Competition Tribunal Tribunal de la Concurrence

Reference: *CarGurus, Inc v Trader Corporation,* 2016 Comp. Trib. 15
File No.: CT-2016-003
Registry Document No.: 41

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 Reasons for Order and Order: October 14, 2016

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE

I. OVERVIEW

[1] On April 15, 2016, CarGurus, Inc. ("**CarGurus**") applied to the Competition Tribunal, pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34 (the "**Act**"), for leave to bring an application under sections 75, 76 and 77 of the Act dealing respectively with refusal to deal, price maintenance and exclusive dealing. If leave is granted, CarGurus seeks an order directing Trader Corporation ("**Trader**") to accept CarGurus as a customer and to supply certain vehicle listings data to it on standard trade terms, and prohibiting Trader from continuing to engage in the practices forming the basis of CarGurus' application.

[2] On May 4, 2016, Trader submitted a request by letter for leave to file affidavit evidence as part of its representations in writing in response (the "**Response**") to CarGurus' application for leave. On June 9, 2016, the Tribunal partially granted Trader's request to file certain affidavit evidence as part of its Response. On June 23, 2016, Trader filed its Response and CarGurus subsequently filed its reply (the "**Reply**") on June 30, 2016.

[3] In support of its application for leave, CarGurus submitted an affidavit sworn on April 14, 2016 by Ms. Martha Blue, the Senior Vice-President Business Development for CarGurus (the "**Blue Affidavit**"). As an exhibit attached to the Blue Affidavit, CarGurus submitted another affidavit of Ms. Blue sworn on March 3, 2016 (the "**Blue Copyright Affidavit**") which had been filed in the context of an on-going copyright litigation between CarGurus and Trader before the Ontario Superior Court of Justice (the "**Copyright Proceeding**").

[4] In its Response, Trader submitted an affidavit sworn on June 23, 2016 by Mr. Roger Dunbar, Vice President of Marketing for Trader (the "**Dunbar Affidavit**"). Trader also relied on several affidavits filed in the Copyright Proceeding, and which were included by CarGurus as attachments to the Blue Affidavit, notably an affidavit of Mr. Dunbar sworn December 22, 2015 (the "**Dunbar Copyright Affidavit**").

[5] Pursuant to subsections 103.1(1) and (6) of the Act, the Tribunal has relied on these affidavits and the written representations of the parties in deciding this application for leave.

[6] CarGurus claims that it has provided sufficient credible evidence to satisfy the Tribunal that there is a reasonable possibility that its business is directly and substantially affected by Trader's practices, and that such practices could be the subject of an order under either section 75, 76 or 77 of the Act. Trader opposes CarGurus' application for leave and seeks an order denying it, with costs. Trader argues that CarGurus has failed to provide sufficient credible evidence for each of the requirements set out in sections 75, 76 or 77 as well as subsections 103.1(7) and 103.1(7.1) of the Act.

[7] For the reasons that follow, I am not satisfied that CarGurus has met its burden under subsection 103.1(7) to apply for relief under the refusal to deal and exclusive dealing provisions

of the Act, nor under subsection 103.1(7.1) with respect to the relief sought under the price maintenance provision.[1]

II. BACKGROUND

A. THE PARTIES

a. CarGurus

[8] CarGurus owns and operates websites that enable potential purchasers of automobiles to research and compare vehicle listings for used and new automobiles within a geographic area, and to contact the sellers of those vehicles. In the context of this application, CarGurus refers to such websites as "**Digital Marketplaces**". CarGurus launched its website in the United States (known as cargurus.com) in 2007 and announced the launch of its Canadian website (i.e., cargurus.ca) on May 26, 2015.

[9] CarGurus asserts that it provides its vehicle listings services to dealers for free and operates on a lower-cost subscription model. It generates the leads to dealers and then follows up with those dealers to offer them additional services. CarGurus argues that it is this low-cost offering that has made it a very successful competitor in the United States.

b. Trader

[10] Trader operates a Digital Marketplace for vehicles in Canada and also offers other related services. Through its websites autotrader.ca and autohebdo.net, Trader advertises an inventory of new and used vehicles for sale in Canada. It sources its inventory of vehicle listings from private sellers and vehicle dealers. It does not buy or sell vehicles, but acts as an intermediary between buyers and sellers.

[11] In addition to offering its listing services, Trader also offers "capture services". If a dealer subscribes to Trader's capture service, Trader has one of its employees, or a contractor who has assigned his or her intellectual property rights to Trader, visit the dealership, consult with and gather information from the dealer and take photographs of the vehicles. The Trader representative then organizes this vehicle information and photographs and uploads all this data for display on one or more of Trader's and the dealer's websites (the "**Trader Vehicle Listings**").

[12] Trader makes its Trader Vehicle Listings available to other competing Digital Marketplaces through a licensing process known in the industry as a "**Syndication Agreement**".

[13] Access to the supply of the Trader Vehicle Listings is the core issue raised by this application for leave filed by CarGurus.

---

[1] The Tribunal wishes to indicate that its decision was ready to be released in mid-September but that, further to Directions issued on September 14 and October 4, 2016, it had agreed to temporarily hold off releasing its decision in light of the parties' settlement discussions.

B. THE RELEVANT FACTS

a. The Industry

[14] CarGurus and Trader both carry on business in the online marketing of automobiles. They compete by offering Digital Marketplaces that allow consumers to search vehicle listings from automobile dealers and private sellers for new and used vehicles for sale. Consumers use the Digital Marketplaces to acquire information about vehicle availability, features and prices in the search and evaluation process leading to the purchase of a vehicle. However, although consumers conduct their search online, the actual purchase of vehicles still typically takes place when consumers visit the physical premises of automobile dealers or the private sellers.

[15] The vehicle listing information available on Digital Marketplaces normally includes, for each vehicle, the make, model, year, vehicle information number, mileage, price, photographs and other details. It is uncommon to market a vehicle without a photograph.

[16] Online marketing of vehicles involves the downstream market where Digital Marketplaces such as CarGurus and Trader offer their services as well as an upstream market for the supply of vehicle listing data (the "**Vehicle Listings**") used by those Digital Marketplaces to deliver their services. CarGurus describes Digital Marketplaces as a two-sided platform connecting sellers of vehicles and potential buyers of vehicles, where both sides benefit from the increase in the size of the group sitting on the opposite side of the platform.

[17] Vehicle Listings are commonly provided by original equipment manufacturers (i.e., the car manufacturers), automobile dealers, private sellers and Digital Marketplaces themselves. Entities known in the industry as feed providers (the "**Feed Providers**") also receive Vehicle Listings from dealers and provide data feeds of such Vehicle Listings to Digital Marketplaces.

[18] CarGurus, Trader and the other operators of Digital Marketplaces aggregate Vehicle Listings information from car manufacturers, automobile dealers and private sellers and make it accessible to consumers through search engines on their respective websites.

[19] CarGurus estimates that there are approximately 10 businesses in Canada operating Digital Marketplaces, including Trader. CarGurus further claims that Trader is the dominant supplier of Vehicle Listings to Digital Marketplaces. While CarGurus does not include Kijiji as a competitor in Digital Marketplaces, Kijiji represents itself as the largest automotive Digital Marketplace in Canada in its advertising materials.

[20] Given that consumers want to have access to comprehensive vehicle information when they are shopping for a vehicle, there is a direct correlation between Vehicle Listings, website traffic, specific inquiries from consumers to dealers about a vehicle (known as "leads" to dealers), and resulting revenues for the Digital Marketplaces. According to CarGurus, the ability to generate leads to dealers is the basis of its revenue model.

b. Relationship between CarGurus and Trader

[21] Trader claims that it owns copyright in the vehicle photographs that are included in its inventory of Vehicle Listings and more specifically in the Trader Vehicle Listings.

[22] In May 2015, Trader found that its vehicle photographs contained in the Trader Vehicle Listings appeared on CarGurus' website and advised CarGurus that it held the copyright on these photographs. In July 2015, Trader sent CarGurus a draft Syndication Agreement relating to the potential future supply of the Trader Vehicle Listings to CarGurus. CarGurus did not accept the terms of the Syndication Agreement proposed by Trader, as CarGurus claims that a number of its provisions would have prevented it from effectively competing with Trader in the Canadian marketplace.

[23] There were no further communications between the parties between July and December 2015.

[24] In December 2015, Trader commenced the Copyright Proceeding seeking declarations that CarGurus had infringed Trader's copyright in relation to some 217,856 photographs added to a website administered by Trader, as well as statutory damages in respect of those infringements.

