

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, RSC 1985, c C-34, as amended;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the *Competition Act*;

**BETWEEN:**

**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**

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**MOTION RECORD OF THE RESPONDENTS  
(Respondents' Motion on Commissioner's Refusals)  
(Returnable April 2, 2019)**

**VOLUME II OF II**

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COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> Date: March 21, 2019 CT-2018-005  Bianca Zamor for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	#59

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Public

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Ottawa, Ontario K1D 5B4

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Public

# Exhibit “D”

This is Exhibit "D" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



---

A Commissioner for Taking Affidavits

**Nicole Rozario**  
Barrister and Solicitor  
in the Province of Ontario

Public

**Joshua Chad**

---

**From:** Adam Chisholm  
**Sent:** Thursday, February 21, 2019 5:15 PM  
**To:** Francois Joyal; Caron, Ryan (IC); Klippenstein, Paul  
**Cc:** David Kent; Mark Opashinov; Joshua Chad  
**Subject:** Live Nation ats CCB - 251233 - Undertakings and Refusals of Lina Nikolova  
**Attachments:** Lina Nikolova - Live Nation examinations for discovery - Undertakings and Refusals Chart.docx

Hello,

Please find attached an undertakings and refusals chart pertaining to the Respondents' examination of Ms. Nikolova.

Many thanks,

Adam

Adam D.H. Chisholm  
d 416.307.4209  
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Assistant: Margie Napolitano | 416.865.7150 | margie.napolitano@mcmillan.ca  
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CT-2018-005

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Respondents

**Lina Nikolova – Undertakings**

January 31, 2019

Number	Page	Question	Undertaking	Answer
1.	23	99	To find out whether the sequence of five numbers and the sequence of eight numbers [on the Commissioner's documents] has any meaning.	
2.	25	108	To provide a complete list of all the letter codes found in the Commissioner's productions subject to relevance and privilege.	

## Public

Number	Page	Question	Undertaking	Answer
3.	26	111	To advise what the various numbering systems [found on the Commissioner's documents] signify other than the fact that a given document is not the same as another given document subject to relevance and privilege.	
4.	26	112	To disclose if [the various number systems found on the Commissioner's documents] have significance.	
5.	27	113	To the degree that any of the numbering or lettering codes [found on the Commissioner's documents] identify the source of the document, or where they were found, what [those numbering or lettering codes] mean.	
6.	33-34	128, 138-139	To advise if Ms. Nikolova recalls any [facts relating to Live Nation Entertainment Inc.'s potential involvement in making price representations that aren't necessarily stated in paragraph 10 of the Commissioner's pleadings that she did not list during this examination].	
7.	34	139	To make reasonable inquiries to determine whether there are any [facts relating to Live Nation's potential involvement in making price representations that aren't necessarily stated in paragraph 10 of the Commissioner's pleadings] so far as the Commissioner is concerned.	
8.	50	188	To make reasonable efforts to identify examples of the policies [that appear on the websites mentioned in the Commissioner's application] where Live Nation Entertainment is named.	
9.	62	237	To advise if the Commissioner becomes aware of additional facts related to the portion of paragraph 12 [where the Commissioner says that Ticketmaster Canada Holdings controls the domain name ticketweb.ca and the associated ticketweb.ca website].	
10.	63-64	245	To advise if there are other facts that come to the Commissioner's attention [associated with whether] Ticketmaster Canada Holdings controlled the website associated with ticketweb.ca.	
11.	65-66	249-250	To advise if any other facts come to the Commissioner's attention in relation to [Ticketmaster Canada Holdings] ULC controlling or influencing the content of ticketmaster.ca, ticketweb.ca and ticketsnow.com.	
12.	67	253	To make reasonable efforts to identify representative examples of facts [associated with Ticketmaster Canada Holdings ULC	

## Public

Number	Page	Question	Undertaking	Answer
			controlling or influencing the content of ticketmaster.ca, ticketweb.ca and ticketsnow.com].	
13.	69-70	262	To make reasonable efforts to provide representative facts that the Commissioner becomes aware of [relating to whether or how VIP Tours controls computer networks relevant to this case, other than what Ms. Nikolova has already told us].	
14.	77	290	To make reasonable efforts to provide representative facts that the Commissioner becomes aware of relating to whether or how VIP Tours is linked to ticketmaster.ca.	
15.	79	296	To make reasonable efforts to provide representative facts that the Commissioner becomes aware of relating to whether ticketsnow.com is linked to ticketmaster.ca and ticketweb.ca.	
16.	79-80	299	To make best efforts to identify the [merger notification filing] that states that Ticketsnow.com, Inc. provides services [that enable tickets to be sold to consumers from ticketsnow.com].	
17.	82	307	To make reasonable efforts to identify representative examples of facts the Commissioner becomes aware of linking Ticketsnow.com, Inc. to the display of content on the three websites listed in the application.	
18.	84	311	To [provide the period and some representative examples of a representation which did not provide the so-called true price of the tickets up front] in Quebec.	
19.	86	321	To make reasonable efforts to provide representative facts that link Live Nation Worldwide to the content, or display of content on [ticketmaster.ca, ticketweb.ca and ticketsnow.com].	
20.	86-87	322	To provide any additional facts as to Live Nation Worldwide's so-called control of ticketmaster.ca, other than what [Ms. Nikolova] has already told us.	
21.	89-90	333, 335	To advise of the date or approximate time period when the representations that are impugned began.	
22.	108	407	To advise if there is any reason to believe that [the Bureau did not assign the section number "74.01(1)(a), misleading representations" to ██████████ complaint].	
23.	118	439	To advise whether Melanie Aitken was the Commissioner in March, 2009.	

## Public

Number	Page	Question	Undertaking	Answer
24.	118	440-442	To make reasonable inquiries into what position with the Bureau [Melanie Aitken] held if she was at the Bureau [in March 2009].	
25.	120	451	To make reasonable efforts to inquire of any web captures that relate to the 2010 review referred to in the pleadings to the extent that such web captures are still available.	
26.	122	457	To advise of whether Mr. Bryenton is still at the Bureau.	
27.	122-123	459	To advise of whether Ms. Rosen is still at the Bureau.	
28.	125	471	To make reasonable inquiries into what Steve Peters' job was [at the time he sent the e-mail that is Exhibit 115].	
29.	130	489	To identify representative examples of [the documents] [Ms. Nikolova] is referring to when she said [REDACTED].	
30.	140-141	521	To make reasonable inquiries of [Mr. Roger, Mr. Homan, Ms. Rosen and Mr. Bryenton] as to if they recall anything other than what is in the documents about communications [with] Ticketmaster [relating to the investigation in 2009 and 2010].	
31.	145	532	To advise if the Commissioner becomes aware of facts suggesting that the Bureau communicated to Ticketmaster that there might be a Competition Act problem with its fee display [REDACTED].	
32.	151	556	To advise if there is any reason to believe [that Exhibit 116] is not accurate.	
33.	154-155	571	To advise if at [the meeting referenced in Exhibit 116] the Bureau representatives were not shown the ticket price display with the currency next to it and, with respect to Ticketsnow, if the Bureau attendees were not shown how the original price is listed and how the resale price of the ticket is listed.	
34.	155-156	573	To ask Mr. Zucker if he recalls who was at the meeting [referenced in Exhibit 116] and advise.	
35.	156	574	To ask Mr. Zucker of his recollection of the meetings other than what is summarized [in Exhibit 116] and advise.	
36.	156	575	To ask [Mr. Zucker] if he recollects whether the Bureau attendees at the meeting [referenced in Exhibit 116] raised any issues with	

## Public

Number	Page	Question	Undertaking	Answer
			Ticketmaster or its counsel about the fee display on the websites that were reviewed.	
37.	159	584-585	To make reasonable inquiries to determine whether the call referred to Exhibit 115 is the same matter as the meeting referred to in [Exhibit] 116.	
38.	169	616-617	To advise if the Commissioner becomes aware of whether, [as of January 8, 2010,] [the Bureau had ever advised Ticketmaster or its counsel that anything related to its fee displays being in contravention, or possibly in contravention of the Competition Act].	
39.	174-175	638-639	To make inquiries of [Messrs. Cowell, Homan and Zucker] to see [REDACTED] [referenced on page 2 of Exhibit 118] prior to March 16 <sup>th</sup> 2010.	
40.	175-176	640-641	To ask whether [Messrs. Cowell, Homan and Zucker] recall anything in addition to what is reported [REDACTED].	
41.	177-178	643	To advise if the Commissioner becomes aware of any communication [REDACTED] [REDACTED] in the 2010 time period referenced.	
42.	185-186	670-673	To point to [web captures of Ticketmaster websites that Ms. Nikolova saw] if [such web captures] and they are in the production set.	
43.	189	684	To advise if the Commissioner becomes aware of any communications [with Ticketmaster with respect to the fee display prior to Ms. Palumbo's letter dated May 12, 2017].	
44.	198	711	To advise whether the Commissioner's position has changed with respect to the [fee] display currently.	
45.	198	712	To confirm that, if the current version of the display is not included within the allegations, at what point from the Commissioner's perspective the so-called problems stopped.	
46.	198	713	To advise, if the post-July 1 <sup>st</sup> , 2018 manner of display turns out to still be within the behaviour that the Commissioner says	

## Public

Number	Page	Question	Undertaking	Answer
			contravenes the [Competition Act], in what respect it contravenes the Act.	
47.	210	747-748	To advise whether the existence of a countdown clock violates the provisions of the Competition Act that have been raised in this case, after reviewing information from the Commissioner's discovery.	
48.	218-219	773-775	To provide the facts the Commissioner has with respect to how purchasers make their purchasing decisions subject to any privilege that may apply.	
49.	225-226	803-804	To provide representative examples of [complaints where consumers have indicated that they feel like they will lose their tickets] to the extent the Commissioner is able to find [such complaints].	
50.	226-227	805-806	To make reasonable efforts to provide all research materials that informed Ms. Nikolova's understanding and point to them if they have been produced subject to any applicable privilege.	
51.	230	817-818	To provide any additional or different information on the subject of consumers underestimating the total price.	
52.	255	899	To provide the complete set of screenshots for the first example, [referenced in paragraph 36 of the Commissioner's pleadings], that run from the initial page through to the final page of the process assuming the Commissioner has [such screenshots].	
53.	255	900	To provide the complete set of screenshots for the second example [referenced in paragraphs 39 and 40 of the Commissioner's pleadings] that run from the initial page through to the final page of the process to the extent available.	
54.	256	901	If the screenshots for the first example in paragraph 36 of the Commissioner's pleadings and the second example in paragraphs 39 and 40 of Commissioner's pleadings were taken from a video capture, to do their best to point to the video capture.	

February 1, 2019

## Public

Number	Page	Question	Undertaking	Answer
55.	282-283	946	To look into whether the documents that would have been on the CD [referenced in Exhibit 119] are in the productions and to make reasonable efforts to point us to those documents. If [these documents] are not in the productions, to make reasonable inquiries to determine whether they still exist and, if so, to produce them subject to privilege.	
56.	284	950	To look into whether the documents that would have been on the CD [in PH 00000011] are in the productions and to make reasonable efforts to point us to those documents. If [these documents] are not in the productions, to make reasonable inquiries to determine whether they still exist and, if so, to produce them subject to privilege.	
57.	295	982	To advise whether the Commissioner becomes aware of any communication from Competition Bureau to Ticketmaster or its representatives that [the Competition Bureau] had an issue with respect to fee display, having regard to Exhibit 120.	
58.	297-298	991-992	To advise whether the Commissioner is aware of any communication from the Competition Bureau to Ticketmaster [regarding the concern that Ticketmaster should advise the buyer that tickets for resale may cost more than their face value].	
59.	311	1046	To give representative examples of [the complaints where people said they were surprised by seeing fees at the end of the ticket purchasing process] Ms. Nikolova described.	
60.	311-312	1047-1048	To try to identify and advise which video [is referenced in the example at paragraphs 43 and 44 of the Notice of Application].	
61.	313	1050	To try to identify [the video capture or relevant image for the complete checkout process or by-flow process for the example given in paragraphs 47-50 of the Notice of Application] in the productions and let us know.	
62.	322	1081	To provide all examples of [the information known to the Commissioner as to what competitors to Ticketmaster have marketed and sold tickets using "attainable prices" inclusive of any mandatory fees, where in Canada they do it, on what platforms, for what kinds of tickets (primary or resale) and in what time periods] that the Commissioner is aware of.	
63.	323-324	1088	To direct to video or [printouts of screengrabs] from [Tickpick and Seatgeek in their productions] and if there are relevant	

## Public

Number	Page	Question	Undertaking	Answer
			examples that did not make it into their productions, to provide them.	
64.	331	1113	To give the Commissioner's information on [which of the respondents are said to carry out business in Canada].	
65.	331	1114	For those respondents that the Commissioner says are carrying on business in Canada, to provide the Commissioner's information as to the way in which those companies are carrying on business in Canada.	
66.	338	1131	To advise whether the several hundred million dollars [referred to in subparagraph 58(b) of the Commissioner's Notice of Application] is the correct or incorrect number and what "gross revenue" captures.	
67.	341-342	1143	To provide whatever [materials published by foreign agencies including reports or publications] that bears on [the effects of presenting initial prices and subsequently adding fees] that is in the Commissioner's knowledge.	
68.	342	1145	To provide whatever [materials published by foreign agencies including reports or publications] to the extent that they have not been produced and, if such materials have been produced, to do their best to point them out.	
69.	351-352	1176-1177	To provide any facts the Commissioner has with respect to what impression consumers form viewing the websites.	
70.	357-358	1194	To provide the Commissioner's information as to how much time or effort is invested or required [for consumers to navigate through the system to find what the Commissioner describes as the true cost of his or her options].	
71.	365	1216	To advise if the Commissioner has any information that suggests that, where language along the lines of "plus fees" is placed beside the price, consumers fail to realize that the ultimate price would be in excess of [the price displayed] [to the extent this] is not captured by a previous undertaking.	
72.	367-368	1222	To advise if the Commissioner hasn't come across examples of delivery fees in the respondents' ticket by-flow that would be included in the non-optional fees with which the Commissioner takes issue.	



## Public

Number	Page	Question	Undertaking	Answer
73.	370	1229-1231	To advise if the Commissioner has received any consumer complaints relating to the budget tool [referred to in paragraph 52 of the Commissioner's pleadings] and provide copies of any notes or representative examples.	
74.	371-372	1236	To advise what market TickPick and SeatGeek were operating in during the relevant periods and whether SeatGeek [more or less functions as an aggregator of tickets being sold by others].	
75.	375-376.	1251	To identify representative examples of the documents that the Commissioner says demonstrate that the respondents are fully aware of the effect that their pricing practices have on consumers and that the Commissioner says reveal that when consumers are faced with lower prices and then face fees that are later dripped, consumers remember the base price and will not rationally combine different prices to work out bundle costs.	
76.	380	1263	To advise if the Commissioner has facts [other than those set out in the reply] that go to the respondents' [pricing] practice not being standard.	
77.	382	1272	To advise of all of the e-commerce companies referred to in paragraph 4 of the reply that the Commissioner is aware of.	
78.	382-383	1273	To direct to, at least examples of, the screen grabs or video of the websites or by-flows [of the e-commerce companies referred to in paragraph 4 of the reply] in the productions.	

## Public

**Refusals**

January 31, 2019

No.	Page	Question	Refusals	Precise Reason for Refusal or Answer
1.	13, 14	56, 58	When was this file opened or begun to be worked on, with respect to the matters that are now in this application?	
2.	15	64	Were you part of the process by which the Bureau decided to open [this] file and begin investigating this file?	
3.	16	69	What triggered the opening of the file leading to the current application?	
4.	16	70	Was [the current application] triggered on the basis of any consumer complaints?	
5.	16-17	71	Ms. Nikolova, were you involved in any way, with the preparation of pleadings in this application; specifically the Commissioner's Notice of Application and the Commissioner's reply?	
6.	17	75	Were you shown drafts of the pleadings before they were finalized?	
7.	17-18	76	Were you given any opportunity to comment on the pleadings before they were finalized?	
8.	18-19	79	Have you made any inquiry of anyone who might be responsible for [the Commissioner's pleadings] to determine whether [your statement that you are not aware of any inaccuracies at this time] is the answer of your organization?	
9.	19	80	Have you made any inquiry of anybody as to whether there are any inaccuracies currently in [the Commissioner's] pleadings?	
10.	45	176	Does the Commissioner say that Live Nation Entertainment Inc. made representations on [ticketmaster.ca, ticketweb.ca or ticketsnow.com]?	
11.	54-55	207	Were you aware of the reorganization [of Ticketmaster] that happened back in 2009 as part of your investigation?	
12.	55	209	Did you have any awareness of the fact of the [2009] reorganization at any time prior to the Notice of Application being filed in January 2018?	

## Public

No	Page	Question	Refusals	Precise Reason for Refusal or Answer
13.	56	212	[Is it] fair to say, that to the extent responsibility for things used to be in the hands of Ticketmaster Ltd., whether those responsibilities remained with its continuing corporation or where it moved to other corporations [in connection with the 2009 reorganization], is not something that was investigated?	
14.	61	235	Do [the statements in paragraph 12 of the Commissioner's pleadings] not take into account [a reorganization at Ticketmaster in 2009 or 2010]?	
15.	73	276-277	You are not aware of any facts associating VIP Tour with [ticketmaster.ca]?	
16.	75-76	285-286	[When you said that you are not aware of any facts linking VIP Tour Company to ticketmaster.ca at this time], does that include directly or indirectly by acting in concert or jointly with somebody else?	
17.	104-105	394-395	Are [redacted] complaints] similar to the complaints made by the Commissioner in the current application?	
18.	105	396	Are the complaints made by [redacted] also complaints made by the Commissioner in the current application?	
19.	109	410	Do you know whether there was any investigation into [redacted] or what steps were taken in response to [redacted] complaint?	
20.	109-110	411	Did anyone at the Bureau ever respond to [redacted]?	
21.	110	412	Was a file opened [redacted] by the Bureau with respect to how prices were displayed on ticketmaster.ca?	
22.	111-112	414-417	Where does, or did the Fair Business Practices branch fit within the hierarchy of the Bureau?	
23.	115-116	430	Why was Ms. Rosen asking for archival website information with respect to ticketmaster.ca, .com and ticketsnow [in her e-mail correspondence with Mr. Bryenton in Exhibit 114]?	

## Public

No.	Page	Question	Refusals	Precise Reason for Refusal or Answer
24.	116	434	What was the misrep issue [that Ms. Rosen] was referring to [in her e-mail correspondence with Mr. Bryenton in Exhibit 114]?	
25.	117	436	Is [the person referred to in the last paragraph of Ms. Rosen's e-mail] Melanie Aitken?	
26.	119	448	What reps were being determined and preserved [per the e-mail response to Ms. Rosen from Mr. Bryenton in Exhibit 114]?	
27.	123	461	Was a more fulsome analysis done by officers on [the issue of misreps on the current websites referred to in Mr. Bryenton's e-mail to Ms. Rosen in Exhibit 114]?	
28.	123	462	I want any analysis that was actually done by officers [on the issue of misreps on the current websites referred to in Mr. Bryenton's e-mail to Ms. Rosen in Exhibit 114].	
29.	123-124	463	What aspects of [the websites referred to in Exhibit 114] was Mr. Bryenton considering when he indicated that there does not appear to be an issue of misreps on those sites?	
30.	124	465	I want production of the entire Bureau file associated with the matter being discussed between Mr. Bryenton and Ms. Rosen at Exhibit 114.	
31.	128-129	484	Did you ask Mr. Roger [REDACTED] [in and around 2009 and 2010]?	
32.	130	488	Are you able to recreate for us a list of what you looked at that gives you the basis for [REDACTED]?	
33.	131-132	494	Do you know whether the Bureau looked at any aspects of [the .ca and ticketsnow] websites [REDACTED]?	
34.	134	500	What was the file with respect to fair business practices issues that was closed [as stated in Mr. Homan's e-mail to Mr. Hunter in Exhibit 115]?	

## Public

No.	Page	Question	Refusals	Precise Reason for Refusal or Answer
35.	140-141	520-522	Can you inquire of [Mr. Roger, Mr. Homan, Ms. Rosen and Mr. Bryenton] about the nature of the investigation that is referred to [in Exhibit 115]?	
36.	141-142	523	[REDACTED] at the same time [as the misleading advertising investigation in and around 2009 and 2010]?	
37.	143-144	527-528	What open matters [was Mr. Homan referencing] [REDACTED] [REDACTED]?	
38.	159	586	Are the activities described at Exhibit 114 [referring to] the same matter [as referred to in Exhibits 115 and 116] or are they two different matters?	
39.	165-166	608	I want an undertaking to find out whether what was intended, beginning at the third paragraph on page 2 [of Exhibit 117], [REDACTED]	
40.	167	612	Why did Mr. Homan not bring to Ticketmaster's attention [in Exhibit 117] [REDACTED]?	
41.	171-172	625-626	Why was there a meeting on [REDACTED]?	
42.	172	628	Was there still a file open at the Fair Practices branch as to Ticketmaster at the time of the meeting [referenced in Exhibit 118]?	
43.	178-179	647, 650	Are there any facts associated with the 2009 version of the fee display that the Bureau did not have access to in 2009 and 2010?	
44.	180	655	Can we agree that the Bureau had access to Ticketmaster's 2009 fee display back in 2009 and 2010?	

## Public

No.	Page	Question	Refusals	Precise Reason for Refusal or Answer
45.	185	670	Did you see [the web captures you reviewed] in your "file" at work?	
46.	186	675	Is there information the Commissioner says relates to the nature or quality of the 2009 version of the fee display which only arose after 2010?	
47.	187	677	When did the Bureau first consider that the 2009 fee displays were misleading?	
48.	187	678	When did the Bureau open its file as to whether or not the fee displays were misleading on ticketmaster.ca, the ticketsnow site or the ticketweb site?	
49.	187	679	Has anything changed since 2010 as to whether or not the 2009 or 2010 fee display was misleading?	
50.	187-188	680	What triggered the Bureau to open a file into whether the fee display is misleading?	
51.	189-190	685	Why did the Bureau take eight years [after Ms. Rosen started a screen capture campaign] to raise this complaint with Ticketmaster?	
52.	195	703	I would like to know whether [the phrase "drip pricing"] is said to be a phrase in terms of use in the ticketing industry or if it comes from some other place.	
53.	203	728	Were you aware of the fact that there were different kinds of fee representations that rolled out and succeeded each other from time to time on the Ticketmaster sites over the period in question, prior to the discovery phase of this case?	
54.	203	729	Was the Bureau aware of [the phrases "fee roll-up period," "list prominence," "no fee with option to see" and "no fee with details linked"] prior to the discovery phase of this case?	
55.	206	737	Does the Commissioner take the position that the existence of a timer is misleading or deceptive to consumers?	
56.	206	738	Does the Commissioner take the position that increasing pressure on consumers to complete a purchase constitutes a misleading or deceptive [marketing practice]?	
57.	209	745	As we sit here today, what is [the Commissioner's position on the existence of a countdown clock]?	

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No.	Page	Question	Refusal	Precise Reason for Refusal or Answer
58.	239, 240	844, 848	What facts are associated with Live Nation Entertainment Inc. [or any of the other seven respondents] acting jointly with another respondent in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?	
59.	239, 240	845, 848	What facts does the Commissioner have in association with whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted in concert in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?	
60.	240	846, 848	What facts or information is the Commissioner aware of with respect to whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted separately, in any way, with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?	
61.	240	847, 848	What information does the Commissioner have, or is the Commissioner aware of, with respect to, or in connection with, whether Live Nation Entertainment Inc. [or any of the other seven respondents] permitted some other respondent to act in any particular way with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?	Refused on the basis that the question has been answered.

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No.	Page	Question	Refusal	Precise Reason for Refusal or Answer
62.	279- 280	941-942	[How does] Ticketmaster know what the order processing fee will amount to per ticket before it knows how many tickets are in the order?	
63.	292- 293	974-975	What Bureau file do [Exhibits 120 and 121] come from?	
64.	293	976	Are [Exhibits 120 and 121] among the screen captures referred to in the March 6 <sup>th</sup> , 2009 e-mail exchange with Ms. Rosen?	

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No.	Page	Question	Refusals	Precise Reason for Refusal or Answer
65.	318, 321-322	1067, 1079-1081	I want all [the information known to the Commissioner as to what competitors to Ticketmaster have marketed and sold tickets using "attainable prices" inclusive of any mandatory fees, where in Canada they do it, on what platforms, for what kinds of tickets (primary or resale) and in what time periods].	
66.	333	1119	Which respondents are said to make the price representations in question and which respondents are said to permit others to make the price representations in question?	
67.	333-334	1120	I would like to have the Commissioner's information with respect to the manner in which each of the respondents permits another respondent to make price representations.	
68.	334	1121	I would like to have the Commissioner's information as to the manner in which each respondent makes the price representations that are the subject of this application.	
69.	343	1149	Ms. Nikolova, did you have any involvement in the preparation of the Commissioner's reply document?	
70.	343-344	1150	Did you see the reply before it was finalized and filed?	
71.	344	1151	Did you have an opportunity to comment on the reply before it was finalized and filed?	
72.	359	1199	Why did the Commissioner not do anything about [the complaints heard in 2008]?	
73.	372-373	1241-1242	If the Commissioner has information [regarding any contact made by the Bureau with TickPick or SeatGeek] you'll let us know?	
74.	378, 380	1258, 1264	I would like to know what information the Commissioner has as to what, if anything, was standard [pricing practice] in e-commerce across the period relevant to this litigation.	
75.	383	1274	Have you or anyone on your team contacted StubHub?	
76.	118	1275	Have you or anyone on your team contacted any other participant in the ticket sale or resale market in Canada?	
77.	119	1276	Has the Bureau gathered or received information from market participants in the ticket sale or resale business in Canada?	



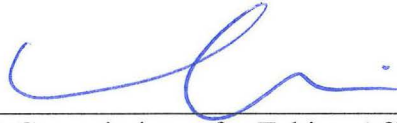
No.	Page	Question	Refusals	Precise Reason for Refusal or Answer
78.	119	1277	Does the Commissioner have any information about the market for online sales or resales of tickets in Canada other than what has been discussed so far?	

