

Competition Tribunal



Tribunal de la Concurrence

Reference: *CarGurus, Inc v Trader Corporation*, 2016 Comp. Trib. 12

File No.: CT-2016-003

Registry Document No.: 21

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

AND IN THE MATTER OF an Application by CarGurus, Inc. for an Order pursuant to section 103.1 granting leave to make application under sections 75, 76 and 77 of the *Competition Act*.

BETWEEN:

CarGurus, Inc.
(applicant)

and

Trader Corporation
(respondent)



Decided on the basis of the written record.

Before Judicial Member: D. Gascon J. (Chairperson)

Date of Order: June 9, 2016

**REASONS FOR ORDER AND ORDER REGARDING A REQUEST FOR LEAVE TO
FILE AFFIDAVIT EVIDENCE IN RESPONSE TO AN APPLICATION FOR LEAVE**

I. OVERVIEW

[1] On May 4, 2016, Trader Corporation (“**Trader**”) submitted a request by letter for leave to file affidavit evidence as part of its representations in writing in response (the “**Response**”) to the application for leave filed by CarGurus, Inc. (“**CarGurus**”) on April 15, 2016. CarGurus is seeking leave from the Tribunal to make an application pursuant to sections 75, 76 and 77 of the *Competition Act*, RSC 1985, c C-34 (the “**Act**”) against Trader.

[2] Trader also requested the Tribunal’s leave to extend the deadline for serving and filing Trader’s Response until 10 business days following the Tribunal’s disposition of this request and CarGurus consented to this extension request. The Tribunal issued a direction granting such request on May 5, 2016.

[3] On May 13, 2016, CarGurus filed a written submission opposing Trader’s request. Trader replied by letter dated May 17, 2016.

[4] In its request to file affidavit evidence, Trader argues that Rule 119(3) of the *Competition Tribunal Rules*, SOR/2008-141 (the “**Rules**”) expressly provides the Tribunal with the discretion to allow a respondent to file affidavit evidence as part of its written representations made in response to an application for leave under section 103.1 of the Act. Trader cites the recent decision of the Tribunal in *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 13 (“**Audatex I**”) as outlining the factors to be considered by the Tribunal in leave requests to file affidavit evidence. Trader also included with its request, further to the additional guidance provided by the Tribunal in *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 (“**Audatex II**”) at para 40, a draft affidavit containing the evidence that it seeks to produce with leave of the Tribunal (the “**Draft Dunbar Affidavit**”). Trader concludes that granting the request for leave is clearly in the interests of justice, will not result in any prejudice to CarGurus and will ensure the Tribunal has the benefit of a proper evidentiary record when exercising its screening function.

[5] On its part, CarGurus contends that Trader’s request to file affidavit evidence should be dismissed. It submits that, at this stage, the Tribunal’s task is to exercise a screening function to ensure that: (1) CarGurus’ application is supported by sufficient credible evidence to give rise to a *bona fide* belief that it may be “directly”, and in the case of sections 75 and 77, “substantially” affected by Trader’s alleged practices and (2) those practices could be the subject of an order from the Tribunal. CarGurus argues that Trader’s proposed evidence will not assist the Tribunal in fulfilling its screening function at the leave stage and that Trader has failed to demonstrate that the proposed evidence is necessary to its written representations. CarGurus adds that the standard of proof on a leave application pursuant to section 103.1 of the Act is lower than proof on a balance of probabilities, which will be the standard applicable to the decision on the merits, and that Trader bears the burden of demonstrating that specific facts and circumstances justify the filing of the affidavit evidence.

[6] For the reasons that follow, I conclude that Trader’s request should be partially granted, on the conditions set out herein.

II. ANALYSIS

a. The test

[7] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 of the Act. It reads as follows:

103.1(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

103.1(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[8] I adopt the principles set out in *Audatex I* for the purposes of this proceeding and note that both parties cite this decision as support for their submissions.

[9] As indicated in *Audatex I*, leave applications under section 103.1 of the Act require the Tribunal to determine whether the application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly (and, in the case of sections 75 and 77, substantially) affected in its business by the alleged practice and that the alleged practice could be subject to an order. I also adopt the principles that such leave applications should be dealt with summarily and are not meant to be final determinations made on the basis of a full evidentiary record.

[10] Rule 119(3) states that the respondent's "[r]epresentations in writing shall not contain affidavit evidence, except with leave of the Tribunal." As such, the filing of affidavit evidence is the exception, subject to the discretion of the Tribunal.

