

Competition Tribunal



Tribunal de la Concurrence

PUBLIC VERSION

Reference: *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28

File No.: CT-2015-010

Registry Document No.: 078

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

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

B E T W E E N:

Audatex Canada, ULC

(applicant)

and

**CarProof Corporation, Trader Corporation, and
Marktplaats B.V.**

(respondents)



Decided on the basis of the written record.

Before Judicial Member: Gascon J. (Chairperson)

Date of Reasons for Order and Order: December 16, 2015

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE

I. OVERVIEW

[1] On October 1, 2015, Audatex Canada, ULC (“Audatex”) 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 a refusal to deal application under section 75 of the Act. If leave is granted, Audatex seeks an order under subsection 75(1) of the Act directing CarProof Corporation (“CarProof”), Trader Corporation (“Trader”) and Marktplaats B.V. (“Marktplaats”) (collectively, the “Respondents”) to accept Audatex as a customer and to supply Canadian automobile listings data to Audatex on usual trade terms.

[2] On November 6, 2015, each of CarProof, Trader and Marktplaats filed written representations in response to Audatex’s leave application. Further to an order issued on October 29, 2015, the Tribunal granted leave to CarProof and Marktplaats to file affidavit evidence, along the terms and conditions set out in such order, as part of their representations in writing.

[3] On November 17, 2015, Audatex filed a reply, which included reply affidavit evidence as well as written representations. Audatex had not sought leave from the Tribunal to file additional affidavit evidence. The issue of the admissibility of that reply evidence will be dealt with below in Part II.D of these reasons.

[4] In support of its application for leave, Audatex submitted an affidavit sworn on October 1, 2015 by Mr. Gabor Toth, the Chief Financial and Operating Officer of Audatex (the “Toth Affidavit”). In its reply, Audatex also added affidavits sworn on November 17, 2015 by Mr. Jason Brady, the Senior Vice President, General Counsel and Secretary of Audatex’s parent company Solera Holdings Inc. (the “Brady Affidavit”) and by Mr. Alberto Cairo, Chief of Staff for North America of Solera (the “Cairo Affidavit”). With their respective responses, CarProof submitted an affidavit sworn on November 5, 2015 by Mr. Paul Antony, Chairman of the Board of CarProof (the “Antony Affidavit”) and Marktplaats submitted an affidavit sworn on November 5, 2015 by Mr. Scott Neil, Director, Commercial Business with eBay GmbH (the “Neil Affidavit”).

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

[6] Audatex 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 the Respondents’ refusal to deal, and that such refusal could be the subject of an order under section 75 of the Act. CarProof, Trader and Marktplaats collectively seek an order denying Audatex leave and dismissing the application, with costs, as Audatex has failed to provide sufficient credible evidence for each of the requirements set out in sections 75 and 103.1(7) of the Act. They further invite the Tribunal to exercise its discretion to refuse to grant leave, in accordance with subsection 103.1(7).

[7] For the reasons that follow, I am not satisfied that Audatex has met its burden under subsection 103.1(7) to apply for relief under the refusal to deal provision of the Act. Audatex’s application for leave shall therefore be dismissed.

II. BACKGROUND

A. The Parties

a. Audatex

[8] Audatex is an Alberta corporation that provides data and software solutions to Canadian automobile insurance companies and automobile repair shops in order to streamline the accident claims process, both for estimating the cost of repairs and for calculating market values of automobiles. As part of the business Audatex describes as its “primary business”, it offers two services to its customers: “total loss valuation” and “partial loss estimating”. Audatex’s affiliate, Audatex North America, Inc. (“Audatex North America”), provides similar services in the United States.

i. Total loss valuation services

[9] Audatex’s total loss valuation services refer to the determination of the market values of damaged automobiles for its insurance company customers. In order to provide these services, Audatex relies on Canadian automobile listings data. These automobile listings data are information about an automobile that is contained in an advertisement listing an automobile for sale. Such advertisements almost always include the year, make and model of the automobile, as well as the asking price. Mileage, features, transmission type and colour of the automobile, amongst other details, are typically also included in automobile listings data. Automobile listings data is the product for which Audatex is seeking an order to supply.

[10] When an automobile is damaged in an accident, Audatex reviews automobile listings data for advertisements of automobiles that have similar characteristics as the damaged automobile and are within a close geographic proximity. Using proprietary algorithms, Audatex generates a total loss valuation for the damaged automobile. Audatex then prepares a report for the insurance company which includes information from the listings that underpin the total loss valuation (the “Valuation Report”). The total loss valuation generated by Audatex is a criterion by which insurers determine if it is preferable to make repairs to an automobile or, if the repair cost is greater than the market value of the automobile, to provide the policyholder with the total loss cash value.

ii. Partial loss estimating services

[11] Audatex’s partial loss estimating services refer to automobile repair estimates offered to both its insurance company customers and its repair shop customers. The partial loss estimating services do not require the automobile listings data in question.

[12] In terms of revenues, the Toth Affidavit reports that approximately one-quarter of Audatex’s revenues in its “primary business” originates from its total loss valuation services provided to insurance company customers. One-third comes from its partial loss estimating services sold to those insurance company customers. The remaining 45% of Audatex’s revenues is generated by automobile repair shops purchasing its partial loss estimating services.

b. The Respondents

[13] CarProof is headquartered in Ontario and its principal business is the sale of detailed vehicle-history reports (the “VHRs”). As stated in the Antony Affidavit, these VHRs are used by car sellers and buyers to obtain detailed information about a vehicle’s past.

[14] In order to prepare its VHRs, CarProof uses various sources of data as inputs. These include “damage repair estimates” provided by repair shops following an accident. Audatex, HyperQuest, Inc. (“HyperQuest”) (an American affiliate of Audatex) [CONFIDENTIAL] all collect this estimate repair data as part of their respective insurance business. CarProof purchases this estimate repair data through licenses obtained from Audatex North America [CONFIDENTIAL].

[15] As a by-product of its VHR business and as an additional source of revenue, CarProof also sublicenses some of the data it sources to other industry participants.

[16] Another important source of data used by CarProof for its VHR business is automobile listings data. As it does for the estimate repair data, CarProof licenses automobile listings data from numerous sources in the United States and Canada, including Trader and Marktplaats. The Antony Affidavit states that [CONFIDENTIAL]. However, as it does with other sources of data, CarProof looks to use automobile listings data as an additional source of revenues through sublicensing some of this data to other industry participants. CarProof has never supplied automobile listings data to Audatex.