[25] On December 8, 2015, CarGurus removed over 1 million photographs from its website for Vehicle Listings that were not obtained from Feed Providers.

[26] The litigation between CarGurus and Trader remains pending and the central issue to be determined in that contested Copyright Proceeding is whether the vehicle photographs contained in the Trader Vehicle Listings do actually enjoy copyright protection.

C. THE PARTIES' ARGUMENTS

a. CarGurus

[27] In its application for leave, CarGurus argues that Trader is engaged in the following anticompetitive conduct in order to exclude or impede CarGurus' expansion in the downstream market for Digital Marketplaces in Canada (the "**Trader Conduct**"):

- Trader discriminates against CarGurus in respect of the Trader Vehicle Listings that Trader administers by refusing to syndicate those vehicle listings on the usual trade terms made available to other Digital Marketplaces;

- Trader refuses to syndicate to CarGurus Vehicle Listings from dealers who request that Trader does so;

- Trader instructs third parties not to syndicate to CarGurus by threatening to otherwise cut off its syndication to these third parties; and

- Trader improperly asserts copyright and has commenced litigation over thousands of non-copyrightable photographs, in an attempt to litigate CarGurus out of the market for Digital Marketplaces.

[28] On this final point, CarGurus adds that, even if Trader's copyright assertions are upheld, Trader's refusal to supply its copyrighted photographs is also violating the Act since such a refusal is more than a mere exercise of copyright because of its cumulative effect on Trader's market power in the provision of Digital Marketplaces.

[29] CarGurus contends that as a result of the Trader Conduct, it has been directly and substantially affected in its business through a significant decrease in leads generated for dealers, a reduced conversion rate (i.e., the percentage of visitors to the CarGurus website who contacted at least one dealer about a car for sale) and a drop in detailed views of CarGurus pages leading to a corresponding drop in advertising revenue. CarGurus estimates that the Trader Conduct has reduced CarGurus' revenue by 39% or $75,000 USD to date and that its forgone revenue through the end of 2017 is expected to be $3.7 million USD.

[30] CarGurus further argues that the Trader Conduct could be the subject of an order by the Tribunal under each of sections 75, 76 and 77 of the Act.

i. Section 75

[31] CarGurus first asserts that the five elements of section 75 on refusals to deal have been met in the following manner:

- CarGurus is substantially affected in its business and precluded from carrying on business due to its inability to obtain the Trader Vehicle Listings for inclusion on its website on usual trade terms (through a Syndication Agreement);

- CarGurus is unable to obtain adequate supply of Vehicle Listings because the Trader Vehicle Listings are in Trader's sole control and Trader controls at least 42.5% of all Vehicle Listings supplied in Canada;

- CarGurus is willing to meet the usual trade terms of Trader for the syndication of the Trader Vehicle Listings through a commercially reasonable agreement based on Trader's standard trade terms with other Digital Marketplaces;

- Vehicle Listings, and more specifically the Trader Vehicle Listings, are not in limited supply and are regularly supplied by Trader to Digital Marketplaces as a matter of course; and,

- Trader's refusal to deal is having an adverse effect on competition in the downstream market for Digital Marketplaces as Trader Conduct denies the expansion of CarGurus' innovative, consumer-focused website in the market.

ii. Section 76

[32] Turning to section 76 on price maintenance, CarGurus argues that the Trader Conduct could be caught under paragraph 76(3)(a) since Trader is engaged in the business of supplying a "product" (i.e., Vehicle Listings). Additionally, CarGurus pleads that if it is accepted that Trader holds copyright in the photographs appearing in the Trader Vehicle Listings, the Trader Conduct could also be caught under paragraph 76(3)(c) as Trader would have the exclusive rights and privileges conferred by the copyright.

[33] CarGurus contends that Trader Conduct breaches subparagraph 76(1)(a)(ii) since Trader has refused to supply the Trader Vehicle Listings to CarGurus in an attempt to keep CarGurus from competing in the downstream market for Digital Marketplaces. CarGurus alleges that Trader is doing so because of CarGurus' low pricing policy for various services, including the "Instant Market Value" produced by CarGurus' mathematical algorithms, and other innovative features.

[34] Furthermore, CarGurus argues that the Trader Conduct also falls within subparagraph 76(1)(a)(ii) because it has "otherwise discriminated" against CarGurus by denying it access to the Trader Vehicle Listings and by refusing to deal with it on the standard trade terms granted by Trader to other Digital Marketplaces.

[35] CarGurus also alleges that Trader has induced Dealer Dot Com ("**DDC**") and other Feed Providers not to syndicate the Trader Vehicle Listings to CarGurus as a condition of doing business with Trader, thus also contravening subsection 76(8) of the Act.

[36] Finally, CarGurus submits that the Trader Conduct has impeded its entry and expansion into the downstream market for Digital Marketplaces in Canada, thereby resulting, or likely to result, in a substantial lessening or prevention of competition.

iii. Section 77

[37] With respect to section 77 on exclusive dealing, CarGurus argues that, as a threshold element, Trader is a "major supplier" of Vehicle Listings in Canada since it is the sole supplier of the Trader Vehicle Listings. It also claims that the exclusivity provisions found in Trader's agreements with dealers and Feed Providers preclude those dealers and other Feed Providers from syndicating their inventory of Vehicle Listings to CarGurus without Trader's consent – which Trader refuses to grant.

[38] CarGurus submits that, as a consequence, Trader's exclusive dealing has impeded CarGurus' entry and expansion in the downstream market for Digital Marketplaces in Canada. It claims that this has resulted, and is likely to result, in a substantial lessening of competition in the market.

b. Trader

[39] Trader opposes CarGurus' application for leave. It argues that CarGurus has failed to provide sufficient credible evidence to give rise to a *bona fide* belief that it has been directly and

substantially affected in its business by Trader's actions, or that Trader has engaged in conduct that could be subject to an order under sections 75, 76 or 77 of the Act.

i. Section 75

[40] Regarding refusal to deal, Trader submits that, in evaluating paragraph 75(1)(a), it is proper to query whether the applicant has "other options in terms of supply" and argues that where the applicant has access to an alternative source of supply which the applicant chooses not to pursue, it cannot be said that insufficient competition among suppliers is the "overriding reason" for the refusal. In terms of alternative source of supply, Trader argues that CarGurus can obtain Vehicle Listings from other Feed Providers and/or generate its own content (including photographs). By way of example, it refers to Kijiji as a company that has competed and grown by obtaining Vehicle Listings information from other Feed Providers. It also argues that there is no impediment to CarGurus replicating Trader's capture services.

[41] Trader also notes that CarGurus has experienced exponential growth even after Trader asserted its copyright on photographs and launched its Copyright Proceeding.

[42] Trader interprets paragraph 75(1)(b) to require that an applicant's inability to "obtain adequate supplies of the product" be causally linked to the "insufficient competition among suppliers of the product in the market". It argues that this provision requires the "insufficient competition among suppliers" be the "overriding reason" why the applicant is unable to obtain adequate supplies of the product. Trader further cites *B-Filer Inc v Bank of Nova Scotia*, 2006 Comp Trib 42 ("***B-Filer***") as stating that "any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason" that explains the respondent's conduct. In this regard, Trader submits CarGurus' blatant infringement of Trader's copyright is its objectively justifiable business reason.

[43] With respect to the criteria under paragraph 75(1)(c), Trader argues that it is customary for Trader and a potential syndication partner to negotiate the terms of their syndication agreement. It emphasized that it is willing to syndicate its copyright content to other competing Digital Marketplaces and does so regularly. It submits that, by choosing copyright infringement over negotiation, CarGurus is not willing to meet Trader's usual and customary trade terms.

[44] Trader relies on the Tribunal's decision in *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26 ("***Stargrove***") in support for its position that relief under paragraph 75(1)(d) is simply not available to CarGurus as the impugned conduct involves the refusal to grant a licence over copyrighted materials.

[45] Trader finally argues that CarGurus has failed to provide sufficient credible evidence that the alleged Trader Conduct is likely to have an adverse effect on competition, as required by paragraph 75(1)(e). It submits that the relevant market is (at its narrowest) the downstream market for Digital Marketplaces, which includes numerous websites such as Kijiji, eBay Motors U.S, Edmunds, Canadian Black Book, Cars.com, Wheels.ca, Auto123.com and AutoExpert. It notes that Trader and CarGurus are but two of many competitors in this market.

ii. Section 76

[46] With respect to price maintenance, Trader argues that CarGurus has failed to meet its burden under both subsections 76(1) and 76(8) of the Act.