[11] I will perform my analysis of whether Trader's affidavit evidence should be allowed on the basis of the analysis articulated in paragraphs 16 and 17 of *Audatex I*. It is useful to reproduce those two paragraphs in their entirety:

[16] Considering the new language of Rule 119(3) and the summary process contemplated by section 103.1 of the Act, the Tribunal is of the view that, on applications for leave, it is now the burden of the respondent to demonstrate the existence of specific facts and circumstances justifying the filing of affidavit evidence, bearing in mind that an application for leave is a screening process meant to be decided expeditiously and not on the basis of a full evidentiary record.

[17] In a refusal to deal leave application, this specific evidence needs to focus on the issues to be determined by the Tribunal, namely whether sufficient credible evidence exists to give rise to a *bona fide* belief that the applicant is directly and

substantially affected in its business by an alleged conduct that could be the subject of an order under section 75. Such specific evidence could include affidavit evidence adduced to demonstrate that an applicant is not willing and able to meet the usual trade terms of the supplier, that the supplier does not sell the product sought to be supplied, that other sources of supply are available or that regulatory, contractual or legislative limits would not allow a product to be in ample supply. This list is not exhaustive and may vary with the circumstances. But the party seeking leave to file affidavit evidence needs to set out, in as much detail as possible, the discrete facts and specific evidence that it wishes to include in the proposed affidavit. It also needs to indicate how the evidence intended to be filed is necessary to its written representations and would be of assistance to the Tribunal in its screening function.

(Emphasis added)

[12] Conversely, categories of evidence which did not meet the test established in *Audatex I* included the history of dealings between the parties and steps that could have been taken by an applicant to remain an effective competitor (*Audatex I* at para 22). I observe that the illustrative list of evidence that could or could not be included as affidavit evidence in *Audatex I* was specific to section 75 of the Act dealing with refusal to deal.

[13] Since the current leave application filed by CarGurus relates not only to section 75 but also to section 76 on price maintenance and section 77 on exclusive dealing, the specific evidence which could be justified under these additional provisions similarly has to focus on the particular issues to be determined by the Tribunal under these two restrictive trade practices. The approach under those provisions will remain guided by the principles established in *Audatex I*.

[14] Therefore, with respect to a leave application relating to price maintenance pursuant to section 76 of the Act, such specific evidence could include affidavit evidence adduced to demonstrate that there is no agreement, threat, promise or any like means; that the respondent is not producing or supplying a product; or, that a supplier's refusal to supply a product to a person is not caused by the low-pricing policy of that person or class of persons. In turn, with respect to leave applications relating to exclusive dealing pursuant to section 77 of the Act, the Tribunal may grant leave to file specific affidavit evidence showing that a particular condition set out under subparagraphs 77(1)(a)(i) or (ii) does not exist; or, that a respondent is not a major supplier of a product in a market. Again, these lists are not exhaustive and may vary with the circumstances.

[15] I pause to stress that the Tribunal must also take into account the interests of justice which, in a case like this, will include an expedited resolution of the application for leave. The filing of affidavit evidence in response cannot simply aim to provide a full evidentiary record as this would reasonably be expected to result in lengthening the leave application process, to the detriment of the applicant. To allow wide-ranging affidavit evidence would generally not be in the interests of justice.

b. Trader's evidence

[16] In this case, Trader indicates in its letter request dated May 4, 2016 that it is seeking to introduce two categories of evidence through the Draft Dunbar Affidavit: (1) additional evidence filed by Trader in an on-going copyright proceeding between the parties (the “**Copyright Proceeding**”), which was allegedly omitted by CarGurus in its materials; and (2) evidence relating to four “discrete” issues.

i. The Copyright Proceeding

[17] With respect to the Copyright Proceeding, Trader indicates that, in December 2015, it commenced an application in the Ontario Court of Justice seeking declarations that CarGurus had infringed Trader’s copyright in relation to 217,856 photographs. Trader states that, in support of its leave application, CarGurus has only filed certain portions of the evidence adduced in that Copyright Proceeding and thus seeks to supplement the current record with the allegedly omitted affidavits. In particular, Trader is seeking leave to adduce affidavit evidence from the Copyright Proceeding that addresses three specific issues: whether Trader considers CarGurus’ website to be innovative; whether Trader instructed CarProof not to integrate with CarGurus; and the date upon which Trader first notified CarGurus that CarGurus was infringing Trader’s copyright. Trader argues that, in the interests of justice, the Tribunal should not rely on cherry-picked evidence from the Copyright Proceeding as the basis of its leave decision.

