

October 23, 2024

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Attention: Badih Abboud

Dear Mr. Abboud:

**Re: Informal motion re: Leave to File Affidavit Evidence and Time Extension in
Goshen Professional Care Inc. v The Saskatchewan Health Authority and The
Ministry of Health
File No. CT-2024-007 (the "Proceeding")**

We are counsel to the respondent, the Saskatchewan Health Authority (the "**SHA**"), in this Proceeding by Goshen Professional Care Inc. ("**Goshen**") pursuant to section 103.1 of the *Competition Act* (the "**Act**")¹ seeking leave to bring an application against the SHA and the Ministry of Health under sections 75 and 79 of the Act (the "**Leave Application**").

This letter is intended to serve as an informal motion under Rule 81 of the *Competition Tribunal Rules* (the "**Rules**")² seeking an order from the Tribunal, in accordance with Rule 119(3), that the SHA be granted:

- i. leave to file affidavit evidence as part of the SHA's responding representations to the Leave Application; and
- ii. an extension of the deadline to deliver the SHA's responding materials, including the affidavit evidence, until November 15, 2024.

¹ R.S.C. 1985, c. C-34.

² SOR/2008-141.

I. The Test for Leave to File Responding Evidence in an Application for Leave

Rule 119(3) of the Rules gives the Tribunal discretion to permit a respondent to file affidavit evidence as part of its representations opposing an application for leave. The Tribunal has allowed such evidence where: i) the proposed evidence is relevant to the test for leave under section 103.1 of the Act; ii) it addresses discrete issues and is not part of an effort to adduce wide-ranging evidence; and iii) it is in the interests of justice to do so, having regard to the summary nature of leave applications.³

The Leave Application requires that Goshen satisfy the requirements set out in section 103.1(7) of the Act:

Granting leave

(7) The Tribunal may grant leave to make an application under section 75, 77 or 79 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.

In this case, the Tribunal must consider whether Goshen has provided sufficient credible evidence to give rise to a *bona fide* belief that Goshen is directly and substantially affected in its business by an alleged conduct that could be the subject of an order under section 75 or 79.⁴

II. SHA's Claims and Proposed Evidence

Goshen's arguments presented in the Leave Application are flawed. They do not meet the requisite elements required by s. 75 and s. 79. For example, among other misconstrued claims, SHA is not a "dominant" participant as alleged by Goshen. SHA's written responses will detail the legal and factual flaws in the allegations presented in the Leave Application.

With regard to the many factual errors, much of the conduct alleged in the Leave Application is inaccurate or based on speculation. The SHA's proposed evidence will contain specific facts that are relevant to whether the alleged conduct could be subject to an order under section 75 or 79 of the Act. The SHA's proposed evidence will demonstrate that the allegations made in the Leave Application are false or misleading. Due to the confidential nature of the personal health information of residents involved in this matter, many of the relevant facts are in the exclusive knowledge of the SHA and its affiant. It is therefore in the interests of justice that this evidence be placed in front of the Tribunal at this early stage, so that the Tribunal may effectively exercise its screening function.⁵ While the SHA broadly denies the allegations contained in the Leave Application, the proposed responding evidence focuses on the material facts that Goshen omitted as part of the Leave Application.

³ *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 13 at paras 9, 11, 16-19 [*"Audatex"*].

⁴ *Ibid.*

⁵ *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp. Trib. 4, Interlocutory Leave Decision dated August 22, 2024 at para 24 [*"JAMP"*]; *Audatex*, *supra* note 3 at paras 9, 11, 16-19.



As such, the SHA's proposed evidence is relevant as to whether:

- i. the SHA has engaged or is engaging in a practice of anti-competitive acts or conduct within the meaning of section 75 and section 79 of the Act as alleged in the Leave Application; and
- ii. Goshen's business could have possibly been directly and substantially affected by an alleged practice or conduct that could be the subject of an order under sections 75 and 79, which is expressly denied.

a. SHA has not engaged in any anti-competitive acts

As this Tribunal recently held in *JAMP*, the proposed responding affidavit evidence must be assessed in light of the applicant's allegations, which include both past and ongoing conduct by the respondent alleged to be a "practice of anti-competitive acts" under paragraph 79(1)(a) or "conduct" for the purposes of paragraph 79(1)(b).⁶

The role of the Tribunal at the leave stage is to assess whether the applicant's evidence could, in light of the respondent's written submissions, lead to an order under s. 79, on the lower standard of proof applicable at the leave stage, and that a respondent should be permitted to adduce focussed evidence in response if that evidence supports a finding that no order "could" be made under section 79 as a result of the applicant's allegations and evidence on the topic.⁷

The SHA seeks leave to file affidavit evidence on the following points to demonstrate that Goshen's allegations cannot give rise to a *bona fide* belief that the SHA has engaged in the alleged reviewable practices. In making its leave decision, this Tribunal should not be deprived of evidence to respond to factual allegations that can "easily be dismissed as false"⁸:

- i. Goshen's representations that SHA wrongfully, deliberately, and prematurely terminated the Accountability Agreement are factually inaccurate and misleading. The SHA will introduce evidence directly responding to and negating Goshen's factual allegations regarding the termination of the Accountability Agreement. The evidence will outline that the Accountability Agreement required that Goshen meet a specified standard of care pursuant to the Program Guidelines for Special Care Homes. SHA seeks to adduce evidence that the Accountability Agreement was terminated due to Goshen's inability to maintain this standard of care. Further, the evidence will show that the Accountability Agreement was not terminated prematurely.⁹
- ii. Goshen's representations regarding the legislative landscape for care homes in Saskatchewan are misguided and incorrect. The SHA will introduce evidence showing that it does not have the alleged oversight in approving personal care home plans and/or licensing as alleged in the Leave Application. Personal care homes are

⁶ *JAMP*, *supra* note 5 at para 24.

