

Competition Tribunal



Tribunal de la concurrence

Reference: *The Commissioner of Competition v Live Nation Entertainment, Inc et al*, 2018 Comp Trib 17

File No: CT-2018-005

Registry Document No: 35

IN THE MATTER OF an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act*, RSC 1985, c C-34 regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the Act;

AND IN THE MATTER OF a motion filed by the Commissioner of Competition for further and better affidavits of documents and other relief.

BETWEEN:

The Commissioner of Competition
(applicant)

and

Live Nation Entertainment, Inc, Live Nation Worldwide, Inc, Ticketmaster Canada Holdings ULC, Ticketmaster Canada LP, Ticketmaster L.L.C., The V.I.P. Tour Company, Ticketsnow.com, Inc, and Tnow Entertainment Group, Inc
(respondents)



Date of hearing: October 12, 2018

Before Judicial Member: M. Phelan J.

Date of Reasons for Order and Order: October 17, 2018

REASONS FOR ORDER AND ORDER REGARDING THE COMMISSIONER'S MOTION FOR FURTHER AND BETTER AFFIDAVITS OF DOCUMENTS AND OTHER RELIEF

I. NATURE OF PROCEEDING

[1] The Commissioner of Competition (“**Commissioner**”) made a motion for the production of further and better affidavits of documents (“**AODs**”) from the Respondents and other such relief stemming from the alleged failure to properly search for and produce relevant documents.

[2] The motion arises in the context of an Application by the Commissioner alleging conduct prohibited under s 74.01(1)(a) and s 74.05 of the *Competition Act*, RSC 1985, c C-34 (“**Act**”) in that one or more of the Respondents engaged in deceptive marketing practices by promoting the sale of tickets to the public at prices that are not in fact attainable.

[3] The Tribunal has established a schedule through to a hearing date which provided for the delivery of AODs. As time is critical, it is necessary to quickly decide the Commissioner’s motion.

[4] Five of the Respondents (Live Nation Entertainment, Inc., Live Nation Worldwide, Inc., Ticketmaster Canada Holdings ULC, The V.I.P. Tour Company and Ticketsnow.com, Inc.) provided AODs which did not list any documents (“**nil AODs**”). These five and the remaining three Respondents are inter-related companies with Live Nation Entertainment, Inc. at the top of the corporate ladder.

[5] In the nil AODs, the affidavit contained the following explanation:

This affidavit discloses, to the full extent of my knowledge, information and belief, all of the documents relevant to the matters in the application that are in (name of Respondent)’s possession, power or control. The documents listed herein, if any, were located through the use of technology-assisted review and in the possession, power or control of a custodian primarily employed by (name of Respondent).

[6] The Commissioner raised the following points:

- (a) that the search for documents was clearly inadequate as it has produced fewer documents than expected; that it was simply implausible that these Respondents did not have relevant documents. In some cases, documents which the Commissioner had from the particular Respondent were not listed in the applicable AOD.
- (b) that the AODs failed to list the documents which were actually in the possession, power and control of the relevant Respondent even if the document’s existence was disclosed in some other AOD.
- (c) that several categories of documents going to issues of marketing practice, consumer conduct and impact of the Respondents’ advertising were not produced.
- (d) that certain legal privilege claims were either insufficiently detailed or unsubstantiated on their face.

[7] The Commissioner requests that the Respondents conduct a further and better search for documents, and that they produce further and better AODs curing the deficiencies noted or failing to do so, the right to cross-examine the affiant of the AODs.

II. SUMMARY OF FACTS

[8] The Respondents have explained away the various deficiencies on the basis that they conducted searches in a more modern manner using computer assisted technology aided by a litigation support company – the technology assisted review (“**TAR**”). The result was the identification of 2.5 million documents which were then vetted through the TAR and lawyers trained in the TAR system and who trained the TAR system, and ultimately approximately 55,000 relevant documents were identified. All of this was accomplished in a relatively short period of time.

[9] The first step in document collection had been interviews with “custodians” – people likely to have some of the relevant documents. There were 28 original custodians who had documents and who were said to be able to identify others who might have relevant documents. If any individual was not so identified, even if at the most senior levels where decisions on corporate policy and practice were made, no one asked if that individual had any potentially relevant documents. In fact, the Respondents even refused to ask for documents from a Mr. Rapino – the chief executive officer of the parent Live Nation Entertainment, Inc.

