

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”);

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

BETWEEN:

CARGURUS, INC.

Applicant

- and -

TRADER CORPORATION

Respondent

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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OTTAWA, ONT	# 28

REPLY MEMORANDUM OF FACT AND LAW OF THE APPLICANT
(Application for Leave Pursuant to Section 103.1 of the *Competition Act*)

June 30, 2016

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REPLY MEMORANDUM OF FACT AND LAW OF THE APPLICANT
(APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*)

(1)
Trader Seeks to Turn a Leave Application into a Fully Contested Evidentiary Hearing

1. Trader argues in its memorandum of fact and law (“**Representations**”) that CarGurus’ Application for leave is not supported by sufficient credible evidence to give rise to a *bona fide* belief that CarGurus may have been directly and substantially affected in its business by reason of the allegations it has made or that any of Trader’s conduct could be subject to an order under any of sections 75, 76, or 77 of the Act.¹ Trader seeks to diminish the evidence that CarGurus has filed and turn each element of each section into an evidentiary contest. That is entirely appropriate at the merits hearing. It is not appropriate at the leave stage.

2. While we reply to several of Trader’s assertions below, the leave stage is meant to be a summary screening process,² and the Tribunal is to address the relevant elements summarily in keeping with the expeditious nature of the leave proceeding under s. 103.1.³ The standard of proof is low, with good reason. If it were as high as proof on a balance of probabilities, the Tribunal would be determining issues at the leave stage at the standard meant for the merits stage.⁴ The leave stage would then require a full evidentiary record, including cross-examinations on affidavits, in order to resolve conflicts.

¹ Memorandum of Fact and Law of the Respondent, Trader Corporation (Response to Application for Leave Pursuant to Section 103.1) [**Trader Representations**] at para 25.

² *Barcode Systems Inc v Symbol Technologies Canada ULC*, 2004 FCA 339, [2005] 2 FCR 254 [**Barcode**] at para 24.

³ *Barcode* at para 19.

⁴ *Barcode* at para 17.

3. That is not the Tribunal's role at the leave stage. The Tribunal's role is to evaluate whether there is sufficient credible evidence in CarGurus' affidavit to support a finding that there are reasonable grounds to believe that Trader's conduct could be subject to an order under sections 75, 76 and/or 77.⁵ In approaching that task, "the benefit of any doubt should work in favour of granting leave in order not to finally preclude [the Applicant] from its day before the Tribunal."⁶ Otherwise put, the Tribunal should not accede to Trader's implicit invitation that the Tribunal weigh CarGurus' evidence against Trader's and engage in resolving evidentiary contests at this stage.
4. Nor should the Tribunal give any credence to Trader's repeated statements that CarGurus' claims are unsubstantiated.⁷ Contrary to Trader's assertions, CarGurus' claims are all supported by affidavit evidence and, in some cases, documentary exhibits. That a fact is supported by an affidavit without a corresponding written record does not make it unsubstantiated, especially at the leave stage when the Tribunal does not demand a full evidentiary record.
5. As the Tribunal noted in *Used Car Dealers Association of Ontario v Insurance Bureau of Canada*,

The question of whether an order "could" be made is being considered in an application for leave which is not supported by a full evidentiary record. ... This means that there will inevitably be

⁵ *Barcode* at para 25.

⁶ *Barcode* at para 27.

⁷ Trader's Representations at paras 39, 51, 53, 61-64, 69, 73, 76, 80, 84, 95. For example, Trader states that CarGurus has not presented any evidence "beyond bald, unsubstantiated allegations that Trader has induced any supplier to refuse to supply to CarGurus" and that CarGurus' allegations in respect of Feed Providers are similarly unsubstantiated (at paras 61, 64). The evidence of these allegations is the sworn affidavit of CarGurus' affiant, Martha Blue: First Blue Affidavit at paras 48, 50, 105-109 (Application Record at pp 95-96, 106). Trader also states at para 62 that CarGurus' application record does not contain a copy of the correspondence with DDC referenced in the First Blue Affidavit. However, the substance of the correspondence is described in the First Blue Affidavit at paras 48, 50 (Application Record at pp 95-96).

incomplete information on some topics. ...[I]t is not reasonable to conclude that hard and fast evidence is required on every point.⁸

6. The Tribunal has explained that the requirement that the Tribunal has “reason to believe” that the applicant may have been directly and substantially affected in its business by a practice that could be subject to an order “does not require that it be satisfied that an applicant be directly and substantially affected, but rather that there are reasonable grounds to believe the applicant’s allegations that he has been so affected.”⁹
7. In this case, CarGurus has provided sufficient credible evidence to give rise to a *bona fide* belief that it may have been directly and substantially affected in its business by Trader’s conduct, and that Trader’s conduct could be subject to an order; that there might be more evidence that comes to light in the future should not act as a bar to CarGurus proceeding with its case.

