

Competition Tribunal



Tribunal de la concurrence

Citation: *Canada (Commissioner of Competition) v Cineplex Inc.*, 2023 Comp Trib 6
File No.: CT-2023-003
Registry Document No.: 26

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

Commissioner of Competition
(applicant)

and

Cineplex Inc.
(respondent)



Date of case management conference: November 16, 2023
Before: Mr. Justice Andrew D. Little (Chairperson)
Date of order: November 17, 2023

CONFIDENTIALITY ORDER

FURTHER TO an application filed by the Commissioner of Competition (the “**Applicant**” or the “**Commissioner**”) on May 18, 2023 against Cineplex Inc. (the “**Respondent**” or “**Cineplex**”) (collectively, the “**Parties**”) for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34;

AND FURTHER to the mutual undertakings provided by the Parties’ respective counsel on August 18, 2023 in respect of confidentiality designations for documents exchanged between the Parties (as part of the Parties’ respective Affidavits of Documents produced on August 18, 2023) wherein the Parties’ respective counsel undertook, *inter alia*, to protect the confidentiality designation made by a Party for that Party’s productions in that Party’s Affidavit of Documents, pending the issuance and entering of a Confidentiality Order;

AND CONSIDERING the draft confidentiality order filed on consent by the Commissioner and the Respondent (and noting that the Respondent took no position on paragraph 2(b));

AND AFTER HEARING from the Parties at a case management conference on November 16, 2023;

AND CONSIDERING that under the Scheduling Order dated August 31, 2023, the Parties will be required to adduce evidence to support their respective confidentiality designations made under this Order;

THE TRIBUNAL ORDERS THAT:

[1] For the purpose of this Order:

- (a) “**Act**” means the *Competition Act*, RSC 1985, c C-34, as amended;
- (b) “**Affiliate**” has the same meaning as in subsection 2(2) of the Act;
- (c) “**Cineplex**” means Cineplex Inc., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by the foregoing entities, and their respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (d) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
- (e) “**Independent Expert**” means an expert retained by a Party with respect to the Proceeding who (i) is not a current employee of the Respondent; (ii) has not been an employee of the Respondent within 2 years prior to the date of this Order, (iii) is not a current employee of a competitor of the Respondent; (iv) has not been an employee of a competitor of the Respondent within two years prior to the date of this Order; and (v) has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;

- (f) **“Parties”** means the Commissioner and the Respondent collectively, and **“Party”** means any one of them;
- (g) **“Person”** means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- (h) **“Proceeding”** means the application filed by the Commissioner against the Respondent (File Number CT-2023-003) for orders pursuant to section 74.1;
- (i) **“Protected Record”** means any Record (including the information such Record contains) that is produced in the Proceeding, including Records listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, Records produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits and submissions that:
 - i. the Party producing the Record claims is confidential pursuant to paragraph 2; or
 - ii. the Tribunal has determined is confidential;
- (j) **“Public Record”** means any Record that is not designated as a Protected Record;
- (k) **“Record”** has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email, communication, or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;
- (l) **“Record Review Vendor”** means a professional service provider retained by a Party with respect to the Proceeding to facilitate the review of Records, both digital and paper, by legal professionals and who has executed the Confidentiality Undertaking in the form attached as Schedule A hereto;
- (m) **“Respondent”** means Cineplex (as defined above);
- (n) **“Third Party”** means any Person other than the Commissioner or the Respondent; and
- (o) **“Tribunal”** means the Competition Tribunal established pursuant to subsection 3(1) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp).

[2] Subject to the *Competition Tribunal Rules* (SOR/2008-141) and any other applicable law, Records containing any of the following types of information may be designated as Protected Records:

- (a) Confidential commercial information which if disclosed there is a real and serious risk that such disclosure could cause harm to a public interest in protecting confidentiality that outweighs the public interest in open and accessible court proceedings;
- (b) Confidential information related to investigative techniques which if disclosed there is a real and serious risk that such disclosure could cause harm to the administration of justice; and
- (c) Information containing sensitive personal information of the Parties.