Public

# Exhibit “E”

Public

This is Exhibit "E" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



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A Commissioner for Taking Affidavits

**Nicole Rozario**  
Barrister and Solicitor  
in the Province of Ontario

## Public

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UT No.	Question number	Description	Answer
1	99	Advise whether the sequence of five numbers and the sequence of eight numbers have any meaning, and if so, what it means	<p>The sequence of five numbers followed by an underscore followed by eight numbers typically indicates that the record's original format was electronic.</p> <p>The sequence of five numbers identifies the electronic location where the document was found or saved and is always followed by a sequence of eight numbers. The sequence of eight numbers is used to identify each record individually.</p>
2	108	To provide a complete list of the letter codes found in the Commissioner's productions, subject to relevance and privilege.	<p>GSJT GSJU GSJV GSJX GSKS GSLN GSNR GSNS GSNT GSNV GSPK LN-[numbers] LNC MLFH PEJG PGJG PHAD PHAE PHAL TM-[letters]</p>
3	113	To the degree that any of the numbering or lettering codes identify the source of the document, or where they were found, advise not just what it signifies, but particularly what it means. Subject to relevance and privilege.	<p>GSJT – Information supplied to the Commissioner by Live Nation Inc. as required under Section 114 of the Competition Act and set out in Section 16 of the Regulations in the matter of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>GSJU– Information supplied to the Commissioner by Ticketmaster Entertainment Inc. as required under Section 114 of the Competition Act and set out in Section 16 of the Regulations in the matter of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>GSJV – Information supplied to the Commissioner by Live Nation Inc. The Bureau's understanding is that documents under this level consist of documents that were submitted to the United States Department of Justice ("US DOJ") in connection with Live Nation Inc.'s <i>Hart-Scott-Rodino Antitrust Improvements Act of 1976</i> ("HSR") filing in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>GSJX – Information supplied to the Commissioner by the US DOJ.</p> <p>GSKS – Declaration of compliance supplied to the Commissioner by Live Nation Entertainment Inc. pursuant to its obligations under the Consent Agreement between the Commissioner, Ticketmaster Entertainment Inc. and Live Nation Inc. filed with the Competition Tribunal on January 25, 2010.</p> <p>GSLN – Information supplied to the Commissioner by [REDACTED]</p> <p>GSNR– Information supplied to the US DOJ by Live Nation Inc., including</p>

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		<p>Live Nation Worldwide Inc. and its parents, and affiliates, pursuant to the US DOJ's request for additional information and documents relevant to the proposed acquisition of Ticketmaster Entertainment Inc. by Live Nation Inc. ("US DOJ's 2<sup>nd</sup> Request").</p> <p>GSNS – Information supplied to the US DOJ by Ticketmaster Entertainment Inc. pursuant to the US DOJ's 2<sup>nd</sup> Request.</p> <p>GSNT – Depositions of corporate entities and witnesses made pursuant to Civil Investigative Demands in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>GSNV – Information supplied to the Commissioner by Ticketmaster Entertainment Inc. pursuant to the Commissioner's Supplementary Information Request ("SIR") in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>GSPK– Information supplied to the Commissioner by Live Nation Inc. pursuant to the Commissioner's SIR in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>LN – These letters were not assigned by the Bureau. The Bureau's understanding is that most of the documents starting with these 2 letters were supplied to the Commissioner by Live Nation Inc. pursuant to the Commissioner's SIR in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc. A portion of the documents starting with these 2 letters were supplied to the US DOJ by Live Nation Inc., pursuant to the US DOJ's 2<sup>nd</sup> Request.</p> <p>LNC02 – These letters were not assigned by the Bureau. The Bureau's understanding is that documents starting with this code were supplied to the Commissioner by Live Nation Inc. pursuant to the Commissioner's SIR in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>LNC03 – These letters were not assigned by the Bureau. The Bureau's understanding is that documents starting with this code were supplied to the Commissioner by Live Nation Inc. pursuant to the Commissioner's SIR in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>TM – These letters were not assigned by the Bureau. The Bureau's understanding is that documents starting with this code were supplied to the Commissioner by Ticketmaster Entertainment Inc. pursuant to the Commissioner's SIR in respect of the proposed merger of Live Nation Inc. and Ticketmaster Entertainment Inc.</p> <p>MLFH – Information supplied to the Commissioner by Live Nation Entertainment Inc. pursuant to the Commissioner's Supplementary Request for Information in respect of the Consent Agreement between the Commissioner, Ticketmaster Entertainment Inc. and Live Nation Inc. filed with the Competition Tribunal on January 25, 2010.</p> <p>PEJG and PGJG – These letters refer to information obtained by the Commissioner in the context of its current investigation.</p> <p>A code starting with PEJG or PGJG and immediately followed by a sequence of eight numbers (without any underscore) indicates that the record's original format was paper. A code starting with PEJG or PGJG and followed by a sequence of five numbers, which is then separated by an underscore and followed by eight numbers, indicates that the record's original format was electronic in nature. More specifically:</p> <p>Documents with a code starting with PEJG00001, PEJG00004, PEJG00005, PEJG00006, PEJG00290, PEJG00480, PEJG00504, PEJG00505, PGJG00001, PGJG00002, PGJG00046, PGJG00047, and</p>
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			<p>PGJG00048 were saved on USBs.</p> <p>Documents with a code starting with PEJG00478, PEJG00479, PEJG00503, PEJG00506, PEJG00507, PEJG00508, PEJG00509, PEJG00510, PEJG00511, PEJG00512, PEJG00606, PEJG00607, PEJG00608, PEJG00609, PGJG00049, PGJG00050, PGJG00051, PGJG00052, and PGJG00053 were saved on the Bureau's network.</p> <p>PHAD and PHAE – These letters refer to information obtained by the Fair Business Practices Branch, mostly in 2009-2010. A code starting with PHAD or PHAE and immediately followed by a sequence of eight numbers (without any underscore) indicates that the record's format was paper when it was found. A code starting with PHAD and followed by a sequence of five numbers, which is then separated by an underscore and followed by eight numbers, indicates that the record's format was electronic in nature when it was found. More specifically:</p> <p>Documents with a code starting with PHAD00010, PHAD00011 and PHAD00776 were saved on CDs.</p> <p>Documents with a code starting with PHAD00777 were saved on the Bureau's network.</p> <p>PHAL - These letters refer to information obtained by the Civil Matters Branch, mostly in 2009-2010. A code starting with PHAL and immediately followed by a sequence of eight numbers (without any underscore) indicates that the record's format was paper when it was found. A code starting with PHAL and followed by a sequence of five numbers, which is then separated by an underscore and followed by eight numbers, indicates that the record's format was electronic when it was found. More specifically, documents with a code starting with PHAL0001 and PHAL0002 were saved on the Bureau's network.</p> <p>PHEA, PHEB, PHEC, PHED and PHDM – These letters refer to merger notification filings provided by the Respondents pursuant to their obligations under the Consent Agreement between the Commissioner, Ticketmaster Entertainment Inc. and Live Nation Inc. filed with the Competition Tribunal on January 25, 2010.</p>
4	139-140	<p>Advise whether the witness recall any further facts regarding whether there is some other activity or step on the part of Live Nation Entertainment Inc. that the Commissioner alleges against it with respect to price representations.</p> <p>Generally, make reasonable inquiries to determine whether there is any additional information, so far as the Commissioner is concerned, regarding the above.</p>	<p>In addition to the facts plead and provided, the Commissioner is aware of the following facts related to LNE's involvement in making or permitting the making of the representations at issue in these proceedings, on the Respondents' online ticketing platforms:</p> <ul style="list-style-type: none"> <li>• LNE is the current owner of the "Ticketmaster" trademark in Canada</li> <li>• LNE is registered as an autonomous system for a set of IP addresses that resolve to ticketmaster.ca and ticketweb.ca.</li> </ul>
5	188	<p>To make reasonable efforts to identify representative examples of policies that name Live Nation Entertainment Inc.</p>	<p>Some examples of policies which appear on the websites at issue and in which Live Nation Entertainment Inc. is named are:</p> <p>Terms of Use</p> <p>2015-02-08 – ticketmaster.ca – PEJG00479_00006367</p>

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			<p>2016-02-16 – ticketsnow.com – PEJG00479_00006448  2016-02-28 – ticketmaster.ca – PEJG00479_00006388  2016-06-30 – ticketweb.ca – PEJG00479_00006543  2016-08-26 – ticketmaster.ca – PEJG00479_00006383  2016-09-26 – ticketmaster.ca – PEJG00479_00006401  2016-12-11 – ticketweb.ca – PEJG00479_00006530  2017-04-03 – ticketsnow.com – PEJG00479_00006465  2017-05-25 – ticketweb.ca – PEJG00479_00006562  2017-10-01 – ticketmaster.ca – PEJG00290_00000030  2017-10-30 – ticketmaster.ca – PEJG00006_00000222,  PEJG00006_00000223, PEJG00006_00000224  2017-11-14 – ticketsnow.com – PEJG00479_00006460  2018-04-05 – ticketmaster.ca – PEJG00503_00000003  2018-04-05 – ticketsnow.com – PEJG00503_00000005  2018-04-05 – ticketweb.ca – PEJG00503_00000006  2018-04-11 – ticketmaster.ca – PEJG00479_00006410  2018-04-11 – ticketsnow.com – PEJG00479_00006473  2018-04-11 – ticketweb.ca – PEJG00479_00006582  2018-09-13 – ticketmaster.ca – PEJG00607_00000159  2018-09-13 – ticketweb.ca – PEJG00607_00000178</p> <p>Privacy Policies</p> <p>2014-02-09 – ticketmaster.ca – PEJG00479_00006356  2014-04-05 – ticketsnow.com – PEJG00479_00006435  2015-04-19 – ticketmaster.ca – PEJG00479_00006364  2015-04-20 – ticketmaster.ca – PEJG00479_00006443  2015-06-02 – ticketmaster.ca – PEJG00479_00006446  2016-03-21 – ticketmaster.ca – PEJG00479_00006398  2016-09-09 – ticketsnow.com – PEJG00479_00006457  2017-05-13 – ticketweb.ca – PEJG00479_00006556  2017-10-01 – ticketmaster.ca – PEJG00290_00000032  2017-10-30 – ticketmaster.ca – PEJG00006_00000225  2018-04-05 – ticketmaster.ca – PEJG00290_00000114  2018-04-05 – ticketsnow.com – PEJG00290_00000116  2018-04-05 – tickemaster.ca – PEJG00290_00000117  2018-04-05 – ticketweb.ca – PEJG00290_00000119  2018-04-11 – ticketmaster.ca – PEJG00479_00006407  2018-04-11 – ticketsnow.com – PEJG00479_00006470  2018-04-11 – ticketweb.ca – PEJG00479_00006577  2018-09-13 – ticketmaster.ca – PEJG00607_00000151  2018-09-13 – ticketsnow.com – PEJG00607_00000165  2018-09-13 – ticketweb.ca – PEJG00607_00000167</p>
6	236	Advise if the Commissioner becomes aware of additional facts relating to whether Ticketmaster Canada Holdings ULC handles consumer transactions, or collects payments for events in Canada, other than information on the ticketmaster.ca and ticketweb.ca websites identifying Ticketmaster Canada Ltd. as the company handling consumer transactions.	<p>The additional facts the Commissioner is aware of at this time are:</p> <ul style="list-style-type: none"> <li>• Ticketmaster Canada Holdings ULC is the parent company to Ticketmaster Canada IP</li> <li>• Merger notification filings from 2014 and 2015 note that Ticketmaster Canada Holdings ULC had significant assets in Canada or significant gross revenues from sales in, from or into Canada.</li> </ul>
7	243	Advise if there are other facts that come to the Commissioner's attention that Ticketmaster Canada Holdings ULC controlled the website associated	The Commissioner is not aware of any such additional facts at this time.

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		with ticketweb.ca.	
8	245, 249-250, 253	Advise if there are any other facts that come to the Commissioner's attention regarding Ticketmaster Canada Holdings ULC controlling or influencing the content on ticketmaster.ca, ticketweb.ca and ticketsnow.com. To make reasonable efforts to identify representative examples of facts.	At this time, the Commissioner is aware of the following additional facts: <ul style="list-style-type: none"> <li>• Ticketmaster Canada Ltd. was the administrative contact on the domain registration for ticketmaster.ca in 2010.</li> </ul>
9	262	Advise if the Commissioner becomes aware of any additional facts relating to whether or how VIP Tour Co. controls computer networks relevant to this case, other than what the witness has already answered. (We will make reasonable efforts to provide representative facts that the Commissioner becomes aware of, and subject to the qualifications discussed off the record, the Commissioner should not be committed to reviewing that information in advance of the undertaking deadline date. So the undertaking pertains to the information we have been able to review as of that time.)	At this time, the Commissioner is aware of the following additional facts relating to whether or how VIP Tour Co. controls computer networks relevant to this case: <ul style="list-style-type: none"> <li>• VIP Tour is registered as an autonomous system for a set of IP addresses that resolve to ticketsnow.com.</li> </ul>
10	290	Advise if the Commissioner becomes aware of any facts that link VIP Tour Co. and ticketmaster.ca, subject to the same qualification above.	The Commissioner is not aware of any such additional facts at this time.
11	296	Advise if the Commissioner becomes aware of any additional facts relating to whether Ticketsnow.com Inc. has any connection to ticketmaster.ca or ticketweb.ca, subject to the same qualification as the two previous undertakings.	The Commissioner is not aware of any such additional facts at this time.
12	299	Make best efforts to identify the Doc ID of the merger notification filing that the witness has referred to.	The Doc IDs in question are: GSJU00000290-GSJU00000291; GSJU00000315-GSJU00000316; GSJU00000329-GSJU00000330.



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13	307	Make reasonable efforts to identify representative examples of facts the Commissioner may become aware of linking Ticketsnow.com Inc. to the display of content on the three websites named in the application.	The Commissioner is aware of the following information in relation to Ticketsnow.com, Inc.: <ul style="list-style-type: none"> <li>• TicketsNow.com, Inc. has been identified as having significant assets in Canada or significant gross revenues from sales in, from or into Canada;</li> <li>• TicketsNow.com, Inc. provides secondary ticketing services which facilitate the resale of tickets on an online exchange primarily for events held in the United States and Canada; and</li> <li>• Ticketsnow.com, Inc.'s principal category of business is to provide secondary ticketing services which facilitate the resale of tickets on an online exchange.</li> </ul>
14	311	To identify the period during which Quebec did not provide the true price upfront and to provide representative examples.	The period of time during which the Respondents' representations in Quebec did not provide the true price upfront was from at least June 2013 until as late as September 2017.  Representative examples include the email [REDACTED] and its attachments [REDACTED].  [REDACTED] [REDACTED] [REDACTED]
15	321, 322	Make reasonable efforts to provide representative facts that link Live Nation Worldwide Inc. to the content, or display of content on the three websites.  Provide any additional facts as to Live Nation Worldwide's control of ticketmaster.ca.	Live Nation Worldwide, Inc. is the registered owner for the domain name ticketmaster.ca, which is linked to IP addresses associated with LNE's network.  The Respondents have admitted in their Response that Live Nation Worldwide, Inc. is one of the entities which control the content on the ticketing platforms at issue.
16	333, 335	Advise of the approximate time period when the impugned representations began.	The conduct described in the application goes back to 2009.
17	407	Advise if there is any reason to believe that someone from the Bureau did not assign the section number to this matter.	The section number would have been assigned by the Bureau.
18	439-442	Make reasonable inquiries to advise whether Melanie Aiken was the Commissioner of Competition in March 2009, and if not, what position at the Bureau she held, to the extent the information is available.	Melanie Aitken was Interim Commissioner of Competition in March 2009.
19	450  666, 673	To the extent that any web captures relate to the 2010 review referred to in the pleadings, and to the extent that any such web captures are still available, we will make reasonable inquiries.	Captures relevant to this proceeding and relating to the 2010 review referred to in the pleadings have been included in our Affidavit of Documents and include:  PHAD00000016 PHAD00000028 PHAD00000031 PHAD00000034 PHAD00000037 PHAD00000044

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		<p>We undertook to make reasonable inquiries as to whether there were web captures related to the 2010 review and, if so, produce them or if they are in the production set, point you to them. And, work with the witness to look for the ones she saw.</p>	<p>PHAD00000062  PHAD00000079  PHAD00000092  PHAD00000098  PHAD00000111  PHAD00000113  PHAD00000115  PHAD00000120  PHAD00000146  PHAD00000250  PHAD00000258  PHAD00000272  PHAD00000305  PHAD00000312  PHAD00000319  PHAD00000346  PHAD00000374  PHAD00000381  PHAD00000403  PHAD00000408  PHAD00000434  PHAD00000447  PHAD00000450  PHAD00000457  PHAD00000460  PHAD00000468  PHAD00000472  PHAD00000475  PHAD00000478  PHAD00000480  PHAD00000491  PHAD00000499  PHAD00000502  PHAD00000509  PHAD00000521  PHAD00000533  PHAD00000540  PHAD00000552  PHAD00000556  PHAD00000564  PHAD00000566  PHAD00000572  PHAD00000663  PHAD00010_0000006  PHAD00010_0000007  PHAD00010_0000008  PHAD00010_0000011  PHAD00010_0000014  PHAD00010_0000017  PHAD00010_0000022  PHAD00010_0000023  PHAD00010_0000027  PHAD00010_0000029  PHAD00010_0000032  PHAD00010_0000034  PHAD00010_0000036  PHAD00010_0000039  PHAD00010_0000041  PHAD00010_0000043  PHAD00010_0000051  PHAD00776_0000001  PHAD00776_0000002  PHAD00776_0000003  PHAD00776_0000004  PHAD00776_0000005  PHAD00776_0000006</p>
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			<p>PHAD00776_00000008                  PHAD00776_00000009                  PHAD00777_00000001                  PHAD00777_00000002                  PHAD00777_00000015                  PHAD00777_00000027                  PHAD00777_00000036                  PHAD00777_00000042                  PHAD00777_00000064                  PHAD00777_00000090                  PHAD00777_00000104                  PHAD00777_00000115                  PHAD00777_00000117                  PHAD00777_00000119                  PHAD00777_00000121                  PHAD00777_00000123                  PHAD00777_00000125                  PHAD00777_00000128                  PHAD00777_00000133                  PHAD00777_00000140                  PHAD00777_00000143                  PHAD00777_00000147                  PHAD00777_00000156                  PHAD00777_00000159                  PHAD00777_00000161                  PHAD00777_00000163                  PHAD00777_00000164                  PHAD00777_00000166                  PHAD00777_00000168                  PHAD00777_00000170                  PHAD00777_00000172                  PHAD00777_00000174                  PHAD00777_00000176                  PHAD00777_00000178                  PHAD00777_00000180                  PHAD00777_00000182                  PHAD00777_00000184                  PHAD00777_00000186                  PHAD00777_00000188                  PHAD00777_00000194                  PHAD00777_00000195                  PHAD00777_00000196                  PHAD00777_00000224                  PHAE00000032                  PHAE00000033                  PHAE00000042                  PHAE00000043                  PHAE00000048                  PHAE00000051                  PHAE00000054                  PHAE00000062                  PHAE00000066                  PHAE00000068</p> <p>The witness has reviewed some of the captures listed above; however it is not possible to identify which ones she saw.</p> <p>Website downloads made in 2009 for www.ticketmaster.ca and www.ticketsnow.com were included in an NFR folder provided as part of the Commissioner's Affidavit of Documents.</p>
20	456	Advise if Mr. Bryenton is still at the Bureau.	Larry Bryenton is no longer employed by the Bureau.
21	458	Advise if Ms. Rosen is still at the Bureau.	Andrea Rosen is no longer employed by the Bureau.
22	470	Make reasonable	At the time, Steve Peters was Acting Assistant Deputy Commissioner of

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		inquiries to determine Steve Peter's position [at the time of the email dated September 25, 2009].	Competition in the Mergers Branch. Steve Peters is no longer employed by the Bureau.
23	488-489	Identify representative examples of what the witness was referring to, which describe the Fair Business Practices' investigation of Ticketmaster at the time [REDACTED].	The witness was generally referring to documents coded under PHAD, including, for example, the following documents: PHAD00000405 PHAD00000406 PHAD00777_00000258 PHAD00777_00000413 PHAD00777_00000415 PHAD00777_00000423
24	521	To make reasonable inquiries of those involved, if they are still at the Bureau, and advise whether they recall anything other than what is in the documents about communication with Ticketmaster.	Those involved in the Fair Business Practices' investigation of Ticketmaster at the time and still at the Bureau have no recollection of communications wherein the dripping of fees was discussed or wherein anything significantly different from what is in the documents was discussed.
25	532	Advise if the Commissioner becomes aware of facts suggesting that the Bureau communicated to Ticketmaster that there might a Competition Act problem with its fee display, [REDACTED].	The Bureau is not aware of any facts suggesting that the Bureau communicated to Ticketmaster that there might a Competition Act problem with its fee display.  The Bureau did not comment on Ticketmaster's fee display nor whether or not it raised any issue under the Competition Act.
26	556	Advise if there is any reason to believe the record of this meeting is not accurate.	[REDACTED] held in the context of the Commissioner's examination into Ticketmaster's conduct under the misleading advertising and deceptive marketing practices provisions of the Competition Act. [REDACTED]  [REDACTED]  [REDACTED]  [REDACTED]  [REDACTED]  [REDACTED]  [REDACTED]  The record appears to accurately reflect that Ticketmaster showed examples of portions of the websites that included the currency, the original price, the resale price, seat information and seat map. There is no indication that the rest of the purchase funnel was included, where prices were then dripped.  The record accurately reflects that Ticketmaster never asked about whether there were other aspects of its websites that were misleading. The record also appears to accurately indicate that the Bureau representatives never stated that the website representations were acceptable to the Bureau.  The record of this meeting needs to be considered along with Mr.

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Commissioner's responses to undertakings  
Examination for discovery of Lina Nikolova, January 31 and February 1, 2019

			Raymond Snow's notes (PHAD00000684).
27	573; 575	Ask Mr. Lawrence Zuker of his recollection of the meeting, other than what is summarized here, and whether the Bureau attendees at the meeting raised any issues with Ticketmaster or its counsel about the fee display on the websites that were reviewed.	Mr. Zuker has been consulted and has no recollection of Ticketmaster asking if the dripping of fees raised any concerns on the part of the Bureau. [REDACTED]
28	573	To ask Mr. Zucker if he recalls who was at the meeting [referenced in Exhibit 116] and advise.	Mr. Zuker's recollection is that, aside from himself, Raymond Snow, Larry Bryenton and Brent Homan attended this meeting.  The Bureau is also aware that Steve Sansom (legal counsel) was also in attendance.
29	584	Make reasonable inquiries to determine and advise whether the call referred to in Exhibit 115 pertains to the same matter as the meeting in Exhibit 116.	The call referred to in Exhibit 115 and the meeting referred to in Exhibit 116 are both related to the FBP investigation.
30	615	As of the date of this letter (Exhibit 117), January 8, 2010, had the Bureau ever advised Ticketmaster or its counsel that anything related to its fee display was in contravention, or possibly in contravention of the <i>Competition Act</i> ? We will advise if such a communication occurred.	The Bureau has no record of a communication between the Bureau and Ticketmaster or its counsel to the effect that its fee display (excluding communications on currency) was in contravention, or possibly in contravention of the <i>Competition Act</i> as of January 8, 2010.
31	638	Make inquiries of Mr. Cowell, Mr. Homan and Mr. Zuker, to the extent they are still at the Bureau, to see what recollection they have of [REDACTED]. Further, do they have a recollection other than what is reported in this document?	Mr. Zuker has been consulted and indicated the following: <ul style="list-style-type: none"> <li>[REDACTED]</li> <li>[REDACTED]</li> </ul> <p>The information reported in this document needs to be considered along with Mr. Lawrence Zuker's notes (PHAE00000012) and the documents distributed by Ticketmaster at the meeting (PHAE00000015, PHAE00000018, PHAE00000021, PHAE00000032, PHAE00000033, PHAE00000034, PHAE00000036, PHAE00000042, PHAE00000043).</p>

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			These documents only show portions of the website and do not include the rest of the purchase funnel, where prices were then dripped.
32	643	<p>Advise if the Commissioner becomes aware of any communication in the 2010 time period wherein the Bureau advised Ticketmaster [REDACTED] that violated or aggravated a violation of the <i>Competition Act</i>.</p>	<p>[REDACTED]</p> <p>Aside from the documents already included in the Commissioner's Affidavit of Documents, the Bureau is not aware of any communication in the 2010 time period wherein the Bureau specifically commented on [REDACTED] violated or aggravated a violation of the <i>Competition Act</i>.</p>
33	684	<p>Advise if the Commissioner becomes aware of any communications to Ticketmaster with respect to fee display prior to the letter dated May 12, 2017.</p>	<p>The Bureau has no record of Ticketmaster requesting a written opinion as to whether the dripping of fees would raise any concerns under the <i>Competition Act</i> despite Ticketmaster being aware of the Bureau's advisory opinion program since at least 2010.</p> <p>The Bureau has no record of a communication between the Bureau and Ticketmaster or its counsel, prior to the letter dated May 12, 2017, to the effect that the dripping of fees was in contravention, or possibly in contravention of the <i>Competition Act</i>.</p>
34	710-713	<p>Advise whether the Commissioner's position has changed with respect to the [fee] display currently.</p> <p>If the current version of the display is not included within the allegations of misconduct that are in the Notice of Application, to confirm at what point from the Commissioner's perspective the so-called problems stopped.</p> <p>Advise if the post-July 1<sup>st</sup> 2018 manner of display is still within the behavior that the Commissioner says contravenes the <i>Competition Act</i>, and if so, advise in what respect it contravenes the <i>Competition Act</i>.</p>	<p>The Bureau continues to have concerns with the Respondents' current representations.</p> <p>The Bureau is aware that after July 1, 2018, the representations at issue on the Respondents' websites and mobile applications were altered. However, the Respondents' manner of display continues to create the false or misleading general impression that consumers in Canada can buy tickets for less than what the Respondents actually charge.</p> <p>For instance on ticketmaster.ca and on the Ticketmaster mobile application, when the order processing fee is first disclosed to consumers, its disclosure is inadequate to remedy the false or misleading impression that consumers would have formed after viewing the prices represented for the tickets. The Respondents only display the true cost of tickets once consumers select their tickets. This disclosure is wholly inadequate to prevent the representations from being false or misleading in a material respect.</p> <p>Also, on ticketmaster.ca, the order processing fee is not disclosed, or referenced at all, on the budget tool. In this regard, the Bureau's concerns, as illustrated in the example provided in paragraphs 52 to 57 of the Notice of Application, remain unaddressed post-July 1, 2018.</p> <p>Another example is the website Ticketweb.ca, where the Respondents' price representations continue to create the false or misleading general impression that consumers can buy tickets for less than what the Respondents actually charge.</p> <p>The Respondents continue to engage in reviewable conduct, contrary to paragraph 74.01(1)(a) and section 74.05 of the <i>Competition Act</i>.</p>
35	741-748	<p>To advise whether the existence of a countdown clock violates the provisions of the <i>Competition Act</i> that have been raised in this</p>	<p>The existence of a countdown clock does not in itself violate the provisions of the <i>Competition Act</i> that have been raised in this case. The Commissioner says that the clock is part of the context in which the representations are made. In this case, the countdown clock creates a sense of urgency which increases the likelihood of deception.</p>