[17] Trader is based in Canada and owns the Canadian websites www.autotrader.ca and www.autohebd.net (collectively “AutoTrader”). AutoTrader offers online automobile classified advertisements services that, for a fee, allow anyone to list an automobile for sale. In the course of its business, Trader has licensed certain automobile listings data to Audatex North America pursuant to an agreement called the “Data Licensing Agreement” (the “Trader Agreement”). The Trader Agreement terminated in August 2015 and is no longer in force.

[18] Marktplaats is headquartered in Amsterdam and operates the www.kijiji.ca website (“Kijiji”). Kijiji is an online classified advertisements service that allows dealers, for a fee, and anyone else, for free, to list an automobile for sale. Vehicle advertisements are live on Kijiji and publicly available for only a limited time. However, [CONFIDENTIAL]. The Neil Affidavit indicates that Marktplaats refers to that [CONFIDENTIAL] as the “Confidential and Proprietary Listing Data”. Marktplaats has recently entered into a data licensing agreement with CarProof regarding its Confidential and Proprietary Listing Data. [CONFIDENTIAL]. The Neil Affidavit attests that Audatex has never been a customer of Marktplaats.

B. The Relevant Facts

[19] Audatex complains that it no longer has access to the AutoTrader and Kijiji automobile listings data from Trader and Marktplaats. In September 2009, Audatex North America had entered into the Trader Agreement, pursuant to which Audatex received Canadian automobile listings data from Trader. It had a [CONFIDENTIAL], which automatically renewed for additional [CONFIDENTIAL] terms unless either party gave at least [CONFIDENTIAL]

notice of termination prior to the end of the current term. On March 24, 2015, Trader sent Audatex North America a letter advising of its termination of the Trader Agreement, effective on August 31, 2015. Since that date, Audatex no longer receives automobile listings data from Trader. The Toth Affidavit states that the reason for terminating the Trader Agreement was because Trader had concluded a long-term, exclusive agreement to provide its Canadian automobile listings data to CarProof.

[20] With respect to the Kijiji automobile listings data, the Toth Affidavit indicates that Audatex had been using a computer script to access specific, relevant vehicle valuation information from Kijiji's online site. Audatex never had a formal supply agreement with Marktplaats. Starting in November 2014, Audatex unsuccessfully attempted to enter into an agreement with Marktplaats for access to Kijiji's Canadian automobile listings data. In July 2015, Kijiji requested that Audatex cease its practice of accessing data on Kijiji, which Marktplaats qualified in the Neil Affidavit as being "data scraping" and contrary to Kijiji's terms of use. The Toth Affidavit confirms that Audatex complied with Marktplaats' request. After that, and as discussed in more detail in the Brady Affidavit, Audatex continued discussions with CarProof for the possibility of an agreement to access Kijiji's automobile listings data. These were ultimately unsuccessful. The Toth Affidavit attests that, in August 2015, Audatex learned that Marktplaats had already entered into an exclusive supply agreement with CarProof with respect to Kijiji's automobile listings data.

[21] Audatex claims that access to AutoTrader's and Kijiji's Canadian automobile listings data is vital to its business. According to the Toth Affidavit, Audatex generated over [CONFIDENTIAL] Valuation Reports in the 2015 fiscal year and, since its algorithm requires at least [CONFIDENTIAL] comparable automobile listings in order to generate each Valuation Report, Audatex requires access to approximately [CONFIDENTIAL] Canadian automobile listings per month. Without access to either AutoTrader's or Kijiji's Canadian automobile listings data, Mr. Toth says that Audatex is not able to have a sufficient number of "new" listings per month, causing the Valuation Reports [CONFIDENTIAL]. This, according to Mr. Toth, severely restricts Audatex from continuing to provide its total loss valuation services.

[22] According to Mr. Toth, Audatex has recently procured Canadian automobile listings data from three different companies; [CONFIDENTIAL]. However, these listings combined fall [CONFIDENTIAL] short of the monthly new listings required by Audatex to continue to operate its total loss valuation services. In August 2015, Audatex also entered into negotiations with Boost Motor Group, but it was advised that Boost had entered into a long-term, exclusive agreement to provide automobile listing data to CarProof.

[23] Audatex tried to negotiate a satisfactory sublicense agreement with CarProof to have access to the AutoTrader and Kijiji automobile listings data but no agreement was reached. The Toth Affidavit, the Brady Affidavit, the Cairo Affidavit and the Antony Affidavit contain details on the exchanges between the parties, on the contractual terms discussed and on the areas of disagreement. There is no need to elaborate on those negotiations for the purpose of this application. Suffice it to say that CarProof was seeking some contractual conditions from Audatex, perceived by Audatex to be over and beyond the terms governing the simple sublicensing of the automobile listings data. CarProof viewed these as forming an integral part of

the agreement to be concluded with Audatex and reflective of the multifaceted nature of their business relationship. [CONFIDENTIAL].

[24] I also note that, in August 2015, CarProof instituted legal proceeding against HyperQuest in the United States, seeking access to HyperQuest's estimate repair data and alleging that HyperQuest reneged on an agreement it had entered with CarProof in July 2014.

C. The Parties' Arguments

[25] Audatex argues that the refusal of CarProof, Trader and Marktplaats to supply the AutoTrader and Kijiji automobile listings data directly and substantially affects its business. The Respondents dispute that.

[26] Audatex further claims that CarProof has purposefully and tactically concluded exclusive agreements with a number of suppliers of automobile listings data, including the key suppliers Trader and Marktplaats, and has thus eliminated competition in the supply of Canadian automobile listings data. These exclusive contracts have, despite Audatex's efforts, prevented it from negotiating access to such data going forward. While Audatex has been able to negotiate agreements for access to Canadian automobile listings data from a few smaller suppliers, it contends that it is unable to obtain adequate supplies of the product from other suppliers. Audatex pleads that it offered to meet and exceed CarProof's usual trade terms, but that CarProof was focused on extracting unconnected concessions from Audatex and its affiliates in the United States as a condition to providing Audatex with Canadian automobile listings data. Furthermore, Audatex submits that it is willing to obtain Canadian automobile listings data from Trader and Marktplaats on usual trade terms, in accordance with the range of market values attributed to such data. Finally, Audatex submits that, if it is not able to compete effectively, Mitchell, described in the Toth Affidavit as Audatex's only material competitor, will lose its most important competitive constraint. Competition will thus be adversely affected in the total loss valuation and partial loss estimating services, as this market would be reduced to only one major competitor. For those reasons, Audatex argues that an order could be issued under section 75.