(2)

Trader Enjoys Market Power in Respect of Vehicle Listings and is Using that Market Power to Affect Competition in the Market for Digital Marketplaces

A. Trader Enjoys Exclusive Control over Vehicle Listings

8. Trader claims that it does not have exclusive control over Vehicle Listings: it says that dealers can list their vehicles with other Digital Marketplaces, and any restrictions imposed by Trader only pertain to information that is Trader’s intellectual property.¹⁰ Trader states that its form of Dealership Syndication Agreement protects only aspects of Data Feed Information under copyright.¹¹ However, as described in CarGurus’ Proposed

⁸ *Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10 at paras 32-34.

⁹ *National Capital News Canada v Milliken*, 2002 Comp Trib 41 at para 10.

¹⁰ Trader Representations at paras 74-75.

¹¹ Trader Representations at para 74.

Notice of Application,¹² Trader's Dealership Syndication Agreement claims that *all* aspects of dealer data, i.e., the data that together constitute an *entire* Vehicle Listing in Trader's database, is copyrighted and that copyright is owned by Trader.

9. As such, Trader claims exclusive control over the ability of Vehicle Listings in its database to appear in other Digital Marketplaces. It does not matter whether dealers want their Vehicle Listings to appear on another Digital Marketplace:¹³ the control of whether the Vehicle Listings will be allowed to appear on a competitor's Digital Marketplace rests solely with Trader, by virtue of the exclusivity provisions it includes in its contracts and the penalties it imposes on dealers who do not comply with such provisions.¹⁴

B. Trader Enjoys Market Power in Vehicle Listings

10. Trader tries to downplay the effect of foreclosure by saying that CarGurus can only point to 30 dealers that have requested their content be syndicated on the CarGurus Website.¹⁵ While to date CarGurus' evidence relates to at least 30 dealers,¹⁶ and Trader's own evidence relates to 36 dealers who have requested it syndicate to CarGurus,¹⁷ that is not the extent of the foreclosure. CarGurus is being denied access to Trader's Inventory, which includes dealers who use the Trader capture service, as well

¹² Proposed Notice of Application at para 142 (Application Record at pp 43-44).

¹³ Trader Representations at paras 20, 31.

¹⁴ The Trader Dealership Syndication Agreement (Application Record at p 135) provides, in part, that (i) dealers need Trader's permission to republish dealer data with any third party website or other medium, and cannot republish the data anywhere else; and (ii) Trader will charge a fee for the republication, and can cancel the Agreement and revoke the dealer's licence to use its own data and the dealer is liable to Trader for any misuse or unauthorized republication of dealer data.

¹⁵ Trader Representations at paras 20, 31.

¹⁶ Memorandum of Fact and Law of the Applicant (Application for Leave Pursuant to Section 103.1 of the *Competition Act*) [**CarGurus Memorandum**] at para 76.

¹⁷ Reply Affidavit of Roger Dunbar at para 11, Application Record at p 270.

as all dealers to whom Trader provides any services (even simple web hosting services).¹⁸ At a minimum, that is over 42% of the market, but may well be more.¹⁹

11. Trader also states that CarGurus has alternative sources of supply, including generating its own photos and Vehicle Listings.²⁰ Trader relies on *Nadeau*²¹ to state that where an applicant has access to an alternative source of supply that the applicant simply chooses not to pursue, it cannot be said that insufficient competition among suppliers is the “overriding reason” why the applicant is unable to obtain adequate supplies or that the applicant is precluded from carrying on its business “due to” the respondent’s conduct.²²
12. What Trader ignores is that Vehicle Listings are not a commodity like chickens, and the market in *Nadeau* was not characterized by network effects, like the Digital Marketplaces market at issue here. As CarGurus observed in its Application,²³ for dealers to work with CarGurus to recreate dealers’ existing listings in the Trader database would involve a duplication of work for dealers, and dealers’ incentives to do so are diminished by the fact that their Vehicle Listings are already on Trader’s Digital Marketplace. If dealers held the rights to their own Vehicle Listings in Trader’s database, or if Trader lifted its objection to dealers sharing Vehicle Listings with CarGurus, uploading the Vehicle Listings to multiple Digital Marketplaces would be at the discretion of the dealer. Dealers are hindered in this regard by Trader’s anticompetitive assertion of property rights in all Vehicle Listings in the Trader database.

