

CANADA COMPETITION TRIBUNAL

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

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*.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
November 6, 2015 CT-2015-010	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 31

AUDATEX CANADA, ULC

Applicant

- and -

CARPROOF CORPORATION, TRADER CORPORATION AND eBAY CANADA LIMITED

Respondents

**MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, TRADER CORPORATION
(Response to Application for Leave Pursuant to Section 103.1)**

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PART I - OVERVIEW

1. Trader Corporation (“Trader”) opposes the application of Audatex Canada, ULC (“Audatex”) for leave to apply for an order under section 75 of the *Competition Act* (the “Act”). Audatex’s application appears to be improperly aimed at leveraging negotiations between Audatex and CarProof, in which Trader has no involvement. Audatex has failed to make the case that it is substantially affected in its business by Trader’s actions, or that Trader has engaged in a refusal to deal that could be subject to an order of the Competition Tribunal (the “Tribunal”).
2. Audatex’s application for leave under Section 103 of the Act should be dismissed as against Trader for the following reasons.
3. Audatex has failed to file sufficient credible evidence that it is substantially affected in its business by the respondents’ actions, let alone those of Trader. Instead, its evidence demonstrates that if Audatex is affected at all, which is not admitted, it is only in respect of its “total loss” valuation service to insurance company customers, which represents only [redacted] of its profits from its “primary business”. Audatex’s claims as to the impact on the remaining [redacted] of its business are tenuous and speculative at best.
4. Audatex’s claim with respect to Trader must also fail because Trader did not refuse to provide it with a “product ... in ample supply”. Rather, Trader has, in the past, provided Audatex with a limited licence to use certain of its proprietary, confidential and copyrighted, data and “Licensed Items” for use in specific lines of business (the “Trader Licence”). As found by the Tribunal in the *Warner Music* case, such a licence cannot be considered a product in ample supply pursuant to Section 75 of the Act and therefore an order could not be made for its supply.
5. In any event, Audatex’s application focuses on certain alleged conduct of CarProof which Audatex claims is anti-competitive. By way of contrast, other than simply reciting the facts around Trader’s decision to terminate the Trader Licence in

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accordance with its terms, Audatex does not allege any improper or anti-competitive conduct on the part of Trader. It likewise provides no evidence to meet the requirement under Section 75(1)(b) that Audatex is unable to obtain adequate supplies of the data it is seeking because of insufficient competition among suppliers of the product in the market. Finally, Audatex provides insufficient evidence to support a claim that the refusal to deal is having or is likely to have an adverse effect on competition, pursuant to Subsection 75(1)(d) of the Act.

6. The materials filed by Audatex leave the distinct impression that it has cast its application under Section 75, and named Trader, simply because there is no private right of action otherwise available to it under the Act in order to pursue its allegations of anti-competitive conduct against CarProof. In Trader's respectful submission, under these circumstances, therefore, even if the Tribunal finds, which Trader denies, that an order could technically be made against Trader pursuant to Section 75, the Tribunal should exercise its residual discretion not to grant leave under Subsection 103.1(7).

PART II - FACTS

7. Trader operates a website for the sale of used vehicles. In the course of that business, it supplied certain data to Audatex pursuant to the Trader Licence.

8. The facts as they are relevant to the Trader Licence are set out in paragraphs 19 through 21 of the affidavit of Gabor Toth sworn October 1, 2015, filed with Audatex's application (the "Toth Affidavit") and the exhibits referenced therein.

9. On September 1, 2009, Trader entered into the Trader Licence with an American affiliate of Audatex North America, Inc. (referred to in the Trader Licence as "Audatex"). The Trader Licence had a [redacted], which automatically renewed for additional [redacted] terms unless either party gave at least [redacted] 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 License in accordance with its terms.

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Affidavit of Gabor Toth, paragraphs 19 and 20, Applicant's Record at 27.

10. The Trader Licence is attached to the Toth Affidavit as Exhibit "5". It is clear on the face of the Trader Licence that it was for the licensing of intellectual property.

11. The Trader Licence is titled "Data Licensing Agreement". The recitals to the Trader Licence provide that [redacted].

Trader Licence, page 1, Applicant's Record at 178.

12. [redacted]

Trader Licence, EXHIBIT A, Applicant's Record at 184.