⁷ *Ibid* at paras 34, 36.

⁸ *Ibid* at paras 25-26.

⁹ *Ibid* at paras 48-49.



not a health service provided by the SHA pursuant to *The Provincial Health Authority Act*.¹⁰

- iii. SHA did not pay Goshen under the Accountability Agreement. The SHA intends to provide specific evidence that Goshen had individual contracts with the residents and that the SHA was not contractually obligated to pay Goshen.¹¹
- iv. SHA or its actions did not force Goshen into insolvency. The SHA seeks to adduce evidence that residents of Goshen were provided a choice to remain at the facility.¹²

b. SHA could not have directly and substantially affected Goshen's business

Goshen's claims regarding the effects of the SHA's alleged conduct do not accurately depict the competition between public and private sector care homes nor the distinction between personal care homes and long-term care homes. The SHA seeks to adduce evidence demonstrating that:

- i. The SHA does not own or operate any personal care homes in the Province of Saskatchewan. The Leave Application highlights Goshen's misunderstanding regarding the distinction between personal care homes and long-term care homes under the relevant legislation in Saskatchewan.¹³ The SHA is, by legislation, responsible for the oversight of publicly funded long-term care in Saskatchewan. Goshen operated a private personal care home, a distinct business under the governing legislation for care homes in Saskatchewan. The SHA seeks to provide credible, cogent, and objective evidence that its decision-making in the public interest could not have directly and substantially affected Goshen's private personal care home business.¹⁴
- ii. The SHA does not supply residents to personal care homes in Saskatchewan.¹⁵ The SHA seeks to adduce evidence that Goshen was only permitted to have long-term care residents pursuant to the Accountability Agreement, and the SHA was required to evaluate that care under the applicable legislation. The Accountability Agreement required that Goshen meet a specified standard of care pursuant to the Program Guidelines for Special Care Homes and failed to meet that standard.¹⁶

¹⁰ S.S. 2017, c. P-30.3.

¹¹ *Audatex*, *supra* note 3 at paras 21-22; *JAMP*, *supra* note 5 at paras 48-49.

¹² *JAMP*, *supra* note 5 at paras 48-49.

¹³ *Special-care Homes Regulations*, 2024, R.R.S. c. P-30.3 Reg 4; *Facility Designation Regulations*, R.R.S. c. R-8.2 Reg 6; *The Health Facilities Licensing Act*, S.S. 1996, c. H-0.02; *Health Facilities Licensing Regulations*, R.R.S. c. H-0.02 Reg 1 *The Health Information Protection Act*, S.S. 1999, c. H-0.021; *Health Information Protection Regulations*, R.R.S. c. H-0.021 Reg 2.

¹⁴ *Audatex*, *supra* note 3 at para 17.

¹⁵ *Ibid.*

¹⁶ Similar to the agreement in *JAMP*, *supra* note 5 at paras 48-49.



- iii. The SHA has no role in personal care homes, including licensing, supervising, or operating them. The Accountability Agreement was a field test/pilot project and the arrangements were all contractual. The Emmanuel Villa Personal Care Home has never been designated a special care home under the *Facility Designation Regulations* or *The Provincial Health Authority Act*. At all times, the Emmanuel Villa Personal Care Home remained licensed and regulated as a personal care home by the Government of Saskatchewan, Ministry of Health (including the beds for residents from the SHA field project). The higher level of care required by the SHA in the Accountability Agreement was based on a contractual arrangement only. The SHA seeks to provide credible, cogent, and objective evidence regarding the distinction between the long-term care services the SHA provides and the private care home services Goshen is permitted to provide under its license.

III. Deadline for Serving and Filing Response

The SHA seeks an extension of the time provided under Rule 119(1) of the Rules to file its response to the Leave Application. The evidence advanced by Goshen is based on speculative opinions and is factually misleading. The spirit of the Act requires that the SHA have a full opportunity to speak to the allegations made against them. Extensions of time are neither unreasonable nor unprecedented, as extensions of this nature were granted in *CarGurus*¹⁷, *JAMP*, and *Audatex*.

In *CarGurus*, responding representations were filed 69 days after the initial application was filed (April 15 – June 23, 2016). In *JAMP*, responding representations were filed 45 days after the initial application (July 26 – September 6, 2024). In *Audatex*, responding representations were filed 39 days after the initial application (October 1 – November 9, 2015).

The SHA's affiant, its Executive Director of Continuing Care - Integrated Regina Health for SHA, is away on pre-booked holidays until October 28, 2024. The affiant was involved in the dealings between the parties, and her unique and exclusive perspectives are critical to the ability of the SHA to prepare its responding materials.¹⁸

Additionally, due to the volume of the materials filed by Goshen in this Proceeding, including the 479-page Affidavit of Mrs. Onasanya and its 42 exhibits, the SHA requires additional time to prepare its responding materials.

We thank the Tribunal for considering the above and would be pleased to address any questions it may have in writing or at a case conference.

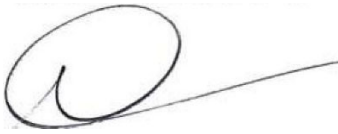
¹⁷ *CarGurus, Inc v Trader Corporation*, 2016 Comp. Trib. 12 [*"CarGurus"*].

¹⁸ *JAMP*, *supra* note 5 at para 53.



Yours truly,

MILLER THOMSON LLP

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line extending to the right.

Eric Dufour

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