¹⁸ CarGurus Memorandum at paras 37, 67; First Blue Affidavit at para 113.

¹⁹ CarGurus Memorandum at para 29(b); First Blue Affidavit at paras 71-72 (Application Record at p 99).

²⁰ Trader Representations at paras 35, 37(b).

²¹ *Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6, aff’d 2011 FCA 188.

²² Trader Representations at para 33.

²³ Proposed Notice of Application at para 100 (Application Record at pp 31-32); Concise Statement of Economic Theory at para 15 (Application Record at p 49).

13. In a two-sided market, where network effects are critical,²⁴ Trader's ability and incentive to withhold at least 42% of Vehicle Listings in Canada substantiates both the fact that Trader enjoys market power and the fact that there is insufficient supply of listings. Over 42% of the listings are not substitutable, with the result that a competitor like CarGurus is faced with trying to compete in a market where consumers and its competitors know that it cannot access comprehensive Vehicle Listing data.²⁵ This is akin to choosing between competing search engines with the knowledge that one of those search engines is prohibited from indexing at least 42% of the web (without the knowledge of which 42% was off limits to that search engine). Once this information is known, users will choose the more reliable, more comprehensive search engine.

C. Trader Enjoys Market Power in Digital Marketplaces

14. Trader states that Trader and CarGurus are "but two of many competitors" in the downstream market for Canadian Digital Marketplaces, and lists other competitors.²⁶ The fact that there are several Digital Marketplaces does not refute the potential that the various competitors' market shares are asymmetrical, nor the potential that Trader has market power in the market for Digital Marketplaces.
15. Trader's assertion that Kijiji is the largest Digital Marketplace in Canada, even if true (which is denied), does not preclude a conclusion that Trader has substantial market power.²⁷

²⁴ Concise Statement of Economic Theory at para 18 (Application Record at pp 50-51).

²⁵ CarGurus Memorandum at paras 32-38; Second Blue Affidavit at paras 5, 36-37; First Blue Affidavit at paras 27, 49, 75-65, 120-123.

²⁶ Trader Representations at paras 52-53.

²⁷ Trader Representations at para 82. See CarGurus Memorandum at paras 27-31; First Blue Affidavit at paras 67-74 (Application Record at pp 98-99); Second Blue Affidavit at para 31 (Application Record at p 61).

16. Further, Trader asserts that Kijiji has competed and grown in the marketplace by obtaining Vehicle Listings from other Feed Providers, and without obtaining Data Feeds from Trader.²⁸ In fact, it is CarGurus' evidence that Trader does syndicate Vehicle Listings to Kijiji.²⁹ This factual dispute cannot be resolved at the leave stage.

(3)

Trader's Conduct Could be Subject to an Order Pursuant to Sections 75, 76, and 77 of the Act

A. Trader is Effectively Asking this Tribunal to Take Sides in a Hotly Contested Copyright Case

17. Trader's Representations hinge on the assumption that it has a legitimate copyright in vehicle photographs,³⁰ and that its refusal to supply Vehicle Listings is therefore not reachable under the private access provisions of the Act, amounting to the mere exercise of intellectual property rights.
18. However, the validity of Trader's copyright claim is currently before the Ontario Superior Court, where 61 affidavits have been filed (50 by Trader and 11 by CarGurus). A central issue in that case is whether the contested photographs do actually enjoy copyright protection. CarGurus denies that the photographs are subject to copyright.³¹ It is not for the Tribunal to usurp the Superior Court's role and make determinations of copyright in this case. Trader builds into its arguments significant legal assumptions that, at this stage, the Tribunal is not in a position to evaluate.

²⁸ Trader Representations at paras 37(a), 82.

²⁹ First Blue Affidavit at paras 108-109 (Application Record at p 106). CarGurus is negotiating with Kijiji.ca to obtain a data feed agreement, and although the talks are in the early stages, Kijiji has told CarGurus that it will not send a data feed for any Inventory without Trader's consent. To date, Trader has refused consent: CarGurus Memorandum at para 72; First Blue Affidavit at para 118 (Application Record at p 108).

