File No.: CT-2008-006
Registry Document No.:

COMPETITION TRIBUNAL

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

IN THE MATTER OF an application by the Canadian Standard Travel Agent Registry, doing business as CSTAR, for an order pursuant to Section 103.1 granting leave to make application under Section 75 of the *Competition Act*;

AND IN THE MATTER OF an application by the Canadian Standard Travel Agent Registry, doing business as CSTAR for an order pursuant to rule 312 of the *Federal Court Rules* and rule 34(1) of the *Competition Tribunal Rules* granting leave to file a supplementary affidavit in support of the application 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:

CANADIAN STANDARD TRAVEL AGENT REGISTRY

Applicant

and

INTERNATIONAL AIR TRANSPORT ASSOCIATION

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW

I. BACKGROUND

1. Canadian Standard Travel Agent Registry ("CSTAR") moves for an order from the Competition Tribunal (the "Tribunal") granting it leave to file a "supplementary" affidavit in support of its application for leave under section 103.1 of the *Competition Act* (the "Act") to file an application under section 75 of the Act.

2. CSTAR's motion was served electronically the night before written representations from the Respondent, International Air Transport Association ("IATA"), were required to be filed in response to CSTAR's section 103.1 application.

3. CSTAR has already filed two affidavits. IATA was refused leave to file an affidavit to respond to the initial affidavit of CSTAR that is required by section 103.1(1) in this application. Now, at the eleventh hour, CSTAR seeks to file a third affidavit in what is supposed to be a quick and summary proceeding. IATA opposes the motion.

II. ISSUES AND THE LAW

A. ISSUES

4. IATA opposes CSTAR's motion for two principal reasons:

   (a) Section 103.1 of the Act and Part 8 of the *Competition Tribunal Rules* (the "Tribunal Rules") form a complete code governing section 103.1 applications. This code does not permit CSTAR to file a supplementary affidavit; and

   (b) Even if CSTAR is permitted to resort to Rule 312 of the Federal Court Rules (the "Court Rules"), CSTAR does not meet the conditions for granting leave to file a supplementary affidavit. There is no reason why additional evidence is required to permit the Tribunal to perform the screening function contemplated by the Act.

B. THE LAW

1. There is No Gap in the Tribunal Rules Permitting CSTAR Access to the Court Rules

(a) The Test

5. The fact that the Tribunal Rules do not contain a provision found in the Court Rules does not mean that there is a gap in the Tribunal Rules. The scheme of the Tribunal Rules must be examined to see whether the absence is deliberate. The court should start from

the proposition that the Tribunal Rules are a complete code and supply all necessary procedural tools. The gap rule is a rule of last resort.[1]

(b) The Scheme of the Tribunal Rules

6. CSTAR argues that the Tribunal Rules are silent about supplementary affidavits, creating a gap that is filled through reference to the Court Rules under rule 34 of the Tribunal Rules. Rule 312 of the Court Rules permits a party to file a supplementary affidavit in an application with leave of the court.

7. However, while the Tribunal Rules do not provide for supplementary affidavits on section 103.1 applications, that is by design and not through inadvertence.

8. Both the Act and the Tribunal Rules expressly determine what material the applicant must file and how that material is to be filed. Section 103.1(1) of the Act says that the application must be "accompanied" by "an" affidavit. That affidavit must set out "the facts" which support the application for leave.

9. Rule 115(1) of the Tribunal Rules says that the application filing shall "include" an affidavit, again, setting out "the facts". That is in contrast with rule 119(3) of the Tribunal Rules, which provides that the respondent's representations shall not include affidavit evidence, except with leave of the Tribunal. Rule 120 of the Tribunal Rules provides for reply representations by the applicant but it does not provide for further affidavit evidence from the applicant, even with leave.

10. This process contemplates that any factual basis for the application must be laid out summarily by the Applicant, without evidentiary opposition by the Respondent, at the beginning of the leave process. The Act and the Tribunal Rules do not set up a factual contest at the leave stage. The filling of serial affidavits, cross examinations, and the other hallmarks of the adversarial process of proof of facts, are simply not a part of the leave process contemplated by the Act and the Tribunal Rules.

