

Competition Tribunal



Tribunal de la Concurrence

Reference: *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 15
File No.: CT-2015-010
Registry Document No.: 0050

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 an 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
eBay Canada Limited**

(respondents)



Decided on the basis of the written record.
Before Judicial Member: Gascon J. (Chairperson)
Date of Order: November 13, 2015

CONFIDENTIALITY (PROTECTIVE) ORDER

[1] FURTHER TO the application filed by the Applicant against the Respondents for an Order pursuant to section 103.1 granting the Applicant leave to make an application under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”);

[2] AND FURTHER TO the Applicant’s motion, on consent, requesting a confidentiality (protective) order;

[3] AND FURTHER TO the draft confidentiality order filed on consent by the Applicant;

[4] AND WHEREAS the parties to this Order acknowledge and agree that the public disclosure, in whole or in part, of certain documents in this proceeding could cause specific and direct harm as such documents contain competitively sensitive and/or proprietary information including, but not limited to, contractual arrangements, operational information, budgets and financial reports, strategic plans and internal market studies;

THE TRIBUNAL ORDERS THAT:

[5] For the purpose of this order

(a) “**Designated Representatives**” means up to three individuals designated by each Party as its representatives who will be permitted access to Documents designated as Level B Protected Documents in accordance with the terms of this Order, which designation shall be made by written notice to the Tribunal, with a copy sent concomitantly to the other Parties’ external counsel. Additional individuals may be named as Designated Representatives by agreement of the Parties or by order of the Tribunal;

(b) “**Document**” means any document whether in physical or electronic form, including things defined as “documents” in section 1 of the *Competition Tribunal Rules*, SOR/2008-141;

(c) “**Expert**” shall mean an expert retained by a Party who:

(i) is not a current employee of any Party or of any of their respective affiliates;

(ii) has not been an employee of any Party or of any of their respective affiliates within two years prior to the date of this Order; and

(iii) is not a current employee of a competitor of any Party or of any of their respective affiliates.

(d) “**Level A Protected Document**” is a Protected Document that has been designated as “Confidential – Level A”, in whole or in part;

(e) “**Level B Protected Document**” is a Protected Document that has been designated as “Confidential – Level B”, in whole or in part;

(f) **“Protected Document”** means any Document produced in the Proceeding, including Documents listed in affidavits of documents, expert reports, pleadings, affidavits, submissions, or lay witness statements and information contained in those Documents that a Party claims is confidential, in whole or in part, or that the Tribunal has determined is confidential, in whole or in part;

(g) **“Parties”** means the Applicant and the Respondents, and **“Party”** means the Applicant or any of the Respondents;

(h) **“Proceeding”** means the section 103.1 application brought by the Applicant and any proceeding under section 75 or section 104 related thereto.

[6] Disclosure of Documents containing any of the following types of information could cause specific and direct harm, and such Documents may be designated as Protected Documents:

(a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives;

(b) Confidential contractual arrangements between the Parties and their customers, agents, and/or suppliers;

(c) Customer and/or supplier information;

(d) Financial data or reports, or financial information relating to the Parties, their respective customers, suppliers or other third parties;

(e) Business plans, marketing plans, strategic plans, budgets, forecasts and other similar information;

(f) Internal market studies and analyses; and

(g) Other Documents containing competitively sensitive and/or proprietary information, including proprietary algorithms, of the Parties or third parties.

[7] If information from a Protected Document is incorporated into any other Document, that Document shall be a Protected Document.

[8] Any Protected Document shall cease to be a Protected Document if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) if the Parties agree in writing that the Document shall cease to be a Protected Document; or (c) the Tribunal determines that the Document shall cease to be a Protected Document.

[9] Protected Documents will be identified in the following manner for the purpose of the Proceeding:

- (a) If a Document originates with or from more than one Party, the originating Parties shall, prior to producing that Document, use their best efforts to determine the appropriate confidentiality level of that Document, failing which the originating Parties may apply to the Tribunal for determination of the confidentiality or appropriate level of confidentiality of that Document. Pending resolution of any such disagreement, paragraph 9(d), below, shall govern the confidentiality designation of the Document in question;
- (b) At the time of production of a Document, or as soon thereafter as possible, a Party that claims confidentiality over a Document shall provide external counsel for the other Parties with written notice identifying that Document as a Protected Document and classifying it as a Level A Protected Document or Level B Protected Document;
- (c) All Documents designated as Protected Documents shall be treated as a Protected Document, save for determination otherwise by the Tribunal;
- (d) If there is a disagreement over whether a Document is a Protected Document, external counsel for the Parties shall use their reasonable best efforts to agree as to whether the Document (or portions thereof) is to be treated as a Protected Document. Pending the resolution of that disagreement, by agreement of the Parties or by order of the Tribunal, the Document in issue shall be deemed to be a Level A Protected Document; and
- (e) If agreement cannot be reached, the Parties may apply to the Tribunal to determine whether the Document, or a portion thereof, is a Protected Document.