[27] CarProof, Trader and Marktplaats respond that the product for which Audatex seeks relief is not the automobile listings data itself but a license to use the confidential and proprietary Trader and Marktplaats data. The Respondents only supply their automobile listings data through licenses and, based on the ratio in *Canada (Director of Investigation and Research) v Warner Music Canada Ltd.* (1997), 78 CPR (3d) 321 (Comp. Trib.), licenses are not products for the purposes of section 75 of the Act as they are not in "ample supply". Trader and Marktplaats further argue that Audatex's claimed inability to obtain adequate supplies is due to the allegedly anti-competitive conduct of CarProof, not a lack of competition among suppliers. CarProof says it has been more than willing to sublicense available automobile listing data to Audatex on fair and reasonable terms consistent with industry practice, and claims that its negotiations with Audatex reflect the complex relationship between the parties and the ubiquity of multi-faceted value exchanges in the industry. The Respondents also submit that Audatex does not provide information regarding the size of the downstream market which it claims will be affected by the refusal to deal, the size of Mitchell or its market power absent Audatex's participation, or the number and size of competitors in that market. Therefore, the Tribunal could not have reason to believe that an order could be issued under the refusal to deal provision.

[28] The Respondents finally argue that the Tribunal should in any event exercise its discretion not to grant leave. Marktplaats states that Audatex’s conduct in scraping the Kijiji website should disentitle it from applying for an order under section 75, as it would compel Marktplaats to do business with a party that knowingly violated its rights by breaching the Kijiji terms of use. Marktplaats also claims that Audatex was the author of its own misfortune due to its apparent failure to act timely to secure a license from Marktplaats (and other licensors). In their view, the Tribunal should not permit the private application process under section 75 to be used as a mechanism for ineffective or unsuccessful competitors to interfere in the competitive process.

D. The Reply Affidavit Evidence

[29] There is disagreement between the parties on the admissibility of Audatex’s reply affidavit evidence as part of this application for leave.

[30] On behalf of the Respondents, CarProof requests that the Brady Affidavit and the Cairo Affidavit filed as part of Audatex’s reply be struck from the record. CarProof claims that Rule 120 of the *Competition Tribunal Rules, SOR/94-290* (the “Rules”) only contemplates that a person may serve a reply, not a “reply record”, at the leave application stage. Contrary to Rule 115 (which expressly allows an applicant to file affidavit evidence) or to Rule 119 (which allows a respondent to file such evidence with leave of the Tribunal), Rule 120 does not contemplate the filing of additional affidavit evidence as part of a reply by an applicant for leave. Relying on the order issued by Mr. Justice Blanchard in *Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2008 Comp. Trib. 6 (“*Nadeau Reply Order*”) at para 4, CarProof contends that a reply must be limited to legal argument, excluding additional affidavit evidence.

[31] Audatex replies that Rule 120 specifically provides for an applicant for leave under section 103.1 to serve a “reply” and that, unlike Rule 119, Rule 120 does not require the applicant to seek leave to include affidavit evidence in the reply. Audatex contends that the right of reply granted by Rule 120 would be meaningless if it did not permit an applicant, by way of reply evidence, to respond to factual allegations made by a respondent. Audatex states that the *Nadeau Reply Order* predates Rule 120 and refers to *B-Filer Inc v The Bank of Nova Scotia*, CT-2005-06, where the applicant was permitted to file reply affidavit evidence. Audatex pleads that no unfairness or injustice would be caused to CarProof by allowing the reply affidavit evidence and that the right of an applicant to file non-repetitive reply evidence responsive to factual allegations is well-established. Audatex also claims that striking the reply evidence would unfairly and unjustly deny Audatex the right to reply to the Respondents’ factual representations, as well as depriving the Tribunal of valuable evidence on which to make its determination.

[32] I disagree in part with Audatex and conclude that some portions of the reply affidavit evidence cannot be allowed and must be struck.

[33] Rule 120 simply provides that “[the] person making an application for leave under section 103.1 of the Act may serve a reply on each person against whom an order is sought (...)”. Contrary to the language used in Rules 115 and 119, no reference is made to affidavit evidence or even to the possibility of seeking leave for it in the context of a reply. Audatex’s claim that Rule 120 provides for the right to file an entire reply record, encapsulating a reply affidavit, is

without merit. In the context of applications for leave, filing an affidavit in reply is contemplated neither explicitly nor implicitly by the Rules. In fact, given the express language found in Rules 115 and 119, the only reasonable interpretation of Rule 120 is that no reply affidavit evidence is to be submitted. This, in my view, is consistent with the nature of an application for leave under section 103.1 of the Act, which is meant to be a summary process (*Symbol Technologies Canada ULC v Barcode Systems Inc.*, 2004 FCA 339 (“*Barcode FCA*”) at para 19). Audatex’s unilateral filing of affidavit evidence with its reply is therefore not permissible under the Rules.

[34] I do, however, mention that Rule 2 permits the Tribunal to “dispense with, vary or supplement the application of any of [the] Rules in a particular case in order to deal with all matters as informally and expeditiously as the circumstances and consideration of fairness permit”. Audatex could therefore have sought permission from the Tribunal, under Rule 2, to file reply affidavit evidence by way of a motion. Alternately, Audatex could have addressed a more informal letter to the Tribunal, as per the requirements of Rule 81. Audatex did not. It just decided to file a reply record.

[35] Audatex defends its position by invoking that the “general right of an applicant to file non-repetitive reply evidence which is responsive to the factual allegations of a respondent is well established”. In the context of summary processes like an application for leave under section 103.1 of the Act, this is only partly correct. The exercise of such a “right” requires permission. By analogy, I refer to applications under Part V of the *Federal Court Rules*, SOR/98-106 (the “FCR”), where no “right” to file reply affidavit evidence is contemplated after parties submit their respective affidavits. Applications governed by Part V of the FCR are summary proceedings meant to be dealt with without delay. Pursuant to Rule 312 of the FCR, a party (whether an applicant or a respondent) needs to obtain leave of the Federal Court in order to file additional affidavits. In the exercise of its discretion, the Court will consider factors such as whether the evidence sought to be adduced was available when the party filed its initial affidavits or could have been available with the exercise of due diligence, whether the evidence will assist the Court and serve the interest of justice, and whether the evidence will cause substantial or serious prejudice to the other parties (*Forest Ethics Advocacy Assn v National Energy Board*, 2014 FCA 88 at para 6; *Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at paras 8-9). Since a party must put its best case forward at the first opportunity, the discretion of the Court to permit the filing of additional material should be exercised with great circumspection (*Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5).