³⁰ See eg, Trader Representations at paras 13, 42-48, 67-68, 85, 94.

³¹ Concise Statement of Economic Theory at para 1 (Application Record at p 45).

19. For the absence of doubt, CarGurus' position is that these photos do not enjoy copyright protection, and this is therefore not a licensing case. CarGurus is not seeking to bring an application for Trader's refusal to supply a *licence*; rather, CarGurus is seeking to bring an application for Trader's refusal to supply *Vehicle Listing data*.
20. Trader has also imposed restrictions on dealers and Feed Providers, removing their ability to syndicate to CarGurus.³² The nature and the effect of Trader's refusal in this case distinguish it from that in *Warner Music*, which was about licensing. Here, the issue is over access to photographs that do not enjoy copyright protection.
21. Even if the photos were subject to copyright, the Tribunal in *Stargrove* noted that, "in light of the limited scope of *Warner Music* it remains an open question whether a copyright is, for some statutory purposes, a 'product'".³³
22. Further, as indicated in CarGurus' Application,³⁴ Trader's refusals to deal with CarGurus are not the "mere exercise" of copyright, because they have the effect of creating market power in another market (the downstream market for Digital Marketplaces). The proposition that refusals to supply are not necessarily the mere exercise of an intellectual property right, but can result in the creation, enhancement, or maintenance of market power and hence be subject to sanction under the Act, is further supported by the Tribunal's recent *TREB* decision, where the Tribunal held that the refusal to provide

³² CarGurus Memorandum at paras 50-55, 63-70; First Blue Affidavit at paras 44, 48, 51-58, 105-107, 112-116 (Application Record at pp 94-97, 106-108).

³³ *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26 [**Stargrove**] at para 31.

³⁴ Proposed Notice of Application at paras 2(e), 108, 144 (Application Record at pp 10, 33, 44); Concise Statement of Economic Theory at para 19 (Application Record at p 51).

copyrighted information was not the mere exercise of an intellectual property right if it resulted in a substantial lessening of competition in a different market.³⁵

23. In any event, Trader should not be asking the Tribunal to accept legal conclusions on issues that are currently before the courts. The Tribunal should not supplant the Superior Court's role and make determinations of copyright.

B. Whether 76(1)(a)(ii) Requires Resale is an Open Question

24. Trader argues that an order could not be made against it under s. 76 because the Tribunal held in *Visa/MasterCard* that a resale is required under s. 76 of the Act, and there is no resale in this case. However, *Visa/MasterCard* was considering the word "resale" in the context of 76(1)(a)(i). It remains an open question whether s. 76(1)(a)(ii) also requires resale. Indeed, the Tribunal noted in *Stargrove* that "it is still an open question whether, in every instance, section 76 requires product resale or that a product input could never be the subject of relief. These are issues worthy of further consideration."³⁶

C. Inducement is Not Required to Establish Exclusive Dealing

25. Trader states 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 data feed information on more favourable terms or conditions.³⁷ Demonstrating inducements to exclusivity is not necessary for a finding of

³⁵ *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7 at paras 754-756.

³⁶ *Stargrove* at para 36.

³⁷ *Trader Representations* at para 76.

exclusive dealing under s. 77(1)(a). CarGurus' evidence regarding Trader's exclusive dealing is set out in its Application.³⁸

D. Whether Trader is Motivated by CarGurus' Low Pricing Policy is in Dispute

26. Trader denies being motivated by CarGurus' low pricing policy and states that it does not believe CarGurus' price structure is "low-cost" as compared to Trader's model.³⁹ However, Trader notes that it "aims to provide premium services to dealers".⁴⁰ CarGurus, in contrast, offers free services to dealers.⁴¹ That low-cost option is what allowed it to become a critical competitor in the US, and it is precisely that which Trader is trying to prevent in Canada. Whether CarGurus is in fact a lower-cost competitor and whether Trader is motivated by CarGurus' low pricing policy are factual issues that cannot be resolved at the leave stage. In its Application, CarGurus has identified the evidence that supports a *bona fide* belief on this issue;⁴² there will likely be more evidence to consider if CarGurus obtains leave.

E. CarGurus Has Provided Evidence of a Substantial Lessening or Prevention of Competition

27. Trader states that CarGurus' Canadian revenues have quintupled since Trader launched the Copyright Application.⁴³ Trader misunderstands the test to be applied. In considering whether CarGurus is substantially affected, the Tribunal should assess how CarGurus' business would have grown but for Trader's actions. CarGurus has provided evidence

³⁸ CarGurus Memorandum at paras 50-76; First Blue Affidavit at paras 50, 105-119 (Application Record at pp 96, 106-108).