[47] Trader submits that, given the decision in *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("***Visa***"), subsection 76(1) requires a "resale" of a product that is "identical or substantially similar" to the product for which price is being allegedly maintained. In this regard, it pleads that CarGurus will oftentimes alter the Trader content before repackaging it and that section 76 does not cover the supply of an "input product".

[48] Trader adds that CarGurus has not presented any evidence beyond bald, unsubstantiated allegations that Trader has induced any supplier to refuse supply to CarGurus as required by subsection 76(8).

[49] With respect to CarGurus' argument that Trader had "otherwise discriminated" against it, Trader notes that the *Stargrove* decision interpreted that phrase to mean "treating a person differently than another without proper justification". Trader claims that it has not treated CarGurus any differently than any other competitor since it provided CarGurus with their standard form of Syndication Agreement and was anticipating a negotiation. To the extent it has treated CarGurus differently, it is solely because CarGurus had "scraped" Trader's copyrighted content.

[50] Trader also contends that CarGurus' application presents no evidence demonstrating that Trader has been motivated by a low pricing policy of CarGurus. Additionally, it denies being motivated by any alleged low pricing policy since it believes that CarGurus' price structure is simply different and not actually "low cost" as compared to Trader's model.

iii. Section 77

[51] With respect to exclusive dealing, Trader argues that CarGurus has failed to provide evidence to support a claim under either paragraph (a) or (b) to the statutory definition of "exclusive dealing" contained in subsection 77(1) of the Act.

[52] Trader asserts that it does not have exclusive control over Vehicle Listings and that many of its customers (i.e., automobile dealers) list their vehicles with Trader as well as with other Digital Marketplaces. Trader does not require dealers to deal exclusively or primarily with it. Furthermore, Trader does not preclude CarGurus from developing its own equivalent to Trader's data feed information in partnership with dealers.

[53] Trader submits that CarGurus' application contains no evidence, and provides no reasonable inference to suggest, that Trader has induced dealers to meet exclusivity conditions by offering to supply information on more favourable terms or conditions as a result. It argues that there is no evidence that dealers receive a financial benefit in return for dealing exclusively with Trader.

[54] Similar to its argument under section 75, Trader also submits that relief under section 77 is simply not available where the alleged exclusivity pertains to a refusal to licence intellectual property.

[55] Regarding the issue of the direct and substantial impact on CarGurus' business, Trader submits that CarGurus has not raised more than a mere speculation that its business has been substantially affected and has based its analysis on its own non-certified projections of revenue without providing a basis for those projections and whether they were commercially reasonable. It also claims that the measurements relied on by CarGurus assumes that they would be infringing Trader's copyright as a baseline.

[56] Finally, Trader submits that should the Tribunal find that CarGurus has met the leave requirements, the Tribunal should nonetheless decline to exercise its discretion to grant leave. In this regard, it argues that it is not commercially reasonable for CarGurus' infringement of Trader's copyright to be rewarded by an order of the Tribunal that would be tantamount to a compulsory licence.

III. ANALYSIS

A. The Leave Test

[57] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 and 77 of the Act, whereas subsection 103.1(7.1) does the same for section 76 of the Act. They read 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.
103.1(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.	**103.1(7.1)** Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu de l'article 76 s'il a des raisons de croire que l'auteur de la demande est directement gêné en raison d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu du même article

[58] Subsection 103.1(7) provides that leave may be granted under sections 75 or 77 if the Tribunal "has reason to believe that an 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". Subsection 103.1(7.1) is similar but does not include the word "substantially".

[59] The approach to the granting of leave for relief under section 75 was recently set out in detail in *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 ("***Audatex***") at paras 42-47. The Tribunal also summarized that approach in *Stargrove* at paras 17-21, in respect of an application relating to sections 75, 76 and 77. I adopt these principles for the purpose of this application for leave.

[60] As indicated in those decisions, 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 substantially in the case of sections 75 and 77) affected in its business by the alleged practice, and that the alleged practice could be subject to an order. While the Tribunal's role at the leave stage is to perform a screening function and the evidence is assessed on a standard that is less than the balance of probabilities, the evidence must nonetheless show more than a mere possibility that the business may be directly and substantially affected (*Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 ("***Barcode FCA***") at para 19).

[61] With respect to the first part of the test under subsection 103.1(7) (i.e., being "directly and substantially affected"), it is worth citing the *Audatex* decision at para 45:

> For the "substantial" component, terms such as "important" are acceptable synonyms to considering whether there has been a "substantial" impact, which is ultimately assessed by reviewing the circumstances at issue (*Canada (Director of Investigation and Research) v Chrysler Canada Ltd* (1989), 27 CPR (3d) 1 (Comp. Trib.), aff'd 38 CPR (3d) 25 (FCA) at para 64). In the *Nadeau* decision on the merits, Mr. Justice Blanchard specified that "the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on its business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way" (*Nadeau Poultry Farm Limited v Groupe Westco Inc et al,* 2009 Comp. Trib. 6 ("*Nadeau Final Order*") at para 131, aff'd 2011 FCA 188).

[62] Turning to the second part of the test (whether the conduct "could be the object of an order"), all the elements of the practice must be addressed (*Barcode FCA* at para 19) and the Tribunal must be satisfied that "each of the elements set out in subsection 75(1) could be met when the application is heard on the merits" (*B-Filer Inc v The Bank of Nova Scotia,* 2005 Comp Trib 38 ("***B-Filer Leave***") at para 53). At the leave stage, it is understood that the question of whether the reviewable conduct "could" be subject to an order is being considered in an application which is not supported by a full evidentiary record (*The Used Car Dealers Association of Ontario v Insurance Bureau of Canada,* 2011 Comp Trib 10 ("***Used Car Dealers***") at para 32).

[63] Since the current application for leave filed by CarGurus relates not only to section 75 but also to section 76 on price maintenance and section 77 on exclusive dealing, I would simply add that the specific evidence which could be justified under these two other provisions similarly has to focus on the particular elements to be determined by the Tribunal under these restrictive trade practices. The approach under those provisions remains guided by the principles established in *Audatex* and *B-Filer Leave*.

B. CarGurus' Application under Sections 75 and 77

[64] For the reasons that follow, I am not satisfied that CarGurus has met its burden for leave to apply for relief under either section 75 or section 77, as it has not demonstrated that there is reason to believe that it has met the first part of the leave test, namely, that it has been or could be substantially affected in its business by the Trader Conduct. I instead find that CarGurus has failed to submit sufficient, non-speculative and cogent evidence to give me reasonable grounds to believe that the impact of the Trader Conduct on its business could reasonably be considered to constitute a "substantial" effect.

[65] It is well-established that the business to be considered on a leave application pursuant to section 75 of the Act is the entire business of the applicant, not simply the product line affected by the refusal to supply (*Sears Canada Inc v Parfums Christian Dior Canada Inc*, 2007 Comp Trib 6 at para 21). The substantiality of the effect must therefore be measured against that whole business. In addition, the case law developed by the Tribunal in applications for leave requires that the effect to be looked at and considered is the impact attributable or linked to those entities whose supply is being refused. Indeed, subsection 103.1(7) refers to the applicant being directly and substantially affected "by the practice".

[66] I have assumed, for the purpose of this decision, that CarGurus is "directly" affected in its business by the Trader Conduct.

a. CarGurus' Evidence on Substantiality

[67] CarGurus' argument relating to this first part of the leave test is found at paragraphs 84 to 93 of its Memorandum of Fact and Law and at paragraph 27 of its Reply Memorandum. The evidence in support of that argument is set forth at paragraphs 46 to 54 of the Blue Affidavit and at paragraphs 120 to 124 of the Blue Copyright Affidavit.

[68] CarGurus submits that the removal of the Trader photographs and its inability to display the Trader Vehicle Listings has led to less traffic and is generating less leads to dealers, which has negatively affected its revenue realization. It submits that it is substantially affected in the following manner:

- The number of multiple leads CarGurus can generate for dealers has diminished significantly;
- CarGurus has lost 60% of leads for dealers whose Vehicle Listings are related to Trader;
- CarGurus has lost approximately 25% of its overall lead volume;

- CarGurus' conversion rate (i.e., the percentage of visitors to the CarGurus website who contacted at least one dealer about a car for sale) has decreased by 16%; and

- Detailed views of CarGurus' pages have dropped by 31%, leading to a corresponding 31% drop in advertising revenue.

[69] CarGurus estimates that, further to those reduced leads, conversion rates and page views, the Trader Conduct has reduced CarGurus' revenues by $75,000 USD or 39% up to the end of March 2016, and that its forgone revenues through the end of 2017 are expected to be $3.7 million USD.

