

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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OTTAWA, ONT.

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CT-2023-003

THE COMPETITION TRIBUNAL

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

COST SUBMISSIONS OF THE RESPONDENT, CINEPLEX INC.

Introduction

1. In the event that the Commissioner of Competition's ("Commissioner's") application is dismissed, Cineplex Inc. ("Cineplex") seeks costs payable in the amount of \$565,311.76 (inclusive of taxes) for disbursements only. Cineplex and the Commissioner agreed to resolve counsel fees at the amount of \$77,000 (plus HST) as fixed by the Tariff B of the *Federal Court Rules*.

2. The amount for disbursements sought by Cineplex is outlined in its Bill of Costs. Cineplex submits that such an award of costs is reasonable and necessary in the circumstances of this case. As will be set out in the discussion below, the disbursements incurred by Cineplex were appropriate given the demands of an expedited timetable and the Commissioner's decision to unnecessarily complicate the case by seeking to introduce expert evidence on multiple tangential issues. This necessitated a comprehensive rebuttal in order to fairly present the expert opinion to the Court.

General Principles

3. Pursuant to Section 8.1 of the *Competition Tribunal Act*, the Tribunal has the jurisdiction to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Court Rules (Rules)*. According to subsection 400(1) of the *Rules*, the Tribunal has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid."¹

4. Subsection 400(3) contains a non-exhaustive list of factors that the Tribunal may consider when exercising its discretion. Success is the most important overall factor in arriving at

¹ *Federal Court Rules*, SOR/98-106, r 400(1) [FC Rules]

a costs award.² However, the successful party is not required to prevail on all of the issues in dispute in order to be entitled to costs.³ The Tribunal will also take into account other factors such as the public interest in bringing the case and behaviour that increases the duration and expense of litigation.⁴

5. Given that the issue of legal fees has been resolved by the parties, the only issue that remains to be decided is the quantum of the disbursements. This Tribunal has consistently held that, in order to be recoverable, disbursements must be reasonable, necessary and justified.⁵ Disbursements are typically assessed in full, provided that they are reasonable.⁶ The Court has previously held that “indemnification of disbursements is not a function of hindsight but rather whether, in the circumstances existing at the time a litigant’s solicitor made the decision to incur the expenditure, it represented a prudent and reasonable representation.”⁷ Further, in *Seedlings Life Sciences Ventures, LLC v Pfizer Canada ULC*, the Court reaffirmed that “it should not be for the losing party ‘to tell the winning party how to they could have succeeded by doing or spending less’”⁸

² *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 03 at para 24 [**Rogers**].

³ *Canada (Commissioner of Competition) v Vancouver Airport Authority*, 2019 Comp Trib 6 at para 819 and 827.

⁴ *Rogers* at para 24.

⁵ *Rogers* at para 27.

⁶ *FC Rules*, section 1(4) of Tariff B; see also *Allergan Inc v Sandoz Canada Inc.*, 2021 FC 186 at para 36.

⁷ *Janssen Inc v Teva Canada, Ltd.*, 2012 CarswellNat 56, 2012 FC 48 at para 68.

⁸ *Seedlings Life Sciences Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 15.

Cineplex's Disbursements are reasonable and sufficiently justified.

6. It is respectfully submitted that Cineplex should be entitled to recover the full amount of its disbursements totalling \$563,800.27. The following chart summarizes the disbursements claimed:

Item	Amounts Claimed
Vega Economics Expert Fees	\$465,725.91
Examination for Discovery Court Reporter Fees and Transcripts	\$4,652.00
Trial Transcripts	\$13,834.50
Online Database Legal Research	\$938.55
Travel and Hotel Expenses	\$35,931.60
Photocopying, Printing and Binding	\$21,972.11
Relativity Data Hosting (E-discovery)	\$10,000.00 (flat estimate)
Courier	\$613.16
TOTAL (including taxes where applicable)	\$563,800.27

The submissions below address the disbursements claimed in Cineplex's Bill of Costs.

Expert Witness Fees

7. Cineplex retained Dr. On Amir through Vega Economics to respond to the two expert reports of the Commissioner: the Expert Report of Dr. Vicki Morwitz dated January 5, 2024, and Expert Report of Jay Eckert dated January 5, 2024. It must be noted that, despite repeated inquiry as to whether the Commissioner would be producing a report, the Commissioner only confirmed that he would be producing expert reports during a Case Management Conference

on December 8, 2023, just one month ahead of the deadline to serve the Commissioner's reports. However, it is instructive to note that the instruction letters issued by the Commissioner to Dr. Morwitz and Mr. Eckert (produced by the Commissioner in this matter) disclose that the Commissioner had retained these experts as early as September 2023 and November 2023 respectively. Cineplex submits that this conduct by the Commissioner should be taken into account when assessing Cineplex's request for full indemnity on the disbursements.