[10] Ultimately the Respondents sorted the relevant records in these AODs without attribution as to which documents were in the possession, power or control of which of the Respondents. The Respondents say that the relevant documents were produced just not identified and listed in the manner required by the *Competition Tribunal Rules*, SOR/2008-141 (“**Rules**”). The general explanation is that the documents were identified in accordance with the Sedona Principles and dealt with in accordance with the Respondents’ view of what was “proportionate” in terms of the legal requirement to produce.

[11] The Respondents had initially proposed delivering a single AOD covering all of the Respondents. The Commissioner objected and required separate AODs from each Respondent. The Respondents then delivered three AODs based on the fact that all of the custodians were primarily employed by that Respondent (although some custodians were employed by more than one Respondent). However, the eight AODs were signed by the same corporate officer – the Vice President, Legal Affairs – Litigation for Live Nation Entertainment, Inc.

[12] This manner of proceeding and the resultant disclosures led to this motion.

III. MATTERS TO BE RESOLVED

A. Further and Better Searches

[13] The Commissioner’s request in this regard is premature. Two senior officials whose documents have yet to be produced but whom the Respondents agree will be produced may shed

further light on what is no more than suspicion that the search was inadequate – but it is not an unreasonable suspicion given the way in which the Respondents produced their AODs.

[14] However, there has been no attack on the Respondents’ use of TAR, and other computer technology to assist in the identification and collection of documents. At this point the major problem is the attribution of documents to each of the Respondents.

[15] The Tribunal encourages the use of modern tools to assist in these document-heavy cases where they are as or more effective and efficient than the usual method of document collection and review.

[16] The issue of further and better searches should await the delivery of further and better AODs in form and content complying with the Rules.

B. Further and Better AODs

[17] The Respondents’ defence to what are clearly non-compliant AODs is that in the end all the relevant documents were produced and that the way in which the Respondents proceeded is consistent with s 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19, to the effect that proceedings are to be dealt with “informally and expeditiously” and consistent with the principle of proportionality. The Respondents also rely on Rule 2(1) which permits the Tribunal to vary the application of any rule.

[18] Firstly, the Tribunal notes that Rule 60(1) requires that each respondent in a case is to serve an affidavit of documents within the time prescribed by the Tribunal. In this case, Justice Gascon set the time for such service of the AODs but no mention was made of the Respondents’ different approach to producing AODs.

[19] Rule 60(2) sets out the specifics for an affidavit of documents. The requirements are more than formalities; the requirements are to elicit a listing of the relevant documents held by each relevant party.

[20] A party’s unilateral view of the operation of the principle of proportionality is not a waiver of the Rules. Where a party wishes to depart from a rule on the basis of proportionality, they are required to seek the concurrence of the judicial member responsible for case management of the matter. *Ex post facto* variation of the operation of a rule should be a rare exception and I am not prepared to grant such variation.

[21] In addition to the principle of compliance with the Rules and obtaining prior approval of exception to the operation of a rule, there is good reason for the Commissioner’s insistence on the service of proper affidavits of documents.

[22] Section 69(2), in particular s 69(2)(c), contains provisions, relevant to civil proceedings, for the authority of documents created and the presumptions of proof based upon possession of documents in the hands of a “participant”.

69 (2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and,

69 (2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :

a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce participant;

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :

(i) que le participant connaissait le document et son contenu,

(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,

(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par

where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant.

[Emphasis added by the Tribunal]

[23] The presumptions are important. Despite the Respondents' desire to serve a single AOD for all Respondents, the Respondents are insisting on being treated separately, defending separately and in some cases pleading that they are not proper parties to the action.

[24] The issue of knowledge within the related corporations and how high up and how far out knowledge of the alleged deceptive advertising extended can be important to liability, and damages or other relief.

[25] Therefore, each Respondent will prepare a further and better AOD listing the documents required in respect of that Respondent. These proper AODs may give rise to the need for further and better searches for relevant documents.

C. Missing Documents

[26] There are three categories of documents which have not been produced for various reasons – transactional and clickstream data; testing documents; and videos.

a. Transactional and Clickstream Data

[27] As a result of the motion, during argument, the Respondents agreed to produce the clickstream data – a record of the computer “clicks” made by potential purchasers of tickets. It includes data collected while consumers interact with the Respondents' websites and mobile apps. It is recognized that this data may be relevant to consumer behaviour in response to the alleged deceptive advertising. Absent the Respondents' concession, the Tribunal would have ordered production.