[3] If information from a Protected Record is incorporated into any other Record, that Record shall be a Protected Record. Any Protected Record shall cease to be a Protected Record if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) the Parties agree in writing that the Record shall cease to be a Protected Record; or (c) the Tribunal determines that the Record shall cease to be a Protected Record.

[4] Protected Records will be identified in the following manner for the purpose of all steps of the Proceeding:

- (a) a Party claiming that a Record is a Protected Record shall, at the time of production of a Protected Record, mark it with the name of the Party producing the Record and with “**Confidential – Level B**” on each page that is claimed as confidential;
- (b) subject to paragraph 3 of this Order, all Records designated as Protected Records shall be treated as a Protected Record onwards, save for determination otherwise by the Tribunal or re-designation pursuant to paragraph 8 below;
- (c) the inadvertent failure to designate a Record or portion thereof as a Protected Record at the time it is disclosed does not constitute waiver of the right to so designate after disclosure has been made;
- (d) if a Record originates with or from more than one Party and is designated by at least one Party as a Protected Record, the highest level of confidentiality shall universally attach to that Record, subject to the resolution of any challenge to that claim of confidentiality;
- (e) at any point in the Proceeding, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party. The Parties shall use their best efforts to agree as to whether the Records (or portions thereof) are to be treated as Protected Records; and
- (f) if agreement cannot be reached, the Parties may apply to the Tribunal to determine whether the Record or a portion thereof is a Protected Record or what level of confidentiality should apply to a Protected Record.

[5] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked “Confidential – Level B” (“**Level B Protected**”) may be disclosed only to:

- (a) the Commissioner, counsel to the Commissioner, and the Commissioner’s staff;
- (b) outside counsel to the Respondent and outside counsel’s staff who are directly involved in the Proceeding;
- (c) Independent Experts and their staff who are directly involved in the Proceeding; and
- (d) Record Review Vendors;
- (e) Individuals designated by the Respondent who have executed the Confidentiality Undertaking in the form attached as Schedule A.

[6] Notwithstanding any provision of this Order, the Commissioner may disclose any Records designated as Level B Protected that he has so designated, and that have not been produced in the Proceeding by the Respondent or otherwise originated from the Respondent, to any Person for the purpose of preparing for the hearing of the Proceeding, subject to the limits prescribed by section 29 of the Act: and the Respondent may do the same with respect to Records it has so designated, and that have not been produced in this Proceeding by the Commissioner or otherwise originated from the Commissioner.

[7] A Party may at any time and with prior reasonable notice to the other Party re-designate any of its own Records designated as Level B Protected as Public Records. Where another Party disputes the re-designation, the Tribunal shall determine the proper designation. Records re-designated as public shall cease to be Protected Records and shall form part of the Public Record if introduced into evidence at the hearing of the Proceeding, unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Record to a Protected Record, a prior disclosure of it shall not constitute a breach of this Order.

[8] If a Party is required by law to disclose a Protected Record, or if a Party receives written notice from a Person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Record, that Party shall give prompt written notice to the Party that claimed confidentiality over the Protected Record so that a protective order or other appropriate remedy may be sought.

[9] Outside counsel to the Respondent and their staff, counsel to the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Record as they require in connection with the Proceeding.

[10] Nothing in this Order prevents either Party from having full access to Protected Records that originated from that Party.

[11] For greater certainty, in accordance with section 62 of the *Competition Tribunal Rules*, all Persons who obtain access to Records and information through documentary, written and oral

discovery through the Proceeding are subject to an implied undertaking to keep the Records and information confidential and to use the Records and information solely for the purposes of the Proceeding (including any application or Proceeding to enforce any order made by the Tribunal in connection with the Proceeding) and any related appeals.