[70] It appears that CarGurus assumes a direct (and linear) correlation between the lead volume, number of leads generated by CarGurus' website, the page views and its revenue realization generated through these indicators.

b. Shortcomings of CarGurus' Evidence

[71] There are five major problems with the evidence of substantial effect provided by CarGurus.

[72] First, there is no reliable evidence on the proportion of CarGurus' total inventory of Vehicle Listings which is represented by the Trader Vehicle Listings that were deleted from CarGurus' website and that Trader allegedly refuses to supply.

[73] The Blue Affidavit (at paragraphs 33, 34, 49 and 56) and the Blue Copyright Affidavit (at paragraphs 67 and 71) refer to Trader as being dominant and having a 42.5 % market share, but there is no clear explanation of how this figure is arrived at and what it actually represents.

[74] A review of the record leads the Tribunal to conclude that the 42.5% figure represents Trader's estimated market share in the downstream market where Digital Marketplaces offer their services. It appears that, in its assessment of the substantial effect attributed to the Trader Conduct, CarGurus assumes that this 42.5% market share of Trader in the downstream market can be used as a proxy for Trader's market share in the supply of Vehicle Listings in the upstream market. However, there is no evidence on the overall supply of Vehicle Listings which would allow the Tribunal to verify whether this assumption can be supported, or on the proportion of the overall supply of Vehicle Listings in the online marketing of automobile business that is accounted for by Trader. Nor is there evidence of the proportion of Vehicle Listings supplied to CarGurus that was actually accounted for by Trader and its Trader Vehicle Listings.

[75] In other words, the Blue Affidavit does not provide information on the actual supply of Vehicle Listings lost by CarGurus further to Trader's refusal to supply the Trader Vehicle Listings, or on the proportion of CarGurus' total inventory of vehicle listings data represented by Trader. The Blue Affidavit only states that Trader has a dominant 42.5% market share. The Blue Affidavit does not describe the volume of Trader Vehicle Listings that is available or that was supplied by Trader (before CarGurus decided to delete the Trader photographs from its website).

[76] I appreciate that there will inevitably be incomplete information on some topics at the application for leave stage (*Used Car Dealers* at para 32). However, sufficient and credible information on the magnitude of the supply of the product at stake and on the proportion represented by the supplier refusing to supply are fundamental and basic elements needed by the Tribunal in order to be able to make a determination on whether the evidence provides the basis for the Tribunal to form a *bona fide* belief of a direct and substantial effect pursuant to subsection 103.1(7) of the Act (*Audatex* at para 68). As indicated in *Audatex*, this type of evidence was typically available to the Tribunal in those cases where it decided to grant an application for leave under section 103.1 of the Act. In *Nadeau Poultry Farm Limited v Groupe Westco Inc et al,* 2008 Comp Trib 7 ("***Nadeau Leave Order***") for example, the evidence of substantial effect was found sufficient by the Tribunal, as the applicant had provided figures showing that the exact supply held by the respondents represented 48% of the overall chicken processing business of Nadeau. This allowed the Tribunal to have a reliable measure of the impact of the intended cut-off in supply, which had not yet occurred in that case.

[77] In the current case, the evidence does not clearly indicate to the Tribunal the proportion of the supply represented by Trader in CarGurus' business, or in the upstream market as a whole. As indicated, the principal evidence adduced on this point is with respect to the market share that Trader allegedly represents in the downstream market for Digital Marketplaces where Trader and CarGurus compete.

[78] I pause to underline that even the 42.5% market share figure used by CarGurus raises significant concerns, as it appears to be based on a market estimate in which the competitor Kijiji has not been taken into account. Yet, the evidence on the record suggests that Kijiji may be, by far, the largest player in the Digital Marketplaces in Canada. According to CarGurus' own data contained in Exhibit 10 to the Blue Affidavit, Kijiji appears to be the most significant player in the supply of online automotive listings, being 2.5 times as large as Trader in terms of total unique visitors and even much larger if indicators such as total views or total visits are used. Other evidence indicates that Kijiji describes itself as the largest supplier of Vehicle Listings in Canada. Neither the Blue Affidavit nor the Blue Copyright Affidavit provides a satisfactory explanation for excluding that entity from CarGurus' market share estimate. If Kijiji were included in the downstream market for Digital Marketplaces, Trader's estimated market share of 42.5% would drop, by at least half. It remains puzzling to the Tribunal how Kijiji could have been entirely excluded from CarGurus' market share calculations and estimates without a more detailed explanation on its reasons for doing so.

[79] The <u>second</u> problem with CarGurus' evidence relates to the actual and expected "reduced revenues" identified by CarGurus, which do not represent an actual drop in existing or anticipated revenues of CarGurus. CarGurus is a new entrant in the Digital Marketplace business in Canada and its evidence on reduced revenues essentially reflects reductions compared to business *projections* it had initially made for its emerging business.

[80] The only financial evidence provided by CarGurus is found at Exhibit 11 of the Blue Affidavit. Exhibit 11 does not contain actual profit and loss statements but rather reproduces two different sets of monthly projections of revenues. Exhibit 11 first provides the original "Canada 2015-2017" monthly projections of revenues of CarGurus established in December 2015 and covering the period until December 2017 (the "**Initial Projections**"). It also includes revised

monthly projections made in April 2016, covering the same time period and allegedly reflecting the impact of the refusal to supply of the Trader Vehicle Listings (the "**Revised Projections**"). Finally, Exhibit 11 provides the actual revenues generated by CarGurus' Digital Marketplaces business for a period of six months, up to the month of March 2016.

[81] The $75,000 USD reduction in actual revenues as of March 2016 and the estimated anticipated loss of $3.7 million USD up to end of 2017 reflect the difference between actual and projected revenues, or between the two sets of projections made by CarGurus. These are not actual or real reductions in revenues. The reduced revenues claimed by CarGurus to be evidence of "substantial effect" on its business essentially portray projections which are not of the same magnitude as what was initially contemplated and expected.

[82] I further note that no support was provided to the Tribunal by CarGurus for these projections of anticipated sales. Indeed, neither Exhibit 11 nor the rest of the Blue Affidavit offer background or explanation on how CarGurus' projections were established, the basis for these projections and how the supply of Vehicle Listings by Trader was factored into these projections.

[83] I agree with CarGurus that it is only required to provide "sufficient credible evidence" to satisfy the Tribunal that there is a reasonable possibility that its business may be directly and substantially affected by a refusal to deal. I am also mindful of the fact that CarGurus does not have to wait until harm actually occurs before bringing an application under subsection 103.1 of the Act (*Nadeau Leave Order* at para 25). But sufficient, cogent evidence is needed, even for anticipated harm. Relying on projections to establish a substantial impact on a business under subsection 103.1(7) still requires support in the form of clear and convincing evidence, which CarGurus has not provided. A party relying on projections has the onus to at least provide a basis for those projections.

[84] This case is quite different from the situation in *Nadeau Leave Order* where the evidence of substantial effect was found sufficient by the Tribunal. In *Nadeau Leave Order*, supply had not yet ceased, but there was nonetheless sufficient and measurable evidence of the anticipated effects of the refusal. Nadeau had provided figures showing the exact supply held by the respondents, as well as solid financial evidence of the proportion of Nadeau's supply actually represented by the suppliers of chicken who intended to terminate supply. This allowed the Tribunal to find reliable evidence regarding the substantiality of the upcoming refusal on Nadeau's business.

[85] This type of evidence has not been offered by CarGurus in this case.

[86] In *Mrs. O's Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24("***Mrs. O's Pharmacy***"), the Tribunal indicated that simple projections and forecasts are not enough to constitute convincing and credible evidence of substantial effect on an applicant's business. Similarly, CarGurus has not provided hard data on the supply of Vehicle Listings actually accounted for by Trader in the upstream market, nor any hard data on its own lost sales or reduced revenues, save for Exhibit 11 to the Blue Affidavit.

[87] It bears underscoring that, at the leave application stage, there must be credible evidence to give the Tribunal a reason to believe that a causal relationship exists between the action of the

supplier and the business consequences for the applicant. When only unsupported projections or forecasts are used, causality becomes speculative as several factors could have an impact on the growth a new business (*Mrs. O's Pharmacy* at para 25). I find that the "projections" evidence adduced by CarGurus only amounts to a mere possibility of substantial effect and is speculative. In a situation like this where the contemplated detrimental effect of the Trader Conduct is through a series of projections for which the assumptions are unknown, I am not satisfied that CarGurus' evidence can be considered as sufficient.