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[1] *Pharmacia Inc. v. Canada (Minister of National Health and Welfare)*, [1995] 1 F.C. 588 (F.C.A.) paras 9 -10; *Khadr (next friend) v. Canada (Minister of Foreign Affairs)*, 2004 FC 1393.

11. That is particularly so in a case where there is no suggestion that the evidence proposed to be submitted could not have been provided in the original affidavit. In circumstances where the Tribunal Rules have laid out a process requiring an initial affidavit and permitting a responding affidavit (with leave), they must be taken to have considered the various times at which affidavit evidence would be possible and to have provided accordingly. There is no gap, because the statutory leave process does not authorise the submission of additional factual material very late in the consideration of the application.

12. This is consistent with the fact that section 103.1 of the Act requires the Tribunal to screen private applications under sections 75 and 77 of the Act in a "summary and expeditious manner".[2] The Act sets out very short times within which the application must be considered and decided. The Commissioner of Competition has only 48 hours, under subsection 103.1(3) of the Act, to certify to the Tribunal that the matter for which leave is sought is not subject to an inquiry or a settlement between the Bureau and one of the parties. The Tribunal in turn has a statutory obligation, under subsection 103.1(5) of the Act, "as soon as practicable after receiving the Commissioner's certification", to notify the applicant and the respondent whether it can hear the application for leave.

13. The respondent then has only 15 days within which to file representations. Contrary to the applicant's assertion, that time limit is not simply found in the Tribunal Rules but originates in section 103.1(6) of the Act. While the Tribunal may extend time periods arising under the Tribunal Rules, it cannot extend statutory time periods without express authority (which is not granted here).[3] These short and mandatory time periods support the conclusion that the absence of a provision for supplementary affidavits is deliberate – there is no time or place for them in this summary process.

14. The onus in section 103.1 is on the applicant to provide sufficient evidence to meet the 'direct and substantial' effect test in 103.1(7). The applicant has one chance to put its best foot forward: it must provide sufficient evidence to pass the screening thresholds when it

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[2] *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] Comp. Trib. 1, 29 C.P.R. (4th) 554, at paras. 22 and 23.

[3] *Canada (Minister of Citizenship & Immigration) v. Liu*, 2007 FCA 94 at para. 2

files its application. Neither the Act nor the Tribunal Rules contemplates a process where the Applicant, having filed its evidence with the application, gets further opportunities to prop up a factually deficient application by filing serial affidavits.

15. There is no gap in the Tribunal Rules. The Tribunal Rules were recently reformed and include both general provisions and Part 8, which deals with applications for private access to the Tribunal. If Parliament intended to permit supplementary affidavits, it could have (and would have) said so in section 103.1 of the Act. Those responsible for the very recent amendment of the Tribunal Rules could have made provision for additional evidence, if they considered they had scope for such an amendment under the statute. The failure to provide in the Tribunal Rules for an evidentiary facility that is available and necessary under the Court Rules for the panoply of proceedings that arise in the Federal Court does not constitute a "gap." Rather, it should be treated as a deliberate omission in accordance with ordinary rules of statutory interpretation.

2. Alternatively, CSTAR Does Not Meet The Conditions For Filing A Supplementary Affidavit

(a) The Rule 312 Test

16. If the Tribunal decides that CSTAR can resort to rule 312 of the Court Rules, CSTAR does not meet the requirements for leave contained in rule 312 and the related jurisprudence. Under rule 312, the Federal Court grants leave to file a supplementary affidavit where the affidavit serves the interest of justice, assists the court, does not cause prejudice to the other side, and is based on evidence that was not previously available.

(b) What CSTAR's *Solicitors* Knew is Irrelevant

17. CSTAR argues that the majority of the evidence that will be submitted in the supplementary affidavit was not available at the time the materials were filed and that any evidence available prior to the original affidavit was unknown to CSTAR's solicitors at the time of filing.