[12] At the hearing of the Proceeding:

- (a) Protected Records tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with paragraph 4(a), above;
- (b) the Tribunal may determine whether the Record should be treated as a Protected Record;
- (c) Protected Records shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Record is not a Protected Record;
- (d) Records over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in the Proceeding if introduced into evidence or otherwise placed on the record. Public Records shall be marked “Public” on each page of the Record; and
- (e) nothing in this Order shall abrogate or derogate any legal onus, burden or requirement applicable to a sealing order or abrogate or derogate in any way from the rights of the Parties to assert confidentiality claims during the course of the hearing.

[13] The Parties shall provide the Tribunal with redacted versions of Protected Records at the time any such Records are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked “Public” on the face of the Record and shall form part of the public record in the Proceeding. Each Protected Record shall identify the portions of the Record which have been redacted from the “Public” version, by highlighting such portions in the Protected Record.

[14] The termination of the Proceeding shall not relieve any Person to whom Protected Records were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Records in accordance with the provisions of this Order and any Confidentiality Undertaking, subject to any further order of the Tribunal.

[15] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Records and any copies of Protected Records, with the exception of Protected Records in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Records states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Respondent and counsel to the Commissioner may keep copies of Protected Records in their files and that any copies of Protected Records as may exist in the Parties’ automatic electronic backup and archival

systems may be kept provided that deletion is not reasonably practical and the copies are retained in confidence and not used for any purpose other than backup and archival purposes.

[16] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[17] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further orders or directions with respect to the use or disclosure of Records or information produced by another Party.

[18] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including, without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 17th day of November, 2023

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

SCHEDULE "A"

Confidentiality Undertaking

IN CONSIDERATION of being provided with Protected Records,

I _____, of the City of _____, in the Province/State of _____, hereby undertake and agree to maintain the confidentiality of any Protected Records that I obtain and, in particular, that:

1. I will not copy, disseminate, transfer or otherwise share or disclose any Protected Record to any other person, except, as applicable, (a) in the case of an Independent Expert or Document Review Vendor staff who are directly involved in this matter; (b) outside counsel for the Party on whose behalf I have been retained, outside counsel's staff who are directly involved in the Proceeding and, in the case of the Commissioner, the Commissioner's staff directly involved in the Proceeding; and (c) Persons permitted by order of the Competition Tribunal.
2. I will not use any Protected Record for any purpose other than in connection with the Proceeding and any related appeals.
3. Upon completion of the Proceeding and any related proceedings, I agree that all Protected Records, and any copies of same shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by the order of the Tribunal.
4. I have read the Confidentiality Order granted by the Tribunal on _____, a copy of which is attached to this Undertaking, and agree to be bound by same. I acknowledge that capitalized terms in this Undertaking have the same meaning as defined in the Confidentiality Order. I further acknowledge that any breach of this Undertaking by me will be considered to be a breach of the Confidentiality Order.
5. I acknowledge and agree that the completion of the Proceeding and any related appeals shall not relieve me of the obligation to maintain the confidentiality of Protected Records in accordance with the provisions of this Undertaking. I further acknowledge and agree that any Party shall be entitled to injunctive relief to prevent or enjoin breaches of this Undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.
6. In the event that I am required by law to disclose any Protected Record, I will provide counsel for the Parties to the Proceeding with prompt written notice so that the Party that claimed confidentiality over the Protected Record may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Records that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to it.

7. I will promptly, upon the request of the Party who provided Protected Records to me, advise where they are kept. At the conclusion of my involvement in the Proceeding and any related proceedings, I will, upon the request and direction of the Party who provided Protected Records to me, destroy, return or otherwise dispose of all Protected Records received or made by me having been duly authorized and directed to do so.
8. I hereby attorn to the jurisdiction of the Tribunal to resolve any disputes arising under this Undertaking.

DATED this ____ day of _____, 2023.

SIGNED, SEALED & DELIVERED in the presence of:

Name of witness

Name of signatory

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Irene Cybulsky

For the respondent:

Cineplex Inc.

Robert S. Russell
Martin Abadi
Joshua Abaki
Raymond Ashurov