projection, the Respondent has overstated net revenues in amounts ranging between:

- for an investor who purchases Package "A" (i.e. 2 phones) and whose phones get the minimum level of use projected by the Respondent (i.e.

25 calls/day), projected net profits are overstated by $839.16/year; and

- for an investor who purchases Package “E” (i.e. 32 phones) and whose phones get the maximum level of use projected by the Respondent (i.e. 75 calls/day), projected net profits are overstated by $40,279.68.

52. It is submitted that the representations regarding profitability are material in that the amount of profit an investor could earn from a particular business opportunity is material to his or her decision to invest in that opportunity.

(iii) made for the purpose of promoting, any business interest

53. It is submitted that the evidence is clear that the representations made by the Respondent and set out in the foregoing sections of this Memorandum were made for the purpose of promoting a business interest; specifically, the Respondent’s scheme to sell investors a “turnkey” payphone businesses

II. Serious Harm

54. Paragraph 74.11(1) (a) of the Act, in part, provides as follows:

> [...] the court may order the person not to engage in that conduct or substantially similar rewiewable conduct if the court is satisfied that:
>
> (a) serious harm is likely to ensue unless the order is issued
>
> ***Competition Act***, s. 74.11

55. As noted in para. **8** above, the second test ordinarily considered by superior courts in deciding whether to grant interlocutory or injunctive relief, is whether the party seeking the injunction would suffer irreparable harm if the injunction is not granted. The concept of "serious harm" is not one which has been traditionally coincided by the courts in the context of injunctive relief.

56. It is submitted that "serious harm" is a new and *sui generis* concept. The Tribunal, in construing para. 74.11(1) (a) of the Act, should be guided by the ordinary meaning of the words "serious" and "harm".

57. It is submitted that the word "serious" means "weighty, important, grave" and the word "harm" means "evil (physical or otherwise) as done or suffered, hurt, injury, damage, mischief".

> **Shorter Oxford English Dictionary**, Clarendon Press, Oxford

58. On the basis of the grammatical and ordinary meaning of the words “serious” and “harm”, it is submitted that the test set out in para. 74.11(a) of the Act has created a different and lower threshold than the traditional “irreparable harm” test applied by superior courts in injunction applications.

59. First, the harm required by para. 74.11(1)(a) of the Act must be serious, but need not be irreparable. Second, para. 74.11(1)(a) of the Act requires that serious harm must be “likely” to occur [...] . It is submitted therefore that it is not necessary for the Applicant to demonstrate that serious harm has occurred or will necessarily occur, if the an order is not issued.

60. It is submitted that in considering the issue of “serious harm”, the Applicant’s role in administering and enforcing the Act must be considered. In bringing this application, the Applicant is not seeking to enforce a private right or interest. The Applicant is seeking to uphold the Act and, ultimately, to protect certain public rights. In light of that fact, it is submitted that the test for establishing whether serious harm is likely to ensue in the instant application is different from that applied in cases involving between private litigants.

61. This difference has been recognized by American and English courts. For example, the U.S. District Court of Pennsylvania, in a case dealing with an application for a preliminary injunction to restrain certain merging parties from proceeding with their merger, stated as follows:

> When the Government acts to enforce a statute or make effective a declared policy of Congress, the standard of the public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.

> ***United States v. Ingersoll-Rand Co.***, 218 F. Supp. 530, at 545 (aff'd, 320 F.2d 509 (3d Circ. 1963)
>
> See also ***Hoffman-Lasercomb Roche v. Trade Sec.***, [1975] A.C. 295

62. It is submitted that the facts before the Tribunal in establish that serious harm is likely to ensue unless an order is granted under para. 74.11 of the Act. The Respondent's false and misleading representations create two types of harm: harm to competition generally and harm to investors.

(a) Harm to competition generally

63. It is submitted that if the Tribunal is satisfied that the Applicant has demonstrated that a strong *prima facie* case exists that the Respondent has engaged and continues to engage in conduct contrary to s. 74.01 of the Act, that, on the basis of that finding, the Tribunal can infer that serious harm is likely to ensue if the Respondent is permitted to continue to make the representations at issue.

64. British courts have ruled that once a breach of public rights has been established by the Attorney-General, further proof of injury is not needed in order for injunctive relief to be granted.