[88] The <u>third</u> problem with CarGurus' evidence of substantial effect is that it is alleged to be occurring or to be likely to occur in a context in which CarGurus expects and forecasts its revenues to continuously *increase* until the end of December 2017. As a practical matter, this renders more difficult the Tribunal's assessment of the alleged substantial adverse effects.

[89] Whether one looks at the Initial Projections or at the Revised Projections contained in Exhibit 11 to the Blue Affidavit, CarGurus' revenues are projected to increase steadily, every single month, until December 2017. This is true even for the Revised Projections of revenues where the alleged refusal to supply the Trader Vehicle Listings and more generally the Trader Conduct are taken into account. The evidence provided by CarGurus indicates that, under the Initial Projections, monthly revenues were expected to increase from $22,000 in December 2015 to $301,000 in December 2016, and then to $762,000 in December 2017. The Revised Projections represent 50% to 60% of the initial forecast, but CarGurus' revenues are nonetheless projected to increase to $192,000 in December 2016, and to $392,000 in December 2017. Even under those projections which allegedly reflect the impact of the refusal to supply the Trader Vehicle Listings, the revenues generated by CarGurus' Digital Marketplace business are expected to increase every single month throughout the period, though at a slower pace than the initial December 2015 forecast.

[90] I appreciate that it is of course more difficult to demonstrate that a refusal to supply or other practice substantially affects a business when the applicant has not been historically supplied by the respondent. But some credible basis for assertions in this regard must nevertheless be provided. I underline that this is not a situation where supported projections of increased revenues did not eventually materialize because of a refusal to supply. CarGurus' case is about revised projections which have not yet been confirmed and have not yet happened.

[91] I agree with CarGurus and acknowledge that, in its assessment of the substantial effect, the Tribunal is essentially conducting a "but for" analysis. As the Tribunal recently elaborated in detail in *The Commissioner of Competition v The Toronto Real Estate Board,* 2016 Comp Trib 7 ("***TREB***") at paras 477-483, a "but for" approach involves comparing a situation in the presence of the impugned conduct with a scenario that likely would have prevailed in the absence of such conduct. Therefore, the fact that CarGurus has or would have managed to increase revenues despite the Trader Conduct, or is projecting increasing revenues, does not, in and of itself, act as a bar to CarGurus' case. However, even using a "but for" approach, I am not convinced that there is sufficient credible evidence to conclude that a "substantial effect" exists in this case.

[92] The test is not simply whether CarGurus' business would have substantially grown but for the Trader Conduct. The Tribunal must also determine whether the reduced projections attributable to the Trader Conduct are enough to conclude that CarGurus' business could be

negatively affected in an important or significant way. Given the uncertainty about those projections and the lack of support on their basis, and in light of expected increased revenues, I am not persuaded that there is non-speculative evidence supporting such a finding. I am not convinced that CarGurus' evidence showing projections of continuing increasing revenues for a new entrant in the business, despite the refusal to deal or exclusive dealing being complained of, gives rise to a reasonable belief that it is substantially affected in its business.

[93] The fourth problem with CarGurus' evidence of substantial effect relates to the actual revenues posted by CarGurus since it entered the Digital Marketplace business in Canada. The limited data provided by CarGurus does not show an adverse effect caused by the Trader Conduct so far.

[94] While CarGurus claims in the Blue Affidavit that the 31% drop in detailed page views in December 2015 attributable to the loss of the Trader photographs corresponds to a 31 % decrease in advertising revenues, this is not what the actual revenues reported by CarGurus show. Quite the contrary.

[95] There was instead an *increase* in advertising revenues in the months following the termination of the supply of the Trader Vehicle Listings. Exhibit 11 to the Blue Affidavit indicates that CarGurus' monthly revenues coming from the dealer subscription revenues in fact grew from $2,602 in October 2015 to $10,471 in December 2015, and up to $43,895 in March 2016. It is also striking to note that those revenues have increased in each of January, February and March 2016 compared to the previous month, and that they were four times as large in March 2016 as they were in December 2015.

[96] In addition to Exhibit 11 to the Blue Affidavit, other evidence provided by CarGurus also suggests that, even after Trader's refusal to supply in December 2015, CarGurus' monthly revenues have continued to increase. The Blue Affidavit reports that CarGurus' monthly advertising revenues have increased from $16,000 in December 2015 to $80,000 in March 2016, despite the Trader Conduct. In the same four-month period, the number of Canadian dealers with advertising packages with CarGurus increased from 39 to 137, and the average amount paid by dealers went from $400/month to $500/month.

[97] So, the actual revenues show continuous growth over the first six months of CarGurus's entry in this new line of business.

[98] I acknowledge that this evidence is limited to only a few months, but this suggests that other sources of supply of Vehicle Listings have remained and will remain available to CarGurus from Feed Providers and other potential sources. It also illustrates that, even without the Trader Vehicle Listings, CarGurus continued to post growing revenues. This undermines CarGurus' assertion that it has been or is likely to be substantially affected in its business. Furthermore, even the financial projections revised in April 2016 that apparently factor in the Trader Conduct which is the subject of this leave application show continuous growth in sales and revenues, month after month, between now and the end of 2017.

[99] It may be that the Revised Projections are not as optimistic as the Initial Projections made prior to December 2015, but such expected growing revenues make it much more difficult for me

to form a *bona fide* belief that CarGurus' business is or may be being substantially affected by the Trader Conduct. As the financial evidence provided by CarGurus shows that actual revenues have been growing month after month since the inception of its business, and have continued to grow since the alleged refusal to deal and exclusive dealing practices are supposed to have affected its business, I am unable to find that the "substantially affected" requirement has been met.

[100] Finally, CarGurus claims that the difference between its Revised Projections and the Initial Projections reflects the impact of the Trader Conduct. The problem is that, when the limited evidence on CarGurus' actual revenues is looked at, it shows that the difference between the Initial Projections and the actual revenues posted until the end of March 2016 was of the same magnitude as the difference between the two sets of projections, even before the claimed effect of the Trader Conduct came into play. Looking at the November 2015 data reported by CarGurus (when CarGurus still enjoyed access to the Trader Vehicle Listings), actual revenues represented only 68% of CarGurus' Initial Projections, and that figure was 47% for the December 2015 revenues. It then stood at between 62% and 65% for the first three months of 2016. In other words, the gap between CarGurus' actual revenues and its Initial Projections is in the same range, before and after the Trader Conduct and the refusal to supply the Trader Vehicle Listings.

[101] This suggests that the differential (or claimed reduction in revenues) identified by CarGurus may well originate from inaccurate projections of its revenue stream rather than from a decrease attributable to the loss of the Trader Vehicle Listings. This evidence also undermines CarGurus' assertion that the drop in anticipated revenues (and the alleged substantial effect on CarGurus' business) could be attributed to the Trader Conduct. Stated otherwise, the difference between the actual revenues and the forecast appears to be independent from the supply of the Trader Vehicle Listings or absence thereof.

c. Conclusion regarding Sections 75 and 77

[102] In light of the foregoing, I am not persuaded that, when all the evidence adduced by CarGurus is considered, it constitutes sufficient credible evidence to allow the Tribunal to reasonably believe that CarGurus may be directly and substantially affected in its business by the Trader Conduct. It is not sufficient that the evidence shows a mere possibility that the business may be substantially affected. The standard of proof requires the "existence of reasonable grounds for a belief" (*National Capital News Canada v Milliken*, 2002 Comp Trib 41 at paras 9-10). A baldly asserted decrease in the anticipated growth of revenues, compared to an earlier unsupported projection, does not rise to the level of providing the basis for a *bona fide* belief of an actual or likely substantial effect in the assessment of applications for leave under subsection 103.1(7) (*Audatex* at paras 80-84).

[103] In addition, on the particular facts of this case, the fact that CarGurus' own projections show a continuous growth in its business notwithstanding its revised figures attributable to the Trader Conduct instead suggests that CarGurus expects to be able to find supplies of Vehicle Listings from sources other than Trader.

[104] This finding is fatal to CarGurus' application under both sections 75 and 77 and is dispositive of the leave application with respect to those two provisions of the Act. Since CarGurus has failed to meet the requirement of "directly and substantially affected in the applicant's business", it is not necessary to consider whether CarGurus has adduced sufficient evidence to meet the second part of the test for leave, namely whether each of the elements of subsection 75(1) or section 77 could be met and an order could be issued under the refusal to deal or exclusive dealing provisions.

C. CarGurus' Application under Section 76

[105] Turning to section 76 on price maintenance, subsection 103(7.1) governing applications for leave under that provision only requires that a party has been "directly affected" by the alleged reviewable conduct. For purposes of this application for leave, that requirement is clearly met.