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			<p>[Redacted text]</p>
<p>37</p>	<p>803, 805, 806</p>	<p>To the extent they are in the productions and we are able to find them, provide representative examples of complaints and the research materials (including articles) that the witness was referring to that informed her understanding that consumers do not wish to "lose their tickets" as referenced in ¶27 of the NOA. Subject to best efforts and any applicable privileges.</p>	<p>Facts with respect to consumers not wanting to lose their tickets can be found in various papers and research materials available publicly, examples of which include:</p> <ul style="list-style-type: none"> <li>• CMA (2015) – Short-term car rental in the European Union</li> <li>• FTC (2012) – Economics at the FTC: Drug and PBM Mergers and Drip pricing</li> <li>• OECD (2014) - OECD Digital Economy Papers No. 236, "Consumer Policy Guidance on Mobile and Online Payments"</li> <li>• OECD (2016) – "Consumer Protection in E-commerce", OECD Recommendation</li> <li>• Rasch, Thone, Wenzel, "Drip pricing and its regulation: Experimental evidence"</li> </ul> <p>Such facts are also found in materials from foreign governmental agencies, examples of which include:</p> <p>PEJG00479_00000758                  PEJG00479_00000802                  PEJG00479_00001029                  PEJG00479_00001031                  PEJG00479_00001033                  PEJG00479_00001148                  PEJG00479_00001150                  PEJG00479_00001181                  PEJG00479_00001246                  PEJG00479_00001282                  PEJG00479_00006613                  PEJG00479_00006752</p> <p>Facts that relate to consumers not wanting to lose their tickets can be found in complaints, examples of which include:</p> <p>PEJG00479_00000148                  PEJG00503_00000007</p> <p>[Redacted text]</p> <p>[Redacted text]</p> <p>[Redacted text]</p> <p>[Redacted text]</p> <p>[Redacted text]</p>



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			<p>[REDACTED]</p>
38	817-818	<p>To provide any additional or different information on the subject of consumers underestimating the total price.</p>	<p>Facts with respect to consumers underestimating the total price can be found in various papers and research materials available publicly, examples of which include:</p> <ul style="list-style-type: none"> <li>• CMA (2015) – Short-term car rental in the European Union</li> <li>• FTC (2012) – Economics at the FTC: Drug and PBM Mergers and Drip pricing</li> <li>• OECD (2014) - OECD Digital Economy Papers No. 236, “Consumer Policy Guidance on Mobile and Online Payments”</li> <li>• OECD (2016) – “Consumer Protection in E-commerce”, OECD Recommendation</li> <li>• Rasch, Thone, Wenzel, “Drip pricing and its regulation: Experimental evidence”</li> </ul> <p>Such facts are also found in materials from foreign governmental agencies, examples of which include:                  PEJG00479_00000758                  PEJG00479_00000802                  PEJG00479_00001029                  PEJG00479_00001031                  PEJG00479_00001033                  PEJG00479_00001148                  PEJG00479_00001150                  PEJG00479_00001181                  PEJG00479_00001246                  PEJG00479_00001282                  PEJG00479_00006613                  PEJG00479_00006752</p> <p>Facts that relate to consumers underestimating the total price can be found in complaints, examples of which include:                  PEJG00479_00000156                  PEJG00479_00000161                  PEJG00479_00000163                  PEJG00479_00000167                  PEJG00479_00000192                  PEJG00479_00000200                  PEJG00479_00000207                  PEJG00479_00000220                  PEJG00479_00000226                  PEJG00479_00000228                  PEJG00479_00000236                  PEJG00479_00000242                  PEJG00479_00000244                  PEJG00479_00000267                  PEJG00479_00000268</p> <p>[REDACTED]</p> <p>[REDACTED]</p>



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		<p>There is another one at PHAD00000011. I would like the same undertaking for each of these CD covers that we got.</p>	<p>PHAD00010_00000032  PHAD00010_00000034  PHAD00010_00000036  PHAD00010_00000039  PHAD00010_00000041  PHAD00010_00000043  PHAD00010_00000046  PHAD00010_00000051</p> <p>The relevant contents of PHAD00000011 consist of website downloads for www.ticketmaster.ca; www.ticketmaster.com and www.ticketsnow.com and were included in an NFR folder provided as part of the Commissioner's Affidavit of Documents.</p> <p>The relevant contents of PHAD00000776 consist of video captures and are:  PHAD00776_00000001  PHAD00776_00000002  PHAD00776_00000003  PHAD00776_00000004  PHAD00776_00000005  PHAD00776_00000006  PHAD00776_00000008  PHAD00776_00000009</p> <p>The relevant content of GSJV00000002 consists of an internal document from the Respondents and is:  GSJV0002_00000305</p> <p>The relevant contents of GSNV00000013 consist of internal documents from the Respondents and are:  TM-AZOI-0000651  TM-AZOI-0002966  TM-AZOI-0007906  TM-AZOI-0015484  TM-HAVM-0024724  TM-HAVM-0026688  TM-HAVM-0036590  TM-HAVM-0050223  TM-HAVM-0050224  TM-IAIV-0003772  TM-IAIV-0017987  TM-IAIV-0025072  TM-IAIV-0025074  TM-IAIV-0025083  TM-IAIV-0025091  TM-IAIV-0025093  TM-IAIV-0025100  TM-LEGB-0000718  TM-LEGB-0000734  TM-LEGB-0002838  TM-LEGB-0008216  TM-LEGB-0008234  TM-LEGB-0011747  TM-LEGB-0014913  TM-LEGB-0021402  TM-LEGB-0021403  TM-LEGB-0021404  TM-LEGB-0048495  TM-LEGB-0048496  TM-LEGB-0053520  TM-LEGB-0063866  TM-LEGB-0067991  TM-LEGB-0071291  TM-LEGB-0071920  TM-LEGB-0072976</p>
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			<p>TM-LEGB-0103307  TM-LEGB-0131966  TM-LEGB-0132927  TM-LEGB-0134573  TM-LEGB-0134575  TM-LEGB-0136207</p> <p>The relevant contents of GSNV00000102 consist of internal documents from the Respondents and are:  TM-WALR-0002100  TM-WALR-0000497</p> <p>The relevant contents of GSNV00000105 consist of internal documents from the Respondents and are:  TM-CLEA-0000173  TM-CLEA-0000483  TM-CLEA-0000493  TM-CLEA-0000556  TM-CLEA-0001072  TM-CLEA-0001148  TM-CLEA-0001819  TM-CLEA-0001849  TM-CLEA-0004274  TM-CLEA-0006191  TM-CLEA-0006970  TM-CLEA-0007251  TM-CLEA-0035993  TM-CLEA-0036307  TM-WALR-0000476  TM-WALR-0000481  TM-WALR-0000489  TM-WALR-0002095</p> <p>The relevant contents of GSPK00000064 consist of internal documents from the Respondents and are:  LN005-00411257  LN005-00411304  LN005-00414233  LN005-00414234  LN005-00414248  LN005-00414249  LN005-00414250  LN005-00414251  LN005-00414252  LN005-00414253  LN005-00414254  LN005-00414255  LN005-00414256  LN005-00414257  LN005-00414258  LN005-00414363  LN005-00414364  LN005-00414377  LN005-00414378  LN005-00414379  LN005-00414380  LN005-00414381  LN005-00414382  LN005-00414383  LN005-00414384  LN005-00414385  LN005-00414386  LN005-00414387  LN005-00414388  LN005-00414389  LN005-00414390</p>
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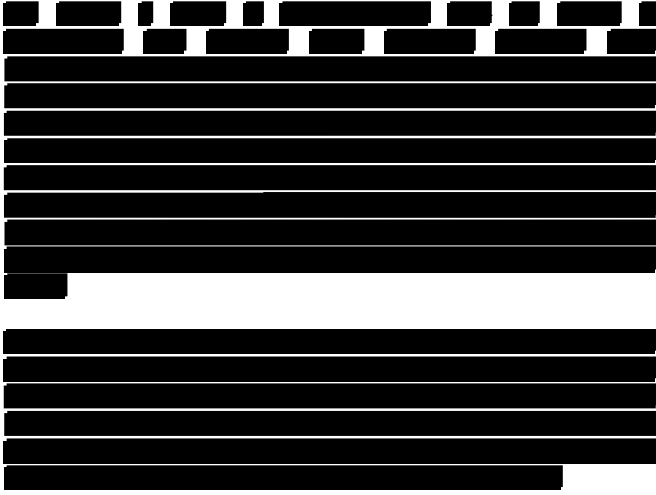
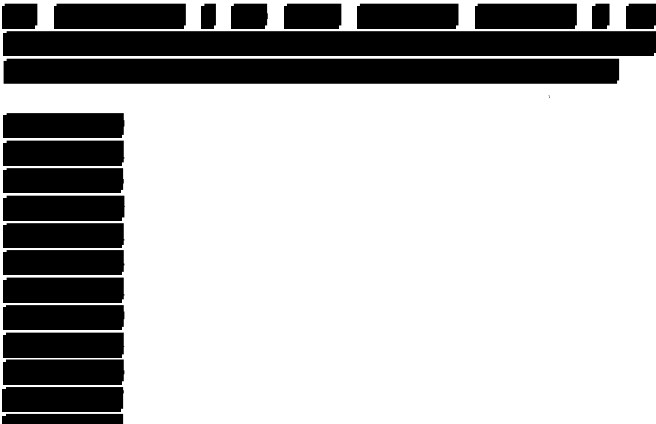
			<p>LN005-00414391 LN005-00414392 LN005-00414393 LN005-00414394 LN005-00414395 LN005-00414396 LN005-00414397 LN005-00414398 LN005-00414399 LN005-00414400 LN005-00414401 LN005-00414402 LN005-00414403 LN005-00414404 LN005-00414405 LN005-00414406 LN005-00414407 LN005-00414408 LN005-00414409 LN005-00414410 LN005-00414411 LN005-00414419 LN005-00414420 LN005-00414433 LN005-00414434 LN005-00414435 LN005-00414436 LN005-00414437 LN005-00414438 LN005-00414439 LN005-00414440 LN005-00414441 LN005-00414442 LN009-00226667 LN009-00226673 LN009-00226675 LN009-00226676 LN009-00227002 LN009-00227008 LN009-00227158 LN009-00227160 LN009-00227161 LN009-00227388</p> <p>Other CD covers were included as part of the Commissioner's Affidavit of Documents, but for which no relevant content was identified, include:</p> <p>GSNV00000010 GSNV00000015 GSNV00000032 GSNV00000036 GSNV00000039 GSNV00000040 GSNV00000042 GSNV00000101 GSNV00000104 GSPK00000033 GSPK00000034 GSPK00000040 GSPK00000048 GSPK00000052 GSPK00000053 GSPK00000056 GSPK00000062</p>
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41	982	Advise whether the Commissioner becomes aware of any communications from the Bureau to Ticketmaster or its representatives that it had an issue with respect to fee display, having regard to Exhibit 120 (as an example).	See answers to undertakings 25 and 33.
42	989	Advise whether the Commissioner is aware of communications from the Bureau to Ticketmaster in regard to the concern that Ticketmaster should advise buyers that tickets for resale may cost more than their face value.	
43	1046	Provide representative examples of the types of complaints described by the witness wherein consumers said they were surprised by seeing fees at the end of the process.	Examples of complaints wherein consumers said they were surprised by seeing fees at the end of the process include:  PEJG00479_00000156 PEJG00479_00000161 PEJG00479_00000163 PEJG00479_00000167 PEJG00479_00000192 PEJG00479_00000200 PEJG00479_00000207 PEJG00479_00000220 PEJG00479_00000226 PEJG00479_00000228 PEJG00479_00000236 PEJG00479_00000242 PEJG00479_00000244 PEJG00479_00000267 PEJG00479_00000268  

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44	1047, 1050	Identify the video captures from which the screenshots included in ¶143, ¶144, ¶147 and ¶148 of the Notice of Application were taken.	The screenshots containing standard tickets in ¶143, ¶144, ¶147 and ¶148 were taken from video capture PEJG00479_00000029. The screenshots containing resale tickets in ¶147 and ¶148 were taken from video capture PEJG00479_00000030.
45	1081	To provide all examples of [the information known to the Commissioner as to what competitors to Ticketmaster have marketed and sold tickets using “attainable prices” inclusive of any mandatory fees, where in Canada they do it, on what platforms, for what kinds of tickets (primary or resale) and in what time periods] that the Commissioner is aware of.	<p>The Commissioner’s information is that TickPick and SeatGeek offer resale tickets for sale to consumers on their websites, where consumers can view tickets prices, make selections and purchase tickets. The Commissioner does not have specific information as to whether or not Seatgeek and Tickpick also sell primary tickets.</p> <p>The Commissioner is aware of TickPick and SeatGeek having offered tickets to Canadian events using attainable prices on their websites since at least February 9, 2017 and May 8, 2018, respectively.</p> <p>The Commissioner is aware of SeatGeek having offered tickets using attainable prices on its mobile application in and around February 2015.</p> <p>The Commissioner’s information is that StubHub offers resale tickets for sale to consumers on its website, where consumers can view tickets prices, make selections and purchase tickets. The Commissioner does not have specific information as to whether or not StubHub also sells primary tickets.</p> <p>The Commissioner is aware of StubHub having offered tickets using attainable prices on its website between April and September 2012 and between January 2014 and September 2015.</p> <p>The Commissioner’s information is that Evenko offers primary tickets for sale to consumers on its website, where consumers can view tickets prices, make selections and purchase tickets. The Commissioner is aware of Evenko having offered tickets to events in the Province of Quebec using attainable prices on its website in and around February 2017.</p> <p>Information within the Commissioner’s productions as to what competitors to Ticketmaster have marketed and sold tickets using attainable prices include:  PEJG00001_00000060  PEJG00001_00000061</p>

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			PEJG00001_00000062 PEJG00004_00000167 PEJG00004_00000168 PGJG00047_00000003 PGJG00047_00000004 PGJG00049_00000024 PGJG00049_00000038 PGJG00049_00000043 PGJG00049_00000048 PGJG00049_00000051 PGJG00049_00000059 PGJG00049_00000067 PGJG00049_00000069 PGJG00049_00000077 PGJG00049_00000107 PGJG00065_00000003 PGJG00065_00000004 PGJG00065_00000005 PGJG00065_00000006    
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46	1088	To identify or produce video captures and/or print-outs of screen grabs of the TickPick and SeatGeek websites.	<p>The TickPick.com captures within the Commissioner's productions are:  PEJG00001_00000061  PEJG00001_00000062  PGJG00047_00000003  PGJG00047_00000004  PGJG00065_00000003  PGJG00065_00000004</p> <p>The SeatGeek.com captures within the Commissioner's productions are:  PEJG00004_00000167  PEJG00004_00000168  PGJG00065_00000005  PGJG00065_00000006</p>
47	1113-1114	Which of the respondents are said to carry out business in Canada? For those respondents which the Commissioner says are carrying on business in Canada, what is the Commissioner's information as to the way in which those companies are carrying on business in Canada?	<p>The Commissioner's information at this point is that the Respondents are involved in carrying out business in Canada as set out in the pleadings and in the answers below.</p> <p>The Commissioner is awaiting information from the Respondents as to the employment of certain individuals involved in making decisions regarding fee display.</p>
		Live Nation Entertainment, Inc.	<ul style="list-style-type: none"> <li>• LNE is parent company to all other Respondents</li> <li>• LNE is the owner of the "Ticketweb" and "Ticketmaster" trademarks in Canada</li> <li>• On certain terms and conditions appearing on the Respondents' websites, LNE is listed as a contact under the address 1 Blue Jays Way, Gate 3, Level 100, Toronto, ON M5V 1J3</li> <li>• LNE has copyright to the Terms of Use page on ticketmaster.ca, where it states: "Ownership of Content and Grant of Conditional License - <u>The Site and all data, text, designs, pages, print screens, images, artwork, photographs, audio and video clips, and HTML code, source code, or software that reside or are viewable or otherwise discoverable on the Site, and all tickets obtained from the Site, (collectively, the "Content") are owned by us or our licensors</u>"</li> <li>• LNE is registrant to a series of IP addresses, some of which link to the domain names ticketmaster.ca and ticketweb.ca</li> </ul>
		Live Nation Worldwide, Inc.	<ul style="list-style-type: none"> <li>• LNW is domain registrant for ticketmaster.ca, a domain linking consumers to a website where they can purchase tickets to Canadian events</li> <li>• LNW offers the Live Nation mobile app</li> </ul>
		Ticketmaster LLC	<ul style="list-style-type: none"> <li>• Ticketmaster LLC offers the Ticketmaster mobile app, from which Canadian consumers can purchase tickets</li> <li>• Some terms and conditions (dating back to 2009) identify TM LLC as the company handling transactions and collecting payments for events in the United States offered through ticketmaster.ca</li> </ul>
		Ticketmaster Canada Holdings ULC	<ul style="list-style-type: none"> <li>• Corporate records indicate Ticketmaster Canada Holdings ULC is registered as a corporation in Nova Scotia</li> <li>• Merger notification filings from 2014 and 2015 note that Ticketmaster Canada Holdings ULC had significant assets in Canada or significant gross revenues from sales in, from or into</li> </ul>

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			Canada
		Ticketmaster Canada LP	<ul style="list-style-type: none"> <li>Corporate records indicate Ticketmaster Canada LP is registered as a limited partnership in Nova Scotia</li> <li>Ticketmaster Canada LP's principal office is at 1 Blue Jays Way, Toronto, ON M5V 1J3</li> <li>Merger notification filings from 2014 and 2015 note that Ticketmaster Canada LP had significant assets in Canada or significant gross revenues from sales in, from or into Canada</li> <li>Ticketmaster Canada LP engaged in ticketing sales throughout Canada</li> <li>For the year ended December 31, 2013, Ticketmaster Canada LP had total sales of \$619.9 million (CDN) for ticketing services</li> <li>Ticketmaster Canada LP is the entity with whom Canadian clients enter into contracts for the provision of ticketing services.</li> </ul>
		The VIP Tour Company	<ul style="list-style-type: none"> <li>Owns the trademark "Ticketsnow" in Canada</li> <li>VIP Tour is registrant to a series of IP addresses, some of which link to the domain name ticketsnow.com</li> <li>The domain ticketsnow.com resolves to IP addresses associated with VIP Tour's network.</li> </ul>
		Ticketsnow.com, Inc.	<ul style="list-style-type: none"> <li>TicketsNow.com, Inc. has significant assets in Canada or significant gross revenues from sales in, from or into Canada</li> <li>TicketsNow.com, Inc. is: "Based in the United States, TicketsNow.com, Inc. provides secondary ticketing services which facilitate the resale of tickets on an online exchange primarily for events held in the United States and Canada"</li> <li>Ticketsnow.com, Inc.'s principal category of business is as follows: "Secondary ticketing services which facilitate the resale of tickets on an online exchange"</li> </ul>
		TNow Entertainment Group, Inc.	<ul style="list-style-type: none"> <li>TNow Entertainment is domain registrant for ticketsnow.com, a domain linking consumers to a website where they can purchase tickets to Canadian events</li> <li>Some of the Terms and Policies appearing on ticketsnow.com are copyright to Tnow Entertainment, Inc.</li> </ul>
48	1131	Advise what "gross revenue" is meant to capture in ¶58 of the NOA. Advise what the Commissioner is saying is in excess of several hundred million dollars, and whether that is the correct or incorrect number.	<p>Paragraph 58b of the Notice of Application includes the Respondents' Annual Value of Sales of Ticketmaster Canada LP from the supply of ticketing services, as referred to in Appendices 5.2.3 and 5.2.4 of the following documents:</p> <p>PHDM00001_00000001  PHEA00001_00000001  PHEB00001_00000001  PHEC00001_00000001  PHED00001_00000001</p> <p>The Commissioner has no reason to believe that the numbers provided in those documents are inaccurate.</p>
49	1143, 1145	Provide the guidance of foreign agencies that bears on the effects of presenting initial prices and subsequently adding fees that are in the Commissioner's knowledge.  Include reports or publications among the foreign agency information.	<p>The Commissioner is aware of the following materials from foreign agencies:</p> <p>PEJG00479_00000758  PEJG00479_00000802  PEJG00479_00001029  PEJG00479_00001031  PEJG00479_00001033  PEJG00479_00001148  PEJG00479_00001150  PEJG00479_00001181  PEJG00479_00001246  PEJG00479_00001282  PEJG00479_00006613</p>

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			<p>PEJG00479_00006752</p> <ul style="list-style-type: none"> <li>• CMA (2015) – Short-term car rental in the European Union</li> <li>• FTC (2012) – Economics at the FTC: Drug and PBM Mergers and Drip pricing</li> <li>• OECD (2014) - OECD Digital Economy Papers No. 236, “Consumer Policy Guidance on Mobile and Online Payments”</li> <li>• OECD (2016) – “Consumer Protection in E-commerce”, OECD Recommendation</li> </ul>
50	1176	Provide the literature and articles the witness referred to in her answer with respect to the facts the Commissioner has with respect to what impression consumers form from viewing those websites, to the extent it is not the same body of literature already referred to.	The literature and articles are those referred to elsewhere in these undertakings.
51	1194	Identify what is the Commissioner’s information as to how much time or effort is invested or required by consumers to ultimately learn the true cost of a consumer’s options? And if it’s different, the time and effort that would be wasted if a consumer abandons the transaction.	<p>The amount of time and effort required to learn the true cost of a ticket will vary by each individual consumer. Some factors specific to the buyflow include the time and effort to create an account or to log into an account. There may also be time and effort expended by the consumers to select tickets that correspond to their budget, schedule and preferences.</p> <p>Information that relates to time and effort required can also be found in complaints. Examples of such complaints include:</p> <p>PEJG00479_00000287          PEJG00503_00000007</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
52	1216	If there is additional information that is not covered by the previous undertaking, advise of	In addition to the information provided in previous undertakings, information that relates to the price representations at issue can be found in complaints, examples of which include:

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		<p>the Commissioner’s information that suggests that where language along the lines of “plus fees” is placed besides the price, i.e. where the price is \$50, and consumers fail to realize that the ultimate price would be in excess of \$50.</p>	<p>PEJG00479_00000207                  PEJG00479_00000218                  PEJG00479_00000219                  PEJG00479_00000220                  PEJG00479_00000222                  PEJG00479_00000224                  PEJG00479_00000226                  PEJG00479_00000228                  PEJG00479_00000236                  PEJG00479_00000238                  PEJG00479_00000240                  PEJG00479_00000242                  PEJG00479_00000244</p> <p>The Commissioner is also aware of various documents in the Respondents’ productions that relate to the price representations at issue, an example of which is:</p> <p>██████████</p> <p>The Commissioner is also aware of user testing conducted by the Respondents that relate to the price representations at issue, an example of which is:</p> <p>██████████</p> <p>Information relating to consumers failing to realize the ultimate price can be found in various papers and research materials, examples of which include:</p> <ul style="list-style-type: none"> <li>• CMA (2015) – Short-term car rental in the European Union</li> <li>• FTC (2012) – Economics at the FTC: Drug and PBM Mergers and Drip pricing</li> <li>• OECD (2014) - OECD Digital Economy Papers No. 236, “Consumer Policy Guidance on Mobile and Online Payments”</li> <li>• OECD (2016) – “Consumer Protection in E-commerce”, OECD Recommendation</li> <li>• Rasch, Thone, Wenzel, “Drip pricing and its regulation: Experimental evidence”</li> </ul> <p>Materials from foreign agencies include:</p> <p>PEJG00479_00000758                  PEJG00479_00000802                  PEJG00479_00001029                  PEJG00479_00001031                  PEJG00479_00001033                  PEJG00479_00001148                  PEJG00479_00001150                  PEJG00479_00001181                  PEJG00479_00001246                  PEJG00479_00001282                  PEJG00479_00006613                  PEJG00479_00006752</p>
53	1222	<p>The Commissioner has defined in his pleadings the term non-optional fees. [...] To my knowledge, and we’ll advise if otherwise, the Commissioner hasn’t come across examples of delivery fees in the respondents’ ticket buy-flow that would be</p>	<p>At this time, the Commissioner is not aware of fees labelled as “delivery” fees that would be included in the non-optional fees with which the Commissioner takes issue.</p>