[28] Transactional data is similar to clickstream and it captures detailed information collected on each ticket purchase concluded on the Respondents' websites and mobile apps.

[29] This data is relevant to how the computer display of ticket prices affects the purchasing conduct and may assist in quantifying the overcharging amount in the alleged “drip pricing” conduct of one or more of the Respondents.

[30] It is to be produced. To the extent that the Commissioner can further define what part of this relevant data set he requires, he should do so.

b. Missing Testing Materials

[31] The Respondents have not provided any substantial reason for not producing the tests of test consumers' reaction to various display alternatives. The evidence presented on this motion establishes its potential relevance in terms of the impact of fees as presented as well as the impact on revenue of such displays.

[32] It should be produced except to the extent that some 2010 tests have already been produced.

c. Videos

[33] There are 436 hours of videos, some of which apparently relate to fee displays. The videos have been identified through the Respondents' own document collection process. What is not known is how many videos are relevant to the litigation because the Respondents have refused to review the videos due to cost and time constraints.

[34] The Respondents have an obligation to make reasonable efforts to obtain and determine relevancy (see *Eli Lilly and Co v Apotex Inc*, 2000 CarswellNat 185, 94 ACWS (3d) 1193 at para 6). The principle of proportionality does not eliminate hard work.

[35] The fact that the Respondents either do not now have or did not create documents, such as contracts, scripted questions and similar material, which would assist in this relevancy exercise, is not a reason to deprive the Commissioner of the relevant videos.

[36] The alternative is for the Respondents to turn all 7,000 videos over to the Commissioner for his review and relevancy determination.

[37] The relevant videos are to be produced. The Respondents will have 10 days to advise the Commissioner how and when the relevant videos will be produced; failing which the Commissioner may seek an order requiring the delivery to him of all videos for his relevancy review.

D. Mr. Rapino

[38] As indicated earlier, Rapino is the senior executive of Live Nation Entertainment, Inc. The Commissioner has requested that the Respondents produce any relevant documents that he may have. Two other senior officers' documents are, as requested by the Commissioner, being produced.

[39] The Respondents have expressed reluctance bordering on refusal to even inquire of Rapino on the basis that he has not previously been identified as a person likely to have relevant documents. They simply do not know and have not made reasonable inquiry.

[40] Given his position within the Respondent's organization, it is more than reasonable to make inquiries of Rapino. Whether he has any documents or which documents he may have is

potentially telling evidence of the extent of involvement of the various Respondents in the alleged misleading activities.

[41] As indicated at the hearing, the Respondents are to inquire of Rapino as to relevant documents he may have and, if any, to produce them forthwith.

E. Privileged Documents

[42] The Commissioner complains that the Respondents' claim of privilege does not comply with Rule 60 in respect to a number of documents. The Commissioner asks that the Tribunal inspect the documents in question to determine the privilege claim.

[43] The search for privileged documents was somewhat different than the TAR search. The privileged documents search was a key word search. It appears that there has been some shifting of documents from one category of privilege to another as the review of these documents settles out.

[44] Before the Tribunal would make an order for individual privilege document review or even a sampling, the Respondents should provide further and better privilege details.

[45] With respect to litigation privilege, the Respondents are to identify the particular litigation over which the privilege is claimed.

[46] With respect to the Respondents' claim of solicitor-client privilege, the fact that the communication was not between a solicitor and a client is not determinative but it is *prima facie* evidence of the privilege. Several of the documents listed have no description of the basis of the claim; this is particularly important where the communication is not with a lawyer.

[47] The Respondents, in the further and better AODs to be served, are to provide a more fulsome description of the subject matter of the claim without disclosing the privilege. Such descriptions as "re: employment claim" or "re: contract interpretation" and similar type descriptions should be sufficient to *prima facie* satisfy the disclosure obligation.

[48] Following compliance with these instructions, should there be problems with the privilege claim, the matters may be raised with the Tribunal.

IV. TIMING

[49] The Respondents have indicated that revised AODs to record new documents produced will be served on November 2, 2018. Given the forthcoming discoveries, absent agreement with the Commissioner, the Respondents' new AODs shall by that same date incorporate the instructions in these Reasons.

THE TRIBUNAL ORDERS THAT:

[50] The Respondents are to comply with these Reasons.

[51] The Commissioner is to have his costs of this motion in any event of the cause.

DATED at Ottawa, this 17th day of October 2018.

SIGNED on behalf of the Tribunal by the presiding judicial member

(s) Michael Phelan

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