³⁹ Trader Representations at para 70.

⁴⁰ Trader Representations at para 10.

⁴¹ CarGurus Memorandum at paras 45-46; First Blue Affidavit at paras 55-60 (Application Record at pp 96-97); Second Blue Affidavit at paras 13, 21-23 (Application Record at pp 58-60).

⁴² CarGurus Memorandum at para 107; Second Blue Affidavit at paras 41-42 (Application Record at p 63).

⁴³ Trader Representations at paras 9, 93.

that Trader's conduct affects the entirety of its business;⁴⁴ the question to be resolved is the extent to which it is affected. The fact that CarGurus has managed to increase revenues in the face of Trader's conduct cannot act as a bar to CarGurus' case. One needs to consider the but-for world, similar to how the Tribunal approaches questions of substantial lessening or prevention of competition.⁴⁵

28. Trader also states that CarGurus has not presented any evidence that its service is innovative, or that as a result of Trader's conduct, innovation or choice has been restricted.⁴⁶ CarGurus set out its evidence in its Application regarding its non-price competition through innovative features.⁴⁷

29. The Commissioner recently emphasized the importance of innovation to competition:

Innovation is a key element of a healthy, sustainable economy. Strong competition drives innovation, which in turn drives productivity, efficiency and economic growth. And for consumers, innovation brings more choices and higher quality products and services in a dynamic marketplace.⁴⁸

30. The question of whether CarGurus' services are as innovative as CarGurus suggests, like the other factual and legal disputes between the parties, can only be determined after a full hearing once the Tribunal has had the opportunity to understand the relevant marketplaces and what is or is not innovative.

⁴⁴ CarGurus Memorandum at paras 85-93; First Blue Affidavit at paras 120-127 (Application Record at pp 109-110); Second Blue Affidavit at paras 43, 46-48, 50-54 (Application Record at pp 64-66).

⁴⁵ *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, 268 DLR (4th) 193 at paras 37-38.

⁴⁶ Trader Representations at para 84.

⁴⁷ CarGurus Memorandum at paras 39-40; First Blue Affidavit at paras 27-31 (Application Record at pp 88-90).

⁴⁸ "Competition, Innovation and Infrastructure", Remarks by John Pecman, Commissioner of Competition (Toronto : May 25, 2016) (as prepared for delivery), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04092.html>.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: June 30, 2016



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SCHEDULE “A” – Authorities

1. *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339.
2. *Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10.
3. *National Capital News Canada v Milliken*, 2002 Comp Trib 41.
4. *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26.
5. *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7.
6. *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, 268 DLR (4th) 193.
7. “Competition, Innovation and Infrastructure”, Remarks by John Pecman, Commissioner of Competition (Toronto: May 25, 2016) (as prepared for delivery).

Schedule “B” – Statutes and Regulations

Competition Act, RSC, 1985, c C-34

PART VIII MATTERS REVIEWABLE BY TRIBUNAL

RESTRICTIVE TRADE PRACTICES

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
- (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
- (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
- (d) the product is in ample supply, and
- (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

Definition of “trade terms”

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Price Maintenance

Price maintenance

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

Order

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

Persons subject to order

(3) An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supplying a product;

(b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or

(c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

...

Refusal to supply

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may

make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

...

Inferences

(10) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

...

(12) For the purposes of this section, “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Exclusive Dealing, Tied Selling and Market Restriction

Definitions

77. (1) For the purposes of this section,

“exclusive dealing”

« *exclusivité* »

“exclusive dealing” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

...

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the “first” person) supplies or causes to be supplied to another person (the “second” person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

GENERAL

Leave to make application under section 75, 76 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under that section.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76 or 77, as the case may be, is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76 or 77, as the case may be, is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner’s certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

(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 applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

Granting leave to make application under section 76

(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.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76 or 77 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76 or 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

Interim order

104. (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a

person who has made an application under section 75, 76 or 77, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Terms of interim order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

...

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”);

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

BETWEEN:

CARGURUS, INC.

Applicant

- and -

TRADER CORPORATION

Respondent

**REPLY MEMORANDUM OF FACT AND LAW
OF THE APPLICANT**

**(Application for Leave Pursuant to
Section 103.1 of the *Competition Act*)**

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