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		included in the non-optional fees with which the Commissioner takes issue.	
54	1229	To advise whether the Commissioner has received consumer complaints relating to the budget tool, and if so, to provide representative examples.	Examples of complaints relating to the budget tool include:  PEJG00479_00000247 PEJG00479_00000248 PEJG00479_00000254 PEJG00479_00000255 PEJG00479_00000256 PEJG00479_00000257 PEJG00479_00000260 PEJG00479_00000262 PEJG00479_00000263 PEJG00479_00000264 PEJG00479_00000265 PEJG00479_00000266 PEJG00479_00000287
55	1236	To advise in what market TickPick and SeatGeek were operating in during the relevant periods, and whether the description of how SeatGeek functions (an aggregator of tickets being sold by others) is more or less accurate.	The Commissioner's information is that TickPick and SeatGeek offer resale tickets for sale to consumers on their websites, where consumers can view tickets prices, make selections and purchase tickets. The Commissioner does not have specific information as to whether or not Seatgeek and Tickpick also sell primary tickets. The Commissioner is aware of TickPick and SeatGeek having offered tickets to Canadian events since at least February 9, 2017 and May 8, 2018, respectively.  The Commissioner does not have specific information in regards to how Seatgeek sources the tickets it offers for sale, or whether it is an "aggregator" website.
56	1251	To identify representative examples of the documents that demonstrate that the Respondents are fully aware of the effects that their pricing practices have on consumers, and that reveal when consumers are faced with lower prices and then face fees that are later dripped, consumer remember the base price, don't want to do the math, and will not rationally combine different prices to work out bundle costs.  With respect to the two phrases in ¶13 of Reply which appear in quotes, we'll try to identify the specific documents.	Examples of relevant documents include: LN005-00012768 LN005-00044262 LN013-00044626 GSNT0005_00001816  LN013-00051055 was specifically referenced in ¶13 of the Reply ("will not rationally combine different prices to work out bundle costs").  LN013-00095080 was specifically referenced in ¶13 of the Reply ("remember the base price (don't want to do the math)"). Sources for LN013-00095080 are listed on page 5 and can be found at:  PEJG00479_00000312 PEJG00479_00000318 PEJG00479_00000344 PEJG00479_00000359 PEJG00479_00000374 PEJG00479_00000386 PEJG00479_00000400
57	1263, 1272, 1273	To advise if the Commissioner has other facts that go to the Respondents' practice not being standard.	There are various ways in which prices can be represented, examples of which are included further below.  [REDACTED] [REDACTED] [REDACTED]

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Commissioner of Competition v Live Nation Entertainment, Inc. et al CT-2018-005

Commissioner's responses to undertakings

Examination for discovery of Lina Nikolova, January 31 and February 1, 2019

		<p>To advise of the e-commerce companies referred to in ¶4 of the Reply that the Commissioner is aware of.</p> <p>To identify examples in the productions of screen captures or videos of the above e-commerce companies' websites or buy-flows.</p>	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>At this time, the Commissioner is aware of the following e-commerce platforms that present prices that are in fact attainable as the first price consumers see:</p> <p>TickPick.com; SeatGeek.com; Evenko.ca; Westjet.com; AirCanada.ca; Cineplex.com; Nike.com; Simons.ca; BestBuy.ca; TheBay.com; CanadianTire.ca; Lowes.ca; Wayfair.ca; Viarail.ca; Apple.com; Homedepot.ca; Audible.ca; Walmart.ca; NewEgg.ca; Amazon.ca.</p> <p>Examples of screen captures or videos of e-commerce websites that show attainable prices are:</p> <p>PEJG00001_00000060 Evenko.ca  PEJG00001_00000061 Tickpick.com  PEJG00001_00000062 Tickpick.com  PEJG00004_00000167 Seatgeek.com  PEJG00004_00000168 Seatgeek.com  PEJG00510_00000001 WestJet.com  PEJG00510_00000002 AirCanada.ca  PEJG00510_00000003 Cineplex.com  PEJG00510_00000004 Nike.com  PEJG00510_00000005 Simons.ca  PEJG00510_00000006 BestBuy.ca  PEJG00510_00000007 Thebay.com  PEJG00510_00000008 Canadiantire.ca  PEJG00510_00000009 Lowes.ca  PEJG00606_00000001 Wayfair.ca  PEJG00606_00000002 Viarail.ca  PEJG00606_00000003 Apple.com  PEJG00606_00000004 Homedepot.ca  PEJG00606_00000005 Audible.ca  PEJG00606_00000006 Walmart.ca  PEJG00606_00000007 Newegg.ca  PEJG00606_00000008 Amazon.ca  PGJG00047_00000003 Tickpick.com  PGJG00047_00000004 Tickpick.com  PEJG00001_00000061 TickPick.com  PEJG00001_00000062 TickPick.com  PGJG00047_00000003 TickPick.com  PGJG00047_00000004 TickPick.com  PGJG00065_00000003 TickPick.com  PGJG00065_00000004 TickPick.com  PEJG00004_00000167 SeatGeek.com  PEJG00004_00000168 SeatGeek.com  PGJG00065_00000005 SeatGeek.com  PGJG00065_00000006 SeatGeek.com</p>
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# Exhibit “F”

Public

This is Exhibit "F" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



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A Commissioner for Taking Affidavits

**Nicole Rozario**  
Barrister and Solicitor  
in the Province of Ontario



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Commissioner of Competition v Live Nation Entertainment, Inc. et al/ CT-2018-005  
 Commissioner's responses to certain refused questions  
 Examination for discovery of Lina Nikolova, January 31 and February 1, 2019


Question number	Description	Answer
465	I want the entire Bureau file associated with this matter that is being discussed at Exhibit 114 produced.	All relevant information associated with the matter discussed at Exhibit 114 has been produced.
500	Reading the second paragraph of Exhibit 115; what was the file with respect to the fair business practices issues that was closed?	<p>Exhibit 115 relates to the Bureau's 2009-2010 examination of Ticketmaster's conduct under the misleading advertising and deceptive marketing practices provisions of the <i>Competition Act</i>.</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
586	Are the activities described at Exhibit 114 [referring to] the same matter [as referred to in Exhibits 115 and 116] or are they two different matters, three matters?	<p>The activities described in Exhibit 114 pertain to the same matter as Exhibits 115 and 116, namely, the Bureau's 2009-2010 examination of Ticketmaster's conduct under the misleading advertising and deceptive marketing practices provisions of the <i>Competition Act</i>.</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
737; 738; 745	Does the Commissioner take the position that the existence of a timer is misleading or deceptive	These questions have been answered. Refer to the answer provided in response to undertaking # 35.



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# Exhibit “G”

This is Exhibit "G" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



---

A Commissioner for Taking Affidavits

**Nicole Rozario**  
Barrister and Solicitor  
in the Province of Ontario





Public

# Exhibit “H”

Public

This is Exhibit "H" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



---

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Barrister and Solicitor  
in the Province of Ontario








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# Exhibit “I”

This is Exhibit "I" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



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in the Province of Ontario



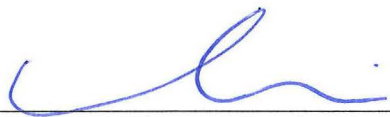


Public

# Exhibit “J”

Public

This is Exhibit "J" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



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Barrister and Solicitor  
in the Province of Ontario







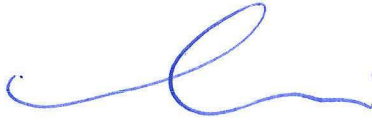


Public

# Exhibit “K”

Public

This is Exhibit "K" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



---

A Commissioner for Taking Affidavits

**Nicole Rozario**  
Barrister and Solicitor  
in the Province of Ontario



Public

# Exhibit “L”

Public

This is Exhibit "L" referred to in the  
Affidavit of Deborah Pouliot  
sworn before me, this 19th day of  
March, 2019.



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A Commissioner for Taking Affidavits

**Nicole Rozario**  
Barrister and Solicitor  
in the Province of Ontario































































































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**CT-2018-005**  
**THE COMPETITION TRIBUNAL**  
**IN THE MATTER OF the *Competition Act*,**  
**RSC 1985, c C-34, as amended;**  
**AND IN THE MATTER OF an application by**  
**the Commissioner of Competition for orders**  
**pursuant to section 74.1 of the *Competition Act***  
**regarding conduct reviewable pursuant to**  
**paragraph 74.01(1)(a) and section 74.05 of the**  
***Competition Act*;**

**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**

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**AFFIDAVIT OF DEBORAH POULIOT**  
**(Sworn March 19, 2019)**

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 Holdings ULC, Ticketmaster Canada LP,  
 Ticketmaster L.L.C., The V.I.P. Tour Company,  
 Ticketsnow.Com, Inc. and Tnow Entertainment  
 Group, Inc.

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# Tab 6

**VOLUME II – MEMORANDUM OF FACT  
AND LAW**

CT-2018-005

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, RSC 1985, c C-34, as amended;

**AND IN THE MATTER OF** an application by the Commissioner of Competition for orders pursuant to section 74.1 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.05 of the *Competition Act*;

**BETWEEN:**

**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**


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**MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS  
(Respondents' Motion on Commissioner's Refusals)**

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**OVERVIEW**

1. The Respondents seek an Order compelling Lina Nikolova to answer certain questions refused during her Examination for Discovery on behalf of the Commissioner of Competition (the "**Commissioner**"), which are set out in the chart found at Schedule "A", and directing Ms. Nikolova to re-attend for a follow-up examination or to provide answers to follow-up questions in a form agreed upon by the parties.

2. The Commissioner alleges that the Respondents engage in reviewable conduct contrary to paragraphs 74.01(1)(a) and 74.05 of the *Competition Act*. The Commissioner's Notice of Application, filed January 25, 2018, alleges reviewable conduct dating back to 2009.
3. Examinations for Discovery have been conducted. The Respondents examined the Commissioner's representative, Lina Nikolova, for one and a half days on January 31 and February 1, 2019.
4. Ms. Nikolova refused to answer 76 questions during her examination. The within motion seeks to compel the Commissioner to answer 34 out of the 71 refusals that remain outstanding (the "**Refused Questions**").
5. The Refused Questions relate to the following issues, and are organized accordingly in Schedule A:
  - a. The Commissioner reviewed the Respondents' Ticketing Platforms for deceptive marketing practices in 2009, but raised no issues about the displays of prices that he now alleges were deceptive. In fact, the Commissioner did not raise his current complaints with the Respondents until 2017. The Commissioner's 2009 review, and his eight year delay in proceeding, are relevant both to the Respondents' pleading of estoppel and waiver and to remedy.
  - b. The Commissioner has named eight Respondents, but most of his allegations assert conduct by the "Respondents" without distinguishing among them. The Commissioner also asserts, generally, that the Respondents work "together and/or individually" and "make or permit" certain representations. Which Respondent is actually alleged to take what steps, and with whom, are relevant to certain

Respondents' pleading that they are simply not responsible for the impugned representations.

- c. All parties have pleaded industry practices and online e-commerce standards, which are relevant both to whether any representations were deceptive and to remedy.
  - d. Ms. Nikolova also refused to answer a question regarding the Respondents' "per-order fees" and, in particular, the manner in which the Commissioner says those amounts could be calculated on a per ticket basis prior to a fan selecting the number of tickets they wish to purchase. As the Commissioner has indicated that per-order fees are part of the allegations against the Respondents, he should provide an answer to this question.
6. The Refused Questions are all proper questions relating to issues arising from the parties' pleadings in this proceeding. The Commissioner's information, knowledge and belief as to the matters raised in the Refused Questions are required to ensure that the Respondents have adequate discovery and disclosure.

## PART I – THE FACTS

### A. The Nature of the Application

7. The Commissioner’s Notice of Application was filed January 25, 2018.<sup>1</sup> The Notice of Application alleges reviewable conduct contrary to paragraphs 74.01(1)(a) and 74.05 of the *Competition Act*.
8. The Commissioner alleges that the display of prices for tickets on certain internet websites and mobile applications (the “**Ticketing Platforms**”) constitute deceptive marketing practices under the Act.
9. The Commissioner is seeking to impugn the Respondents’ pricing displays over a period beginning in 2009 and continuing to date.<sup>2</sup>

### B. The Refused Questions

10. Ms. Nikolova was examined for discovery on behalf of the Commissioner for one and a half days on January 31 and February 1, 2019.<sup>3</sup>
11. During Ms. Nikolova’s examination, she refused to answer certain questions asked by counsel for the Respondents. In total, Ms. Nikolova refused to answer 76 questions.
12. Subsequently, when delivering answers to Ms. Nikolova’s undertakings, the Commissioner also answered five of the 76 refused questions.<sup>4</sup> No information was provided with respect to the 71 remaining questions refused by Ms. Nikolova.

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<sup>1</sup> Notice of Application of the Commissioner of Competition filed January 25, 2018 [**Notice of Application**]; Respondents’ Motion Record, Tab 2 at p. 11.

<sup>2</sup> Affidavit of Deborah Pouliot sworn March 19, 2019 [**Pouliot Affidavit**], Exhibit “E”; Respondents’ Motion Record, Tab 5 at p. 504, q. 710-713.

<sup>3</sup> Pouliot Affidavit, Exhibits “B” & “C”; Respondents’ Motion Record, Tab 5 at pp. 83, 350.

<sup>4</sup> Pouliot Affidavit, Exhibit “F”; Respondents’ Motion Record, Tab 5 at pp. 522-523.

13. The within motion seeks to compel the Commissioner to answer only the 34 Refused Questions. These are set out in Schedule A, and are organized according to the issues identified in paragraph 5 above and discussed below.

## **PART II – STATEMENT OF POINTS IN ISSUE**

14. The only issue in this motion is whether the Commissioner should be compelled to answer the Refused Questions.

## **PART III – CONCISE STATEMENT OF SUBMISSIONS**

### **A. The Test**

15. Discovery is used to obtain admissions to facilitate proof of matters at issue between the parties. It is also used to allow the parties to define the issues by informing themselves prior to trial of the other party's positions.<sup>5</sup>
16. Relevance is the key determinant of whether a question is proper, and should therefore be answered. Relevance is assessed broadly and flexibly on discovery, and against a lower standard than at trial. Doubts as to whether a question is relevant are to be resolved in favour of disclosure.<sup>6</sup>
17. In determining whether a question should be answered, a generous and flexible standard of relevance is applied. The pleading will inform whether the question should be answered. If the question may fairly lead the examining party to a train of inquiry which may directly or indirectly advance its case, or damage that of its adversary, it is a proper question for discovery and, as a result, must be answered:

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<sup>5</sup> *Canada v. Lehigh Cement Ltd.*, 2011 FCA 120 at para. 30; Respondents' Motion Record, Tab 9; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2007 FC 236 at para. 17, Respondents' Motion Record, Tab 8.

<sup>6</sup> *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2011 FC 52 at para. 19; Respondents' Motion Record, Tab 7.



It is fair to say, therefore, that the Court will apply a generous and flexible standard of relevance in determining whether a question should be answered. A fair amount of latitude will be allowed on discovery provided that a question is relevant to issues raised by the pleadings. The standard of relevance on discovery is lower than at trial and doubt as to the propriety of the question will be resolved in favour of disclosure.<sup>7</sup>

## **B. The Refused Questions Should be Answered**

### **a. Issue 1 - Historic Conduct – Estoppel, Waiver and Remedy**

18. The Refused Questions in this category the (“**Refused Historic Questions**”) deal with the Commissioner’s knowledge of, and investigation into, the Respondents’ price displays in 2009 and 2010. The questions are relevant to the Respondents’ estoppel defence and to the appropriateness and magnitude of any remedy.
19. The Respondents pleaded as follows on these points in their Response:<sup>8</sup>
  82. It would be inappropriate to penalize [the Respondents] now for conduct that the Commissioner chose not to pursue many years ago.
  86. The Commissioner should be estopped from bringing this Application in respect of [the Respondents’] past conduct and must be deemed to have waived his rights to do so.
20. The Commissioner has known of the conduct that is the subject of this Application since before the relevant period began in 2009. The Commissioner has produced customer complaints from prior to 2009 as relevant documents in the Commissioner’s documentary production.<sup>9</sup>

<sup>7</sup> *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2011 FC 52 at para. 19; Respondents’ Motion Record, Tab 7; *Monit International Inc. v. Canada* (1999), 175 FTR 258 at para. 10 (FCTD); Respondents’ Motion Record, Tab 10.

<sup>8</sup> Respondents’ Response filed March 12, 2018 [**Respondents’ Response**] at paras. 82, 86; Respondents’ Motion Record, Tab 3 at pp. 55-56.

<sup>9</sup> Pouliot Affidavit, Exhibits “G”, “H” & “I”; Respondents’ Motion Record, Tab 5 at pp. 525-532.

21. The Commissioner also produced records relating to Competition Bureau investigations of certain of the Ticketing Platforms in 2009 and 2010 as relevant documents in this Application.<sup>10</sup>
22. In 2010, the Competition Bureau provided Ticketmaster with a “no action” letter, advising that it was not pursuing a deceptive marketing practices proceeding against it under section 74.01(1) of the Act, and flagging areas of remaining concern related to the Respondents’ Ticketing Platforms.<sup>11</sup> Despite identifying other issues as potentially related to deceptive marketing practices, the Commissioner neither objected to nor identified any potential issues regarding the Respondents’ display of ticket fees.<sup>12</sup>
23. In 2015, the Competition Bureau specifically examined the display of fees on the Ticketing Platforms and took no steps at that time.<sup>13</sup>
24. In fact, the Commissioner did not raise any issue with the Respondents about the display of fees on the Ticketing Platforms until 2017.
25. The Commissioner’s current position in this Application is that the Ticketing Platform the Commissioner examined during the 2009/2010 investigations contravened section 74.01(1) of the Act then, and that subsequent versions do so now.
26. The Commissioner’s stated basis for refusing to answer the Refused Historic Questions is that they are not relevant. This position is incorrect for two reasons.
27. First, the Refused Historic Questions go to the Respondents’ estoppel and waiver defence. The Respondents’ position at trial will be that the Commissioner reviewed the

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<sup>10</sup> Pouliot Affidavit, Exhibit “E”; Respondents’ Motion Record, Tab 5 at pp. 494-496, q. 113.

<sup>11</sup> Pouliot Affidavit, Exhibit “J”; Respondents’ Motion Record, Tab 5 at pp. 534-536.

<sup>12</sup> Pouliot Affidavit, Exhibit “J”; Respondents’ Motion Record, Tab 5 at pp. 534-536.

<sup>13</sup> Pouliot Affidavit, Exhibit “L”; Respondents’ Motion Record, Tab 5 at pp. 540-580.

Ticket Platforms, considered possibly deceptive marketing practices on them, issued a “no action” letter, identified possible future problems for Respondents to avoid, and never once suggested that there was any problem with what the Commissioner now vilifies as “drip pricing”. It is important that the Respondents obtain full disclosure from the Commissioner about what the Competition Bureau previously reviewed and the scope and nature of that review. The Commissioner’s refusal of the Refused Historic Questions prevents this.

28. The Commissioner has provided some information, but on a limited basis, while refusing the bulk of the Respondents’ questions in this area. For example, in an undertaking answer regarding notes of a meeting that arose as part of the Commissioner’s 2009 investigation, the Commissioner advised:

The record appears to accurately reflect the meeting held in the context of the Commissioner’s examination into Ticketmaster’s conduct under the misleading advertising and deceptive marketing practices provisions of the Competition Act.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>14</sup>

29. The Commissioner should provide all facts in relation to the Competition Bureau’s knowledge and original investigation of the Respondents’ conduct. The Respondents should be entitled to test the Commissioner’s apparent attempt to isolate its 2009 investigation from the current proceeding. The Commissioner should not be able to selectively disclose information on what was examined, while omitting further

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<sup>14</sup> Pouliot Affidavit, Exhibit “E”; Respondents’ Motion Record, Tab 5 at p. 502, q. 556.

information that the Respondents may seek to rely upon. Relevant questions include, for example, those set out in Schedule A relating to:

- a. why the 2009 investigation was commenced (qq. 69, 70);
  - b. prior and contemporaneous consumer complaints of what the Commissioner now describes as “drip pricing” (qq. 70, 410, 411, 1199);
  - c. the nature of the “misrepresentations” being investigated in 2009, and the analysis of what was thought by the Commissioner to be misleading (qq. 434, 461, 462, 463, 608, 976);
  - d. which aspects of the Ticketing Platforms were examined (qq. 462, 463, 494);
  - e. what the Bureau intended to convey to Ticketmaster in its no action letter (qq. 527-28, 608, 612); and
  - f. why, if the Respondents’ price displays drew no criticism from the Commissioner in 2009 and 2010, and were not even identified among the potential problems that Ticketmaster should have regard to in the future, those price displays were alleged to be deceptive and misleading eight years later in 2017 (qq. 647, 650, 677, 678, 679, 685).
30. Second, the Refused Historic Questions are relevant to the issue of remedy as well. As noted above, the Respondents will argue that the Commissioner’s delay in bringing this Application and notifying the Respondents about any issue related to the display of pricing should mitigate or eliminate the award of any remedy against the Respondents. The Commissioner’s knowledge of the Respondents’ conduct, and its delay in

proceeding, are issues that the Respondents will advance and which they should be entitled to explore on discovery.

**b. Issue 2 – Individual Respondent Allegations**

31. The Commissioner has named eight companies as Respondents in this proceeding. The Respondents have pleaded that some of them are not proper parties, as they do not make and have no responsibility for the representations that the Commissioner says are misleading or deceptive.<sup>15</sup>
32. The Commissioner’s pleading, however, is vague and imprecise as to which Respondents undertake what steps with respect to the representations in question, and masks the allegations actually being made as against each individual Respondent. For example:
- a. conduct, including making price representations, is routinely attributed to “the Respondents” at large, rather than to specific Respondents in particular;<sup>16</sup>
  - b. the Commissioner alleges that the Respondents “work together and/or individually” with respect to price representations, without indicating which Respondents are alleged to be culpable because of joint rather than independent conduct;<sup>17</sup> and
  - c. the Commissioner alleges that the Respondents “make or permit each other to make” price representations, again without indicating which Respondents are

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<sup>15</sup> Respondents’ Response, paras. 11-13, Respondents’ Motion Record, Tab 3 at p. 39.

<sup>16</sup> Notice of Application, paras. 3, 21-32; Respondents’ Motion Record, Tab 2 at pp. 14, 18-21.

<sup>17</sup> Notice of Application, paras. 1(a), 19; Respondents’ Motion Record, Tab 2 at pp. 13, 17.

alleged to be culpable for permitting as opposed to actually making the representations in question.<sup>18</sup>

33. It is important for the Respondents to obtain complete information about the specific allegations made against them in light of the unclear and ambiguous assertions made by the Commissioner in his Notice of Application. In particular, given that some of the Respondents have pleaded that they are not involved with the representations or Ticketing Platforms at issue, they are entitled to know whether as to each Platform they are said to be responsible directly, or indirectly (through joint conduct or by “permitting” others to act) and, in either case, the facts relating to such allegations. The Commissioner cannot hide behind a “rolled up” pleading.
34. The Refused Questions in this category represent the Commissioner’s inappropriate refusal to provide information flowing from his ambiguous pleading, and relating to the position of some of the Respondents that they are not properly named. Relevant questions include, for example, those set out in Schedule A relating to:
- a. the connection between certain Respondents and the Ticketing Platforms (qq. 176, 276-77);
  - b. whether, and how, each Respondent is said to have been acting jointly or in concert with other Respondents (qq. 285-86, 844-848);
  - c. whether, and how, each Respondent is said to have been acting separately and individually with respect to certain price representations (qq. 846, 848);

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<sup>18</sup> Notice of Application, para. 19; Respondents’ Motion Record, Tab 2 at p. 17.

- d. whether, and how, each Respondent is said to have “permitted” others to make price representations on certain Ticketing Platforms (qq. 847, 848, 1119, 1120); and, more generally,
  - e. how each Respondent is actually said to have made the price representations at issue (q. 1121).
35. Refused Questions in each of these areas flowed naturally from the pleadings and represented relevant and appropriate inquiries for the Respondents to make on discovery.

**c. Issue 3 – Industry Practice and Standards**

36. The Respondents pleaded as follows with respect to e-commerce standards and consumers’ expectations in making online transactions:<sup>19</sup>
1. The Application focuses on pricing practices on Ticketmaster’s Ticketing Platforms. Those practices are transparent, pro-consumer and proper. They are standard in the ticketing industry, and in e-commerce more generally.
  5. [...] The Commissioner’s position that total per-ticket pricing must be displayed in the first step of a purchase has no basis in law, ignores the transparent disclosure of all fees in the course of each purchase transaction, and runs contrary to how e-commerce transactions are effected.
  35. The Application is about the rise of e-commerce in recent years and how Canadian consumers understand the processes involved in online purchasing.
  67. The relevant consumer is the average consumer who is interested in the product. Modern consumers understand the purchasing buy-flows used in e-commerce. As noted above, leading online retailers use similar buy-flows to those used by Ticketmaster

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<sup>19</sup> Respondents’ Response, paras. 1, 5, 35, 67; Respondents’ Motion Record, Tab 3 at pp. 37, 38, 44, 52.

37. The Commissioner, in a section of his Reply entitled “The Respondents’ Practices Are Not “Standard” in E-Commerce”, joined issue with the Respondents on this point.<sup>20</sup>
38. Thus, the pleadings demonstrate that the parties view e-commerce standards as relevant to the disposition of this Application. The Commissioner has already delivered limited information about other e-commerce vendors, but has maintained his refusal to answer other related questions. The Commissioner should be obliged to answer fully with respect to his knowledge, information and belief in response to these questions. See Schedule A, Issue 3 (qq. 1067, 1079-81, 1258, 1264, 1276, 1277).

**d. Issue 4 – “Per Order” Fees**

39. The Commissioner has refused to answer a question regarding the merits of his claim against the Respondents regarding “per order” fees. This is especially important given that the Commissioner has now disclosed that he is challenging Ticketmaster’s current fee display, even though it complies with new Ontario legislation designed specifically for online ticket sales, because the Commissioner says it does not abide by the Commissioner’s expectations regarding “per order” fees.<sup>21</sup>
40. Per order fees (for order processing) are charged at a set price for an entire order, regardless of the number of tickets purchased. The Commissioner alleges that the per ticket amount of these fees should be disclosed on the very first page of the Ticketing Platforms seen by a fan. The Commissioner has refused to answer as to how the Respondents could know what the order processing fee would amount to, per ticket, before knowing how many tickets are being ordered. As the Commissioner has indicated

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<sup>20</sup> Reply filed March 26, 2018, paras. 4-7; Respondents’ Motion Record, Tab 4 at pp. 61-62.

