

Competition Tribunal



Tribunal de la Concurrence

Citation: *Canada (Commissioner of Competition) v Cineplex Inc.*, 2024 Comp Trib 1

File No.: CT-2023-003

Registry Document No.: 55

IN THE MATTER OF *an application by the Commissioner of Competition for one or more orders under sections 74.01 and 74.1 of the Competition Act, RSC 1985, c C-34 as amended;*

BETWEEN:

Commissioner of Competition
(applicant)

and

Cineplex Inc.
(respondent)



Date of pre-hearing conference: February 9, 2024

Before: Mr. Justice Andrew D. Little (Chairperson)

Date of order: February 9, 2024

ORDER ON RESPONDENT'S INFORMAL MOTION FOR LEAVE TO FILE A SUR-REPLY REPORT FROM ITS PROPOSED EXPERT WITNESS

[1] **FURTHER TO** a Case Management Conference with the parties on February 9, 2024 (the “CMC”), during which the respondent requested leave from the Tribunal under Rule 2 of the *Competition Tribunal Rules* to file an affidavit attaching a further report dated February 5, 2024, from its proposed expert, Dr Amir (the “Further Report”), for use at the hearing that commences on February 14, 2024;

[2] **AND CONSIDERING** that the Further Report is styled as an “Addendum” to a previous affidavit and attached expert report of Dr Amir dated January 12, 2024, served and filed under the Scheduling Order dated August 31, 2023. The Addendum is in essence a sur-reply report that responds to the reply reports of the Commissioner’s two proposed experts dated January 29, 2024;

[3] **AND UPON** hearing and considering submissions from counsel for the respondent and counsel for the applicant during the CMC;

[4] **AND CONSIDERING** the subsection 9(2) of the *Competition Tribunal Act*, Rules 2 and 77 of the *Competition Tribunal Rules*, and the deadline dates for service and filing of expert reports in the Scheduling Order;

[5] **AND RECOGNIZING** that the agreed deadlines in the Scheduling Order have been in place for several months, and that both parties are represented by sophisticated and experienced counsel before the Tribunal;

[6] **AND CONSIDERING** that the respondent should have sought leave from the Tribunal immediately upon sending the Further Report to the Commissioner, at the latest;

[7] **AND CONSIDERING** the dates in the Scheduling Order for the delivery of the respondent’s proposed expert report on January 12, 2024, following receipt of the Commissioner’s proposed expert reports on January 8, 2024;

[8] **AND CONSIDERING** that the fairness and prejudice issues identified by the Commissioner during submissions related to compliance with the *Competition Tribunal Rules* and the dates in the Scheduling Order (which was made on consent of the parties), the recent service of the Further Report, and the time between service of it on the Commissioner on the evening of February 5, 2024, and the hearing;

[9] **AND CONSIDERING** that the Commissioner advised that his proposed experts may wish to respond during their examinations in chief to the Further Report, but did not argue at the CMC that they do not have adequate time to prepare to do so and confirmed that the Commissioner did not intend to file a sur-sur-reply report from either proposed expert;

[10] **AND CONSIDERING** the contents of the Further Report, which partly concern why Dr Amir maintains the opinions in his report dated January 12, 2024, despite the reply reports of the Commissioner’s experts, and also provides statements about the opinions in the Commissioner’s proposed experts’ reply (and, in some instances, the original) reports. Based on the parties’ submissions and the Tribunal’s review, it appears that these topics may be addressed as necessary during examination in chief of the Commissioner’s proposed experts or may be the subject of cross examination;

[11] **AND CONSIDERING** that that Dr Amir will be the last witness to testify at the hearing, on either February 20 or February 21, following three days on which the Tribunal will not sit (February 17-19), which should give the Commissioner adequate time to prepare for cross-examination on matters in the Further Report;

[12] **AND CONSIDERING** the truth-seeking function of the Tribunal;

[13] **AND CONSIDERING** that this order does not determine the admissibility of the Further Report (or any part of it) as an expert report, or the admissibility of oral evidence of any proposed expert;

[14] **AND UPON DETERMINING** that leave should be granted, with appropriate flexibility at the hearing to allow the Commissioner to ask questions, as necessary, to his proposed expert witnesses to answer new critiques of their opinions raised in the Further Report and such other points in the Further Report as may be appropriately answered at that time.

THE TRIBUNAL ORDERS THAT:

[15] Leave is granted to the respondent to file the Further Report of Dr Amir.

[16] The examination in chief of the Commissioner's proposed expert witnesses may include questions to elicit their answers to new critiques of their opinions raised in the Further Report and such other points in the Further Report as may be appropriately answered at that time.

[17] This order does not determine the admissibility of the Further Report (or any part of it) as an expert report, or the admissibility of oral evidence of any proposed expert.

[18] No costs shall be payable in respect of this motion.

DATED at Ottawa, this 9th day of February, 2024

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

COUNSEL OF RECORD:

For the applicant:

Commissioner of Competition

Jonathan Hood
Irene Cybulsky
Adam Newman

For the respondent:

Cineplex Inc.

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