[106] I must now turn to the second part of the leave test, which requires that I be satisfied that each of the elements of the price maintenance provision could be met. For the following reasons, I find that CarGurus has not made the case for leave to seek relief under section 76. In brief, I am not persuaded, based on the evidence before me, that all elements set out in section 76 could be met if the application is heard on the merits.

a. The Section 76 Elements

[107] The primary purpose of the price maintenance provisions contained in section 76 of the Act is to allow greater price competition among retailers/dealers by freeing them from pricing restraints which would otherwise be imposed by their suppliers. Section 76 sets out three distinct reviewable trade practices. The first is resale price maintenance (paragraph 76(1)(a)(i)). The second is refusal to supply because of a low pricing policy (paragraph 76(1)(a)(ii)). The third is inducing a supplier to refuse to supply because of a low pricing policy (subsection 76(8)). In all three cases, the conduct can only be subject to an order if it has had, is having or is likely to have, an "adverse effect" on competition in a market.

[108] CarGurus' application relates to the second and third trade practices covered by section 76. These each essentially contain five basic requirements. In order to constitute reviewable conduct, there needs to be: 1) a person engaged in the business of producing or supplying a product in Canada (or a person described in paragraphs 76(3)(b) or (c)); 2) a direct or indirect refusal to supply the product, or other discrimination, by such person; 3) a low pricing policy by the person being denied supply; 4) a refusal to supply or other discrimination which is motivated, at least primarily, by such low pricing policy; and 5) and an actual or likely adverse effect on competition in a market. In the case of subsection 76(8), there also needs to be an inducement to another supplier.

[109] Under the leave test, CarGurus carries the burden of demonstrating that each of these elements of the price maintenance practice could be met if the application were heard on the merits. The words "could be" connotes a probability, and not only a mere possibility (*Barcode Systems Inc v Symbol Technologies Canada ULC*, 2004 Comp Trib 1 ("***Barcode***") at para 13).

[110] I am not satisfied that CarGurus has met the threshold for leave under section 76 of the Act on at least three of the elements of section 76: the requirement that CarGurus has a low pricing policy, the requirement that the refusal to supply the Trader Vehicle Listings is due to CarGurus' low pricing policy, and the actual or likely adverse effect on competition in the downstream market for Digital Marketplaces where CarGurus compete.

b. The Low Pricing Policy

[111] First, I find that there is insufficient credible evidence of CarGurus' alleged low pricing policy and of CarGurus being a low-cost competitor.

[112] In order to support an application under section 76(1)(a)(ii) or 76(8), CarGurus must first provide evidence on its own low pricing policy. In this case, the evidence offered in that respect is limited, at best unclear and uncertain, and not convincing. CarGurus simply states in the Blue Affidavit and the Blue Copyright Affidavit that it offers its services either for free or for a lower cost than Trader. Surprisingly, no material evidence has been provided on the actual pricing offered by CarGurus, despite the fact that the existence of a low pricing policy is a key element of its application under section 76.

[113] Information regarding CarGurus' pricing is found in paragraphs 27 and 28 of the Blue Affidavit and at paragraphs 55 to 60 of the Blue Copyright Affidavit. At paragraph 27, Ms. Blue indicates that the amount charged by CarGurus varies based on the dealership size, the number the listings and the size of the market. In the following paragraph, Ms. Blue indicates that CarGurus had 39 customers and that their cost per month was "an average of $400".

[114] The low pricing policy contemplated by section 76 requires, at the very least, evidence of "low pricing" and of a "policy". Since subparagraph 76(1)(a)(ii) and subsection 76(8) refer to a "policy" rather than a "practice", I accept that an applicant's stated intent with respect to a future course of low pricing conduct may constitute a low pricing policy, even where that person has not yet engaged in the conduct. However, the "low pricing" element must be supported by evidence showing, for example, that an applicant's price is below a supplier's pricing suggestions, that it is less than the price the applicant charges for similar products elsewhere, or that it is lower than the price that other retailers typically charge for similar products. CarGurus has not provided such evidence.

[115] The only material evidence of pricing was in fact provided in the Dunbar Affidavit where Mr. Dunbar offered figures indicating that CarGurus' pricing was not lower than many of its competitors in the Digital Marketplaces business.

[116] This is a situation quite different from *Used Car Dealers* or *Stargrove* where the evidence provided clearly showed that the applicants in those cases were undoubtedly offering their respective products at a price lower than their competitors ($7 by listing in *Used Car Dealers*, and $5 per CD in the case of *Stargrove*).

[117] I am not persuaded that the evidence before me on the alleged low pricing policy of CarGurus constitutes sufficient credible evidence to allow the Tribunal to reasonably believe that CarGurus could meet this element of section 76 and that an order could be issued under that provision. It was CarGurus' burden to provide evidence on this element of section 76, and in fact

CarGurus was best positioned to demonstrate the existence of its own low pricing policy. It has failed to do so.

c. The Causation Element

[118] Second, I do not find that there is sufficient credible evidence that the alleged refusal by Trader to supply the Trader Vehicle Listings is due to or motivated by any low pricing on the part of CarGurus.

[119] Paragraph 76(1)(a)(ii) only applies to refusals to supply imposed "because of the low pricing policy" of a person or class of persons. There must therefore be a causal connection between the low pricing policy and the refusal to supply or the discrimination. Historically, in decisions issued under the former criminal price maintenance provision contained in the old section 61 of the Act, Courts have held that the sole and effective reason for the refusal to supply had to be the retailer's low pricing policy (*R v Griffith Saddlery & Leather Ltd.* (1986), 14 CPR (3d) 389 (Ont Prov Ct) at para 24; *R v Andico Manufacturing Ltd* (1983), 4 CPR (3d) 476 (MBQB) at para 47). However, some later decisions moved away from the requirement that the low pricing policy be the only real driving concern. Two decisions involving the real estate industry indeed suggested that the person's low pricing policy could be the main reason behind the refusal to supply or one reason incidental to it, or one of many reasons regardless of priority (*R v 41813 Alberta Ltd* (February 4, 1994), No 9201-13366 (ABQB); *R v Royal LePage Real Estate Services Ltd* (October 28, 1994), No 9201-14125 (ABQB)). In other words, the low pricing policy had to be a proximate cause of the refusal to supply, but other proximate causes could exist. This approach appears to have been retained by the Competition Bureau in its *Price Maintenance Guidelines* issued in 2014 (Canada, Competition Bureau, *Price Maintenance (Section 76 of the Competition Act)* (September 15, 2014) (the "**Guidelines**") at section 3.1.3).

[120] This is the first time that the Tribunal has to interpret the terms "because of" the low pricing policy in the context of the new civil price maintenance provision now described at section 76 of the Act. I note that the words "because of" are also used in section 75 on refusal to deal, where relief can be granted if a person is unable to obtain adequate supplies of a product "because of" insufficient competition among suppliers. In the context of section 75, these words have been interpreted by the Tribunal as meaning that insufficient competition needs to be the "overriding reason" for the refusal (*Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6, aff'd 2011 FCA 188 ("***Nadeau***") at paras 228-229 and 247; *Canada (Director of Investigation and Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83 (Comp Trib) at para 83).

[121] A similar approach must prevail under section 76. I am therefore of the view that, in order to be successful in an application under paragraph 76(1)(a)(ii) or subsection 76(8), the applicant must demonstrate that the low pricing policy is the overriding reason for the refusal, even though it may not be the only reason. Stated differently, it must be a principal reason for the refusal.

[122] In this case, no direct evidence has been provided by CarGurus, such as correspondence from Trader or internal notes reflecting discussions to that effect with Trader, showing that Trader's refusal to supply the Trader Vehicle Listings is motivated or caused in any way by

CarGurus' low pricing policy. I would add that not only has CarGurus failed to provide direct evidence bearing on Trader's motives, but its claim in that respect has been squarely contradicted by Mr. Dunbar in the Dunbar Affidavit, where Mr. Dunbar denied that Trader was motivated in any way by CarGurus' low pricing policy.

[123] This, once again, is a situation different from *Stargrove* where the respondents in that application for leave had not produced any evidence in rebuttal and where the Tribunal found that Stargrove had itself provided some circumstantial evidence of motive on the part of the suppliers involved (*Stargrove* at paras 38-39).