<sup>21</sup> Pouliot Affidavit, Exhibit “E”; Respondents’ Motion Record, Tab 5 at p. 504, q. 710-713.

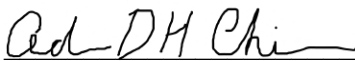


that per order fees form part of his allegations against the Respondents, he should answer this question (qq. 941-42).

#### **PART IV – ORDER SOUGHT**

41. The Respondents seek an Order compelling Ms. Nikolova to answer the Refused Questions set out in Schedule “A” on behalf of the Commissioner and to answer further follow-up questions at the expense of the Commissioner, with costs of this motion paid to the Respondents.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21st day of March, 2019.

per  \_\_\_\_\_

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AND TO: **THE REGISTRAR OF THE COMPETITION TRIBUNAL**

Competition Tribunal  
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Ottawa, Ontario K1D 5B4

## Schedule A

<b>Issue 1 - Historic Conduct – Estoppel, Waiver and Remedy</b>		
Page	Question	Refusal
16	69	What triggered the opening of the file leading to the current application?
16	70	Was [the current application] triggered on the basis of any consumer complaints?
109	410	Do you know whether there was any investigation into [REDACTED] or what steps were taken in response to [REDACTED] complaint?
109-110	411	Did anyone at the Bureau ever respond to [REDACTED] ?
116	434	What was the misrep issue [that Ms. Rosen] was referring to [in her e-mail correspondence with Mr. Bryenton in Exhibit 114]?
123	461	Was a more fulsome analysis done by officers on [the issue of misreps on the current websites referred to in Mr. Bryenton’s e-mail to Ms. Rosen in Exhibit 114]?
123	462	I want any analysis that was actually done by officers [on the issue of misreps on the current websites referred to in Mr. Bryenton’s e-mail to Ms. Rosen in Exhibit 114].
123-124	463	What aspects of [the websites referred to in Exhibit 114] was Mr. Bryenton considering when he indicated that there does not appear to be an issue of misreps on those sites?
131-132	494	Do you know whether the Bureau looked at any aspects of [the .ca and ticketsnow] websites [REDACTED] ?
143-144	527-528	What open matters [was Mr. Homan referencing] when he communicated to Ticketmaster that the closing of the Fair Business Practices’ misleading advertising file [REDACTED] [in Exhibit 115]?
165-166	608	I want an undertaking to find out whether what was intended, beginning at the third paragraph on page 2 [of Exhibit 117], was to provide some guidance to Ticketmaster as to how to avoid missteps with respect to false or misleading representations and deceptive marketing practices, with respect to the matters that are then articulated below.
167	612	Why did Mr. Homan not bring to Ticketmaster’s attention [in Exhibit 117] anything to do with fee displays so that Ticketmaster might avoid conflict with the false and misleading representations and deceptive marketing practices provisions of the Competition Act in the future?
178-179	647, 650	Are there any facts associated with the 2009 version of the fee display that the Bureau did not have access to in 2009 and 2010?
187	677	When did the Bureau first consider that the 2009 fee displays were misleading?
187	678	When did the Bureau open its file as to whether or not the fee displays were misleading on ticketmaster.ca, the ticketsnow site or the ticketweb site?
187	679	Has anything changed since 2010 as to whether or not the 2009 or 2010 fee display was misleading?
189-190	685	Why did the Bureau take eight years [after Ms. Rosen started a screen capture campaign] to raise this complaint with Ticketmaster?
293	976	Are [Exhibits 120 and 121] among [the screen captures] referred to in the March 6 <sup>th</sup> , 2009 e-mail exchange with Ms. Rosen?
359	1199	Why didn’t the Commissioner do anything about [the complaints from 2008]?

<b>Issue 2 – Individual Respondent Allegations - Liability</b>		
Page	Question	Refusal
45	176	Does the Commissioner say that Live Nation Entertainment Inc. made representations on [ticketmaster.ca, ticketweb.ca or ticketsnow.com]?
73	276-277	You are not aware of any facts associating VIP Tour with [ticketmaster.ca]?
75-76	285-286	[When you said that you are not aware of any facts linking VIP Tour Company to ticketmaster.ca at this time], does that include directly or indirectly by acting in concert or jointly with somebody else?
239-240	844, 848	What facts are associated with Live Nation Entertainment Inc. [or any of the other seven respondents] acting jointly with another respondent in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?
239-240	845, 848	What facts does the Commissioner have in association with whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted in concert in respect of the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?
239-240	846, 848	What facts or information is the Commissioner aware of with respect to whether Live Nation Entertainment Inc. [or any of the other seven respondents] acted separately, in any way, with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?
240	847, 848	What information does the Commissioner have, or is the Commissioner aware of, with respect to, or in connection with, whether Live Nation Entertainment Inc. [or any of the other seven respondents] permitted some other respondent to act in any particular way with respect to the OneRepublic concert [referenced on page 12 of the Commissioner's pleadings]?
333	1119	Which respondents are said to make the price representations in question and which respondents are said to permit others to make the price representations in question?
333-334	1120	I would like to have the Commissioner's information with respect to the manner in which each of the respondents permits another respondent to make price representations.
334	1121	I would like to have the Commissioner's information as to the manner in which each respondent makes the price representations that are the subject of this application.

<b>Issue 3 – Industry Practices and Standards – Liability and Remedy</b>		
Page	Question	Refusal
318-319, 321-322	1067, 1079-1081	I want all [the information known to the Commissioner as to what online ticket vendors have marketed and sold tickets using “attainable prices” inclusive of any mandatory fees, in particular what competitors to Ticketmaster do so, where in Canada they do it, on what platforms, for what kinds of tickets (primary or resale) and in what time periods].
378, 380-381	1258, 1264	I would like to know what information the Commissioner has as to what, if anything, was standard [pricing practice] in e-commerce across the period relevant to this litigation.
384	1276	Has the Bureau gathered or received information from market participants in the ticket sale or resale business in Canada?
384	1277	Does the Commissioner have any information about the market for online sales or resales of tickets in Canada other than what has been discussed so far?

<b>Issue 4 – Per Order Fees – Liability and Remedy</b>		
Page	Question	Refusal
279-280	941-942	[How does] Ticketmaster know what the order processing fee will amount to per ticket before it knows how many tickets are in the order?

**APPENDIX A  
PROVISIONS OF STATUTES AND REGULATIONS**

Competition Act, R.S.C. 1985, c. C-34, ss. 74.01(1)(a), and 74.05

**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;

**(b)** makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

**(c)** makes a representation to the public in a form that purports to be

**(i)** a warranty or guarantee of a product, or

**(ii)** a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

**74.05 (1)** A person engages in reviewable conduct who advertises a product for sale or rent in a market and, during the period and in the market to which the advertisement relates, supplies the product at a price that is higher than the price advertised.

Competition Tribunal Rules, SOR/2008-141, rr. 34(1), 64

**Questions as to practice or procedure**

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

**Examination for discovery**

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

**Power of the Tribunal**

**(2)** The Tribunal may, in case management, make rulings to deal with the

timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.

Federal Courts Rules, SOR/98-106, rr. 97, 240

### **Failure to attend or misconduct**

**97** Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may

- (a) order the person to attend or re-attend, as the case may be, at his or her own expense;
- (b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;
- (c) strike all or part of the person's evidence, including an affidavit made by the person;
- (d) dismiss the proceeding or give judgment by default, as the case may be; or
- (e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.

Scope of examination

**240** A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

- (a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or
- (b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

Public

# Tab 7

**VOLUME II – AUTHORITIES  
(APPENDIX B TO THE MEMORANDUM OF FACT AND LAW)**



2011 FC 52  
Federal Court

Apotex Inc. v. Sanofi-Aventis Canada Inc.

2011 CarswellNat 696, 2011 FC 52, [2011] F.C.J. No. 402, 199 A.C.W.S. (3d) 936, 383 F.T.R. 37 (Eng.)

## **Apotex Inc., Plaintiff and Sanofi-Aventis, Defendant**

Sanofi-Aventis and Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership,  
Plaintiffs and Apotex Inc. and Apotex Pharmachem Inc. and Signa Sa de Cv, Defendants

Yves de Montigny J.

Heard: November 22, 2010  
Judgment: January 17, 2011  
Docket: T-644-09, T-933-09

Counsel: Mr. Ben Hackett, for Plaintiff, Apotex Inc.  
Mr. Marc Richard, for Defendants

Subject: Civil Practice and Procedure; Intellectual Property

### ***Yves de Montigny J.:***

1 The parties to this motion are Apotex Inc. and Apotex Pharmachem Inc. (collectively "Apotex") and Sanofi-Aventis and Bristol-Myers Squibb Partnership (collectively "Sanofi"). This is a motion by Apotex for an Order setting aside those portions of a September 14, 2010 Order by Madam Prothonotary Tabib not requiring Sanofi to answer certain questions which were refused or taken under advisement at the examinations for discovery held on November 16 to 20, 23, 24 and 26, 2009 and June 1 to 3, 2010.

### **I. Background**

2 Apotex is a company incorporated in the Province of Ontario, and carries on business as a manufacturer and distributor of pharmaceutical products.

3 Sanofi-Aventis is a company incorporated in France and is listed as the owner of the patent 1,336,777 (the '777 Patent) in the Canadian Patent Office. This patent is entitled "dextro-rotatory enantiomer of methyl alpha-5 (4,5,6,7-tetrahydro (3,2-c) thieno pyridyl) (2-chlorophenyl)-acetate, a process for its preparation and the pharmaceutical compositions containing it". The '777 Patent claims, *inter alia*, the compound clopidogrel bisulfate, which is an antiplatelet inhibiting medicine that is sold under the brand name PLAVIX® around the world.

4 Apotex commenced its impeachment action by way of a Statement of Claim, issued on April 22, 2009 and amended on May 29, 2009 (Court File No. T-644-09). The Statement of Claim seeks a declaration that each of the '777 Patent claims is invalid, void, and of no force and effect, as well as a declaration that Apotex's intended Canadian clopidogrel products (clopidogrel bisulfate and besylate tablets) will not infringe any valid claim of the '777 Patent.

5 On June 8, 2009, Sanofi and Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership (the "Partnership") filed a Statement of Claim against Apotex and Signa SA de CV for infringement of the '777 Patent (the action against the Partnership was subsequently discontinued). This action was given Court file no. T-933-09. The alleged infringing acts by the Defendants are the manufacturing in Canada of clopidogrel and the exporting of clopidogrel outside of Canada to countries including Hong Kong, New Zealand, Iran, Libya, Malaysia, Singapore, and the U.S. In its Statement of

Defence, Apotex defends the action on the basis that the '777 Patent is invalid and through counterclaims for a declaration of invalidity.

6 Shortly after starting the action for infringement, Sanofi brought a motion in both Court files (Nos. T-933-09 and T-644-09) to consolidate the two actions. The only reason why a separate infringement action had been brought in Court file no. T-933-09 instead of a counterclaim for infringement in Court file no. T-644-09 was that the jurisprudence does not permit a party (i.e. the Partnership, to whom a licence had been granted and which was also suffering damages) to be added as a plaintiff to a counterclaim.

7 By Order dated November 2, 2009, Prothonotary Tabib [2009 CarswellNat 5922 (F.C.)] ordered that Sanofi's motion to consolidate the infringement and impeachment actions was granted. The Court also bifurcated the issues of a) the quantum of damages claimed by the Plaintiffs and b) the quantum of profits earned by the Defendants and claimed by the Plaintiffs under an accounting of profits.

8 Discoveries in the consolidated action commenced in November 2009. Dr. Pierre Savi, a representative of Sanofi-Aventis, was examined from November 16 to November 20, 2009. At this examination, Dr. Savi either refused or took under advisement many questions concerning unadmitted allegations of fact. One of the inventors of the patent at issue, Mr. Alain Badorc, was also examined from November 23 to November 26, 2009. Following the examination of Dr. Savi, Sanofi-Aventis provided a fair number of follow-up answers and documents in response to questions taken under advisement or undertaken to be answered at the examination. The answers were provided on a rolling basis from April 19, 2010 to May 31, 2010.

9 The continuation of the first round examination of Sanofi-Aventis on scientific issues took place from June 1 to June 3, 2010. As Dr. Savi was no longer with Sanofi Aventis, Dr. Josiane Merlier was examined as a replacement representative. At this examination, a number of questions concerning unadmitted allegations of fact were again either refused or taken under advisement.

10 In light of the refusals and questions taken under advisement at these examinations for discovery, Apotex moved to compel Sanofi-Aventis to provide answers to nearly 300 questions. The motion was heard by Case Management Prothonotary Tabib on June 22 - 24, 2010; the motion was allowed in part by Order dated September 14, 2010. In the meantime, Sanofi-Aventis had provided answers to questions agreed to be answered or ordered answered on July 30, 2010, and had provided additional answers on August 30, 2010 and September 1, 2010.

11 In her Order, Prothonotary Tabib found that a number of questions were properly refused as they were either not relevant, improper, overbroad, lacked proportionality, or sought opinion. It is those portions of the Order that Apotex is now appealing, on the grounds that the Prothonotary erred in law in declining to order certain questions answered.

## II. Issues

12 This appeal essentially raises two issues:

- a. What is the applicable standard of review against which the Order of the Prothonotary should be assessed?
- b. Did the Prothonotary err in declining to order that Sanofi-Aventis provide a response to some questions put to Dr. Savi and Dr. Merlier during their examinations for discovery?

## III. Analysis

13 Discretionary orders of Prothonotaries ought not to be disturbed on appeal to a judge unless they raise questions vital to the final issue of the case, or they are clearly wrong in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Merck & Co. v. Apotex Inc.*, 2003 FCA 488 (F.C.A.), at para 19; *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287 (F.C.A.), at para 52.

14 It will be a rare case when it can be shown that the denial of further discovery or further documents will be vital to the final outcome: *Galerie au Chocolat Inc. v. Orient Overseas Container Line Ltd.*, 2010 FC 327 (F.C.), at para 13; *Ruman v. Canada*, 2005 FC 474 (F.C.), at para 7.. In any event, Apotex has not alleged that the matters at issue are vital to the final disposition of the case

15 As a result, Apotex needed to demonstrate that the Prothonotary erred in law or misapprehended the facts. While a case manager's expertise does not insulate him or her from review where an error of principle has been made, it has been recognized that there is a heavy burden upon litigants seeking to overturn an interlocutory order by a case manager. Interference with interlocutory orders adds to the delay and expense of the proceeding. Further, it is recognized that a case manager is intimately familiar with the history and details of complex matter: *Galerie au Chocolat Inc. v. Orient Overseas Container Line Ltd.*, above, at para 10; *Montana Band v. R.*, 2002 FCA 331 (Fed. C.A.).

16 Pursuant to Rule 240, a person being examined for discovery is required to answer any questions relevant to any unadmitted allegation of fact disclosed in the pleadings as well as any question concerning the identity of any person, other than an expert witness, who may reasonably be expected to have knowledge of matters in issue.

17 Rule 242(1) establishes, however, permissible objections during an examination for discovery, if, for example, the question is not relevant, is unreasonable, is unnecessary or would be unduly onerous. Relevance is a matter of law, not discretion. The question of whether a document "relates" to an issue in the case depends upon a reasonable interpretation of the pleadings. The party demanding a document must demonstrate that the information in the document may, either directly or indirectly, advance its own case or damage the case of an opponent.

18 More recently, the Federal Court of Appeal has adopted the "train of inquiry test" with respect to which documents may be deemed to advance a party's case. In other words, the Court must determine whether it is reasonable to conclude that the answer to a particular question might lead the questioning party to a train of enquiry that may either advance its case or damage the case of its opponent: see *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379 (F.C.A.) at para 30.

19 It is fair to say, therefore, that the Court will apply a generous and flexible standard of relevance in determining whether a question should be answered. A fair amount of latitude will be allowed on discovery provided that a question is relevant to issues raised by the pleadings. The standard of relevance on discovery is lower than at trial and doubt as to the propriety of the question will be resolved in favour of disclosure: see *Monit International Inc. v. R.* (1999), 175 F.T.R. 258 (Fed. T.D.); *Glaxo Group Ltd. v. Novopharm Ltd.*, [1998] F.C.J. No. 1808 (Fed. C.A.), at para 4.

20 That being said, the Court retains a residual discretion to decide not to compel the production of technically relevant documents where such production would have no benefit or could not be used to advance a party's case. Although there is a broad right of examination, there are limits on that right of discovery and the Court will not permit the discovery process to be used as a fishing expedition: see *Apotex Inc. v. Merck & Co.*, 2004 FC 1038 (F.C.), at para 16; *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2007 FC 1195 (F.C.), at para 19, aff'd 2008 FC 281 (F.C.); aff'd 2008 FCA 287 (F.C.A.), at paras 69-70; *Faulding (Canada) Inc. v. Pharmacia S.p.A.* (1999), 3 C.P.R. (4th) 126 (Fed. C.A.), at paras 2-3.

21 Moreover, the simple fact that a question can be considered "relevant" does not mean that it must inevitably be answered. Relevance must be weighed against matters such as the degree of relevance, how onerous it is to provide an answer, whether the answer requires fact or opinion of law, and so forth: *GSC Technologies Corp. v. Pelican International Inc.*, 2009 FC 223 (F.C.), at para 11; *Astrazeneca Canada Inc. v. Apotex Inc.*, 2008 FC 1301 (F.C.).

22 It is with these principles in mind that I must now examine the decision under appeal with a view to determining whether Prothonotary Tabib erred in fact or in law when she declined to compel Sanofi-Aventis to answer certain questions. Before doing so, however, some background must be provided with respect to the scientific issues raised in the pleadings.

23 The subject patent of this proceeding is the '777 Patent. This patent relates to the dextrorotatory enantiomer of methyl alpha-5 (4,5,6,7-tetrahydro (3,2-C) thieno pyridyl)(2-chlorophenyl)- acetate (the "Racemate"), which is a process for its preparation and the pharmaceutical compositions containing it. According to the '777 Patent, this enantiomer (also known as clopidogrel), the Racemate containing clopidogrel, and clopidogrel's levo-rotatory enantiomer (referred to herein as l-clopidogrel) had been described in French patent application No. 2,530,247.

24 The '777 Patent states that "in an unexpected manner", the l-clopidogrel does not exhibit a platelet aggregation inhibiting activity. Further, the '777 Patent states that l-clopidogrel is the less well-tolerated of the two enantiomers. In both cases, these assertions of utility are made in relation to human beings. Thus, the purported discovery disclosed in the '777 Patent is that l-clopidogrel does not work as promised in French patent application No. 2,530,247. The Canadian equivalent of the French Patent application is Canadian Letters Patent No. 1,194,875 (the "'875 patent").

25 The '777 Patent also notes that some of carboxylic and sulfonic salts classically used in pharmacy had been prepared of clopidogrel, but it was found that these precipitate in an amorphous form and/or are hygroscopic making them difficult to handle on an industrial scale and difficult to purify. The '777 Patent identifies these unsuitable salts as including (but not being limited to) the following: "acetic, benzoic, fumaric, maleic, citric, tartaric, gentisid, methane-sulfonic, ethanesulfonic, benzenesulfonic (besylate) and laurylsulfonic acids as well as the salts of dobesilic acid ... and para-toluenesulfonic acid". The patent identifies hydrogen sulphate (bisulphate), taurocholate and hydrogen bromide salts as preferred salts that crystallize easily and have desirable solubility in water and hygroscopicity.

26 In both its Statement of Claim to impeach the '777 Patent in T-644-09, and its Statement of Defence and Counterclaim in T-933-09, Apotex advances several bases for its assertion that the '777 is invalid. Apotex argues that the '777 Patent is invalid for obviousness, lack of novelty, and lack of utility including lack of utility for lack of sound prediction. In addition, Apotex asserts the '777 Patent is invalid for double patenting in view of the '875 patent. Finally, Apotex asserts that the '777 Patent is invalid as being an "invalid selection" patent. However, in light of the decision of the Supreme Court of Canada in *Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, 2008 SCC 61 (S.C.C.) and of the Federal Court of Appeal in *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2010 FCA 197 (F.C.A.), according to which there is nothing wrong in principle with selection patents, Apotex has moved for leave to amend its pleading to recharacterize some of its allegations. Specifically, Apotex's proposed amended pleading seeks to locate the relevant allegations previously directed at invalid selection into the usual categories of invalidity (i.e. inutility, obviousness, anticipation, and insufficiency). Apotex's motion to amend its pleading was granted by Prothonotary Tabib on November 26, 2010.

27 Apotex first alleged that the '777 Patent is invalid on the basis of inutility. In particular, Apotex alleges that clopidogrel does not have superior utility to that of the Racemate or the other compounds of the '875 patent in humans. The doctrine of patent inutility was explained by the Supreme Court of Canada in *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.* (1981), 56 C.P.R. (2d) 145 (S.C.C.) in the following way (at p. 160):

[Not useful] means that the invention will not work, either in the sense that it will not operate at all, or more broadly, that it will not do what the specification promises that it will do [...] the practical usefulness of the invention does not matter, nor does its commercial utility, unless the specification promises commercial utility, not does it matter whether the invention is of any real benefit to the public, or particularly suitable for the purposes suggested.

28 The Supreme Court in *Apotex Inc. v. Wellcome Foundation Ltd.* recognized that the practical usefulness of an invention, as demonstrated by prior human clinical trials establishing toxicity, metabolic features, bioavailability and other factors is not a prerequisite for a useful invention for the purposes of patent law. The Court stated that the requirements for regulatory approval of a pharmaceutical product and the utility of an invention related to that product in the eyes of the Commissioner of Patents are distinct concepts:

The prerequisites of proof for a manufacturer who wishes to market a new drug are directed to a different purpose than patent law. The former deals with safety and effectiveness. The latter looks at utility, but in the context of inventiveness.

*Apotex Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153 (S.C.C.), at para 77.

29 Further, the Supreme Court also noted that "[T]here may in such cases be some doubt about the commercial success of the invention, but utility in this context means useful for the purpose claimed, not commercial acceptance": *Apotex Inc. v. Wellcome Foundation Ltd.*, above, at para 54. As noted by my colleague Justice Mactavish in *Aventis Pharma Inc. v. Apotex Inc.*, 2005 FC 1283 (F.C.) at para 272 (aff'd 2006 FCA 64 (F.C.A.)), utility and marketability are distinct concepts:

Utility does not depend upon marketability: *Wandscheer v. Sicard Limited*, [1948] S.C.R. 1 at p. 25, 8 C.P.R. 35. In other words, in assessing whether an invention has utility, the issue is not whether the invention is sufficiently useful as to be able to support commercialization, unless commercial utility is specifically promised. Rather, the question is whether the invention does what the patent promises that it will do.

30 To sum it up, the true test of utility of an invention is whether it will, when put into practice by a competent person, do what it assumes to do, and be practical and useful at the time when the patent was granted for the purposes indicated by the patentee: see *Visx Inc. v. Nidek Co.* (1995), 68 C.P.R. (3d) 272 (Fed. T.D.), at p 275 (aff'd (1996), 72 C.P.R. (3d) 19 (Fed. C.A.); *Faulding (Canada) Inc. v. Pharmacia S.p.A.* (1998), 82 C.P.R. (3d) 208 (Fed. T.D.), at para 10.

31 When the utility of an invention has not been demonstrated, the utility requirement for patentability can be supported by sound prediction based on the information and expertise then available. Sound prediction, if it applies, is to be evaluated as of the Canadian filing date. Sound prediction does not mean certainty. The requirements for sound prediction are:

- a) A factual basis for the prediction;
- b) The inventor must have an articulable and sound line of reasoning from which the desired result can be inferred from the factual basis;
- c) There must be proper disclosure.

*Apotex Inc. v. Wellcome Foundation Ltd.*, *supra*, at paras 56-70;

*Aventis Pharma Inc. v. Apotex Inc.*, 2006 FCA 64 (F.C.A.), at para 30;

*Pfizer Canada Inc. v. Novopharm Ltd.*, 2010 FCA 242 (F.C.A.).

32 It will be for the trial judge to determine whether, as Apotex alleges, the '777 Patent is invalid for lack of sound prediction. More particularly, Apotex alleges that the purported inventors of the '777 Patent speculated that clopidogrel would have such utility:

- a. without offering a factual basis for such a conclusion;
- b. without describing in the '777 Patent any studies of platelet aggregation inhibition or toxicology that were actually performed, performed as stated or in a reasonable manner, available and which were statistically significant or otherwise relevant; and an articulable and sound line of reasoning from which to predict the promised utility of clopidogrel from any factual basis, since neither the tests described in the patent or the common general knowledge and the state of the art would have allowed a skilled person to soundly predict that clopidogrel would be useful as promised; and

c. without disclosing the factual basis and sound line of reasoning, to the extent that such a line of reasoning existed, in the '777 Patent. It is on the basis of these allegations that the relevance of the disputed questions must be assessed.

33 Third, Apotex alleges that, if the invention of the '777 Patent was soundly predictable, then the invention would have been obvious to the skilled addressee at all material times based on that person's common general documents and teachings in certain prior art documents. Apotex also alleges, in the alternative, that a skilled person would have arrived at the Racemate without the exercise of inventive ingenuity, would have considered it routine to make each of the enantiomers, would have run routine pharmacologic tests to ascertain their relative biological properties, would have thought it obvious to try to make clopidogrel bisulphate as part of routine salt selection program, and would have expected the tests to yield the desired results. In support of this contention, Apotex pleads that the named inventors of the '777 Patent reached the purported invention directly and without difficulty and that any purported delay or difficulty experienced by these persons in reaching the purported invention of the '777 Patent was due to their lack of relevant expertise and lacklustre efforts.

