

Competition Tribunal



Tribunal de la Concurrence

Reference: *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 13

File No.: CT-2015-010

Registry Document No.: 0027

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

**AND IN THE MATTER OF** an Application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make an application under section 75 of the *Competition Act*.

B E T W E E N:

**Audatex Canada, ULC**

(applicant)

and

**CarProof Corporation, Trader Corporation, and  
eBay Canada Limited**

(respondents)



Decided on the basis of the written record.

Before Judicial Member: Gascon J. (Chairperson)

Date of Reasons for Order and Order: October 29, 2015

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

## **I. OVERVIEW**

[1] On October 20, 2015, CarProof Corporation (“CarProof”) made a request for leave to file affidavit evidence as part of its response to the application for leave filed in the present matter by Audatex Canada, ULC (“Audatex”) on October 1, 2015. Audatex seeks leave to bring a refusal to deal application under section 75 of the *Competition Act*, RSC 1985, c. C-34 (the “Act”) against CarProof and the other respondents.

[2] On October 23, 2015, Audatex filed a letter opposing CarProof’s request. CarProof replied by letter dated October 26, 2015.

[3] On October 26, 2015, Marktplaats B.V. (“Marktplaats”), as owner of the confidential and proprietary “eBay” data that Audatex is seeking to access, made a similar request for leave to file affidavit evidence as part of its response to Audatex’ application for leave. On October 28, 2015, Audatex filed a letter responding to Marktplaats’ request and opposing it in part. The Tribunal observes that Marktplaats is not yet a respondent in these proceedings but that its counsel has asked counsel for Audatex to amend his materials so as to substitute Marktplaats for eBay Canada Limited.

[4] In their respective letters, CarProof and Marktplaats argue that Rule 119(3) of the *Competition Tribunal Rules*, SOR/2008-141 (the “Rules”) 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.

[5] CarProof contends that, when determining to grant leave to file affidavit evidence under Rule 119(3), the Tribunal should consider whether (i) the filing of the proposed affidavit evidence would cause substantial or serious prejudice to the applicant; (ii) the filing of the proposed affidavit evidence would assist the Tribunal in making its final determination; and (iii) the filing of the proposed affidavit evidence would serve the interests of justice. CarProof claims that the affidavit evidence it seeks to adduce would allow the Tribunal to receive evidence regarding numerous issues relevant to the Tribunal’s decision on Audatex’ application for leave and to have a full evidentiary record.

[6] Marktplaats, for its part, affirms that the affidavit evidence it seeks to file would provide evidence on whether the license sought by Audatex from Marktplaats is in ample supply and on the usual trade terms for such a license.

[7] For the reasons that follow, the Tribunal concludes that CarProof’s and Marktplaats’ requests should be granted on the conditions set out herein.

## II. ANALYSIS

[8] 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.

[9] The test to be followed on an application for leave in refusal to deal cases was first articulated by Madam Justice Dawson in *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, at para 14. It was subsequently adopted by the Federal Court of Appeal in *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339 ("*Barcode*"), and has been followed since then by the Tribunal in section 103.1 matters. Pursuant to this test, the Tribunal must determine whether the application for leave is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in its business by the refusal to deal, and that the practice in question could be subject to an order.

[10] Since the Tribunal must only be convinced that the reviewable conduct "could" be subject to an order, what is being considered in an application for leave need not be supported by a full evidentiary record. As Madam Justice Simpson said in *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10, at para 32:

Parliament decreed that an applicant would file an affidavit and a respondent would file representations. This means that there will inevitably be incomplete information on some topics.

[11] In *Barcode*, the Federal Court of Appeal further noted that, when determining whether to grant leave, the Tribunal's role is a screening function based on the sufficiency of evidence advanced and that leave applications are to be dealt with summarily (*Barcode* at para 24).

[12] In other words, pursuant to the language and intent of section 103.1 of the Act, decisions on applications for leave are not meant to be final determinations made on the basis of a full evidentiary record.

[13] In that context, Part 8 of the Rules details the procedure to be followed on applications for leave under section 103.1. Rule 115 provides that an application for leave shall include an affidavit setting out the facts in support of the proposed application, a proposed notice of application and a memorandum of fact and law. Rule 119 authorizes the respondents to file

representations in writing. Rule 119(3) expressly states that such “[r]epresentations in writing shall not contain affidavit evidence, except with leave of the Tribunal”. The rule is therefore that respondents are only allowed to file written representations without affidavit evidence. The filing of affidavit evidence is the exception, subject to the discretion of the Tribunal.

[14] Rule 119(3) was included in the Rules as part of the latest round of amendments to the Rules made as of May 14, 2008. Before these May 2008 amendments, the Rules were silent on whether responding parties in applications for leave were permitted to file evidence in support of their written representations. However, the practice had been that, in many instances, respondents had in fact filed affidavit evidence as part of their responding materials to applications for leave under section 103.1. The Tribunal observes that, in those cases, the filing of affidavit evidence was done without seeking leave from the Tribunal and that the applicants did not object to the filing of the respondents’ evidence. The Tribunal had not issued an order or direction granting the respondent permission to file evidence along with their written representations.