13. [redacted] of the Trader Licence granted to Audatex a limited licence to do certain things with [redacted] that would otherwise be reserved to an owner of the Data and Licensed Items, and to use them in specific fields:

[redacted]

Trader Licence, page 1 Applicant's Record at 178-79.

14. Also typical of an intellectual property licence, [redacted] of the Trader Licence [redacted]

Trader Licence, page 2, Applicant's Record at 179.

15. Pursuant to [redacted] of the Trader Licence, [redacted]

Trader Licence, page 3, Applicant's Record at 180.

16. As outlined in the Toth Affidavit and exhibits thereto, Trader provided Audatex with written notice on March 26, 2015 of its intent not to renew the Trader Licence, and accordingly that the Trader Licence would terminate at the end of the current term, that is, on August 31, 2015. The Toth Affidavit attaches correspondence sent by Audatex on June 8, 2015 – more than 2 months after Trader's notice, and Trader's quick response on June 10, 2105, including an offer to explore further opportunities for collaboration.

**Toth Affidavit, paragraphs 20 and 21 and Exhibits 6 and 7;
Applicant's Record at 27, 187 and 190.**

17. Aside from this evidence, the Applicant has failed to file any evidence of any other attempt by it, whether before or after receiving Trader's notice, to secure for itself the future supply of the data that it now claims is critical to its business.

PART III - POINTS IN ISSUE

18. The issue is whether Audatex has satisfied the test for leave under subsection 103.1(7) of the Act. Trader submits that the answer is no.

PART IV - SUBMISSIONS

(a) The Test for Leave

19. Subsection 103.1(7) of the Act sets out the test for leave in this instance:

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.

Competition Act, Section 103.1(7)

20. The test to be followed on an application for leave in a refusal to deal case was cited in the Tribunal's reasons dated October 29, 2015 in this matter:

... the Tribunal must determine whether the application for leave is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in its business by the refusal to deal, and that the practice in question could be subject to an order.

Reasons for Order and Order Regarding Requests for Leave to File Affidavit Evidence in Response to an Application for Leave, October 29, 2015, at paragraph 9.

21. Trader submits that Audatex's application is not supported by sufficient credible evidence to give rise to a *bona fide* belief either: That the applicant may have been

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directly and substantially affected in its business by the refusal to deal; or that the practice in question could be subject to an order. In these submissions, Trader will address these criteria in reverse order.

(b) Insufficient Credible Evidence that the Practice in Question Could be Subject to an Order Against Trader

22. In seeking leave, Audatex has not distinguished among the Respondents in terms of whom is the target of the order being sought. Trader's submissions are restricted to the question of whether there is sufficient credible evidence that could give rise to a *bona fide* belief that an order could be made against Trader. Trader's submissions should not be taken as agreeing that any order could be made against either of the other two respondents, however, and any such implication is expressly denied by Trader.

23. Section 75 of the Act provides in its relevant part:

(1) Where ... 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

...

(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.

24. Although Audatex has failed to meet the burden on it under each subsection of Section 75, under this Part of the Submissions, Trader will focus primarily on Subsections 75(d), (b) and (e), in that sequence.¹

25. This case fails to meet the requirements of Subsection 75(d) of the Act, that is, it does not relate to a “product ... in ample supply.” The instant case is on all fours with *The Director of Investigation and Research v. Warner Music Canada* (“*Warner Music*”). In *Warner Music*, the Tribunal found it had no jurisdiction to hear the application of the Director of Investigation and Research pursuant to Section 75 of the Act, requesting it to compel the respondents to issue licences to BMG Canada so that BMG Canada could manufacture recordings.

Director of Investigation and Research v. Warner Music Canada Ltd., 1997 CanLII 3725 (CT).

26. The issue decided in *Warner Music* was whether the Tribunal had jurisdiction to make the order requested. It determined that it did not. The Tribunal in that case accepted that the definitions of “article” and “product” in section 2 of the Act were broad enough to encompass a copyright right as a form of personal property. It noted, “[H]owever, this conclusion does not answer the next question, which is whether the licences are products within the meaning of section 75 of the Act.” The ratio of the Tribunal, at page 14 of the reasons, is set out below:

... Although a copyright licence can be a product under the Act, it is clear that the word “product” is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an “ample supply” of a “product” and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a “product” – there cannot be an “ample supply” of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. [emphasis added]

¹ Trader addresses the insufficiency of Audatex’s evidence to meet the requirement of Subsection 75(a) below, under Part (c) of these submissions.