34 It is axiomatic that if the invention claimed in a patent is found not to be inventive, the patent will be invalid. A patented invention will be considered obvious if persons skilled in the relevant art, in light of the knowledge they shared at the priority date of the patent, would have been led to it directly and without difficulty. An allegation that the invention claimed in the patent was obvious is assessed objectively, but evaluated on the basis of all available evidence relating to the issue. In *Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, above, Justice Marshall Rothstein adopted the four-step approach elaborated by the British Courts and quoted approvingly from *Pozzoli SpA v. BDMO SA*, [2007] F.S.R. 37, [2007] EWCA Civ 588 (Eng. C.A.) the four questions to be asked:

- (1) (a) Identify the notional "person skilled in the art";
- (b) Identify the relevant common general knowledge of that person;
- (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;
- (3) Identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed;
- (4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

35 Justice Rothstein held that it is in the fourth step of the obviousness test that the issue of "obvious to try" will arise. He indicated that in some instances and for some inventions it may be appropriate to consider whether the invention was "obvious to try". An invention will be "obvious to try" where it is very plain or more or less self evident that what is being tested ought to work. For a finding that the invention was "obvious to try", there must be evidence to convince a judge on a balance of probabilities that it was more or less evident to try to obtain the invention. The mere possibility that something might turn up is not enough.

36 The Supreme Court also added that another important factor to consider is the actual course of conduct which culminated in the making of the invention. The route taken by the inventor in developing his invention — what the inventor actually did and did not do — is thus a proper matter for discovery, and may ultimately prove to be the source of relevant evidence in resolving issues of obviousness at trial. As Justice Rothstein stated:

...if the inventor and his or her team reached the invention quickly, easily, directly and relatively inexpensively, in light of the prior art and common general knowledge, that may be evidence supporting a finding of obviousness, unless the level at which they worked and their knowledge base was above what should be attributed to the skilled person. Their course of conduct would suggest that a skilled person, using his/her common general knowledge and the prior art, would have acted similarly and come up with the same result. On the other hand, if time, money and

effort was expended in research looking for the result the invention ultimately provided before the inventor turned or was instructed to turn to search for the invention, including what turned out to be fruitless "wild goose chases", that evidence may support a finding of non-obviousness. It would suggest that the skilled person, using his/her common general knowledge and the prior art, would have done no better.

*Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, above, at para 71.

37 Finally, Apotex argues that the '777 Patent is invalid because it could have been anticipated and because it constitutes double patenting. This ground of invalidity derives from s. 27(1) of the *Patent Act*, which requires as a condition for obtaining a patent that the invention was not "known or used" and was not "described" in any patent or any publication more than two years before the patent application was filed.

38 In *Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, above, the Supreme Court refined the well-established test for anticipation. Justice Rothstein confirmed that two elements must be satisfied such that a prior disclosure, or in the case of a selection patent, the prior patent, can be considered anticipatory. First, there must be disclosure such that the person skilled in the art would understand the special advantages of the invention disclosed in reading the prior art or prior patent. In this regard, no trial and error is permitted. In the case of a selection patent, if the genus patent does not disclose the specified advantage, there is no anticipation.

39 Second, prior disclosure must be enabled. The prior art must provide enough information to the person skilled in the art who may use common knowledge to perform the subsequently claimed invention without undue burden. Routine trials are acceptable but prolonged or arduous trial and error would not be considered "routine". Once again, Justice Rothstein enumerated four factors that should normally be considered in determining whether prior disclosure constitutes enabling disclosure, two of which are particularly relevant in the case at bar:

3. The prior patent must provide enough information to allow the subsequently claimed invention to be performed without undue burden. When considering whether there is undue burden, the nature of the invention must be taken into account. For example, if the invention takes place in a field of technology in which trials and experiments are generally carried out, the threshold for undue burden will tend to be higher than in circumstances in which less effort is normal. If inventive steps are required, the prior art will not be considered as enabling. However, routine trials are acceptable and would not be considered undue burden. But experiments or trials and errors are not to be prolonged even in fields of technology in which trials and experiments are generally carried out. No time limits on exercises of energy can be laid down; however, prolonged or arduous trial and error would not be considered routine.

4. Obvious errors or omissions in the prior patent will not prevent enablement if reasonable skill and knowledge in the art could readily correct the error or find what was omitted.

*Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, above, para 37.

40 Furthermore, it must be recalled that a selection patent that claims a compound that is patentably distinct from the genus patent will not be invalid for obviousness double patenting: *Sanofi-Synthelabo Canada Inc. v. Apotex Inc.*, above, at para 113.

41 It is on the basis of these general principles that the decision of the Prothonotary must be reviewed to determine whether she erred in law or misapprehended the facts with respect to the relevance of the questions under review.

42 Starting with the examination for discovery of Dr. Pierre Savi held on November 16-20, 2009, the first category of items under challenge relates to the thienopyridine compounds. Dr. Savi took under advisement Apotex's request that he provide a list of all of the thienopyridines synthesized at Sanofi-Aventis that had been made public, either through publications, patents, or otherwise, up until 1990.

43 Apotex argued that thienopyridines are a class of ADP receptor/P2Y<sub>12</sub> inhibitors used for their anti-platelet activity. Clopidogrel is one such thienopyridine. According to Apotex, the work done by Sanofi on thienopyridines will provide background information useful to understand: (a) how it is that the Sanofi inventors ultimately came to synthesize clopidogrel; (b) the inventors' understanding of the structure, activity, and toxicity levels of compounds of this sort; and (c) whether clopidogrel was a typical or unusual compared with other thienopyridines. As such, Apotex submitted that this information will be relevant to its allegations of (a) obviousness (in particular whether clopidogrel was arrived at with relative ease or difficulty by the inventors based on their background knowledge); and (b) sound prediction (in particular, whether based on their familiarity with other thienopyridines, the inventors could have soundly predicted that clopidogrel could be used to treat humans).

44 The Prothonotary ruled that this request was overbroad in terms of its relevance. She added that "Relevance is not high, some may be relevant, but depends upon the date, both of synthesis and of testing, the knowledge of the inventors of this work and whether testing as to both activity and toxicity was performed and the results thereof".

45 Having read the written submissions of Apotex and heard its counsel, I have not been convinced that Mme Prothonotary Tabib erred in coming to her conclusion. Indeed, Apotex has failed to identify which principle the Prothonotary failed to apply and how she was "clearly wrong" in refusing that request. While the '875 Patent does relate to thienopyridines, the inquiry went well beyond the compounds of the '875 Patent and well beyond the relevant time period. Counsel for the Defendant mentioned at the hearing that there are in excess of 1,500 thienopyridines compounds, which would clearly make Apotex's request overbroad. Moreover, Sanofi has already indicated in its discovery answers that no such list exists, which would make the compilation of all the thienopyridine compounds quite onerous. Accordingly, there is no reason to interfere with the Prothonotary's order on that item.

46 The second category of items under challenge relates to the enantiomers. Item 14 is the broadest, and concerns an inquiry as to which enantiomers, of any compound, Sanofi-Aventis has marketed to date. Dr. Savi also took under advisement the following questions:

- a. an inquiry as to which enantiomers, of any compound, Sanofi-Aventis had marketed up until 1990 (item 15);
- b. an inquiry as to which enantiomers Sanofi-Aventis has ever sought regulatory approval for, to date (item 16) and up until 1990 (item 17);
- c. an inquiry as to whether there are any other enantiomers of thienopyridines, aside from clopidogrel, for which regulatory approval has been sought to date (item 18) or had been sought up to 1990 or 1995 (item 19);
- d. various requests relating to the resolution of enantiomers (to provide a list of the enantiomers, and thienopyridine enantiomers that have been resolved to date (item 20) and up to 1990 (item 21));
- e. an inquiry as to whether, apart from [PCR 1033](#), any other compounds had been resolved by July 13, 1982 at Sanofi (item 36);
- f. an inquiry as to whether there are racemic compounds other than thienopyridines that had been resolved or for which enantiomers were synthesized;
- g. an inquiry as to whether the enantiomers were tested for activity (item 64);
- h. an inquiry as to whether the company resolved or synthesized enantiomers from racemic compounds from July 13, 1982 to February 17, 1987 or February 8, 1988 (item 121)).

47 The Prothonotary refused to order these questions answered on the basis that they were overbroad. She ruled that item 14 it was "overbroad, as posed: goes beyond the '875 patent, beyond the relevant date, scientific motivation is only relevant, beyond utility on the advantages of the patent, beyond the subjective work of the inventors". Her answers to



item 15-17 were subsumed by her answer to item 14, except for the dates. For items 18 and 19, she stated, "Overbroad in date, as to compounds, regulatory approval is irrelevant. As evidence of routine nature of separation and testing of enantiomers, relevance is weak. In my discretion, proportionality does not warrant the answering of the question". Items 20, 21, 64 and 121 were also found to be overbroad. Finally, the Prothonotary found the answer already provided to item 36 to be sufficient as to what is relevant, i.e. thianopyridines.

48 Counsel for Apotex argued that the Prothonotary erred in holding that all of these questions were overbroad in that they go beyond the compounds listed in the '875 patent. In his view, techniques and familiarity with separating enantiomers is not a matter that can be confined to the compounds disclosed in the '875 patent, and Sanofi's general approach to racemic drugs will shed light on whether Sanofi resolved the compound to obtain clopidogrel in a routine and standard manner. If Sanofi marketed a large number of enantiomeric drugs or sought regulatory approval for such drugs, then it can be inferred that such an understanding was common at Sanofi and, likely, more generally. Such information would also support Apotex's position on sound prediction, to the extent that the skilled addressee would know that drug companies were motivated to separate racemic drug candidates in order to learn about the distribution of activity and toxicity among the enantiomers, to identify the more active/less toxic enantiomer, and to identify the less active/more toxic enantiomer as an impurity to be removed. If, on the contrary, Sanofi did not have much experience with the separation of enantiomers, it would support Apotex's argument that any purported delay or difficulty experienced by Sanofi's scientists in reaching the purported invention of the '777 Patent was due to their lack of relevant expertise and lacklustre efforts.

49 I am unable to find any reviewable error in the Prothonotary's exercise of her discretion. The questions were not limited to the compounds of the '875 Patent or even to thienopyridines generally. As such, they could clearly be considered overbroad. I note that Sanofi has already provided any relevant information and has indicated which thienopyridines were separated during the relevant time period. The answers sought by Apotex, beyond those that have already been answered in relation to thienopyridines, would not be directly relevant and would clearly be onerous to provide. Besides, there is nothing to prevent Apotex from making its argument at trial with respect to sound prediction and obviousness on the basis of scientific evidence publicly available and/or on the basis of evidence from their own experts. Even if I accept Apotex's argument that the questions reaching up to 1990 are not overbroad in terms of date because the compounds marketed up until that date may be predicated on research done prior to the priority date of the '777 Patent, it does not detract from the fact that the substance of these questions goes too far. It was not unreasonable for the Prothonotary to conclude that the experience and expertise of Sanofi in separating enantiomers is a matter that can be confined to the compounds disclosed in the '875 patent for the purposes of the obviousness argument. Finally, whether the claimed invention is suitable for regulatory purposes or the marketplace is not relevant to whether the claimed invention has utility pursuant to s. 2 of the *Patent Act*.

50 The third category of questions under challenge has to do with salts. These questions all go to the obviousness of the salt selections, and relate to paragraphs 103 (h), (i) and (j) of Apotex's Amended Statement of Defence and Counterclaim. Dr. Savi took under advisement a request to investigate and determine "whether there were instances for the compounds in the examples shown where an attempted salt formation in one salt form was tried and was not successful so another salt form was tried and made then reported in the '875 patent" (item 154), and "if there was any testing, other than the '875 thienopyridines, on the hydrogen sulphate, up to the Canadian filing date, to produce same" (item 290). As a follow-up to that last question, Dr. Merlier was also asked to advise, for both thienopyridines and beyond thienopyridines, whether the company had made a hydrogen bromide salt (item 88), a taurocholate (item 89). He was also asked, if Sanofi had not made taurocholate before the priority date of the '875 patent, to provide the date of the first time Sanofi made such a salt (item 90).

51 The Prothonotary found the first question put to Dr. Savi to be irrelevant "because it inquires specifically as to what is or is not reported in the '875 patent". She was of the view that the second question was overbroad and lacking in proportionality. As for the three questions put to Dr. Merlier, the Prothonotary ruled that they did not need be answered since Apotex conceded earlier rulings apply.

52 As already mentioned, the '777 Patent purports to identify certain salts of clopidogrel, including the bisulphate salt, as having desired properties (i.e. solubility and hygroscopicity). Some of the salts identified were also identified in the '875 patent. Counsel for Apotex argued that the Prothonotary erred in law and in fact and misunderstood the questions by suggesting that they were irrelevant insofar as they were concerned with that which was reported in the '875 patent. This is inaccurate, according to Apotex's counsel, since the questions were directed, in substance, at ascertaining the ease with which Sanofi formed salts or whether multiple experiments and trials were required.

53 Contrary to that argument, I am once again of the view that the Prothonotary has not erred in law or in fact in coming to the conclusion that these questions are overbroad. They go beyond thienopyridines and well beyond the scope of the '875 patent; they purport to inquire about "any testing" Sanofi has done with three particular salts other than the '875 thienopyridines, without any limitations in terms of date, type of compounds, project, etc. Sanofi's general experience with salts is not probative to the issue at trial, which is focused on a particular compound. This request goes too far and is akin to a fishing expedition.

54 The last category of questions with respect to Dr. Savi's examination for discovery relates to the Japanese Regulatory Guidelines. Dr. Savi took under advisement an inquiry as to whether Sanofi (or whatever entity or joint venture partner there existed for Japan at the pertinent time) was aware of the Pharmaceutical Manufacturing Guidelines, 1985 edition, edited by the Society of Japanese Pharmacopodia (item 316), or of the part of Guidelines at the sixth last page of Exhibit C dealing with racemic modification (item 317), and if so, at what point in time Sanofi had become familiar with these publications.

55 The Prothonotary disposed of those questions in the following terms:

The Court accepts that regulatory guidelines are arguably relevant as analysis of the prior art and common general knowledge. I accept that the knowledge of Sanofi and the inventors is arguably relevant to the history of the invention. Knowledge of third parties of the regulation is irrelevant to the story of the invention, is of relevant (sic) to the common general knowledge and qualification as prior art, but knowledge of one or two parties is of such low probative value that the inquiry is disproportionate.

56 According to counsel for Apotex, the Japanese Manufacturing guidelines of 1985 appear to include a requirement to resolve racemic medicines into their constituent enantiomers. If Sanofi was aware of these requirements, then this would have provided a motivation for Sanofi to separate one of the million of compounds covered by Patent '875 and thereby obtain clopidogrel. As a result, it is Apotex's view that the Prothonotary erred in law by holding that the information in question was of low probative value and did not need to be answered; that question was relevant and could at least have led to a train of inquiry which may directly or indirectly advance Apotex's case, according to counsel, whatever the ultimate probative value of the answer.

57 Once again, I am in agreement with the Prothonotary's disposition of those questions. She was right in finding that the regulatory guidelines in Japan were arguably relevant as part of an assessment of the prior art and common general knowledge. To that extent, the knowledge by Sanofi and the inventors of those regulatory guidelines was relevant to the history of the invention. Indeed, Sanofi did answer a few questions pertaining to its knowledge of those regulatory guidelines. However, the two questions in dispute go far beyond what would be a relevant inquiry, and would have required Sanofi to inquire about the awareness by third parties (essentially Japanese joint ventures partners) of these regulatory guidelines. To the extent that motivation is relevant, it is the motivation of the person skilled in the art that is relevant. The knowledge of third parties is at best of marginal relevance to the development of the invention, and is clearly offset by the onerous nature of the efforts required by Sanofi representatives to provide an answer. If Apotex wants to make an argument at trial that major pharmaceutical players were aware of these requirements to show that the Japanese regulatory requirements would require racemic drugs to be resolved into their enantiomers, it may do so with its own experts.

58 Turning next to the examination for discovery of Dr. Josiane Merlier, the first category of questions under challenge all relate to Apotex's argument made regarding sound prediction. Dr. Merlier took under advisement a request to provide Sanofi's experience with respect to whether or not specific toxicities are particular to specific species (item 76), and also refused to answer the following questions:

- a. To provide the basis for the answer to the previous question, and more particularly to point out what testing and what circumstances either the specific toxicities are peculiar to a particular species or the contrary (item 77);
- b. To provide Sanofi's experience as to whether or not activity testing with animals is predictive of activity within the human, both generally and specifically with respect to thienopyridines (item 78);
- c. To provide the factual basis that the inventors used to make a prediction that clopidogrel would be useful in terms of being tolerable in humans (item 95);
- d. To provide the factual basis for the prediction that the D-enantiomer would be better tolerated than the L-enantiomer in humans (item 107).

59 The Prothonotary found that the first three questions (items 76, 77 and 78) were overbroad and refused to order Sanofi to provide an answer. For the last two questions (items 95 and 107), she concluded that Sanofi properly refused to answer them, as they posit a promise of the patent which Sanofi disputes (useful in terms of tolerable in humans). According to the Prothonotary, the questions could not be answered without accepting an opinion as to '777 Patent's construction.

60 Apotex has pleaded that clopidogrel is invalid for lack of sound prediction because the inventors could not have soundly predicted that clopidogrel could have had the activity and toxicity profile in humans promised in the patent. One of the bases for this allegation is that data about the toxicity and activity of clopidogrel gleaned from animal studies was not reliable predictor of how the molecule would interact with humans. According to counsel for Apotex, the Prothonotary erred in holding that questions directed at this issue were overbroad, since Sanofi's general understanding with respect to the use of animal studies and toxicity will inform its approach to predicting the utility of the invention at issue in this proceeding.

61 While this is an interesting argument to make, Prothonotary Tabib did not err in law and properly exercised her discretion in ruling that these questions were overbroad. The first two questions concern to Sanofi's general experience with toxicity without focusing on the specific work done to invent the compound that is the subject of the '777 Patent. The questions are not limited by any criteria, such as species, date, tests, etc. They are clearly much too broad and would probably not be of much help to the Court in any event. As for item 78, it was already answered by Sanofi with respect to thienopyridines. As for the broader aspect of that question, relating to Sanofi's experience as to whether or not activity testing with animals is predictive of activity within the human in general, it is similarly overbroad.

62 As for items 95 and 107, I agree with the Prothonotary that the questions are problematic in their wording. They are essentially legal questions having to do with the construction of the '777 Patent. For Sanofi to answer those questions, it would have to agree with the construction of the Patent implicit in the formulation of the questions, a construction that it disputes. Examination for discovery is meant to elicit factual answers, not legal opinions. Counsel for Apotex submitted that if Sanofi does not prevail on that construction, it would be impossible to know about the facts that it would assert on an alternative construction. Not only is this argument speculative, but it overlooks the fact that the work done by the inventors is set out in great detail in the documents produced, which were the subject of extensive discovery by Apotex over the course of 13 days.

63 The second category of questions taken under advisement by Dr. Merlier, and which the Prothonotary refused to order answered, relates to trial testimony from experts who testified in the U.S., where Apotex was found liable for patent infringement with respect to clopidogrel (see *Sanofi-Synthelabo v. Apotex Inc.*, 492 F.Supp.2d 353 (U.S. S.D.

N.Y. 2007), aff'd 2008 U.S. App. LEXIS 24991). More particularly, Apotex sought the transcript of the testimony of Dr. Stephen Byrn or whoever else has testified (item 51), as well as the transcript of the deposition of a scientist given prior to the trial, if there is such a deposition (item 52).

64 The Prothonotary ruled against Apotex on both items, stating that the questions, even if relevant but to a train of inquiry only, lack proportionality in view of the history of the litigation

65 Counsel for Apotex is of the view that in order to determine whether or not the selection of certain salts of clopidogrel constituted a valid selection, it is necessary to determine the following: whether it was surprising that these particular salts had certain advantages over others, how the salts were selected, and whether they actually exhibit the properties promised in the '777 Patent. Since Dr. Byrn was identified as an individual who had previously provided information on this point, the information requested is *prima facie* relevant, and the production of the trial transcript would therefore be highly probative and not onerous, according to Apotex. As for item 52, counsel for Apotex submitted that Sanofi has produced a report on clopidogrel salt selection prepared by a consulting chemistry firm; as a result, the data underlying the report, related documents, the identity of who prepared the report, and information from individuals involved in the drafting of same would all be relevant to the issue of whether the selection of particular salts of clopidogrel was inventive and/or whether these salts have certain advantages over other salts.

66 These arguments are not persuasive. First of all, the expert opinion of an individual given in another jurisdiction is not relevant or admissible at trial in respect of the issues before the Court in this proceeding. Apotex has already sought, by way of motion, extensive production from litigation in other jurisdictions and this Court has deemed such production unnecessary: *Apotex Inc. v. Sanofi-Aventis Canada Inc.*, 2010 FC 77 (F.C.), at paras 61-62. Second, deposition and trial testimony of an individual given in another jurisdiction is not relevant or admissible at trial in respect of the issues before the Court in this proceeding: *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2007 FC 1195 (F.C.), at paras 47-50; aff'd 2008 FC 281 (F.C.); aff'd 2008 FCA 287 (F.C.A.). Such trial testimony and deposition could only be used to impeach a witness at trial, and as such, this information need not be produced on discovery. Third, the expert opinion and testimony would have been created after the filing of the '777 Patent and this would not be relevant to the issues of obviousness and sound prediction. Finally, Apotex can obtain the testimony if the information is publicly available; if it is not, then it would still be subject to confidentiality and its production would be restricted. For all of these reasons, I believe the Prothonotary did not err in exercising her discretion to refuse this request.

67 The third category of questions that Dr. Merlier took under advisement and that the Prothonotary refused to order answered relates to salts, and has already been dealt with (see above, paras. 51-54 of these reasons).

68 The last two questions that Dr. Merlier refused to answer relate to the identified side effects of clopidogrel. The first reads as follows: "To advise whether, with respect to clopidogrel, there are any reports in the company of after-market experiences with clopidogrel dealing with toxicity experiences or activity reports or failures of the product" (item 91). As for the second, it states: "To advise whether Sanofi maintains files on complaints received about products that it markets and, if so, to produce the complaint file for the performance both as to activity and toxicity of clopidogrel" (item 92).

69 The Prothonotary found that both of those questions lack proportionality, especially since a specific issue of activity or toxicity is not identified as a controversial issue in these proceedings.

70 Counsel for the Plaintiff argues that the Prothonotary erred, since the activity and toxicity of clopidogrel, particularly in comparison to similar drugs, is a central issue in this proceeding. According to counsel, information and data about clopidogrel's activity and toxicity is relevant to evaluating whether this compound has the utility promised in the patent, and whether it has a substantial advantage over previously disclosed thienopyridines.

71 The Prothonotary has not erred in refusing to open up what would be an irrelevant area of inquiry. Apotex is seeking information that does not concern utility for the purposes of patentability but that rather extends to commercial acceptance, marketability, and regulatory exigencies. As previously seen, the practical usefulness of an invention is

directed to a different purpose than is patent law. "Usefulness" is not assessed in terms of commercial acceptance but in relation to the purpose claimed in the Patent itself. Apotex has not alleged that clopidogrel causes any particular side effects, and even if there were such side effects, they would not be relevant in determining the validity of the patent. Considering the very marginal relevance of these questions and the broadness of the inquiry, the Prothonotary did not err in finding that these two items lack proportionality.

72 For all of the foregoing reasons, I am therefore of the view that Apotex's motion ought to be dismissed, with costs fixed in the amount of \$1,500.00 in the cause. Apotex has failed to demonstrate that the Prothonotary's rulings were clearly wrong, or that she misapprehended the applicable legal principles or the facts.

**Order**

*THIS COURT ORDERS* that this motion is dismissed, with costs in the amount of \$1,500.00 in the cause.

Public

# Tab 8

**VOLUME II – AUTHORITIES  
(APPENDIX B TO THE MEMORANDUM OF FACT AND LAW)**

2007 FC 236, 2007 CF 236  
Federal Court

Apotex Inc. v. Wellcome Foundation Ltd.

2007 CarswellNat 1839, 2007 CarswellNat 564, 2007 FC 236,  
2007 CF 236, [2007] F.C.J. No. 344, 156 A.C.W.S. (3d) 58

**Apotex Inc., Plaintiff and The Wellcome Foundation  
Limited and Glaxosmithkline Inc., Defendants**

F.E. Gibson J.

Heard: February 21, 2007  
Judgment: March 1, 2007  
Docket: T-1686-01

Counsel: Jerry Topolski, for Plaintiff  
Alison White Norvak, for Defendants

Subject: Civil Practice and Procedure; Intellectual Property

APPEALS by both plaintiff and defendants from decision of Prothonotary ordering answers to questions on discovery and to interrogatories.

***F.E. Gibson J.:***

**Introduction**

1 These reasons follow the hearing on the 21st of February, 2007, at Toronto, of two motions in appeal from two Orders of Prothonotary Milczynski dated the 30<sup>th</sup> of August, 2006.

2 One of the motions in appeal, (the "first motion"), was brought by the Plaintiff Apotex Inc. ("Apotex") and seeks to set aside the Order of Prothonotary Milczynski in which she ordered the Plaintiff to provide answers to certain questions posed on examination for discovery of Apotex' nominee and follow-up written interrogatories. The first Order and the questions at issue are attached as Schedule "A" to these reasons.

3 The second motion in appeal (the "second motion") was brought by the Wellcome Foundation Limited and GlaxoSmithKline Inc. (the "Defendants") and seeks to set aside the Order of Prothonotary Milczynski requiring the Defendants to provide answers to certain questions posed to their nominee on examinations for discovery. The Order at issue on the second motion and the related questions are attached as Schedule "B" to these reasons.

4 Prothonotary Milczynski provided no reasons for the Orders at issue.

**Background**

5 This action was commenced by Statement of Claim dated the 20<sup>th</sup> of September, 2001. Apotex seeks various forms of relief in respect of the harm allegedly caused to it by reason of the Defendants' unsuccessful prosecution of two applications under the *Patented Medicines (Notice of Compliance) Regulations*<sup>1</sup> seeking to prohibit the Minister of Health from issuing a Notice or Notices of Compliance to Apotex in respect of the drug acyclovir.

6 Section 8 of the *Patented Medicines (Notice of Compliance) Regulations* specifically provides for relief by way of damages or profits in respect of harm suffered by reason of any delay in the issuance of a Notice of Compliance caused by the commencement of an application for prohibition under those *Regulations*. In the claim, at paragraph 47, Apotex has asserted that, by reason of the *Regulations* and the Defendants' commencement of the prohibition proceedings, it was prevented from obtaining a Notice of Compliance from mid-February, 1996 to August 21, 1997. In the result, Apotex asserts that it suffered damages flowing from, among other things, lost sales revenues for its acyclovir tablets.