[18] Paragraphs 6 to 8 of the Draft Dunbar Affidavit deal with the allegedly omitted materials from the Copyright Proceeding. As part of this draft affidavit, Trader seeks to attach two affidavits, or parts thereof, previously filed in the Copyright Proceedings: the reply affidavit of Allen Wales sworn on March 3, 2016 (the “**2016 Wales Affidavit**”) and Exhibit “C” of another affidavit of Allen Wales sworn on December 22, 2015 (the “**Wales Exhibit**”). More specifically, Trader attaches the totality of the 2016 Wales Affidavit to the Draft Dunbar Affidavit in order to draw particular attention to paragraphs 27 and 28 therein.

[19] In response, CarGurus submits that the allegedly omitted evidence does not further the Tribunal’s analysis under section 103.1 of the Act, which does not need to be supported by a full evidentiary record. It further argues that both sets of allegedly omitted evidence go to the merits of CarGurus’ case and are not relevant for the Tribunal’s screening function.

[20] I agree with CarGurus with respect to the 2016 Wales Affidavit and its paragraphs relating to the innovative nature of CarGurus’ website and Trader’s dealings with CarProof. Trader has failed to convince me that evidence on these two points constitute discrete facts and specific evidence that should be allowed to be filed by Trader at the leave application stage. True, some of these materials may have been omitted in CarGurus’ application and the Tribunal may not have a full evidentiary record before it, but such evidence goes to the merits of the case and is more in the nature of wide-ranging evidence that the Tribunal is not expected to consider in section 103.1 applications. Such evidence does not meet the exception contemplated by Rule 119(3) and I am not persuaded that it is in the interests of justice to consider it at this juncture.

[21] I also consider that the Wales Exhibit does not fall in the category of specific evidence for which leave to file affidavit evidence should be granted. The Wales Exhibit allegedly demonstrates that Trader first notified CarGurus in June 2015 that it was infringing Trader’s

copyright. I note that this initial date of notification is not relevant at this stage of the proceeding. In addition, there is no dispute as to the existence of the on-going Copyright Proceeding. For those reasons, I conclude that Trader's evidence stemming from the Copyright Proceeding should not be allowed and I will direct Trader to strike paragraphs 6 to 8 of the Draft Dunbar Affidavit, including Exhibits "A" and "B" to such affidavit.

ii. The "discrete" issues

[22] Turning to the four discrete issues identified by Trader, I am of the view that, in some respects, these requests deal with narrowly identified issues which the Tribunal typically considers to be different from the more fulsome type of evidence that the Act clearly intended not to be filed and considered at the leave application stage. Such elements constitute discrete facts meeting the exception contemplated by Rule 119(3) and relevant to the screening function to be exercised by the Tribunal in section 103.1 applications for leave.

[23] On this front, Trader seeks to adduce affidavit evidence in order to demonstrate that CarGurus is not substantially affected by Trader's conduct and that an order could not be issued under sections 75, 76 or 77 of the Act. Specifically, the Draft Dunbar Affidavit proposes to provide evidence buttressing Trader's following four arguments: (1) Trader is not motivated by CarGurus' low-pricing policy as it relates to an element under section 76; (2) Trader does not require or provide an incentive for exclusivity from any of its customers as it relates to an element under section 77; (3) Kijiji should not be excluded from the analysis of the market for purposes of determining Trader's status as a dominant or major supplier as it relates to an element under section 77; and (4) alternative sources of data are currently available within the industry and other steps that CarGurus could take to remain as an effective competitor as it relates to an element under section 75.

[24] CarGurus replies that the evidence sought to be adduced in this regard would again not affect the outcome of its leave application and is not necessary to Trader's written representations. CarGurus more specifically submits that: (1) Trader's argument regarding CarGurus' low-pricing policy is merits-based and the Tribunal is in no position to prefer either party's evidence at this stage; (2) CarGurus relies on the provisions found in Trader's contracts with dealers as evidence of exclusive dealing and these contractual terms speak from themselves; (3) Trader's proposed evidence on Kijiji does nothing to refute its position that Trader is a major supplier; and (4) Trader's position regarding alternative sources of data is another merits-based argument and ignores CarGurus' position that those options are not economically viable alternatives.

[25] Each of Trader's "discrete" requests will be dealt with in turn.

[26] On the evidence relating to CarGurus' low-pricing policy, I note that Trader cites an excerpt from *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26 at para 39, as a ground for seeking to file specific evidence that it was not motivated by CarGurus' low-pricing policy. In that decision, Justice Barnes observed that the evidence bearing on the respondents' motives "[lied] exclusively within the knowledge of the Respondents and they have not produced any evidence in rebuttal," and he used that as an

element to conclude that “in the face of the unanswered evidence submitted” by the applicant, the applicant had met the relatively low evidentiary threshold for leave.