[15] Since the new rules came into force in May 2008, the Tribunal has dealt with affidavit evidence from respondents in two applications for leave. In *Steven Olah v. Her Majesty the Queen as represented by the Correctional Service of Canada et al.* (CT-2008-008), cited by CarProof in its letters, the respondent’s affidavit evidence was filed on consent. In *Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority* (CT-2011-001), the Tribunal issued a direction refusing to grant the respondent leave to file affidavit evidence. In both cases, no reasons were issued. There is therefore no precedent from the Tribunal on the interpretation of Rule 119(3) and the situations where leave to file affidavit evidence could be granted.

[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.

[18] In its October 20 letter, CarProof claims that it should be granted permission to file affidavit evidence as Audatex “has failed to provide the full evidentiary record required by the Tribunal” to properly consider whether leave should be granted. This cannot be the test at the leave application stage as the Act does not contemplate that the Tribunal requires such a full evidentiary record in order to make its determination under section 103.1.

[19] 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 simply aiming to provide a full evidentiary record could reasonably be expected to result in lengthening the leave application process, to the detriment of the applicant. Leave applications are intended to be summary processes and to be dealt with on a burden of proof that is lower than the ordinary civil burden of balance of probabilities. To allow wide-ranging affidavit evidence would not be in the interests of justice.

[20] In the present case, the Tribunal notes that, in its October 20 and 26 letters, CarProof refers to its intent to provide affidavit evidence on specific issues described as follows: “the numerous alternative sources of data that are currently available within the industry; other steps that [Audatex] could have taken and can take to remain as an effective competitor; the proprietary and confidential nature of the data that it seeks to license; [...] the terms on which CarProof has made the data in question available both to [Audatex] and to other parties in the market”; “the course of dealing between the parties and the current status of the extensive and ongoing negotiations between [Audatex] and CarProof”; and the fact that “[Audatex] is not willing to meet the relevant terms of trade”. CarProof specifically states in its October 26 letter that the evidence it is requesting to adduce is “limited to “discrete” issues and is not part of an effort to “adduce wide-ranging evidence”.”

[21] Marktplaats, for its part, indicates that its affidavit evidence would relate to the “confidential and proprietary nature of the data Audatex is seeking to license from Marktplaats, including but not limited to the data licensing agreement between CarProof and Marktplaats”.

[22] The Tribunal is of the view that, in many respects, these requests deal with narrowly identified issues which the Tribunal 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. This is the case for Marktplaats’ requests. In the Tribunal’s opinion, the confidential and proprietary nature of Marktplaats’ data and the specific data licensing agreement with CarProof both 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] Turning to CarProof, the Tribunal similarly considers that its request regarding alternative sources of data available to Audatex, the proprietary and confidential nature of the sought data, CarProof’s terms of sale and Audatex’ alleged unwillingness to meet the relevant terms of trade also fall in the category of specific evidence for which leave to file affidavit evidence should be granted. However, this is not the case for CarProof’s history of dealings with Audatex or for the other steps that Audatex could have taken to remain an effective competitor. CarProof has failed to convince the Tribunal that evidence on these two issues constitute discrete facts and specific evidence which should be allowed to be filed by respondents at the leave

application stage. Such evidence is more in the nature of wide-ranging evidence that the Tribunal is not expected to consider in section 103.1 applications.

[24] The Tribunal further finds that CarProof and Marktplaats have provided sufficient detail on the specific evidence they wish to include in the proposed affidavits and on the reasons why such evidence is necessary to their written representations and would be of assistance to the Tribunal in the context of Audatex' section 103.1 application.

[25] Further to its review of the contents of the letters filed by CarProof and Marktplaats, the Tribunal is therefore satisfied that, in the circumstances of this case and for the discrete issues identified above, the affidavit evidence intended to be filed by CarProof and Marktplaats meets 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. The Tribunal is thus of the view that CarProof and Marktplaats should be allowed to file affidavit evidence, along the lines set out above, with their written representations in response to Audatex' application for leave.

[26] The Tribunal pauses to note that it is mindful of Audatex' claims that any delays in the treatment of its application for leave is prejudicial to it. The continuous commitment of the Tribunal to expeditious proceedings will serve to ensure that Audatex' application will be dealt with as rapidly as possible.

**FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:**

[27] Leave is herewith granted to CarProof and Marktplaats to file affidavit evidence as part of their representations in writing in response to Audatex' application for leave.

[28] With respect to Carproof, such affidavit evidence shall deal with the following specific issues identified by CarProof in its October 20 and 26 letters: the alternative sources of data available to Audatex within the industry; the proprietary and confidential nature of the data that Audatex seeks to license; and the terms on which CarProof has made the data available to Audatex and Audatex' alleged unwillingness to meet the relevant terms of trade.

[29] With respect to Marktplaats, such affidavit evidence shall deal with the following specific issues identified by Marktplaats in its October 26 letter: the confidential and proprietary nature of the data Audatex is seeking to license from Marktplaats; and the data licensing agreement between CarProof and Marktplaats.

[30] As neither CarProof nor Marktplaats is seeking costs for their requests, no order as to costs is made.

DATED at Ottawa, this 29th day of October, 2015.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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