7 The Defendants have defended this action on the basis that Apotex has no cause of action either under section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, or in equity and hence, no damages are owing. Alternatively the Defendants allege, even if Apotex has a cause of action under section 8 of the *Regulations*, either Apotex suffered no damage or its damages were not caused by the Defendants, but resulted instead from Apotex' own trade practices and its entry into an already confounded market.

8 The Defendants filed their Statement of Defence on the 8<sup>th</sup> of March, 2002 and amended their defence on the 17<sup>th</sup> of April, 2003.

9 Apotex filed its reply on the 22<sup>nd</sup> of March, 2002 and its Amended Reply on the 6<sup>th</sup> of May, 2003.

10 Apotex's representative, Dr. Bernard Sherman, was examined for discovery on the 5<sup>th</sup> of July, 2005. On the 24<sup>th</sup> of August, 2005, the Defendants brought a motion seeking an Order compelling Dr. Sherman to answer questions that were refused on his examination.

11 The Defendants' motion above referred to was heard on the 27<sup>th</sup> of October, 2005, and, on the 10<sup>th</sup> of November, 2005, Prothonotary Lafrenière ordered that Apotex answer two (2) questions which had been refused. That same day, counsel for Apotex provided the answers to the questions ordered by Prothonotary Lafrenière to be answered. Following the provision of those answers, the parties agreed that the second round of Dr. Sherman's examination dealing with the answers given, and questions arising therefrom, would be continued by way of written interrogatories. On March 30, 2006, the Defendants delivered a set of written interrogatories to counsel for Apotex. On the 30<sup>th</sup> of May, 2006 Apotex delivered its responses to the written interrogatories. In responding, Apotex refused to answer a number of the purported follow-up questions posed by the Defendants as Apotex considered those questions to be irrelevant or otherwise improper for reasons given. The Defendants' motion before Prothonotary Milczynski leading to the Order that is the subject of motion number one, now before the Court, followed.

12 The Defendants' representative on examinations for discovery was examined as part of the first round of examinations on the 3<sup>rd</sup> of May, 2005. Answers to undertakings arising from that examination, and answers to questions ordered to be answered, were provided by the Defendants on the 11<sup>th</sup> of August, 2005, the 10<sup>th</sup> of November, 2005 and the 1<sup>st</sup> of December, 2005. A second examination of the Defendants' representative took place on the 30<sup>th</sup> of January, 2006 and answers to undertakings arising from that examination, and answers to questions ordered to be answered, were provided by the Defendants on the 31<sup>st</sup> of May, 2006.

13 Apotex brought a motion to compel answers to questions that were refused by the Defendants in connection with the second round of examinations for discovery, leading to the Order of Prothonotary Milczynski that is before the Court on appeal under motion number two.

#### Standard of Review

14 In *Apotex Inc. v. Pfizer Canada Inc.*<sup>2</sup>, my colleague Justice de Montigny wrote at paragraph 7 of his reasons:



There is no doubt that discretionary and interlocutory decisions of prothonotaries ought not to be disturbed and reviewed *de novo* unless the questions raised in the motion are vital to the final issues of the case, or the order is clearly wrong in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, at p. 462-3 (F.C.A.); *Merck & Co. v. Apotex Inc. v. Apotex Inc.*, (2003), 30 C.P.R. (4<sup>th</sup>) 40, at p. 53; *Z.I. Pompey Industrie v. Ecu-Line N.V.*, [2003] 1 S.C.R. 450, at p. 461.

While Justice de Montigny's decision was reversed on appeal<sup>3</sup>, the Federal Court of Appeal took no issue with the foregoing quoted paragraph made in the context of reasons for decision arising in connection with an appeal from a decision of a prothonotary regarding answers refused or taken under advisement at examinations for discovery in an action, as here, under section 8 of the *Patented Medicines (Notice of Compliance) Regulations*.

15 Counsel were in agreement that the appeals here before the Court arose out of discretionary and interlocutory decisions of a prothonotary and that the foregoing quoted paragraph accurately summarizes the appropriate standard of review here, that is to say, the orders under review should not be interfered with unless the learned Prothonotary's decisions of either of them were or was clearly wrong in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

#### Appropriate Principles of Law

16 In *Apotex Inc. v. Pfizer Canada Inc., Pfizer Corporation and Her Majesty the Queen, supra*, Justice de Montigny succinctly summarized the principles of law applicable on the matter before him, and thus on this matter, and I can do no better than to adopt his summary. Once again, I am satisfied that the Federal Court of Appeal, in reversing Justice de Montigny, did not differ with his summary of the principles of law but rather differed with his application of those principles to the facts before him. In very brief reasons, essentially a single paragraph, in that matter, Justice Sharlow, for the Court, wrote:

We are all of the view that this appeal should be allowed, the order of the judge set aside, and the order of the prothonotary restored. We accept submissions of the appellant [Apotex Inc.] that the disputed questions are relevant to claims made in the pleadings, either to the allegation of common enterprise or to the computation of damages, assuming that damages may be measured by reference to the respondents' profits.

17 Justice de Montigny wrote at paragraphs [8] to [10] of his reasons:

[8] In the present case, Pfizer has argued that the Prothonotary erred by failing to apply the correct principles of law. More specifically, Pfizer submitted that the Prothonotary erred in law by failing to follow the principle that relevance must be determined by the pleadings. Since the Prothonotary has not given reasons for her order, I must assume that she has adopted Apotex' [here Apotex on motion number one and the Defendants' on motion number two] arguments and proceed to review her decision on that basis.

[9] There is no dispute between the parties that in order to assess the relevance of a question, one must look at the pleadings. The purpose of discovery, after all, is to secure admissions with a view to advance the case of the parties. As Martineau J. stated in *Apotex Inc. v. Merck & Co. et al.* (2004), 33 C.P.R.(4th) 387 (F.C.) (QL), at par. 15 (affirmed (2005), 38 C.P.R.(4th) 289 (F.C.A.)):

The purpose of discovery, whether oral or by production of documents, [and here, in part by responses to interrogatories], is to obtain admissions to facilitate proof of all the matters which are properly in issue between the parties. The question of whether a document "relates" to an issue in the case depends upon a reasonable interpretation of the pleadings. In this regard, the party demanding a document must demonstrate that the

information in the document may, either directly or indirectly, advance its own case or damage the case of its opponent...

[10] In *Hayden Manufacturing Co. v. Canplas Industries Ltd.* (1998), 83 C.P.R. (3d) 19 (F.C.), this Court stated that there must be limitations placed on discovery given the resources of the courts and concern over costs, congestion and delay. The Court referred to the earlier case of *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 25 F.T.R. 226 (F.C.) and identified six principles which place limitations on the scope of discovery. It is worth setting out these principles as presented by Prothonotary Hargrave in *Hayden*, above:

1. The documents to which parties are entitled are those which are relevant. Relevance is a matter of law, not discretion. The test to apply, in determining relevance, is whether information obtained may directly or indirectly advance one party's case, or damage that of the other party.
2. Questions which are too general, or which seek an opinion, or are outside the scope of a proceeding, need not be answered.
3. Discovery is confined to matters relevant to the facts which have been pleaded, rather than to facts which a party proposes to prove and thus relevance, in the context of discovery, limits questions to those that may prove or disprove allegations of fact which have not been admitted.
4. A court should not compel answers which, although perhaps relevant, are not likely to advance the party's legal position.
5. Before requiring an answer to a discovery question, the court should weigh the probability of the usefulness of the answer against the time, trouble, expense and difficulty which might be involved in obtaining it: "One must look at what is reasonable and fair under the circumstances..." (*loc. cit.*)
6. Fishing expeditions undertaken through far-reaching, vague or irrelevant questions are to be discouraged.

#### **Application of the Foregoing Principles to the Positions of the Parties, Against the Appropriate Standard of Review**

##### ***Motion in Appeal Number One***

18 Counsel for Apotex urged that, since the learned Prothonotary provided no reasons for her decision in Order number one, there is simply no basis upon which this Court can discern how she applied the foregoing principles of law and that thus, no deference should be accorded to her decision. Bearing in mind the foregoing, counsel urged that the learned Prothonotary allowed follow-up questions in respect of matters which are not pleaded and to which the answer, if given, could not assist the Defendants in establishing any fact in issue and more particularly, that it is impossible for this Court to discern what, if any, unadmitted facts in the pleadings could or might be proved or disproved by the answers ordered to be provided. Further, counsel urged, the Defendants have, by the questions ordered to be answered, been permitted to pose follow-up questions on a second round of examination where those questions arise out of the initial round of questioning and could reasonably have been asked as follow-up questions on the first round of discovery. Counsel urges that the Order in question encourages a "never ending process that knows no boundaries"<sup>4</sup>.

19 I disagree. By reference to the words of Justice Sharlow in her very brief reasons on the appeal in *Apotex Inc. v. Pfizer Canada Inc.*, *supra*, I am satisfied that the questions at issue on the first motion in appeal are relevant to claims made in the pleadings, in particular the Amended Statement of Defence, in that they go to allegations of common enterprise and thus to the computation of damages, particularly having regard to vague answers provided by Apotex' representative on the first round of discoveries that were not amenable to detailed follow-up questions in the context of that round or, if followed up, would likely only have led to greater confusion on the issue of common enterprise and thus on the issue of computation of damages. Put another way, I am satisfied that the questions ordered to be answered, when answered,

are likely to advance the Defendants' position or to contribute towards settlement. The questions do not amount to a fishing expedition undertaken through far-reaching, vague or irrelevant questions.

### ***Motion in Appeal Number Two***

20 Counsel for the Defendants urges that the questions directed to be answered by the Order under appeal in motion in appeal number two go beyond the scope of the pleadings. In particular, as they relate to allegations of control, counsel urges that those allegations, by the pleadings, are strictly related to the direct relationship between the Defendants and do not relate to other enterprises that might be part of a "common enterprise" designed to conceal, or having the effect of concealing, information relevant to damages. Counsel further urges that the questions at issue are vague, far-reaching, go beyond the issue of transfer-pricing and, as such, even if relevant, amount to a "fishing expedition" that could in no way advance Apotex' legal position.

21 Once again, by reference to the words of Justice Sharlow above referred to, I cannot agree. I am satisfied that the disputed questions are relevant to claims made in the pleadings in that they relate to common enterprise and to transfer pricing and thus the computation of damages. While the questions at issue are indeed far-reaching, I am satisfied that they at least when answered, may prove or disprove allegations of fact which have not been admitted and that they are thus likely to advance the legal positions of the parties, thus contributing to the trial process herein or to settlement. Weighing the probability of the usefulness of answers to the questions at issue against the time, trouble, expense and difficulty that might be involved in obtaining answers, I am satisfied that the weighing process favours upholding the questions. The questions do not amount to a "fishing expedition" outside the bounds of permitted discovery.

### **Conclusion**

22 Based upon the foregoing brief analysis, against the standard of review earlier enunciated, I cannot conclude that the Orders under review, or either of them, are or is clearly wrong in the sense that the exercise of discretion by the learned Prothonotary was based on a wrong principle or upon a misapprehension of the facts, facts better known to her in the intensive involvement that she and her colleague Prothonotary Lafrenière have had with the progress of this action to date, than they are known to this Judge after a relatively brief hearing of these motions. In the result, both motions in appeal will be dismissed.

23 Both Apotex and the Defendants seek costs on both motions. Following the precedent set in the Orders of the learned Prothonotary that are here under appeal, costs on both orders flowing from the motions in appeal that are before the Court will be in the cause.

## **APPENDIX A**

*Date: 20060830*

*Docket: T-1686-01*

*Toronto, Ontario, August 30, 2006*

*PRESENT: Madam Prothonotary Milczynski*

*BETWEEN:*

*APOTEX INC.*

*Plaintiff*

*and*

*THE WELLCOME FOUNDATION LIMITED  
and GLAXOSMITHKLINE INC.*

*Defendants*

## Order

*UPON MOTION* by the Defendants, The Wellcome Foundation Limited and GlaxoSmithKline Inc. (collectively, the "Defendants"), heard at Toronto on August 28, 2006, for:

1. An order compelling the Plaintiff, Apotex Inc., to answer written interrogatories that were refused from the continued examination for discovery of its representative, Dr. Bernard Sherman, as listed in Schedule "A" attached to the Notice of Motion dated July 10, 2006 (the "Notice of Motion"), on or before a date to be set three (3) weeks from the disposition of the motion;
2. An order requiring the Plaintiff's representative, Dr. Sherman, to answer any follow-up questions arising from any answers to the Written Interrogatories that are ordered to be answered;
3. An order requiring the Plaintiff's representative, Dr. Sherman, to answer any follow-up questions arising from the answers to the Written Interrogatories received May 30, 2006 on Dr. Shermans' continued examination for discovery; and
4. Costs of the motion;

*AND UPON* reading the Defendants' Motion Record dated July 10, 2006, including the affidavit of Sharon O'Connor, sworn June 28, 2006, and upon reading the Plaintiff's Responding Motion Record dated August 11, 2006;

*AND UPON* hearing the submissions of counsel for the Plaintiff and the Defendants;

*AND UPON* being advised that the Plaintiff had agreed to provide answers to Questions I B(a), (b), (f) and (g) of Schedule "A" to the Notice of Motion;

*AND UPON* being advised that the Defendants were withdrawing questions I B(n) and (o) of Schedule "A" to the Notice of Motion;

*THIS COURT ORDERS that*

1. The Plaintiff shall provide answers to the following questions: I B(c), (d), (e), (h), (i), (j), (k), (l), (m), (p), (q), (r), (s), (t), (u), (v) and II B(a) of Schedule "A" to the Notice of Motion; and
2. Costs of this motion shall be in the cause.

"Martha Milczynski"  
 Prothonotary

## Questions

*I. B. Written Interrogatories refused as follow-up to the answer to Question No. 8*

...

(c) If the "common parent" is a corporation, to provide the date and jurisdiction of incorporation of the "common parent".

(d) If the "common parent" is a corporation, to advise whether the "common parent" is a private or public company.

(e) If the "common parent" is a corporation, to advise who the officers and directors of the "common parent" were between February 22, 1991 and August 21, 1997.

...

(h) To advise whether Apotex and Nu-Pharm were related companies in that they were each under the control of the "common parent" at that time that the arrangement referred to at paragraph 22 of the Statement of Claim was entered into.

(i) To confirm that, between February 22, 1991 and August 21, 1997, Apotex and Nu-Pharm were directly controlled by the "common parent".

(j) To advise whether the "common parent" controlled the time and manner in which Medichem would apply for and obtain a compulsory license for acyclovir.

(k) If the "common parent" did not control the time and manner in which Medichem would apply for and obtain a compulsory license for acyclovir, to advise what, if any, role the "common parent" played in determining the time and manner in which Medichem would apply for and obtain a compulsory license for acyclovir.

(l) To advise whether the "common parent" controlled the time and manner in which Nu-Pharm would apply for and obtain a Notice of Compliance in respect of acyclovir.

(m) If the "common parent" did not control the time and manner in which Nu-Pharm would apply for and obtain a Notice of Compliance in respect of acyclovir, to advise what, if any, role the "common parent" played in determining the time and manner in which Nu-Pharm would apply for and obtain a Notice of Compliance in respect of acyclovir.

...

(p) To advise whether the "common parent" controlled the time, manner and jurisdictions in which Nu-Pharm would manufacture and sell Nu-acyclovir.

(q) If the "common parent" did not control the time, manner and jurisdictions in which Nu-Pharm would manufacture and sell Nu-acyclovir, to advise what, if any, role the "common parent" played in determining the time, manner and jurisdiction in which Nu-Pharm would manufacture and sell Nu-acyclovir.

(r) To advise whether the "common parent" controlled which of Apotex, Nu-Pharm or Medichem would apply for a compulsory license for acyclovir.

(s) If the "common parent" did not control which of Apotex, Nu-Pharm or Medichem would apply for a compulsory license for acyclovir, to advise what, if any role it played in determining which of Apotex, Nu-Pharm or Medichem would apply for a compulsory license for acyclovir.

(t) To advise whether the "common parent" controlled which of Apotex or Nu-Pharm would apply for an Abbreviated New Drug Submission for acyclovir.

(u) If the "common parent" did not control which of Apotex or Nu-Pharm would apply for an Abbreviated New Drug Submission for acyclovir, to advise what role, if any, the "common parent" played in determining which of Apotex, Nu-Pharm would apply for an Abbreviated New Drug Submission for acyclovir.

(v) To advise what role, if any, the "common parent" played in arriving at the arrangement referred to at paragraph 22 of the Statement of Claim.

...

*II. B. Written Interrogatory refused as follow-up to the answer to Question No. 9*

(a) To advise what provinces Nu-Pharm marketed and sold Nu-acyclovir commencing in April 1996.

**APPENDIX B**

*Date: 20060830*

*Docket: T-1686-01*

*Toronto, Ontario, August 30, 2006*

*PRESENT: Madam Prothonotary Milczynski*

*APOTEX INC.*

*Plaintiff*

*and*

*THE WELLCOME FOUNDATION LIMITED and  
 GLAXOSMITHKLINE INC.*

*Defendants*

**Order**

*UPON MOTION* brought on behalf of the Plaintiff, for:

1. An Order requiring Mr. Ostap Mojsiak to re-attend for examination for discovery on behalf of the Defendants and to provide under oath, answers to undertakings and refusals given on his examination as set out in Schedule "A" hereto;
2. Costs of this motion; and
3. Such further and other relief as this Honourable Court may deem just.

*AND UPON* reviewing the motion record filed by the Plaintiff and the responding motion record of the Defendants;

*AND UPON* hearing the submissions of counsel for the Plaintiff and counsel for the Defendants;

*THIS COURT ORDERS that*

1. The Defendants shall provide answers to the questions set out as item nos. 1 to 9 in Schedule "A" attached to the Notice of Motion.
2. Costs in the cause.

"Martha Milczynski"  
 Prothonotary

**Continued Examination by Mr. Crofoot**

<i>Item No.</i>	<i>Page No.</i>	<i>Question/Line No.</i>	<i>Undertaking/Refusal/Advisement</i>
1.	95	Line 6	<i>ADVISEMENT</i> to confirm whether any of the directors in Canada were either officers or directors of entities shown as being senior to the Canadian company, i.e., above it on the corporate chart that Ms. Nowak has produced.
2.	101-102	183	<i>ADVISEMENT</i> to produce, as a follow-up to the answer given to Question 100 on Pages 38-39, which is No. 12 on the August chart of Ms. Nowak, a sample inter-corporate invoice or whatever documentation would exist which would show the actual mark-up for a purchase of acyclovir.
3.	103	Line 6	<i>UNDERTAKING</i> to make equities and advise who determined the amount of dividends that were to be paid out, as a follow-up to the answer to Question 100 on Page 39, which says, "With respect to the general profits that were generated between 1993 and 1998 by BWI and its successors, some of these profits were paid to Wellcome by way of dividend. There is, however, no general pattern to the manner or amount by which such dividends were paid out in those years." and to advise whether the Board of Wellcome Foundation Ltd., Glaxo Group, Glaxo Wellcome PLC or Wellcome PLC have a role in the determination of the amount of such dividends and to identify any consideration that applied to determining the amount of dividend on a year-by-year basis, for instance, whether the dividends were influenced by the amount of profit earned in Canada or by the financial needs of the entity to whom the dividends are paid or by some other determination or whether it is totally random.
4.	110	193	<i>REFUSAL</i> to advise of the names of the representatives of Glaxo Wellcome Inc. who negotiated the Licence Agreement dated March 1, 1996, with AltiMed, marked as Exhibit 8, and to advise of their positions in the company.
5.	110	194	<i>REFUSAL</i> to advise when negotiations commenced with respect to the Licence Agreement dated March 1, 1996 with AltiMed, marked as Exhibit 8, and how long it took to conclude the agreement.
6.	112-113	199	<i>REFUSAL</i> to produce the sales forecast produced respecting the period between the inception of the Licence Agreement dated March 1, 1996, marked as Exhibit 8, and the issuance of the Notice of Compliance in August 1997, having regard to the fact that Section 4.1 of the Agreement refers to written

7.	117	206	estimates of sales forecasts being provided for an 18-month period. <i>UNDERTAKING</i> to confirm whether Technilab had any licence rights prior to the Amended and Restated Licence Agreement dated March 18, 1999, marked as Exhibit 9, or whether it was previously acting as an entirely independent generic in some way.
8.	119	Line 1	<i>ADVISEMENT</i> to advise whether there was a spike in orders for acyclovir in either the last three months of 1996 or the first six months of 1997, i.e., orders from Technilab and AltiMed to Glaxo, having regard to the IMS data which shows that Technilab and AltiMed had increased sales in 1996 and 1997.
9.	123-124	214	<i>ADVISEMENT</i> to advise of the positions of Christopher Vichbacher and Patricia Rowe, and in which companies and when and whether they are employed in any position, and whether they were involved in decisions to seek prohibition against Apotex Inc. or whether they were involved in the marketing of acyclovir, as a follow-up to the answer to Question 154, Page 82.

*Appeals dismissed.*

#### Footnotes

- 1 SOR/93-133.
- 2 *Apotex Inc. v. Pfizer Canada Inc.*, 2006 FC 262 (F.C.), February 28, 2006.
- 3 *Apotex Inc. v. Pfizer Canada Inc.*, 2006 FCA 246 (F.C.A.), June 28, 2006.
- 4 *John Labatt Ltd. v. Molson Breweries, A Partnership* (1996), 69 C.P.R. (3d) 126 (Fed. T.D.), at 128 .



# Tab 9

**VOLUME II – AUTHORITIES  
(APPENDIX B TO THE MEMORANDUM OF FACT AND LAW)**

2011 CAF 120, 2011 FCA 120  
 Federal Court of Appeal

Lehigh Cement Ltd. v. R.

2011 CarswellNat 1015, 2011 CarswellNat 2188, 2011 CAF 120, 2011 FCA 120, [2011] 4 C.T.C.  
 112, [2011] F.C.J. No. 515, 200 A.C.W.S. (3d) 1219, 2011 D.T.C. 5069 (Eng.), 417 N.R. 342

## Her Majesty the Queen, Appellant and Lehigh Cement Limited, Respondent

John M. Evans, Eleanor R. Dawson, Carolyn Layden-Stevenson J.J.A.

Heard: March 3, 2011

Judgment: March 31, 2011

Docket: A-263-10

Proceedings: affirming *Lehigh Cement Ltd. v. R.* (2010), 2010 CarswellNat 2097, 2010 TCC 366, 2010 D.T.C. 1239 (Eng.) (T.C.C. [General Procedure])

Counsel: Daniel Bourgeois, Geneviève Léveillé, for Appellant  
 Warren J.A. Mitchell, Q.C., Mathew G. Williams, Natasha Reid, for Respondent

Subject: Income Tax (Federal); Civil Practice and Procedure

APPEAL by Minister from judgment reported at *Lehigh Cement Ltd. v. R.* (2010), 2010 CarswellNat 2097, 2010 TCC 366, 2010 D.T.C. 1239 (Eng.) (T.C.C. [General Procedure]), ordering production of internal memoranda and provision of answer to question.

### ***Eleanor R. Dawson J.A.:***

1 This is an appeal from an interlocutory order of the Tax Court of Canada (Tax Court) rendered in respect of a motion brought by Lehigh Cement Limited (Lehigh). Lehigh moved for an order requiring Her Majesty the Queen (the Crown) to answer a question objected to on discovery and to produce certain documents. The issue raised on this appeal is whether the Judge of the Tax Court erred by ordering the Crown to:

1. Answer the following question: If the shares of CBR Cement Corp. had been owned by the appellant instead of a non-resident company related to the appellant, would the Crown have contested the arrangement (the disputed question).
2. Produce internal memoranda of the Canada Revenue Agency (CRA) from 2000 to July 2007 that specifically relate to the development of a general policy concerning paragraph 95(6)(b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (Act), not including documents relating to a particular taxpayer (the disputed documents).

A subsidiary issue is raised with respect to the appropriate level of costs to be awarded on this appeal.

2 The Judge's reasons in support of the order under appeal are cited as 2010 TCC 366, 2010 D.T.C. 1239 (Eng.) (T.C.C. [General Procedure]).

### **The Facts**

3 The relevant facts and the procedural context are set out succinctly in the following paragraphs from Lehigh's memorandum of fact and law:

1. In 1995 the Respondent, Lehigh Cement Limited ("Lehigh"), borrowed US\$100,000,000 in Canada and contributed the US\$100,000,000 as a capital investment in CBR Development NAM LLC ("CBR-LLC"), its wholly-owned U.S. subsidiary. Lehigh deducted the interest paid on the said loan pursuant to s. 20(1)(c) of the *Income Tax Act* (the "Act").

2. CBR-LLC in turn lent the US\$100,000,000 to CBR Cement Corp. ("CBRUS"), a United States operating company, the shares of which were owned by CBR Investment Corporation of America ("CBR-ICA"), also a United States corporation.

3. In the years 1996 and 1997, CBR-US carried on an active business and paid interest to CBR-LLC of CDN \$11,303,500 and CDN\$11,305,800 respectively.

4. Lehigh, CBR-LLC and CBR-US were all treated as "related" corporations as that term is defined in the Act. Subparagraph 95(2)(a)(ii) of the Act, as it read at the time, provided that so long as the corporations were *related*, the interest so paid would retain its character as active business income to CBR-LLC, and as such become exempt surplus of CBR-LLC.

5. CBR-LLC paid dividends to Lehigh in 1996 and 1997 of CDN\$8,294,940 and CDN\$14,968,784 respectively. Paragraph 113(1)(a) of the Act provides that to the extent such dividends were paid out of exempt surplus of CBR-LLC, Lehigh was entitled to deduct such dividends in computing its taxable income, which it did.

[...]

7. Notices of Reassessment for each of the 1996 and 1997 taxation years were issued on November 30, 2004 and on May 3, 2005. The Minister's primary basis of reassessment was s. 95(6)(b), asserting that the effect of that provision was that the shares of CBR-LLC were deemed not to have been issued, with the result that the deduction under s. 113(1)(a) of the Act should be disallowed. The alternate basis was s. 245 of the Act, the general antiavoidance rule (the "GAAR").