[36] In my view, in the context of a summary process like an application for leave under section 103.1 of the Act, these principles apply even more forcefully.

[37] That being said, it is important to step back and consider CarProof’s request to strike Audatex’s reply affidavit evidence in the context of this particular application for leave. In this matter, the Tribunal has allowed CarProof and Marktplaats to file affidavit evidence, as part of their respective responses, limited to certain specific and discrete facts meeting the exception contemplated by Rule 119(3) (*Audatex Canada, ULC v CarProof Corporation*, 2015 Comp. Trib. 13 (“*Audatex Affidavit Order*”) at para 16). In the case of CarProof, it was in relation to “[the] alternative sources of data available to Audatex within the industry; the proprietary and confidential nature of the data that Audatex seeks to license; and the terms on which CarProof has made the data available to Audatex and Audatex’ alleged unwillingness to meet the relevant

terms of trade” (*Audatex Affidavit Order* at para 28). In the case of Marktplaats, it was limited to “the confidential and proprietary nature of the data Audatex is seeking to license from Marktplaats; and the data licensing agreement between CarProof and Marktplaats” (*Audatex Affidavit Order* at para 29).

[38] In those circumstances, and bearing in mind the principles set out above, I believe that, pursuant to Rule 2, the Tribunal could have supplemented the application of Rule 120 and allowed Audatex to file reply affidavit evidence to respond to this specific factual evidence. While Audatex should have asked the Tribunal permission to do so prior to or at the time of filing its reply affidavit evidence, I am satisfied that the Tribunal can exercise its discretion to consider the application of Rule 2 at this stage. However, Audatex’s reply affidavit evidence could only be allowed to the extent that it is responding to the factual evidence filed by CarProof and Marktplaats and for which specific, tailored leave has been granted by the Tribunal. This is what Audatex did for most of its reply evidence, but this is not the case for those paragraphs of the Cairo Affidavit dealing with Audatex’s substantial harm and the effect of not having the listings data on Audatex’s business. The Respondents made written representations about this issue but neither the Antony Affidavit nor the Neil Affidavit provide factual evidence on Audatex’s business. I therefore cannot conclude that the portions of the Cairo Affidavit dealing with this matter constitute proper reply evidence in the context of these proceedings. I further note that the Cairo Affidavit does not specify whether this additional evidence of harm was available or could have been available to Audatex before it filed its application on October 1, 2015.

[39] As a result, the following portions of Audatex’s reply evidence (and the corresponding portions of its Memorandum of Fact and Law relying upon such evidence) cannot be accepted on the record and will not be considered by the Tribunal: paragraphs 15 to 19 of the Cairo Affidavit. However, given that the remaining portions of the Cairo Affidavit, as well as the entire Brady Affidavit, respond to new factual evidence filed by CarProof and Marktplaats, I will exercise my discretion to allow that evidence to be part of the record in this proceeding.

[40] I have one final comment. In these proceedings, the request to file affidavit evidence in response was not made by way of a formal motion. Instead, CarProof and Marktplaats both sent letters to the Tribunal outlining the topics they wished to address in their affidavit evidence. Such a process is perfectly in line with Rule 2, and the Tribunal accepted it. However, by doing so, the Tribunal did not have much detail on the actual contents of the affidavits intended to be filed. Going forward, it would be helpful for the Tribunal if respondents seeking leave to file affidavit evidence in response to an application for leave file, along with their request, a draft of the affidavit evidence they seek to produce. In this case, that would have allowed the Tribunal to better and more quickly assess whether the contemplated evidence fell within the principles and guidance set out in the *Audatex Affidavit Order*. Similarly, if an applicant seeks leave or permission from the Tribunal, under Rule 2, to file reply affidavit evidence, it would be helpful for the Tribunal to have a draft of the affidavit evidence intended to be produced. Such reply affidavit evidence will typically have to be limited to the issues covered in the respondent’s affidavit evidence.

III. ANALYSIS

A. The Leave Test

[41] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 of the Act. It reads as follows:

103.1(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

103.1(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[42] The test to be followed on an application for leave in refusal to deal cases was first articulated by Madam Justice Dawson in *National Capital News Canada v Milliken*, 2002 Comp. Trib. 41 (“*Milliken*”) at para 14. It was subsequently adopted by the Federal Court of Appeal in 2004 in *Barcode FCA* when it considered an appeal of the Tribunal's decision to grant leave. The test has been followed since then by the Tribunal in section 103.1 matters. Pursuant to this test, the Tribunal must determine two elements: whether the application for leave is supported by sufficient credible evidence to give rise to a *bona fide* belief that 1) the applicant is directly and substantially affected in its business by the refusal to deal; and 2) the practice in question could be subject to an order under section 75. There is no dispute between the parties that this is the test to be applied in this leave application.

[43] In *Barcode FCA*, the Federal Court of Appeal further noted that leave applications are to be dealt with summarily and that, when determining whether to grant leave, the Tribunal's role is a screening function based on the sufficiency of evidence advanced (*Barcode FCA* at para 24). The evidence is looked at on a scale which is less than the balance of probabilities (*Barcode FCA* at para 17). However, it is not sufficient that the evidence shows a mere possibility that the business may be directly and substantially affected. The standard of proof requires the “existence of reasonable grounds for a belief” (*Milliken* at paras 9-10).

[44] While the test is a lower standard of proof than proof on a balance of probabilities, “it is important not to conflate the lower standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application” (*Barcode FCA* at para 18). As Mr. Justice Rothstein said in that decision, the refusal to deal required is not “simply a refusal by a supplier to sell a product to a willing customer” (*Barcode FCA* at para 18). It has to meet the elements mapped out in section 75, and these must all be addressed by the Tribunal before granting leave.

[45] With respect to the first part of the test under subsection 103.1(7) (being “directly and substantially affected by a refusal to deal”), the terms “directly” and “substantially” should be given their ordinary meaning. 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). The “direct” component has not been interpreted, but its ordinary meaning calls for a close nexus between the refused supply and the impact on an applicant’s business.