[124] The Tribunal can of course consider circumstantial evidence when no direct evidence is available (*Used Car Dealers* at paras 44-48). However, such circumstantial evidence must still meet the "requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order" (*Used Car Dealers* at para 48). In *Used Cars Dealers*, efforts had been made by the applicant to provide evidence of concerns with the low pricing policy being the driving factor for the termination of the supply. The affidavit submitted in that case referred to circumstantial evidence on price differentials, the actions of a competitor and connections that provided to the applicant reasons to believe that the refusal to supply occurred because of its low pricing policy (*Used Cars Dealers* at paras 46-47). The affidavit submitted tried to provide evidence on the reasons for the refusal to supply and referred notably to the absence of other reasons for terminating supply. The applicant argued that, in the absence of an alternative reason, a reasonable adverse inference could be drawn from such silence and that the low pricing policy could be considered as the driving factor for the refusal.

[125] Even though there were some details in the affidavit to support the affiant's belief that the refusal may have been motivated by the low prices of the applicant, the Tribunal was nevertheless not convinced by such circumstantial evidence and could not conclude that there was sufficient credible evidence to show the possibility that the termination was due to a low pricing policy (*Used Cars Dealers* at para 61). The Tribunal thus dismissed the application for leave.

[126] In the current case, not only has CarGurus not provided any direct evidence on Trader's motivation but there is no circumstantial evidence on Trader's motives. No efforts or attempts have even been made to refer to circumstantial evidence supporting the proposition that Trader's refusal to supply the Trader Vehicle Listings was due to CarGurus' low pricing policy.

[127] It is worth citing the evidence provided by CarGurus in respect of that element of section 76. It is found at paragraphs 40 to 42 of the Blue Affidavit and reads as follows:

> 40. As noted in the First Affidavit at paragraph 110, I believe that Trader views CarGurus as its biggest competitive threat <u>because the CarGurus Website is</u> innovative and CarGurus drives considerable value to dealers and the public, as is proven by CarGurus' U.S. business. CarGurus' IMV ratings range drive consumer traffic and VDP views not only to the CarGurus' Website, but also dealers' websites based on CarGurus' rankings. This provides value to dealers that Trader cannot.

> 41. <u>Moreover</u>, CarGurus offers these services either for free or for a lower cost than Trader offers its own service. For example, CarGurus' basic package, which is offered to dealers free of charge, includes posting dealers' inventory on the CarGurus Website with up to 10 photographs, and allows CarGurus Website users to anonymously email such dealers about their available vehicles for sale.
>
> 42. I believe that Trader's different treatment of CarGurus and its refusal to deal with CarGurus on the usual terms with which it deals with other Digital Marketplaces <u>stems from CarGurus' low pricing policy and from Trader's concern that CarGurus' expansion in the Canadian market would force Trader to compete by providing more innovative products and services and by lowering its prices</u>.
>
> [emphasis added]

[128] Similar wording appears at paragraph 99 of CarGurus' Memorandum of Fact and Law and at paragraphs 107 and 108 of its Proposed Notice of Application. I observe that paragraph 110 of the Blue Copyright Affidavit refers to CarGurus' innovative features and how it allows it to expand into the marketplace, but does not contain any reference to CarGurus' low pricing policy.

[129] I point out that this is the whole extent of the evidence provided by CarGurus on this causation element of section 76. Indeed, in its Reply Memorandum, when referring to the evidence to support a *bona fide* belief on that issue, CarGurus strictly refers to paragraph 107 of its Memorandum and to paragraphs 41-42 of the Blue Affidavit. No further evidence has been provided to support CarGurus' statements on Trader's motives or on the causal relationship between CarGurus' low pricing policy and Trader's refusal to supply the Trader Vehicle Listings.

[130] More specifically, nowhere does the Blue Affidavit refer or allude to efforts or attempts made by CarGurus to obtain evidence of CarGurus' pricing policy being the cause or motivation of the Trader Conduct. Left with such limited evidence and assertions, I can only conclude that there is no credible evidence to support the causation element contained in section 76. True, these are factual issues that would be elaborated and developed in an application on the merits. However, an applicant still needs to provide at least a minimum level of credible evidence on this element of the practice to be granted leave. I am of course mindful that, at the leave stage, and prior to discovery, the means available to CarGurus to find such evidence are more limited. However, it is still a burden that it carries in order to be granted leave. Even at the leave stage, an applicant cannot simply repeat the wording of the Act, provide no evidence in support and expect that such orphaned statements can be sufficient to give the Tribunal the *bona fide* belief it needs to have.

[131] The statements contained at paragraphs 40 to 42 of the Blue Affidavit lead me to make two further observations.

[132] First, Ms. Blue states at paragraph 42 that she "believe(s)" that the Trader Conduct stems from CarGurus' low pricing policy. The belief of an affiant is not sufficient to establish the level of evidence needed under subsection 103.1(7) or 103.1 (7.1). The applicant has to provide sufficient credible evidence so that the Tribunal has the *bona fide* belief that an order could be made. But the Tribunal's belief cannot simply rely on the applicant's own belief. It has to rely on the applicant's evidence.

[133] In *Brandon Gray Internet Services Inc v Canadian Internet Registration Authority*, 2011 Comp Trib 17 ("***Gray***"), the Tribunal indeed stated that a "bald statement of belief" about adverse impact on competition in the market (such as simply stating that the termination of supply will result in reduced competition), without any supporting evidence, was not sufficient, and therefore leave was not granted (*Gray* at para 13).

[134] My second observation is this. I find it striking to note that paragraphs 40 to 42 of the Blue Affidavit, and all other references made by CarGurus to the reason for the Trader Conduct and its refusal to supply the Trader Vehicle Listings, never suggest that CarGurus' low pricing policy could be the overriding factor for the Trader Conduct. In fact, the Blue Copyright Affidavit, as the source of the Blue Affidavit, does not even mention CarGurus' low pricing policy. In addition, in every sentence where CarGurus refers to this issue in its evidence, it always alludes to both its low pricing policy and to CarGurus' superior innovative features. There is never a reference made solely to the primary role of CarGurus' low pricing policy. Indeed, paragraphs 40 to 42 of the Blue Affidavit first refer to CarGurus' innovative feature as being the apparent driver of the Trader Conduct and use the word "Moreover" to introduce the concern about the low pricing policy.

[135] This is a fundamental deficiency in CarGurus' evidence.

[136] Section 76 is the price maintenance provision of the Act. Its purpose is to provide relief in respect of refusals to supply or discriminatory practice motivated by a person's low pricing policy. It aims at reducing the restrictions that a supplier can put on the ability of resellers to compete on price, where those restrictions have, or are likely to have, an adverse impact on competition. The provision cannot be resorted to in order to sanction refusals by a supplier which may be driven by other motives. It may be that a supplier refuses to supply a product based on other behavior which could be found to be anti-competitive. It may be that a supplier would refuse to supply or discriminate against a person because of that person's disrupting innovative marketing practices or products. But this is not what section 76 aims to address. Section 76 applies to refusals or discrimination motivated primarily by the low pricing policy of a person. Had Parliament intended, in section 76, to prohibit refusals to supply primarily motivated by a person's innovative practices, it would have said so. It has not. Section 76 is strictly concerned with a low pricing policy. Other provisions of the Act, such as abuse of dominance, can be invoked to challenge an anti-competitive practice aimed at eliminating or disciplining an innovative new entrant. But that cannot constitute a ground to justify a section 76 application.

[137] The low pricing policy must be the overriding or principal cause of the supplier's refusal or discrimination. The Tribunal accepts, as stated by the Competition Bureau in the Guidelines, that a person's low pricing policy need not be the only reason for the refusal or discrimination. However, such low pricing policy has to be the *overriding* or *principal* reason informing and

motivating the supplier's decision. Even if a number of other factors contributing to the refusal are present, there still must be evidence that the low pricing policy plays a material and principal role in the refusal to supply.

[138] In this case, I do not find evidence allowing me to reasonably infer that CarGurus' low pricing policy could be the overriding or principal cause of Trader's refusal to supply, as opposed to CarGurus' status as a disruptive innovator. By systematically linking its claimed low pricing policy and its innovative features as the motives allegedly driving the Trader Conduct, CarGurus does not allow me to conclude that the low pricing policy could be the main or principal cause of the Trader Conduct. In fact, CarGurus' own evidence suggests that the overriding reason for the Trader Conduct is CarGurus' innovating features rather than its low pricing policy.

[139] This is the wording that CarGurus chose to use in its evidence and in the Blue Affidavit. Considering the evidence submitted, I am therefore not satisfied that CarGurus has met the evidentiary threshold on the causation element of section 76. There is no sufficient credible evidence to give me a *bona fide* belief that CarGurus' low pricing policy, separate and distinct from other competing and innovative features it may have, could be the principal motivation and the overriding factor behind the Trader Conduct and its refusal to supply the Trader Vehicle Listings.