18. However, it is irrelevant whether the evidence is known to CSTAR's *solicitors* at the time of filing. Instead the question is whether the evidence was known to CSTAR. To

permit otherwise would allow applicants to submit evidence any time by simply waiting to give the evidence to their counsel until a convenient time.

(c) The Availability of the Proposed Evidence is Immaterial

19. The proposed evidence would seek to add other members of CSTAR as supporting the Application. The number of travel agency members that CSTAR purports to have authorization from is not material to the sufficiency of the evidence of direct and substantial harm that constitutes the threshold it must meet. The motion does not seek to adduce evidence of the individual business circumstances of any of the proposed additional agencies.

20. In addition, the evidence seeks to provide information about the difficulties encountered following implementation of full E-ticketing, after the application was made and after the cross examination of Mr. Bishins. It should be apparent that these concerns should have been foreseeable at the time the application was made, and indeed the affidavits of Mr. Bishins address these matters.

(d) CSTAR's Assertions are not Supported by any Evidence

21. Moreover, the sole affidavit submitted in support of CSTAR's motion for leave to file a supplementary affidavit was sworn by CSTAR's counsel's law clerk. CSTAR has not submitted any direct evidence to support the assertion that the proposed evidence was not available to it at an earlier date. And the law clerk does not say that anything was unknown to CSTAR, even on information and belief. In fact, the clerk does not even testify that the evidence was unknown to her employers, CSTAR's counsel. There is nothing in the record to support the allegation that the evidence was not available at the date of the first affidavit.

(e) CSTAR has Delayed

22. There was a case conference on Monday June 2 with Justice Simpson. No mention was made then of any supplementary material. In fact, the applicant did not raise this possibility until after 4:00 p.m. on Thursday June 5, just before the cross-examination of

Mr. Bishins for the applicant scheduled for 8:00 a.m. on Friday June 6. The clerk's affidavit does not explain this delay.[4]

23. IATA's counsel immediately (i.e. within the hour) wrote back to object to any supplementary filings and to advise that CSTAR should seek leave if it intended to proceed in that manner.[5] Nevertheless, CSTAR produced Mr. Bishins for his cross-examination on June 6 and did nothing to bring on this motion until after 5:00 p.m. on Tuesday, June 10, the evening before IATA's submissions were due. The clerk's affidavit does not explain this delay either.

24. Even if supplementary affidavits are theoretically available, it is imperative that an applicant who wishes to file one seek leave at the earliest possible moment and not on the eve of the respondent's filing deadline. This is particularly true given that the respondent's deadline is statutory and not amenable to extension. CSTAR did not move quickly, but instead seems to have delayed, presumably for its own tactical reasons. CSTAR has not even attempted to explain its delay in an affidavit. Accordingly, it should not be permitted to now file a late supplementary affidavit.

(f) IATA is Prejudiced

25. It would prejudice IATA to permit CSTAR to file a supplementary affidavit. CSTAR delayed bringing the motion to file a supplementary affidavit for at least six days, choosing to wait until the night before IATA's submissions were due. IATA was not relieved of its filing deadline until midday on the filing day, when virtually all work except final formatting had been completed. As a result, IATA has incurred substantial costs preparing its written representations that will be thrown away if CSTAR is permitted to now file a supplementary affidavit.

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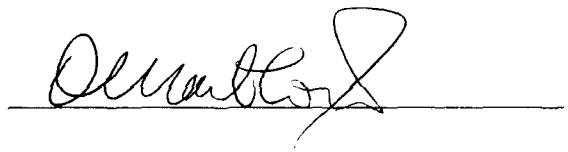
[4] Affidavit of Samantha Trottola, sworn June 10, 2008, at Exhibit A

[5] *Ibid.* at Exhibit B.

III. ORDER REQUESTED

26. IATA requests that CSTAR's motion for leave to file a supplementary affidavit be denied and that the Tribunal award IATA its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June, 2008.



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