[46] Turning to the second part (whether the refusal “could be the object of an order”), all the elements of the refusal to deal set out in subsection 75 (1) of the Act must be addressed (*Barcode FCA* at para 18). In order to grant leave, 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). The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding and, “[a]s long as it is apparent that each element is considered, the Tribunal’s discretionary decision to grant or refuse leave will be treated with deference by [the Federal Court of Appeal]” (*Barcode FCA* at para 19).

[47] At the leave stage, 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). Madam Justice Simpson added in *Used Car Dealers* that, in applying this part of the test and considering if an order is possible, “hard and fast evidence” is not required on every point and that “reasonable inferences may be drawn where the supporting grounds are given and circumstantial evidence may be considered” (*Used Car Dealers* at para 34).

[48] Subsection 75(1) of the Act sets out five elements to be met for a refusal to deal under that provision. It reads as follows:

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,

75.(1) Lorsque, à la demande du commissaire ou d’une personne autorisée en vertu de l’article 103.1, le Tribunal conclut :

a) qu’une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu’elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l’alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l’insuffisance de la concurrence entre les fournisseurs de ce produit

(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.

sur ce marché;

c) que la personne mentionnée à l’alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu’un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d’un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d’égalité avec d’autres personnes qui sont capables de se procurer l’article en quantité suffisante au Canada.

[49] If there is insufficient evidence dealing with one of the elements of subsection 75(1), leave cannot be granted (*Brandon Gray Internet Services Inc v Canadian Internet Registration Authority*, 2011 Comp. Trib. 17 (“*Gray*”). In that case, 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 considered sufficient by the Tribunal, and therefore leave was not granted (*Gray* at para 13). In brief, if an applicant for leave fails to provide some cogent evidence to demonstrate that each element of subsection 75(1) could be met, leave will be denied.

[50] I add one other remark. 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).

[51] In *Barcode FCA*, Mr. Justice Rothstein was more specifically referring to the requirement of paragraph 75(1)(e) of an adverse effect on competition in a market. However, I note that the overarching concern about the competition and market-related dimension of the refusal to deal provision is also reflected in the language of paragraph 75(1)(b) requiring that the inability to obtain adequate supplies result from “insufficient competition among suppliers of the product in the market”. Insufficient competition has been held to mean that the competitive conditions in the market for the supply of the product must be the “overriding reason” that adequate supplies are not available (*Canada (Director of Investigation and Research) v Xerox*, [1990] CLD 1146 at para 83; *Nadeau Final Order* at para 229; *Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2011 FCA 188 at para 61).

[52] Both of these components of section 75 (i.e., paragraphs 75(1)(b) and (e)) reflect the fact that the provision is not there to arbitrate private contractual disputes relating to the supply of a product in circumstances where the refusal to deal does not result from insufficient competition and does not have a market impact.

B. The Requirement of Direct and Substantial Effect

[53] I now turn to the first part of the test: whether the evidence before the Tribunal is sufficient to satisfy it that there is reason to believe Audatex’s allegations that it is directly and substantially affected in its business by a practice referred to in section 75. There are two dimensions to this requirement: a direct and substantial effect on Audatex’s business, and a causality link with the Respondents’ alleged refusal to deal.

[54] 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 (“*Sears*”) 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 has also reflected the fact that the effect to be looked at and considered is the impact attributable or linked to those entities whose supply is being refused. Subsection 103.1(7) indeed refers to the applicant being directly and substantially affected “by the practice”.

[55] I have assumed, for the purpose of this decision, that Audatex is “directly” affected in its business by the Respondents’ refusal but, for the reasons that follow, I am not satisfied that Audatex has provided sufficient credible evidence to give rise to a *bona fide* belief that it is or may be substantially affected in its business by the Respondents’ refusal to supply automobile listings data. I instead find that Audatex has failed to submit sufficient non-speculative, cogent evidence to give me reasonable grounds to believe that the impact of the refusal on its total loss valuation and partial loss estimating services could reasonably be considered to constitute a “substantial” effect, even if only its “primary business” were considered.

a. Audatex's evidence

[56] Audatex claims that its business is directly and substantially affected now that it is not able to receive the AutoTrader and Kijiji automobile listings data from either CarProof, Trader or Marktplaats. The Toth Affidavit describes them as the only sufficiently large sources of data to enable Audatex to produce [CONFIDENTIAL] Valuation Reports for its customers. In essence, Audatex contends that the refusal to supply affects the entirety of its total loss valuation services where the automobile listings data is needed and that, as described in the paragraph below, it also impacts its partial loss estimating services and thus the totality of its "primary business".

[57] Paragraphs 42 to 45 of the Toth Affidavit summarize Audatex's allegation of substantial harm:

42 Given the need for current automobile listing data and the insufficiency of Audatex's other data sources, Audatex's total loss valuation service will soon begin to experience significant performance issues if access to sufficient Canadian automobile listings data is not restored.

43 As Audatex's performance dips below the accepted service levels in its customer agreements, its customers will be able to terminate their contracts. Additionally, the uncertainty of the situation will likely cause Audatex's customers who are in the contract renewal process to reconsider staying with Audatex. In fact, [CONFIDENTIAL]. Audatex is concerned that the current situation will negatively impact those negotiations.

44 Once Audatex can no longer provide the total loss valuation service, all revenues and profits generated from it will be lost. As set out in Exhibit "3", Audatex's total loss valuation service, which generates approximately one-quarter of its revenues and profits will rapidly decline to zero as Audatex can no longer meet the mandated service levels in its customer agreements. Given that Audatex's insurance company customers are able, and I believe will in all likelihood want, to cancel their partial loss estimating service upon cancelling or losing their total loss valuation service, I expect that a further one-third of Audatex's revenues and profits will also be severely impacted. Finally, without any insurance company customers themselves using or mandating automobile repair shops to contract with Audatex, I believe the remaining revenues and profits, derived from automobile repair shops, will also steadily shrink.

45 In other words, Audatex's entire business is in jeopardy.

[58] The Toth Affidavit specifies that access to sufficient Canadian automobile listings data is critical to Audatex's business, and that Audatex requires access to approximately [CONFIDENTIAL] Canadian automobile listings per month for its total loss valuation services (of which approximately [CONFIDENTIAL] would be new listings). The Toth Affidavit adds that its recently procured listings from [CONFIDENTIAL] together represent a monthly shortfall in the order of [CONFIDENTIAL] on new listings.