[10] Subject to a further order of the Tribunal, the consent of the Parties or as required by law, Level A Protected Documents may only be disclosed to the following people:

- (a) external counsel for the Parties and their staff; and
- (b) Experts retained by a Party who have executed a Confidentiality Undertaking in the form attached to this Order as Schedule A.

[11] Subject to a further order of the Tribunal, the consent of the Parties or as required by law, Level B Protected Documents may only be disclosed to the following people:

- (a) the individuals described in paragraph 10; and
- (b) Designated Representatives of the Parties who have executed a Confidentiality Undertaking in the form attached to this Order as Schedule A.

[12] If a Party is required by law to disclose a Protected Document, that Party shall give prompt written notice to the Party that claimed confidentiality over the Protected Document so

that the Party that claimed confidentiality may seek a protective order or other appropriate remedy.

[13] External counsel for a Party and his or her staff and Experts for a Party and his or her staff may make copies as they require in connection with the Proceeding.

[14] Nothing in this Order prevents a Party from having full access to Protected Documents that originated from that Party.

[15] Parties shall provide the Tribunal with redacted versions of all Protected Documents at the time of filing the Protected Document, for the public record.

[16] At the hearing of the Proceeding:

(a) Protected Documents tendered as evidence at the hearing of the Proceeding shall be identified as such and clearly marked as such; and

(b) Protected Documents shall not form part of the public record unless the Party claiming confidentiality waives the claim, or the Tribunal determines that the Document is not a Protected Document.

[17] The Parties shall provide the Tribunal with redacted versions of Protected Documents, as applicable, at the time any such Documents are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked "Public" on the face of the Document and shall form part of the public record in this Proceeding. Each Protected Document shall identify the portions of the document which have been redacted from the "Public" version, by highlighting such portions in the Protected Document.

[18] For greater certainty, all persons who obtain access to Documents through this Proceeding are subject to a deemed undertaking to keep the Documents and the information contained therein confidential and to use the Documents and the information contained therein solely for the purposes of this Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[19] This Order does not determine the admissibility of any Documents as evidence in this Proceeding. For greater certainty, this Order is without prejudice to any rights the Parties may have to object to the filing or production of Documents.

[20] The termination of the Proceeding shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Documents in accordance with the provisions of this Order.

[21] Upon completion or final disposition of the Proceeding and any appeals, all Protected Documents and any copies of Protected Documents shall be destroyed or returned to the Party that produced them unless the Party that produced the Documents states, in writing, that they may be disposed of in some other manner, provided that external counsel may keep one set of Protected Documents in their file.

[22] This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 13th day of November, 2015.

SIGNED on behalf of the Tribunal by the Chairperson

(s) Denis Gascon

[23] SCHEDULE "A"

CONFIDENTIALITY UNDERTAKING

IN CONSIDERATION of being provided with documentation in connection with this application over which claims for confidentiality have been advanced ("Protected Documents"),

I, _____, of the city of _____, of the [province/state of] _____, hereby undertake and agree to maintain the confidentiality of any Protected Document that I obtain, and in particular:

1. I will not disclose a Protected Document to any other person, except to a person permitted to receive it under the Confidentiality Order of the Competition Tribunal (the "Tribunal") dated _____, 2015, or such further Order as the Tribunal may make.
2. I will take all such measures as reasonably required in order to ensure that Protected Documents are treated and maintained in strict confidence, including such steps for the physical and electronic storage of documents necessary to safeguard them from being viewed or accessed by any other persons.
3. I will not use the Protected Documents so obtained for any purpose other than in connection with the Proceeding (including any application or proceedings to enforce any Order made by the Tribunal in connection with the Proceeding, and any application under section 106 of the Competition Act to vary or rescind any Order made by the Tribunal in connection with the Proceeding), and any related appeals.
4. I will not copy, transfer, disseminate, or otherwise share or disclose any Protected Document or the information contained therein to any other person, entity, or party.
5. Upon completion of this Proceeding and any related appeals, I agree that all Protected Documents in my possession shall be dealt with as prescribed by Order of the Tribunal.
6. I have read the Confidentiality (Protective) Order, a copy of which is attached to this undertaking, and agree to be bound by it. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the Confidentiality (Protective) Order of the Competition Tribunal.
7. I acknowledge and agree that the Party that claims confidentiality over a Protected Document may not have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this undertaking are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that the Party that claims confidentiality over a Protected Document shall be entitled to injunctive relief to prevent breaches of this undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.
8. In the event that I am required by law to disclose any Protected Document that is subject to this undertaking, I will provide prompt written notice to [insert name of retaining or employing party] so that the Party that claimed confidentiality over such Protected Document

may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Document that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to it.

9. I will promptly, upon the request of the person providing a Protected Document, advise where it is kept by me.

10. I hereby attorn to the jurisdiction of the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this ____ day of _____, _____.

Name of Signatory:

Name of Witness:

COUNSEL

For the applicant:

Audatex Canada, ULC

Donald B. Houston

Julie K. Parla

Jonathan Bitran

For the respondents:

CarProof Corporation

Adam Fanaki

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