8. Lehigh objected to the reassessments. On February 27, 2009 the Minister confirmed the reassessments. Lehigh appealed to the Tax Court of Canada.

### The Decision of the Judge

4 After setting out the background facts, the Judge framed the dispute before her in the following terms:

9. The appellant's objective in bringing this motion is to have a better understanding of the respondent's position on the scope, and object and spirit, of s. 95(6)(b). The respondent resists largely on grounds that the information sought is not relevant.

5 The Judge then noted that the principles applicable to the issues before her had recently been discussed by the Tax Court in *HSBC Bank Canada v. R.*, 2010 TCC 228, 2010 D.T.C. 1159 (Eng.) (T.C.C. [General Procedure]) at paragraphs 13 to 16. The Judge particularly noted that the purpose of discovery is to provide a level of disclosure so as to allow each party to "proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet." The Judge indicated that while fishing expeditions are to be discouraged, "very little relevance need be shown to render a question answerable." No specific challenge is made to the Judge's statement of general principles.

6 With respect to the disputed question, the Judge reasoned:

12. [...] It is not in the interests of fairness or efficiency for the respondent to resist answering the question on grounds of principle. The answer will help the appellant know what case it has to meet and is within the broad purposes of examinations for discovery.

13. The purposes of discovery were summarised in *Motaharian v. Reid*, [1989] OJ No. 1947:

- (a) to enable the examining party to know the case he has to meet;
- (b) to procure admissions to enable one to dispense with formal proof;
- (c) to procure admissions which may destroy an opponent's case;
- (d) to facilitate settlement; pre-trial procedure and trial;
- (e) to eliminate or narrow issues;
- (f) to avoid surprise at trial.

7 The Judge's conclusion with respect to the disputed documents was as follows:

15. As for the production of internal CRA memoranda, these documents are potentially relevant because it appears that they directly led to the respondent's position in this appeal. Effectively, these documents are the support for the assessments even though CRA's policy may have been in the formative stages when the assessments were issued. This type of disclosure is proper: *HSBC Bank*, para. 15.

16. It is also significant that the appellant's request is not broad. Mr. Mitchell indicated in argument that there are likely only a few documents at issue.

17. Disclosure will therefore be ordered, except that the formal order will clarify that production will apply only to memoranda that specifically relate to the development of a general policy. It will exclude documents that relate to a particular taxpayer.

### The Asserted Errors

8 The Crown asserts that in making the order under appeal the Judge erred by:

- a. failing to observe principles of natural justice by accepting factual assertions made by counsel for Lehigh without providing the Crown with an opportunity to challenge them;
- b. making findings of fact unsupported by the evidence and relying on such facts in support of her decision;
- c. ordering the production of internal CRA memoranda; and
- d. ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position.

### Consideration of the Asserted Errors

#### *a. Did the Judge fail to observe principles of natural justice?*

9 The Crown identifies three factual submissions made by counsel for Lehigh that it states were not supported by affidavit evidence. It states that it objected to these "bare assertions" being made because they were unsupported by evidence so that the Crown had no opportunity to challenge the assertions through the cross-examination of a deponent. The three impugned submissions are:

- 1. During oral discovery, counsel for Lehigh singled out two CRA officers, Wayne Adams and Sharon Gulliver, when questioning on the existence of internal memoranda.

2. Counsel for Lehigh stated at the hearing that the alleged change in CRA policy "was developed between 2000 and July 2007, when the CRA announced the new policy."

3. Counsel for Lehigh stated at the hearing that he did not think there would be many memoranda concerning the new policy. He only expected there to be three or four memoranda.

These assertions are said to have significantly influenced the Judge's decision.

10 For the following reasons, I conclude that the Judge did not err as the Crown submits.

11 To begin, the first impugned submission was not made to the Judge. What is complained of is a question asked by counsel for Lehigh on his discovery of the Crown when he sought production of the disputed documents. Counsel stated his request was "specifically but not exclusively" with respect to documents emanating to and from the two named employees. Such a question asked on discovery does not breach principles of natural justice.

12 The remaining two impugned submissions were made to the Judge by counsel for Lehigh. However, counsel for Lehigh was explicit in his submissions to the Court that "[w]e don't know if there are any documents, to begin with. We are saying, if there are documents that give the context of this assessment we would like to see them." (Transcript of oral argument, Appeal Book page 81 lines 14-19). This makes clear that counsel was not improperly giving evidence about matters within his knowledge. I read counsel's submissions as being in the nature of supposition as to when any memoranda would have been produced and the number of such memoranda. The Judge's reference to the number of documents reflected counsel's submissions.

13 Further, counsel's submissions were informed by a memorandum prepared by Sharon Gulliver dated May 2, 2002 (Gulliver memorandum). The Gulliver memorandum was produced by the Crown following oral discovery, but before the hearing before the Judge, and was appended to the affidavit filed in support of Lehigh's motion. It will be described in more detail later in these reasons.

14 The Crown has not established any breach of the principles of natural justice.

***b. Did the Judge make and rely upon findings of fact which were unsupported by the evidence?***

15 The Crown asserts that the Judge based her decision to order the production of the disputed documents on the basis of two allegations which were not substantiated by evidence. The allegations were that:

1. The disputed documents led directly to the Crown's position in the underlying appeal.
2. The disputed documents provided the support for the assessments under appeal, even though the CRA's policy may have been in the formative stages when the assessments were issued.

The Crown points to paragraph 15 of the Judge's reasons, quoted above, to argue that the Judge made and relied upon these assumptions.

16 In my view, the Judge's reasons, read fairly, fall well short of a finding of fact that the disputed documents either led directly to the Crown's position on the appeal or provided the support for the assessment. I reach this conclusion for the following reasons.

17 First, as set out above, Lehigh was explicit that it did not know if the disputed documents existed. At paragraph 6 of her reasons, the Judge correctly stated that it was an assertion made by Lehigh, not an established fact, that the CRA's policy concerning the application of paragraph 95(6)(b) was developed between 2000 and July 2007 when the CRA announced the new policy.

18 Second, the Judge noted in paragraph 15 of her reasons that the disputed documents were "potentially relevant because *it appears* that they directly led [...]." No determination was made by the Judge that the documents existed, had led to the Crown's position on this appeal or had provided support for the assessment.

19 Third, the Gulliver memorandum was in evidence before the Judge. This memorandum provided a basis for the Judge's conclusion by way of inference that any subsequent memoranda were potentially relevant. From the content of the Gulliver memorandum it was at least arguable that subsequent memoranda expressed the basis for the assessments at issue. As explained below, the Crown's disclosure of the Gulliver memorandum evidenced the Crown's position that it was relevant to Lehigh's appeal.

20 The Crown has not persuaded me that any of the impugned findings of fact were indeed made by the Judge.

21 The Crown also argues that Lehigh had specific knowledge of documents relating to a change in policy "but chose not to adduce any evidence which might have shed light on the nature, volume and relevance of these documents." I agree with Lehigh's responsive submission that only the Crown possessed the knowledge of whether the disputed documents exist or if any existing documents are relevant. In such a circumstance it is difficult to see how Lehigh could have provided better affidavit evidence that shed light on these points.

***c. Did the Judge err by ordering the production of internal CRA memoranda?***

22 I begin by noting that while the Judge ordered the production of internal CRA memoranda prepared from 2000 to July 2007, during oral argument counsel for Lehigh significantly narrowed the relevant timeframe to be from the date of the Gulliver memorandum (May 2, 2002) to the date of the assessments (November 30, 2004 and on May 3, 2005).

23 The Crown argues that in ordering the production of internal memoranda the Judge erred because:

1. Opinions expressed by CRA officials outside of the context of a particular taxpayer's situation are irrelevant.
2. Official publications issued by the CRA are relevant only where a taxpayer seeks to establish that the CRA's interpretation of the Act, expressed in an official publication, is correct and contradicts the interpretation upon which the assessment in issue was made.

24 The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. See *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379, 162 A.C.W.S. (3d) 911 (F.C.A.) at paragraph 35. In the words of this Court in *Eurocopter c. Bell Helicopter Textron Canada Ltée*, 2010 FCA 142, 407 N.R. 180 (F.C.A.) at paragraph 13, while "the general principles established in the case law are useful, they do not provide a magic formula that is applicable to all situations. In such matters, it is necessary to follow the case-by-case rule."

25 It follows from this that the determination of whether a particular question is permissible is a fact based inquiry. On appeal a judge's determination will be reviewed as a question of mixed fact and law. Therefore, the Court will only intervene where a palpable and overriding error or an extricable error of law is established. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.); *Bristol-Myers Squibb Co. v. Apotex Inc.*, as cited above, at paragraph 35.

26 In this case, consideration of whether a particular question is permissible begins with Rule 95 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a which governs the scope of oral discovery. Rule 95(1) states:

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that

- (a) the information sought is evidence or hearsay,

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

[emphasis added]

95. (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants:

a) le renseignement demandé est un élément de preuve ou du oui-dire;

b) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;

c) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée.

[Non souligné dans l'original.]

27 The Crown correctly observes that prior to its amendment in 2008, Rule 95(1) required a person examined for discovery to answer any proper question "relating to" ("qui se rapporte ô) any matter in issue in the proceeding. A question was said to relate to any matter in issue if it was demonstrated that "the information in the document may advance his own case or damage his or her adversary's case". See *SmithKline Beecham Animal Health Inc. v. R.*, 2002 FCA 229, 291 N.R. 113 (Fed. C.A.) at paragraphs 24 to 30. At paragraph 31 of its reasons this Court characterized this test to be substantially the same as the train of inquiry test.

28 The Crown submits, however, that it "is doubtful that the 'train of inquiry' test, in its present form, will survive the amendment" of Rule 95(1) in 2008. The Crown argues that the jurisprudence relied upon by Lehigh does not address the impact of the narrower wording of Rule 95(1).

29 In my view, the 2008 amendment to Rule 95(1) did not have a material impact upon the permissible scope of oral discovery. I reach this conclusion for the following reasons.

30 First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. R.* (1999), [2000] 1 F.C. 267 (Fed. T.D.) at paragraph 5:

The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial. It is sound policy for the Court to adopt a liberal approach to the scope of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial.

[emphasis added]

31 That the amendment of Rule 95(1) was not intended to effect a change in the scope of permissible questions is supported by the Regulatory Impact Analysis Statement (RIAS) accompanying the *Rules Amending the Tax Court of Canada Rules (General Procedure)*, SOR/2008-303, *Canada Gazette*, Part II, Vol. 142, No. 25 at pages 2330 to 2332.

The RIAS describes the amendment to Rule 95(1) to be a "technical amendment". Courts are permitted to examine a RIAS to confirm the intention of the regulator. See *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (S.C.C.) at paragraphs 45 to 47 and 155 to 157.

32 Second, in *Owen Holdings Ltd. v. R.* (1997), 216 N.R. 381 (Fed. C.A.) this Court considered and rejected the submission that the phrase "relating to" (as then found in Rule 82(1) of the *Tax Court of Canada Rules (General Procedure)*) encompassed the concept of a "semblance of relevance." The Court indicated that "relating" and "relevance" encompassed similar meanings. At paragraphs 5 and 6 of its reasons the Court wrote:

5. With respect to the appeal, counsel for the appellant argues that the judge erred in holding that only documents which are relevant, that is to say which may advance the appellant's case or damage that of the respondent, should be disclosed. Rule 82(1),<sup>1</sup> counsel says, uses the phrase "relating to" not "relevant to," a basic distinction clearly confirmed and acted upon by this Court in *Canada (Attorney-General) v. Bassermann*.<sup>2</sup> At this stage, submits counsel, relevance should be of no concern; a "semblance of relevance," if necessary, should suffice, an abuse of process being the only thing to be avoided.

6. We indicated at the hearing that we disagreed with counsel's argument. Although obviously not synonyms, the words "relating" and "relevant" do not have entirely separate and distinct meanings. "Relating to" in Rule 82(1) necessarily imparts an element of relevance, otherwise, the parties would have licence to enter into extensive and futile fishing expeditions that would achieve no productive goal but would waste judicial resources. The well established principles that give rise to the relatively low relevance threshold at the stage of discovery, as opposed to the higher threshold that will be required at trial for the admission of evidence, are well known. We simply do not believe that the Tax Court ever had the intention of abandoning those principles any more than this Court could have had such an intention when, in 1990, it changed the word "related" to "relevant" in revising its corresponding provisions, namely subsections (1) and (2)(a) of Rule 448.<sup>3</sup>

[emphasis added and footnotes omitted]

33 Finally, there is an abundance of jurisprudence from this Court which has interpreted the permissible scope of examination under Rule 240 of the *Federal Courts Rules*, SOR/98-106. Like Rule 95(1), Rule 240 incorporates the test of whether a question is "relevant" to a matter which is in issue. Rule 240 states:

A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that

(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or

(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

[emphasis added]

La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui:

a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;

b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.



[Non souligné dans l'original.]

34 The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287, 381 N.R. 93 (F.C.A.) at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.

35 Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 (F.C.A.) at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 (F.C.A.) at paragraph 3.

36 This Court's comment at paragraph 64 of the *Eli Lilly* decision is of particular relevance to the Crown's submission that the 2008 amendment effected a material change. There, the Court wrote:

64. Furthermore, the Prothonotary's reference to a fishing expedition in paragraph 19 of her Reasons was one where a party was required to disclose a document that might lead to another document that might then lead to useful information which would tend to adversely affect the party's case or to support the other party's case. In my view, limiting the "train of inquiry" test in this manner is consistent with the test described in *Peruvian Guano*, *supra*, and applied by this Court in *SmithKline Beecham Animal Health Inc. v. Canada*, [2002] 4 C.T.C. 93 (F.C.A.), where, at para. 24 of her Reasons for the Court, Madam Justice Sharlow wrote:

[24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

[emphasis in original]

37 As can be seen, when interpreting relevance under the *Federal Courts Rules* the Court quoted with approval its prior articulation of the train of inquiry test in *SmithKline Beecham*. That decision concerned the proper interpretation of the pre-2008 version of Rule 95(1) of the *Tax Court of Canada Rules (General Procedure)*. Thus, the train of inquiry test has been found to be appropriate both under the pre-2008 *Tax Court of Canada Rules (General Procedure)* and the current *Federal Courts Rules* where the test is relevance.

38 Turning to the application of these principles, in the present case the Crown had disclosed the Gulliver memorandum to Lehigh. The memorandum was produced in response to a request that the Crown provide "all correspondence and memoranda within head office, the district office, and between head office and the district office, giving instructions or dealing with their advisement on the GAAR issue."

39 The Gulliver memorandum makes the following points:

1. The CRA was "pursuing cases coined 'indirect loans' whereby a Canadian company invests money into the equity of a newly created company in a tax haven and those funds are then lent to a related but non-affiliate non-resident company."

2. With respect to subsection 95(6) of the Act:

While subsection 95(6) has been amended for taxation years after 1995, in nearly all of the "indirect loan" cases reviewed, the structure was in place prior to the amendments. We did consider whether paragraph 95(6)(b), as it then read, could apply to the "indirect loan" issue with respect to the incorporation of the tax haven company and its issuance of shares to CANCO. However, it was concluded from its wording that it was contemplated that the foreign affiliate or a non-resident corporation that issued the shares already existed before the series of transactions. In addition, without the use of the tax haven company, there was no certainty that CANCO would have otherwise transferred fund [sic] to the non-resident borrower so that there would be "tax otherwise payable". Therefore, subsection 95(6) was not proposed but in our view, this provision demonstrates that it is not acceptable to insert steps to misuse the foreign affiliate rules.<sup>11</sup>

[emphasis added]

3. Footnote 11 to the above passage stated:

<sup>11</sup> We have no written legal opinion on the matter at the present time. It is possible that Appeals or Litigation might see merit in arguing subsection 95(6).

[emphasis added]

40 In my view, the inference may be drawn from the Gulliver memorandum and the subsequent reassessment of Lehigh on the basis of subsection 95(6) that there may well be subsequent memoranda prepared within the CRA that considered whether subsection 95(6) of the Act could be argued to be a general anti-avoidance provision. Such documents, if they exist, would be reasonably likely to either directly or indirectly advance Lehigh's case or damage the Crown's case. In my view, the Judge did not err in ordering their production. The trial judge will be the ultimate arbiter of their relevance.

41 In so concluding, I have considered the Crown's arguments that the opinions of CRA officials outside the context of a particular taxpayer are irrelevant and that official publications of the CRA are of limited relevance. Those may well be valid objections in another case. However, in the factual and procedural context of this case, the Crown has already disclosed as relevant the Gulliver memorandum. For Lehigh to proceed expeditiously towards a fair hearing, knowing exactly the case it has to meet, it should receive any subsequent memoranda relating to the development of a general policy concerning paragraph 95(6)(b) of the Act.

***d. Did the Judge err by ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position?***

42 The Crown argues that the Judge erred in ordering it to answer the disputed question because:

1. The question is hypothetical.

2. The purpose of the question is to elicit from the Crown details pertaining to its legal argument.

3. The question is a pure question of law.

43 Lehigh responds that the purpose of the question is to determine if in reassessing Lehigh, paragraph 95(6)(b) of the Act was applied because the shares of CBR-US were owned by CBR-ICA, a non-resident corporation and not by Lehigh, a Canadian resident corporation.

44 The Judge ordered the question to be answered in order to help Lehigh know the case it has to meet. In the context of this proceeding the question is not a pure question of law, nor does it elicit details of the Crown's legal argument. Lehigh is entitled to know the basis of the reassessment and what led the CRA to conclude it had acquired its shares in CBR-LLC for the principal purpose of avoiding the payment of taxes that would otherwise have been payable. In the factual and procedural context before the Court, the Crown has not demonstrated that the Judge erred in concluding that the disputed question should be answered.

45 For all of the above reasons I would dismiss the appeal.

#### **Costs and Conclusion**

46 Should this appeal be dismissed, Lehigh seeks an award of costs fully indemnifying its expenses in bringing the motion in the Tax Court and in opposing this appeal. Such an award is estimated to be in excess of \$125,000.00.

47 Lehigh concedes that such an award is commonly made where a party is found to have acted in a reprehensible, scandalous, or outrageous manner. Lehigh acknowledges that no such conduct has occurred in the present case. It submits, however, that such an award is justified in this case because the discoveries were held on November 11, 2009 and Lehigh has been put to delay and considerable expense "all for no just cause."

48 Rule 400 of the *Federal Courts Rules* provides that the Court has full discretionary power over the award of costs. Rule 407 provides that unless the Court orders otherwise, party-and-party costs are to be assessed in accordance with column III of the table to Tariff B of the Rules. This reflects a policy decision that party-and-party costs are intended to be a contribution to, not an indemnification of, solicitor-client costs.

49 Lehigh has not established exceptional circumstances that would warrant departure from the principle that solicitor-client fees are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties. See *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paragraph 77. The willingness of one party to incur significant expense on an issue cannot by itself transfer responsibility for that expense to the opposing party. The question then becomes, what is the appropriate contribution to be made to Lehigh's costs if the appeal is dismissed?

50 If successful, the Crown seeks, in lieu of assessed costs, costs here and in the Tax Court fixed in the amount of \$5,000.00. Having particular regard to the complexity of the issues, I see nothing in the record to make this an unreasonable quantification of party-and-party costs. As Lehigh was awarded its costs in the Tax Court, on this appeal I would dismiss the appeal and order the appellant to pay costs to Lehigh in the Tax Court and in this Court fixed in the amount of \$5,000.00, all-inclusive, in any event of the cause.

**John M. Evans J.A.:**

I agree

**Carolyn Layden-Stevenson J.A.:**

I agree

*Appeal dismissed.*

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# Tab 10

**VOLUME II – AUTHORITIES  
(APPENDIX B TO THE MEMORANDUM OF FACT AND LAW)**

1999 CarswellNat 2919  
Federal Court of Canada — Trial Division

Monit International Inc. v. R.

1999 CarswellNat 2919, 175 F.T.R. 258, 95 A.C.W.S. (3d) 625

**Monit International Inc., Plaintiff and Her Majesty The Queen, Defendant**

Lemieux J.

Judgment: November 19, 1999

Docket: T-878-93

Counsel: *Marc Laurin*, for Plaintiff.  
*Jean Lavigne*, for Defendant.

Subject: Evidence

MOTION by defendant for order dismissing objections made by plaintiff in examination out of court; Motion to file another motion should plaintiff's undertakings not be fulfilled.

***Lemieux J.:***

**Procedure**

1 Through a written motion made under Rule 369 of the *Federal Court Rules, 1998*, the defendant asks that this Court dismiss the objections made by the plaintiff during the examination out of court of Mr. Barry Kotler, the duly authorized representative of the plaintiff, Monit International Inc.

2 The defendant also requests that this Court allow her to file a motion similar to this one after June 14, 1999, should one or more of the undertakings made by the plaintiff on the examination out of court of Mr. Barry Kotler not be fulfilled within the agreed time limits.

3 In the context of the present proceedings, this is an action in damages against the Federal Crown arising out of alleged unfair activities and misrepresentations made to the detriment of the plaintiff, Monit International Inc., in the context of an invitation for proposals for a lease to accommodate the offices of the International Civil Aviation Organization (ICAO).

4 The plaintiff is the owner of a building situated at 1000 Sherbrooke Street West in Montréal in which the ICAO offices had been located since 1974; the lease, signed with the Department of Public Works, terminated on October 31, 1994.

**Analysis**

***Objections***

5 Objections were made in regard to two questions asked by the defendant:

Did Monit ever consider putting a bid for this city site, I mean the east site?

Do you remember, are there any documents you have, you still have in file that would show how Monit did proceed to determine the first financial bid, the figure you put in the first call for tender?

6 These objections were made on the ground that the above questions were irrelevant. In the case of the first objection, the plaintiff submits that the question asked is nothing but pure hypothesis, in that no proceeding filed in this case refers to any interest of the plaintiff in some other site and that this question is intended only to distract the Court's attention from the real issues in dispute.

7 As to the second question, the plaintiff submits that the detailed calculations used in the preparation of its bid in response to the defendant's invitation for proposals is irrelevant since the rejection of that bid is not based on the proposed costs and, in the context of an invitation for proposals, no tenderer is required to describe its calculations in detail.

8 In regard to the issue of the relevance of certain questions asked during an examination or concerning the filing of documents demanded by one of the parties, this Court has in fact considered the applicable test on several occasions.

9 My colleague, Mr. Justice Teitelbaum, reviewed these decisions in *T.O. Forest Products Inc. v. Fednav Ltd.*,<sup>1</sup> in which he stated the following:

In the case of *Everest & Jennings Can. Ltd. v. Invacare Corp.*, (*supra*), at pages 857 and 858, Urie, J. states, as to the test of relevance:

The correct test of relevancy for purposes of discovery was, in our opinion, propounded by McEachern C.J. in the case of *Boxer and Boxer Holdings Ltd. v. Reesor et al.* (1983), 43 B.C.L.R. 352 (B.C.S.C.) when, at page 359, he said:

It seems to me that the clear right of the plaintiffs to have access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application.

In the case of *Reading & Bates Construction Co. et al. v. Baker Energy Resources Corp. et al.*, (*supra*), it is stated under the "Held" per McNair, J:

#### **Purpose of discovery**

The purpose of discovery, whether oral or by production of documents, is to obtain admissions to facilitate proof of the matters in issue between the parties. The prevailing trend favours broadening the avenues of fair and full disclosure to enable the party to advance his own case or to damage the case of his adversary.

The test as to what documents are required to be produced is relevance. The test of relevance is not a matter for the exercise of discretion. The test as to whether a document properly relates to the matters in issue is that it must be one which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences.

Usefulness of an answer must be balanced with the time, trouble, expense and difficulty involved in obtaining it.

10 In light of these decisions, I find that the relevance of a question or document is reviewed with great flexibility and that, in so far as it is not clearly demonstrated that the question or document is completely unrelated to the issues in dispute, the witness must answer the question or the party must table the document.

11 In this case, having read and analyzed the amended statement of claim filed by the plaintiff on March 9, 1999 and the submissions by the parties, I find that these questions are indirectly related to the points at issue that are raised in the case. Indeed, in the case of the first objection, the defendant submits that reference is made, in the invitation for

proposal documents of the Department of Public Works, filed in support of this action, to the "[*Translation*] east site", for the purpose of encouraging the interested persons to make a proposal in relation to that site.

12 As to the second objection, there is a reference in the amended statement of claim to the said proposal submitted by the plaintiff, Monit International Inc., concerning the architectural and financial representations made in the context of this proposal.

13 In these circumstances, I have no difficulty in saying that the questions put to Mr. Barry Kolter are relevant. I hereby dismiss, therefore, the objections made by the plaintiff and I order the witness to answer the questions.

#### ***Fulfilment of undertakings***

14 In regard to the defendant's second request, concerning the fulfilment of the plaintiff's undertakings, I find, after observing the record, that there is no indication in it that appears to suggest that the plaintiff has failed to comply with the undertakings it has made.

15 Accordingly, I conclude that, in view of the hypothetical and speculative nature of this request, I am unable to allow it since it is clearly premature. Thus, to the degree that the undertakings are not in fact fulfilled, the defendant may then ask this court to extend or amend the deadlines for the filing of the undertakings that have been made.

#### **Conclusion**

16 I dismiss objections numbers 6 and 7 as recorded in the transcript of the examination filed herein and I therefore order Mr. Barry Kolter, the duly authorized representative of the plaintiff, to answer the said questions that were the subject of the objections.

17 I dismiss the defendant's request for leave to file a similar motion herein after June 14, 1999, should one or more of the undertakings made prove insufficient and it is necessary to ask this Court to order the witness, Mr. Barry Kolter, to provide the requisite undertakings or clarify his answers.

18 Costs to follow the event.

*Motion for order dismissing objections granted; Motion to file another motion regarding undertakings dismissed.*

#### Footnotes

1 (1993), 72 F.T.R. 39 (Fed. T.D.).



CT-2018-005

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

**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**

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**MOTION RECORD OF THE RESPONDENTS  
(Respondents' Motion on Commissioner's Refusals)  
(Returnable April 2, 2019)**

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