[59] According to Mr. Toth, Audatex's total loss valuation services represent approximately one-quarter of the revenues and profits from its "primary business", and the Respondents' refusal will affect all of this line of business. In addition, these services are said to be inextricably linked

to Audatex's partial loss estimating services. The Toth Affidavit describes the close link between these two services by saying that the vast majority of Audatex's insurance company customers use both services. [CONFIDENTIAL], those who do not use both services use only the total loss valuation services. Referring to Audatex's agreements with two insurance company customers, the Toth Affidavit specifies that the customers purchasing both services do so pursuant to a single bundled contract which allows them to terminate the entire contract if Audatex fails to provide either of the services at the agreed upon service levels. As it is easier to deal with one service provider for both total loss valuation and partial loss estimating services, Mr. Toth expects that Audatex's insurance company clients can and would, in all likelihood, terminate use of Audatex's services altogether if it cannot provide a total loss valuation service. The Toth Affidavit attests that this will result in a further loss of approximately one-third of Audatex's revenues and profits.

[60] The Toth Affidavit then adds that, if an insurer drops Audatex as a supplier, the incentive for automobile repair shops dealing with that insurer to remain with Audatex is weakened, if not completely eliminated. Mr. Toth expects that, with the loss of insurer clients, Audatex's automobile repair shops will have less incentive to remain customers, thereby dissipating Audatex's remaining revenues and profits in its partial loss estimating services. The Toth Affidavit refers to Audatex's Repair Shop Template in that respect. As a result, the Toth Affidavit claims that the entirety of Audatex's "primary business" is directly and substantially affected by CarProof's refusal to deal. Mr. Toth further states that without automobile listings data from AutoTrader and Kijiji, insurance companies and their policy holders will question the legitimacy of the Valuation Reports, and have a lack of confidence in the Valuation Reports' conclusions. The Toth Affidavit refers to [CONFIDENTIAL] in relation to that issue.

[61] In essence, the Toth Affidavit asserts that Audatex will be directly and substantially affected in its business in two phases. First, the refusal will impact its total loss valuation services where the automobile listings data are directly used. Second, the detrimental impact will expand to its partial loss estimating services even though the automobile listings data are not needed for those. I will review these two claims in turn.

b. The effect on Audatex's total loss valuation services

[62] The refusal to supply complained of by Audatex relates to one product, the automobile listings data. The Toth Affidavit indicates that this input is only used in Audatex's total loss valuation services, which is one of its lines of business. In order to determine whether there is sufficient credible evidence to have a *bona fide* belief that Audatex may be directly and substantially affected in its business by the alleged refusal to supply automobile listings data from the Respondents, the Tribunal must thus first consider the evidence on the magnitude of the supply being refused and the impact of the refusal on Audatex in the context of its overall business.

[63] The Toth Affidavit states that Audatex is engaged in the supply of “data and software solutions” to insurance companies and automobile repair shops. The Toth Affidavit then attests that:

13 55% of Audatex’s revenues from its automobile accident claims business are from insurance company customers, including independent appraisers, with revenues from the automobile repair shops making up the balance. 40% of Audatex’s insurance company revenues are generated from its total loss valuation services. In other words, with respect to total revenues from Audatex’s primary business, approximately one-quarter is made up of insurance company customers with respect to total loss valuation services, one-third is made up of insurance company customers with respect to partial loss estimating services, and 45% is made up of automobile repair shops with respect to partial loss estimating services [...].

(emphasis added)

[64] The financial figures referred to in the Toth Affidavit are limited to Exhibit 3 containing one page entitled “PnL By Line of Business” for the year ended June 30, 2015. It refers to total revenues of approximately [CONFIDENTIAL] from [CONFIDENTIAL], and distinguishes between Partial Loss and Total Loss. The percentages mentioned in the Toth Affidavit are drawn from the figures in Exhibit 3. The Toth Affidavit speaks of Audatex’s “primary business”, but I observe that there is no indication as to what this “primary business” represents in Audatex’s “data and software solutions” business, and what its share is in the overall business of Audatex. There is no other reference, in the Toth Affidavit (or in the Brady and Cairo Affidavits), to figures or financial statements relating to Audatex’s total business.

[65] In other words, the Toth Affidavit does not provide clear evidence on the total business of Audatex or on the relative place of its “primary business” in Audatex’s supply of data and software solutions. I further note that the “approximately one-quarter” reference used by the Toth Affidavit to reflect the proportion of its “total loss valuation” services is in fact 22% (i.e., 40% of 55%). This 22% figure indeed corresponds to the ratio of the total loss valuation business from its insurance company customers and independent appraisers to the total revenues of [CONFIDENTIAL] reported on the P&L statement attached to the Toth Affidavit at Exhibit 3. When the [CONFIDENTIAL] revenue stream is excluded, that proportion is identified as 23% in Exhibit 3. But there is no indication as to what this “approximately one-quarter” (or in fact 22-23%) of Audatex’s “primary business” would actually be as a proportion of Audatex’s overall business.

[66] Furthermore, I observe that “approximately one-quarter” (or 22-23%) represents the totality of Audatex’s total loss valuation services. The Toth Affidavit does not provide information on the actual supply of AutoTrader and Kijiji automobile listings data lost by Audatex from Trader, Marktplaats and/or CarProof, or on the proportion of Audatex’s total purchases of automobile listings data represented by the Respondents. The Toth Affidavit only states that, until recently, Audatex relied “primarily” on the AutoTrader and Kijiji listings data. The Toth Affidavit does not describe the total AutoTrader automobile listings data that was supplied by Trader (when Audatex had the Trader Agreement with it) and that it lost at the end of August 2015. As to the Kijiji automobile listings data, the Neil Affidavit states that Audatex never was a customer of Marktplaats, and there is also no information regarding the magnitude

of Kijiji automobile listings data that Audatex had access to with its “computer script” prior to the notice it received in July 2015 to cease using the Kijiji data. The only financial figures provided reflect Audatex’s revenues for the entirety of its total loss valuation services. It is therefore not possible for the Tribunal to tell precisely what is the refused supply of AutoTrader and Kijiji automobile listings data actually required for Audatex’s total loss valuation business.

[67] The Toth Affidavit however says that Audatex requires [CONFIDENTIAL] automobile listings data per month. It further estimates that AutoTrader posts 1.1 million listings per month and Kijiji 760,000 listings. Arguably, the Tribunal could deduct from these figures that supplies from the Respondents “could” account for about [CONFIDENTIAL] of Audatex’s total supply of automobile listings data, assuming Audatex had indeed used all the potential supply available from these two sources. Based on this information, the lost supply of the AutoTrader and Kijiji automobile listings data could represent about [CONFIDENTIAL] of Audatex’s total loss valuation business, which is itself only approximately one-quarter (22-23%) of the total revenues of its “primary business”.