27. The request for an order against Trader is effectively the same as that requested against Warner Music and rejected by the Tribunal in that case as being outside its jurisdiction. Audatex requests an order to compel Trader to license its intellectual property, both copyright and confidential information, by effectively requesting the extension of the self-same intellectual property rights as Trader had licensed to it under the Trader Licence.

28. This case is not like the *Used Car Dealers Association* case, where leave was granted in part because there was no licence agreement at issue.

The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada, 2011 CACT 10 (CanLII).

29. Audatex acknowledged these intellectual property rights held by Trader when it entered into the Trader Licence. It cannot now seek to disclaim those rights merely through its counsel's assertion, not backed by any evidence, that it consists "merely of factual data about automobiles that are for sale, and which is not arranged in any original fashion." In any event, as has been determined by the Supreme Court, the standard for originality required in order to ground a copyright claim, including that in respect of a compilation such as the Data and Licensed Items, is the exercise of skill and judgment.

CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339, at page 356, paras. 24 and 25.

30. Audatex also incorrectly argues that the general principles for application of competition law to intellectual property, set out in *Eli Lilly and Co. v. Apotex Inc.* ("*Eli Lilly*"), trump the very specific non-applicability of Section 75 to intellectual property licences due to the requirement that a product be "in ample supply." However, Audatex has brought forward no evidence to suggest that Trader has done anything beyond exercising its right to refuse to grant it a licence – in the words of *Eli Lilly*, "the mere exercise of the IP right and nothing else".

Eli Lilly and Co. v. Apotex Inc., 2005 FCA 361.

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31. Trader also submits that Audatex has failed to file sufficient credible evidence that its inability to obtain adequate supplies of listing data is due to “insufficient competition among suppliers of the product in the market”, pursuant to Subsection 75(1)(b) of the Act.

32. As noted by the Tribunal in *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, under this element of refusal to deal, “the Tribunal must ... determine whether the Applicant has established that insufficient competition among suppliers in the market is the overriding reason why it is unable to obtain adequate supplies...” [emphasis added]

***Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009
Comp. Trib. 6, at para. 229.**

33. In this case, Audatex’s evidence in fact suggests there are a large number of suppliers of “product”, i.e., automobile listings. Audatex, however, is claiming its inability to obtain adequate supplies is due to the allegedly anti-competitive conduct of CarProof, not a lack of competition among suppliers. Notably, Audatex does not allege that the fact Trader (or the other respondent, eBay, for that matter) entered into agreements with CarProof indicates that there was insufficient competition among suppliers. It is entirely open to the Tribunal to find that CarProof simply outcompeted Audatex for the rights to both suppliers’ listings data.

34. Rather than providing sufficient evidence to provide a *bona fide* reason to believe that insufficient competition among suppliers of listing data is the “overriding reason” why it is unable to obtain adequate supplies, Audatex instead blames this inability on what it describes over the course of 10 paragraphs of the Toth Affidavit as “a pattern of aggressive and anticompetitive behaviour by CarProof”.

35. Audatex frames its case almost entirely by reference to CarProof’s conduct and not any alleged lack of competition for the supply of the listing data. Indeed, the section of the Toth Affidavit describing the effects on its business is titled, “Direct and Substantial Effect on Audatex of CarProof’s Refusal to Deal.” [emphasis added] At paragraph 30 of the Toth Affidavit, under the heading “CarProof’s Ongoing Conduct

Aimed at Thwarting Audatex”, the affiant states “I believe that CarProof has undertaken a systematic course of conduct by entering into exclusive agreements for Canadian automobile listings data with as many suppliers as possible and more crucially with Trader and eBay, in an effort to block Audatex from having access to such data.” Even if true, which Trader denies, such a course of conduct by CarProof does not satisfy this element of a refusal to deal.

Toth Affidavit, paragraphs 30-40, Applicant’s Record, pages 30-34.