[140] I observe in closing that, in addition, there is also ample evidence on the record that the reason driving the Trader Conduct and its refusal to supply the Trader Vehicle Listings is in fact its claim of copyright infringement by CarGurus and the ongoing litigation it commenced against CarGurus in the Copyright Proceeding. It may be that Trader's claim could be denied by the Ontario Superior Court of Justice and that its allegations of copyright infringement relating to the Trader photographs are not upheld by the Court. However, at this stage and in light of the evidence before me in this application for leave, the existence of the Copyright Proceeding provides an objective business reason for the refusal to supply the Trader Vehicle Listings to CarGurus and is yet another factor pointing to an absence of sufficient credible evidence that Trader's refusal to supply is motivated by CarGurus' low pricing policy.

d. Adverse Effect on Competition

[141] Third, I am not convinced that there is sufficient credible evidence to form a *bona fide* belief that the Trader Conduct could have an actual or likely adverse effect on competition in a market.

[142] For the purposes of the adverse effect analysis (whether under paragraph 76(1)(b) on price maintenance or paragraph 75(1)(e) on refusal to deal), it is recognized that the relevant market is the market in which the applicant participates, namely the operation of Digital Marketplaces.

[143] In *B-Filer*, the Tribunal stated that paragraph 75(1)(e) "requires the assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal" (*B-Filer* at para 200). The Tribunal also considered the concept of "adverse effect on competition" in *Nadeau*. The Tribunal held that, in order to determine whether a refusal to deal would be

likely to have an adverse effect, it was necessary to examine a series of indicators which could vary on a case-by-case basis. In *Nadeau*, these included factors such as market share and market concentration (requiring an assessment of the relevant product and geographic markets), barriers to entry, impact on prices, the effect on rivals' costs, the impact on the quality and variety of the product, possible foreclosure of supply to other processors in the market and the impact of the possible elimination of the applicant from the market.

[144] In each of *B-Filer*, *Visa* and *Nadeau*, the Tribunal stated that, in its view, even if the threshold for establishing an "adverse" effect on competition is lower than that for a "substantial" reduction, it still requires evidence that the refusal to deal or price maintenance would have the effect of creating or enhancing a supplier's "market power". For a refusal to deal to have an adverse effect on a market, the Tribunal stated that the "remaining market participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power" (*B-Filer* at para 208). In other words, "without market power there can be no adverse effect in a market" (*Nadeau* at para 369; *Visa* at para 350).

[145] An assessment of an adverse effect on competition thus requires a consideration of whether the refusal creates, enhances or preserves the market power of the remaining market participants. In *Canada (Director of Investigation and Research) v NutraSweet Co.* (1990), 32 CPR (3d) 1, the Tribunal noted that "[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period". In that case, the Tribunal recognized that this valid conceptual approach is not one that can be readily applied. It held that the factors that need be considered in evaluating market power will vary from case to case but ordinarily include indicators such as market share and entry barriers (*Nadeau* at para 368). Market power has also been defined in the jurisprudence alternatively in terms of "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms," and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*TREB* at para 165).

[146] In this case, there is very limited evidence in the Blue Affidavit on the issue of adverse effect of the Trader Conduct on competition. At paragraph 59 of the Blue Affidavit, Ms. Blue simply states that: "If Trader continues its current practices, the percentage of the market it controls will only increase with time as it enters into exclusive agreements with additional dealers and Feed Providers, shutting CarGurus out of the market." And there are the various references mentioned above relating to the alleged 42.5% market share of Trader. No specific assessment was made by CarGurus on the likely geographic or product market at stake.

[147] The Tribunal could conservatively assume that the relevant market in this case is the narrowest market in which CarGurus operates, namely the Canadian Digital Marketplaces. Assuming that is the case, the evidence on the record shows that there are at least 10 businesses or competitors in Canada offering Digital Marketplace services and competing in this downstream "market," including Kijiji and Trader as the two major and leading players. The evidence provided does not allow the Tribunal to clearly measure the size of the downstream market which CarGurus claims will be affected by Trader's refusal to supply, or the market power of participants absent CarGurus' participation. However, looking at Exhibit 10 to the Blue

Affidavit, the evidence indicates that the market for Digital Marketplaces is quite competitive, with two leading competitors (Kijiji and Trader) and a series of smaller ones.

[148] From the information on the number and size of competitors in Exhibit 10, it is apparent that CarGurus is a fairly minor competitor for the time being. There is also no evidence of the market share or relative size that CarGurus would likely achieve in the foreseeable future in the absence of the Trader Conduct. This is therefore not a situation where a major competitor would be eliminated by the Trader Conduct. In fact, CarGurus' own projections rather indicate that, even without access to the Trader Vehicle Listings, it will continue to expand and will arguably increase its presence and market share in the business, be it at a slower growth rate.

[149] I am therefore not satisfied that CarGurus has provided sufficient credible evidence that the refusal to supply the Trader Vehicle Listings could create, enhance or preserve market power of any entity in the Digital Marketplaces market. It is not a situation similar to *Nadeau* where evidence had been provided that the anticipated refusal to supply would displace a major competitor in the downstream market (Nadeau) and eliminate it as a main competitor of the leading players in the business.

[150] As the Tribunal indicated in *Audatex*, the requirement of an actual or likely adverse effect on competition is a key dimension of the private recourses available under sections 75 or 76 of the Act. The Tribunal stated the following at paragraph 50 of that decision:

> While sections 75 and 103.1 provide for a private right of action for refusals to deal, they are part of the Act and must be considered in the context of this legislation and what it aims to protect and accomplish. As Mr. Justice Rothstein said in *Barcode FCA*, "[the] basic purpose of the *Competition Act* as described in subsection 1.1 is 'to maintain and encourage competition in Canada' and the purpose of section 75 is in furtherance of that objective" (*Barcode FCA* at para 14). He elaborated on that point further in his reasons, restating the purpose of the Act to maintain and encourage competition and adding that "[i]t is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition" (*Barcode FCA* at para 23).

[151] The requirement of an adverse effect on competition reflects the fact that the private application provisions of the Act are not there to arbitrate private contractual disputes relating to the supply of a product in circumstances where a refusal to supply does not have a market impact. The adverse competitive effect has to be more than an impact on CarGurus' business, as this is already captured by the requirement that the applicant be substantially affected by the refusal to supply. The evidence has to have a market dimension. As the Tribunal stated in *Nadeau* at para 368, the requirement that the practice is "likely to have" an adverse effect means that there is a requirement to establish the likelihood that an adverse effect is probable and not merely possible.

[152] Here, CarGurus is a new entrant. Evidence needed to demonstrate that there could be an adverse effect on competition in these circumstances is arguably more difficult to meet. But it is still the burden of the applicant to bring forward sufficient credible evidence to give the Tribunal

a *bona fide* belief that this requirement of section 76 could be met. In light of the market structure for the operation of Digital Marketplaces in Canada, the presence of two leading competitors and numerous other smaller ones, and the relatively small, but growing, size of CarGurus, I am not satisfied that sufficient credible evidence has been produced by CarGurus to support a *bona fide* belief that holding CarGurus out of the Digital Marketplaces market or limiting its expansion could have an adverse effect on competition in the market.

e. Conclusion regarding Section 76

[153] For all these reasons, I conclude that the Tribunal "could" not make an order under section 76 requiring Trader to supply CarGurus when the application is heard on the merits, as insufficient evidence has been provided on at least three elements set out in the price maintenance provision.

IV. CONCLUSION

[154] For the reasons discussed above, CarGurus' application for leave is not supported by sufficient credible evidence to give rise to a *bona fide* belief that CarGurus may be or is substantially affected in its business by the alleged refusal to supply or exclusive dealing by Trader. Accordingly, CarGurus' application for leave to apply under section 75 and 77 of the Act is denied.

[155] Similarly, the Tribunal concludes that it could not make an order under section 76 of the Act as the evidence on at least three elements of the price maintenance provision is insufficient to give rise to a *bona fide* belief that CarGurus could meet them.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[156] The application seeking leave for relief under sections 75, 76 and 77 of the Act is dismissed.

[157] The respondent Trader is awarded costs against the applicant CarGurus, at the mid-point of Column III of the table to Tariff B of the *Federal Courts Rules*, SOR/98-106.

DATED at Ottawa, this 14th day of October 2016.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL:

For the applicant:

CarGurus, Inc.

Nikiforos Iatrou
Bronwyn Roe

For the respondent:

Trader Corporation

Michael Koch
Peter Ruby
Hannah Arthurs