[68] I note that, in its reply submissions, Audatex did not clarify the issue of its “primary business” or the proportion represented by its total loss valuation services in its overall business, despite the arguments made by the Respondents in their responses and raising concerns about the information provided by Audatex on the magnitude of its business. This is evidence that only Audatex could have provided. 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 applicant’s own business and on the proportion represented by the suppliers refusing to supply are fundamental and basic elements needed by the Tribunal in order to be able to have a *bona fide* belief of a direct and substantial effect pursuant to subsection 103.1(7) of the Act.

[69] I pause to point out that 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. The applicant had provided figures showing that the exact supply held by the respondents represented 48% of the overall chicken processing business of the applicant. 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. In the current case, the evidence does not clearly indicate to the Tribunal the proportion of the supply represented by the Respondents in Audatex’s total loss valuation business, and what the total loss valuation business represents within Audatex’s total business (over and above its “primary business”). The only figure the Tribunal has is the “approximately one-quarter” (in fact 22-23%) for Audatex’s total loss valuation services.

c. The effect on Audatex’s partial loss estimating services

[70] Audatex also claims that, even though the automobile listings data supplied by the Respondents is only used for its total loss valuation services, and that these total loss valuation services only account for approximately one-quarter (22-23%) of its “primary business”, the refusal will also impact its partial loss estimating services which account for the remaining 77-78% of its “primary business”. These partial loss estimating services are sold to both insurance

company customers (33%) and to repair shops (45%). Since the automobile listings data refused to Audatex is not used as input for Audatex's partial loss estimating services, sufficient credible evidence needs to be adduced to illustrate how the refusal to supply may end up impacting this other line of business representing three times the revenues generated by Audatex's total loss valuation services.

[71] Relying on Audatex's Master Services Agreements with the [CONFIDENTIAL], which both contemplate the provision of total and partial loss services as a single bundle, Mr. Toth states that all of Audatex's business with insurance companies, whether total loss valuation or partial loss estimating services, will be affected by the refusal to deal. The Toth Affidavit speaks of some insurance company customers purchasing both types of services through a single bundled contract which "allows them to terminate the entire contract" if Audatex fails to provide both services. Then, the Toth Affidavit adds that "frequently", its repair shop customers are mandated to deal with Audatex through the insurance company customers. So, if an insurer drops Audatex as a customer, Mr. Toth "expects that the automobile repair shops will begin providing notices of termination". The Toth Affidavit later refers to "automobile repair shops generally" selecting a service provider based on insurance company preferences. From that sequence of events, the Toth Affidavit draws the conclusion that "Audatex's revenue from both total loss and partial loss services is jeopardized if it can no longer access sufficient Canadian automobile listings data to provide total loss valuation services".

[72] Audatex relies on this evidence from the Toth Affidavit to claim that the refusal to supply will affect the totality of the partial loss estimating services provided to insurance company customers (representing one-third of its "primary business") as well as the totality of the partial loss estimating services provided to repair shop customers (representing 45% of its "primary business"). Repair shop customers do not use Audatex's total loss valuation services.

[73] I am not persuaded that this constitutes sufficient credible evidence to support a *bona fide* belief that Audatex may be "directly and substantially" affected in its other line of business of partial loss estimating services to insurance customers and even less so, to repair shops. I cannot find in the Toth Affidavit the elements to allow the Tribunal to have reasonable grounds to believe that the refusal to supply automobile listings data could have such an impact on a line of business which represents more than three-quarters of Audatex's "primary business" and where the refused automobile listings data are not required. Apart from the scenarios described by Mr. Toth, there are no examples or circumstantial evidence supporting the allegations being made.

[74] The Toth Affidavit states that "it is simpler and more efficient to deal with one service provider for both total and partial loss estimating services", but Mr. Toth does not offer credible supporting evidence on that connection. No evidence from insurance company customers has been adduced on this point. The Toth Affidavit only relies on the contractual language referring to the bundled package. There is also no reference to experiences of insurance company customers having terminated their whole contract or threatening to do so because of poor performance or other issues in one of the two services. Similarly, no evidence was provided with respect to past experiences of contract terminations by insurance company customers and their effect on the partial loss estimating services purchased by repair shops. Neither is there evidence adduced regarding the incentive for automobile repair shops dealing with a specific insurer to remain with Audatex only as long as such insurer deals with Audatex; or regarding situations

where repair shop customers have raised this prospect as a reason to terminate their business with Audatex.

[75] I agree with the Respondents that Audatex's allegations in respect of its partial loss estimating services are based on speculation. I find that the Toth Affidavit relies on a complex chain of cascading assumptions that are based on what might occur in the future with respect to Audatex's business other than total loss valuation services, with no credible evidence in support. The allegations are essentially based on an interpretation of certain contractual provisions. The Toth Affidavit contains no evidence from insurance company customers expressing concerns that the lack of AutoTrader or Kijiji automobile listings data could impact their partial loss estimating business. As CarProof pointed out in its submissions, Mr. Toth does not identify a single insurance customer (or repair shop customer) that has threatened to terminate its agreement with Audatex, despite the fact that Audatex no longer receives supplies of automobile listings data from AutoTrader and that it can no longer use its computer script to access the Kijiji automobile listings data. Similarly, with respect to the allegation that automobile repair shops generally select a service provider based on insurance company preferences, there is no specific evidence of a repair shop having such a practice or stating an intention to terminate on that basis.

[76] It is of note that the partial loss estimating services account for 77-78% of Audatex's "primary business" (according to Exhibit 3 of the Toth Affidavit), and the automobile listings data which form the basis of Audatex's complaint are not required as supply for that business. To support an allegation that the refusal to supply such data would affect this line of business to the point where it is substantially affected and that Audatex's whole business is in jeopardy would require more than the general assertions contained in the Toth Affidavit.