> ***Attorney-General v. Cockermouth Local Board,*** [1874] Equity Cases 172, at 178;
>
> see also ***Attorney-General v. Shrewsbury (Kinsland Bridge Company***, [1878] Chancery division 752; ***Attorney-General v. London and North Western Railway***, [1900] Q.B. 78

65. American courts, in cases dealing with applications for injunctions in the anti-trust context, have taken a similar approach to the English courts. In a cases involving an applications by the U.S. Attorney-General for preliminary injunctions, the U.S. courts have stated as follows:

> Defendant's argument that there has been no showing of irreparable injury to warrant a preliminary injunction is irrelevant. Section 7 on the Clayton Act expresses a Congressional proscription on such an acquisition where it effect" may be substantially to lessen competition, or tend to create a monopoly". This proscription is a legislative declaration that an acquisition having such an effect is against the public interest. The Government need not to show that it will suffer irreparable damage *qua* Government, but only that there is a probability that it would prevail upon trial on the merits. The public interest in preventing a violation of Sec. 7 outweighs considerations of losses to speculating or investing stockholders resulting form the prevention of possible enhancement in stock value which might result from the acquisition. TheGovernment need not show that it will suffer irreparable damage qua Government, but only that there is a probability that it would prevail upon a trial on the merits.
>
> ***United States v. Chrysler Corp.***, 232 F. Supp. 651, at 657, (D.N.J. 1964)

66. It is submitted that the serious harm to competition generally can be inferred on if the Tribunal concludes that the Applicant has demonstrated that a strong *prima facie* case exists.

67. Moreover, it is submitted that further serious harm to competition is likely to be suffered by the companies trying to enter the market for pay telephones. Approximately 75% of the 300 Competitive Pay Telephone Service Providers registered with the CRTC have purchased their phones through the Respondent. It is estimated that an amount of $2,100,000 has already been paid to the Respondent since it began its pay telephone promotion in January, 1999.

Affidavit of Larry Bryenton, para. 58

68. American courts have stated that harm caused to competition, even in cases where it is not immediate or obvious, should be considered in the determination of the appropriateness of injunctive relief.

> Furthermore, the fact that no concrete anti-competitive symptoms have occurred does not itself imply that competition has not already been affected, 'for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger.
>
> ***United States** v. **General Dynamics Corp***. (1974), 415 U.S. 486, at page 505

(b) Serious harm to potential investors

69. It is submitted that serious harm is also likely to be suffered by investors who lured to invest in the scheme created by the Respondents on the basis of the Respondent's false or misleading representations.

70. It is submitted that certain investors who have to date invested in the Respondent's payphone business opportunity are losing money on their businesses. The experience of investor Ruth Perriam shows that:

- she and her husband decided to invest in 8 payphones with Universal, for a total of $33, 600 paid on March 16, 1999;
- they paid for their investments by cheque and they finance this purchase through a line on credit;
- the phones are operating at a net loss; and

- they anticipate that they will eventually have to collapse their RRSP's in order to pay off the line of credit used to invest in the Respondent's opportunity.

Affidavit of Larry Bryenton, para.55

71. The evidence of other investors indicates that none of them are currently operating a profitable pay telephone business.

Affidavit of Larry Bryenton, para.56

72. As noted in paragraph 59, many persons have already invested with the Respondent. It is estimated that an amount of $2,100,000 has already been paid to the Respondent since the beginning of this promotion in January 1999.

Affidavit of Larry Bryenton, para. 58

73. It is submitted that the Respondent is conducting an increasingly aggressive publicity campaign and targeting a wide range of potential investors.

Affidavit of Larry Bryenton, paras. 14-18

74. It is submitted that serious harm to potential investors is likely to ensue in that they may forego other valid opportunities for investment and put their money at risk on the basis of misinformation.

III. Balance of Convenience

75. The final "test" which under s. 74.11 of the Act the Tribunal is required to consider in deciding whether to issue an order under that section, is whether "the balance of convenience favours issuing the order".

Competition Act, s. 74.11

76. As noted in paragraph 3 above, the balance of convenience test is also considered by courts in Canada when deciding whether to grant interlocutory injunctive relief. With respect to that test, the B.C. Court of Appeal has stated as follows:

> I would adopt and follow the approach of Madam Justice McLachlin to the second prong of the test, namely, the assessment of the balance of convenience. I would summarize that approach in this way: in assessing the balance of convenience, a judge should consider these points: the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent f the injunction is granted; the preservation of the contested property; other factors affecting whether the harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the *status quo*; the strength of the applicant's case; any factors affecting the

> public interest; and any other factors affecting the balance of justice and convenience.
>
> ***Canadian Broadcasting Corporation v. CKPG Television Ltd.***, *supra* at 102

77. It submitted that applying the balance of convenience test does not involve a process whereby each factor is considered separately and, in the end, the score is tallied. Rather, it is submitted that the test requires that all relevant factors be assessed at one time and in one unified context to reach a single overall conclusion as to where the balance of convenience lies.

> ***Canadian Broadcasting Corporation v. CKPG Television Ltd.***, *supra* at 102-103
>
> ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.***, *supra* at 128
>
> ***British Columbia (A.G.) v. Wale***, 9 B.C.L.R. (2d) 333 at 346-347

78. It is submitted that, as the passage from *CBC* set out in paragraph 69 hereof illustrates, in litigation between two private litigants, the balance of convenience often turns in large measure on which of the parties will suffer the greater harm in the event the injunction is, or is not, granted. It is submitted that in an application such as the present one, where the party seeking the "injunction" is a body charged with the administration and enforcement of a
piece of legislation, different considerations apply.