[27] Since the Tribunal can, in certain circumstances, draw an adverse inference against a respondent where potential evidence “lies exclusively within [the respondent’s] knowledge” and it does not seek leave to adduce it, I am satisfied that Trader has a valid ground to have its evidence regarding CarGurus’ low-pricing policy placed on the record. It does not mean, though, that the Tribunal will engage in an exercise of weighing the evidence at the leave stage, but this is specific evidence relevant to the Tribunal’s screening function in matters related to section 76. Those paragraphs of the Draft Dunbar Affidavit will therefore be allowed to be part of Trader’s written representations.

[28] With respect to the exclusivity requirements of Trader, or absence thereof, I am also satisfied that the evidence Trader seeks to introduce is specific enough to Trader’s practice and thus meets the exception of Rule 119(3). In other words, it is sufficiently linked to a relevant element under section 77 of the Act and to whether an order could be made under that section. Paragraph 14 of the Draft Dunbar Affidavit will thus be accepted.

[29] Turning to the evidence that Trader intends to introduce on whether it is a dominant supplier for the purposes of section 77 of the Act, I agree with CarGurus that the requirement to be determined under section 77 is whether Trader is a “major supplier.” In that context, I am not persuaded that the evidence proposed by Trader addresses specifically this issue, and I find that it thus does not meet the test outlined by the Tribunal in *Audatex I*. Paragraph 15 of the Draft Dunbar Affidavit will have to be deleted.

[30] Finally, regarding Trader’s fourth discrete issue, the Tribunal has already indicated in *Audatex I* that evidence on alternative sources of data available to an applicant was part of those elements falling in the category of specific evidence for which leave to file affidavit evidence should be granted. This evidence is covered in paragraphs 16 to 19 of the Draft Dunbar Affidavit and can therefore be part of Trader’s written representations in response. However, the Tribunal had also found in *Audatex I* that a respondent’s history of dealings or the other steps that an applicant could have taken to remain an effective competitor were not evidence intended to be covered by Rule 119(3). I am therefore not persuaded that evidence on steps that CarGurus could have taken constitutes discrete facts and specific evidence which should be allowed to be filed by Trader at this stage. Such material is more in the nature of wide-ranging evidence that the Tribunal would consider at the merits stage, but not in a section 103.1 application. This evidence is covered in paragraphs 20 to 22 of the Draft Dunbar Affidavit and will have to be deleted.

III. CONCLUSION

[31] In summary, I find that Trader has provided sufficient detail, with the Draft Dunbar Affidavit, on some specific “discrete” evidence it wishes to include and on the reasons why such evidence is necessary to its written representations and would be of assistance to the Tribunal in the context of CarGurus’ application under section 103.1 of the Act. Further to my review of the contents of the letters filed by Trader and of the Draft Dunbar Affidavit, I am therefore satisfied that, in the circumstances of this case and for the discrete issues identified above, certain portions of the affidavit evidence intended to be filed by Trader meet the exception contemplated by Rule

119(3) and the specificity called for by the screening function to be exercised by the Tribunal in section 103.1 applications for leave.

[32] I underline however that the Tribunal remains mindful of the fact that delays in the treatment of applications for leave can be prejudicial to the applicant. The continuous commitment of the Tribunal to expeditious proceedings will serve to ensure that CarGurus' application will be dealt with as rapidly as possible.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[33] Leave is hereby granted to Trader to file affidavit evidence as part of its representations in writing in response to CarGurus' application for leave, as follows.

[34] Trader is allowed to file affidavit evidence containing the following paragraphs from the Draft Dunbar Affidavit: paragraphs 1 to 4; paragraph 5 in so far as it relates to the response to certain specific allegations made in the Second Blue Affidavit (as defined in the Draft Dunbar Affidavit); paragraphs 9 to 14; and paragraphs 16 to 19. Trader is however not allowed to file the contents of paragraphs 6 to 8, 15 and 20 to 22 of the Draft Dunbar Affidavit.

[35] On May 5, 2016, the Tribunal had granted the request by Trader, on consent, to extend the deadline for filing its representation in writing in response to CarGurus' application for leave. Based on that Direction to counsel, the Tribunal directs Trader to serve and file its representations in writing within 10 business days of this Order with a modified affidavit from Mr. Dunbar based on these reasons.

[36] In light of the split result and the decision to only partially allow the affidavit evidence sought by Trader, no order as to costs is made.

DATED at Ottawa, this 9th of June 2016.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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