[77] It bears underscoring that, at the leave application stage, the evidence only needs to show a reasonable possibility that Audatex's business may have been directly and substantially affected. However, with respect to the effect on Audatex's partial loss estimating services, I find that the evidence adduced by Audatex only amounts to a mere possibility and is speculative. In a situation like this where the contemplated detrimental effect of the refusal to supply is through a series of indirect events affecting a line of business which accounts for the vast majority of Audatex's "primary business", I am not satisfied that Audatex's evidence is sufficient.

d. Conclusion on direct and substantial effect

[78] The Tribunal is essentially left with an alleged impact on Audatex's total loss valuation business. Even if the Tribunal were to accept that all of Audatex's total loss valuation services business can be considered to be directly affected by the Respondents' refusal to supply automobile listings data (despite the fact that these supplies only account for a portion of the automobile listings data used by Audatex in that business), and even if the Tribunal were to accept that Audatex's "primary business" represents its total business (despite unclear evidence about that), I am not persuaded that, overall, the figures and evidence provided constitute sufficient credible evidence to allow the Tribunal to reasonably believe that Audatex may be directly and substantially affected in its business.

[79] Audatex's own evidence indicates that the total loss valuation services at issue represent only about one-quarter (or in fact 22-23%) of Audatex's total revenues in its "primary business".

And, as mentioned above, the evidence on the effect on the remaining partial loss estimating services is at best speculative. This, in my opinion, is insufficient to establish that Audatex could be affected in an important or significant way by the alleged refusal. An effect of this magnitude does not rise to the level of substantial effect typically considered sufficient by the Tribunal to grant applications for leave under subsection 103.1(7).

[80] In the reasons allowing the application for leave in the *Barcode* case, evidence was provided that a receiver had been appointed for all the property, assets and undertakings of Barcode and 50% of employees had been laid off in the business directly affected by the refusal to supply (*Symbol Technologies Canada ULC v Barcode Systems Inc.*, 2004 Comp. Trib. 1 at paras 14-16). In *B-Filer Leave*, the Tribunal was satisfied with the applicants' evidence that they could be substantially affected in their business because 50% of their revenue was dependent on the banking services provided by the respondent (*B-Filer Leave* at para 54). In *Nadeau Leave Order*, the evidence showed that the supply of live chickens provided by the respondents accounted for 48% of the applicant's whole business and that the anticipated refusal to supply would have a direct impact on the applicant's production of processed chicken. In *Used Car Dealers*, the affidavit showed that the specific business at stake and supplied by the respondent accounted for more than 50% of the applicant's net income (at para 31).

[81] Conversely, in *Construx Engineering Corporation v General Motors of Canada*, 2005 Comp. Trib. 21 ("*Construx*"), leave was denied. Madam Justice Simpson concluded that "Construx' evidence did not provide sufficient information about its business and the impact of the Policies on its business" (at para 8), and that the Tribunal could not assess the significance of the sales of the product purchased from the respondent, even though there was a general statement that they accounted for 38% of total sales over a given period. Madam Justice Simpson noted several deficiencies, including an absence of evidence on the nature or volume of transportation products sold, total annual sales, and what the losses from the respondent meant for the whole enterprise (*Construx* at paras 5, 8).

[82] In *Broadview Pharmacy v Wyeth Canada Inc*, 2004 Comp. Trib. 22 ("*Broadway*"), leave was denied by Mr. Justice Blais as the losses claimed were "speculative and undocumented" (*Broadway* at para 21). In that case, the applicant feared a loss of customers because "they will not be able to fill multiple prescriptions including the respondent's products" (*Broadway* at para 21). But no figures were provided to show the impact or potential impact of the loss of the respondent's products and no evidence was presented to support the assertion that not filling all the prescriptions for a given patient will mean not filling any. The leave applications in *Mrs. O's Pharmacy v Pfizer Canada Inc*, 2004 Comp. Trib. 24 at paras 23-24, *Broadview Pharmacy v Pfizer Canada Inc*, 2004 Comp. Trib. 23 at para 18 and *Paradise Pharmacy Inc and Rymal Pharmacy Inc v Novartis Pharmaceuticals Canada Inc*, 2004 Comp. Trib. 21 at para 23 were all dismissed by Mr. Justice Blais for the same reasons: there was no direct and non-speculative evidence about the impact of the refusal on the applicant's business. In *Sears*, it was found that alleged harm such as the improved bargaining position of other brands was mere speculation, in the absence of evidence showing that it was based on the deponent's actual experience or comments to that effect made by personnel who worked for other brands (*Sears* at para 35).

[83] I agree with Audatex 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. And I also agree with Audatex that it 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. In *Nadeau Leave Order*, supply had not yet ceased, but there was nonetheless sufficient and measurable evidence of the anticipated effects of the refusal amounting to 48% of the business.

[84] In the current case, the supply of AutoTrader and Kijiji automobile listings data to Audatex has already ceased, but the harm alleged by Audatex continues to be anticipated. There is no evidence of lost sales or lost revenues (whether in the total loss valuation or in the partial loss estimating business) even though Audatex has no access to the Kijiji automobile listings data since mid-July 2015 and to the AutoTrader automobile listings data since the end of August 2015, which are said to be “critical” for its business. In these circumstances, I am not satisfied that the evidence provided by Audatex rises to the level of sufficient credible evidence required to give the Tribunal a *bona fide* belief that Audatex may be directly and substantially affected in its business due to its inability to obtain automobile listings data from Trader, Marktplaats and/or CarProof. The evidence presented by Audatex is not sufficient at this time to meet the burden it carries to show a substantial effect.

[85] I add that my conclusion would not have been different even if the struck paragraphs of the Cairo Affidavit had been admitted as part of Audatex’s reply affidavit evidence. In my opinion, they would not have added sufficient credible evidence of harm to reach the “direct and substantial” threshold set forth in subsection 103.1(7) of the Act.

[86] This finding is fatal to Audatex’s application.

C. The Section 75 Factors

[87] Since Audatex has failed to meet the requirement of “directly and substantially affected in the applicant’s business”, this first element of the section 103.1 test is dispositive of the leave application. In view of this conclusion, it is therefore not necessary to consider whether Audatex has adduced sufficient evidence to meet the second part of the test for leave, namely whether each of the elements of subsection 75(1) could be met and an order could be issued under the refusal to deal provision.

IV. CONCLUSION

[88] The Tribunal concludes that the leave application is not supported by sufficient credible evidence to give rise to a *bona fide* belief that Audatex may be or is directly and substantially affected in its business by the refusal to supply of the Respondents. Accordingly, Audatex’s application for leave to apply under section 75 of the Act is denied.

FOR THE ABOVE REASONS, THE TRIBUNAL THEREFORE ORDERS THAT:

[89] Audatex's application for leave to apply under section 75 of the Act is denied.

[90] The Respondents are awarded costs.

DATED at Ottawa, this 16th day of December, 2015.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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