36. Trader further submits that Audatex has failed to provide sufficient credible evidence that the refusal to deal of which it complains is likely to have an adverse effect on competition in a downstream market, under Subsection 75(1)(e) of the Act. Audatex’s materials contain only scant evidence on this point, set out in three short paragraphs of the Toth Affidavit. Namely, Toth merely makes vague statements that its “only material competitor” (Mitchell) will lose its “most important competitive constraint”, if Audatex is unable to compete effectively. Toth further states his belief that “Mitchell will be able to significantly strengthen its market position” in light of uncertainty in the market.

Toth Affidavit, paragraphs 47-49, Applicant’s Record, page 36.

37. As noted by the Federal Court of Appeal, “the purpose of the Act is to maintain and encourage competition in Canada. It 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.” “The threshold at the leave stage is low, but there must be some evidence by the applicant ... of the effect of the refusal to deal on competition in a market.”

***Symbol Technologies Canada ULC v. Barcode Systems Inc., [2005]*
2 FCR 254, 2004 FCA 339 (CanLII).**

38. Other than these statements, the Toth Affidavit does not provide any 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, the number and size of other competitors in the market, the absence or presence of

rivalrous behaviour in the market, or the absence or presence of other competitors, among other factors. In short, there is insufficient information on the basis of which a *bona fide* belief could be established that the refusal to deal will have an adverse effect on a downstream market.

39. In summary, therefore, Audatex has failed to provide sufficient credible evidence to support a *bona fide* belief that an order could be made against Trader.

(c) Insufficient Credible Evidence that the Applicant may have been Directly and Substantially Affected in its Business by the Refusal to Deal

40. Under this criterion an applicant must show sufficient credible evidence of a substantial effect on the entire business/enterprise of the applicant and not only one sector or segment of its business. Audatex's application clearly falls short of this requirement.

***Sears Canada v. Parfums Christina Dior Canada Inc.*, 2007 Comp. Trib. 6, (CanLII), at paras. 16-21.**

41. Audatex has failed to provide evidence of any actual impact on its business in terms of lost revenues or profit. However, even assuming – which Trader denies – that Audatex requires Trader's automobile listings in order to be a viable competitor in the market for "total loss" valuation services provided to insurance companies, Audatex's materials make clear that the automobile listings it is seeking are only required in this business. The automobile listings at issue are not required for [redacted].

42. This represents a fatal flaw in its application, since Audatex concedes the "total loss" valuation business only reflects [redacted] of its revenues and profits. In an attempt to demonstrate an effect on its other business lines, Audatex makes ever more tenuous claims regarding the connections between its "total loss" valuation business and its other businesses. First, it claims that it [redacted] of its insurance customers. However, other than asserting that [redacted], Audatex provides no credible evidence to suggest it will be directly and substantially affected in its business providing partial loss estimating services to insurance customers.

Toth Affidavit, paragraph 11, Application Record, at 23.

43. Even more tenuous and speculative still (and built on the shaky foundation of its claim that [redacted]) is Audatex's claim [redacted]. Audatex simply speculates that [redacted]. No credible evidence is provided regarding the importance of this so-called [redacted] relative to other factors affecting Audatex's competitive position in supplying auto repair shops with these partial loss repair estimating services.

Toth Affidavit, paragraphs 11, 12 and 13, Applicant's Record, at 23 and 24.

44. Audatex's claims are speculative, and do not rise to the required level of "sufficient credible evidence" required to found a *bona fide* belief that Audatex will be directly and substantially affected by its inability to obtain automobile listings from Trader.

PART V - ORDER SOUGHT

45. Trader seeks an order denying Audatex leave and dismissing its application as against Trader, with costs.

PART VI - LIST OF AUTHORITIES AND STATUTES TO BE REFERRED TO

1. *Competition Act*, Sections 103.1(7) and 75.
2. *Director of Investigation and Research v. Warner Music Canada Ltd.*, 1997 CanLII 17 (CT).
3. *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 CACT 10 (CanLII).
4. *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339.
5. *Eli Lilly and Co. v. Apotex Inc.*, 2005 FCA 361 (CanLII).
6. *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009 Comp. Trib. 6.
7. *Symbol Technologies Canada ULC v. Barcode Systems Inc.*,

2004 FCA 339 (CanLII).

8. *Sears Canada v. Parfums Christina Dior Canada Inc.*, 2007 Comp. Trib. 6 (CanLII).

All of which is respectfully submitted this 5th day of November, 2015.



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