> ***Competition Act***, s. 7

79. It is submitted that where an injunction is sought to protect the public interest or to enforce public rights, courts will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship the injunction would impose upon the person subject to the injunction. As stated in Sharpe, *Injunctions and Specific Performance*:

> It seems clear that where the Attorney General sues to restrain breach of statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse [an injunction] on discretionary grounds. In one case, it was held that"the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land".
>
> Sharpe, *Injunctions and Specific Performance*, 2nd ed. (Toronto: Canada Law Book, 1996), (looseleaf)
>
> ***The Queen in the right of British Columbia v. Alpha Manufacturing Inc. et al.***, 150 D.L.R. (4th) 193

80. It is submitted that the U.S. courts have consistently held that the public interest in the enforcement of antitrust laws and in the preservation of competition is not easily outweighed by private interests and that, generally, private interests must be subordinated to public ones.

> ***United States v. Siemens***, (1980) 621 F.2d 499 at 506
>
> ***United States v. Columbia Pictures***, (1980) 507 F. Supp. 412 at 434

81. Finally, it is submitted that the fact it is the Applicant and not the Attorney General of Canada who seeks an order under s. 74.11 of the Act in this case is of no consequence. In *B.C. v. Alpha Manufacturing, supra*, a case in which the B.C. Minister of Environment sought an injunction to stop a company

from dumping garbage, it was argued that the court should give less weight to the element of the public interest in light of the fact the application had been brought by the Minister and not the Attorney General. In rejecting that argument, the court stated as follows:

> While that distinction may have some validity in some cases, I cannot find that it is a matter of significance in this case.
>
> The Minister having established a substantive case of breach of the statute, the question becomes whether there were circumstances which required the application to be refused.
>
> ***The Queen in the right of British Columbia v. Alpha Manufacturing Inc. et al.***, *su*pra at 206

82. It is submitted that as there is a strong *prima facie* case that the Respondent has engaged in reviewable conduct contrary to s. 74.01 of the Act and, absent an order from the Tribunal, is likely to continue to engage in that conduct, the balance of convenience lies in favor of granting an order to prevent the Respondent from continuing to engage in such conduct. The harm likely to be suffered to the public interest and to private interests is set out in paragraphs 55 through 67 above.

83. It is submitted that the harm which could be suffered by the Respondent if it is subject to an order under para. 74.11 of the Act and it is subsequently determined that the Respondent did not engage in conduct contrary to para. 74.01 of the Act, it will have lost a period of time in which it can attract additional investors. Moreover, it may be that if the Respondent becomes subject to an order under para. 74.11 of the Act its reputation in the business

community will be tarnished and prospective investors could be deterred from investing with the Respondent. The potential impact of the latter harm would presumably be substantially reduced by the subsequent finding by the Tribunal that the Respondent did not engage in conduct contrary to para. 74.01 of the Act.

84. It is submitted that the public interest in seeing the Act enforced and the interests of investors in being able to make investment decisions on the basis of accurate and complete information outweighs any temporary harm which could be suffered by the Respondent in the event an order is granted under para. 74.11.

S. 104 of the Act Distinguished

85. The Applicant notes that, by contrast to s. 74.11 of the Act, s. 104 of the Act provides that, in deciding whether to grant an interim order in the nature of an injunction, the Tribunal shall have "regard to the principles ordinarily considered by the superior courts when granting interlocutory or injunctive relief." Those principles are as follows:

- whether there is a serious issue to be tried;
- whether the litigant who seeks the injunction would suffer irreparable harm if the injunction is not granted; and
- the "balance of convenience", or which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction.

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311;

Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110;

American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396.

86. It is submitted that, in enacting s. 74.11 of the Act, Parliament must be presumed to have been aware of s. 104 of the Act. It is settled in law that a difference in wording within a statute indicates a difference in intended meaning. It is submitted therefore, except in regard to the "balance of convenience", the jurisprudence relevant to an application under s. 104 of the Act, is of marginal relevance to an application under s. 74.11 of the Act.

R v. Schwartz, [1977] 1 S.C.R. 673
R v. Barnier, [1980] 1 S.C.R. 1124

V. RELIEF SOUGHT

87. The Applicant submits that an order should be issued. The Applicant therefore seeks, pursuant to para. 74.11 of the Act, the issuance of an Order directing the Respondent to cease making false or misleading representations as described above and as more particularly set out in the Applicant's Notice of Application dated September 15, 1999 and the Applicant's Draft Order, or such other order as may to the Tribunal appear just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Hull, this 15th Day of September, 1999.

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