8. The reports of Dr. Morwitz and Mr. Eckert are strictly based on opinion evidence and did not rely on any scientific information or empirical data of the Cineplex website or app, the subject of this matter. As Cineplex argued at the hearing, the examination of whether the price representations made on the Cineplex website or app constitute reviewable conduct under the *Competition Act* does not require opinion evidence. The engagement of Dr. Morwitz and Mr. Eckert was unnecessary and all it did was prolong the hearing, increase costs for the parties and waste the Tribunal's resources.

9. Dr. Amir provided a rebuttal Expert Report, which addressed the limitations of the Commissioner's Expert Reports and situated these reports within the requirements of the scientific method e.g., as explained by Dr. Amir at trial, the requirements of validating and testing hypotheses empirically and fairly and impartially presenting all relevant considerations that support or detract from a position, amongst others. The purpose of Dr. Amir's report, as Dr. Amir testified, was to assist the Tribunal in fairly and fully assessing and contextualizing the evidence before it. Dr. Amir was forced to prepare (within a short period of time and at considerable effort) an Addendum to assist the Tribunal, which was accepted by the Tribunal. The Addendum was necessary to provide commentary for the Tribunal on new facts and considerations raised in the respective Reply reports of Dr. Morwitz and Mr. Eckert and to clarify material omissions in respect

of the literature cited and the treatment in the literature of various propositions and sources put forth by Dr. Morwitz. On that point, Dr. Amir was required to cross reference, at significant effort, the large number of sources cited, as well as those omitted by Dr. Morwitz, that did not advance the Commissioner's experts' position.

10. Accordingly, if Cineplex is successful, it should recover all of the disbursements incurred in respect to the expert report and testimony of Dr. Amir. The line item for expert fees in Schedule A includes all of the work completed in connection with the Expert Report, Addendum, and testimony of Dr. Amir. All of this was completed on an expedited basis due to the compressed schedule, which required the use of considerable time and resources.

Court Reporter and Transcription Services

11. Cineplex claims \$4,652 for transcripts and court reporter fees from examinations for discovery as well as \$13,834.50 for daily trial transcripts (excluding HST). The Court has previously recognized the necessity of transcription services. In *Apotex Inc. v. H. Lundbeck A/S*, the Court held that:

As every trial lawyer knows, an accurate transcript prepared by an independent reporter is crucial. Examinations for discovery are transcribed in order to adequately and properly deal with undertakings and objections. The transcript may be used at trial as read-ins or to bring an inconsistent testimony to a witness' attention.⁹

The same principle applies to trial transcripts. In fact, the Commissioner claims the same amount for trial transcripts from the same transcription services provider. As such, Cineplex should

⁹ *Apotex Inc. v. H. Lundbeck A/S*, 2013 FC 1188 at para 36.

be entitled to recoup the full amount for expenses associated with court reporter and transcription fees.

Travel Expenses

12. Cineplex attended an in-person mediation in Ottawa as well as a seven-day hearing which took place over three weeks. The Cineplex legal team from Borden Ladner Gervais, with the assistance of the Cineplex in-house legal counsel team, is based in Toronto and travelled to Ottawa for each of these attendances in order to properly prepare and present arguments at the hearing.

13. Cineplex's travel expenses of \$35,931.60 for a team of seven people, are both reasonable and necessary. Notably, the Commissioner's travel expenses total \$12,538.84 even though the legal team for the Commissioner is largely based in Ottawa and therefore did not have to incur substantial travel expenses. Therefore, Cineplex seeks full reimbursement of the amounts incurred for flights to and from Ottawa as well as accommodation in Ottawa.

Photocopying, Printing and Binding

14. Cineplex seeks costs incurred for photocopying, printing and binding in respect of various trial preparation and hearing related materials, including material for the preparation of witnesses and examination for discoveries (including answers to undertakings). The costs incurred were both reasonable and necessary. Accordingly, Cineplex should be entitled to recoup its photocopying, printing and binding fees of \$21,972.11.¹⁰

¹⁰ Note that the actual costs incurred for photocopying, printing and binding was \$31,776.47. Cineplex seeks approximately seventy percent of these costs.

Relativity Data Hosting

15. Cineplex used Relativity, a document management system, to host and review documents in this matter. This Tribunal has held that electronic document management services are increasingly becoming a necessity.¹¹ In the present case, the software was a cost-effective way to quickly and efficiently review a voluminous number of documents and produce the relevant documents for the purposes of discovery. Cineplex submits that it should be entitled to recover these fees in full.¹²

Conclusion

16. For all the reasons cited above, Cineplex respectfully submits that, in the event the Commissioner's Application is dismissed, an award of \$563,800.27 in disbursements (taxes included) should be made in its favour.

17. Cineplex further submits that, in the event that the Commissioner's Application is dismissed, an award for legal costs of \$77,000 plus HST, as fixed by the Tariff B of the *Federal Court Rules* and as agreed to by the parties, should be made in its favour.

¹¹ *Rogers* at para 80.

¹² Note that the line item for Relativity Data Hosting is an estimate of the total fees incurred.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th DAY OF APRIL, 2024



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