File No: CT-2013-007

COMPETITION TRIBUNAL

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

AND IN THE MATTER of an Application by Safa Enterprises Inc. doing business as My Convenience Store for an Order pursuant to Section 103.1 granting leave to make application under section 76 of the *Competition Act*.

BETWEEN:

SAFA ENTERPRISES INC.

Applicant

and

IMPERIAL TOBACCO COMPANY LIMITED

Respondent

REPRESENTATIONS OF
IMPERIAL TOBACCO COMPANY LIMITED
IN RESPONSE TO APPLICATION FOR LEAVE
PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

October 8, 2013

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Part I – Introduction

1. Imperial Tobacco Company Limited ("ITCL") opposes Safa Enterprises Inc.'s ("SEI") application for leave to apply for an order under section 76 of the *Competition Act*, R.S.C., 1985, c. C-34 (the "*Act*"). SEI falls well short of satisfying the grounds upon which leave may be granted under subsection 103.1(7.1) of the *Act*. SEI has failed to file any, let alone sufficient, credible evidence to establish that it is directly affected by a practice referred to in section 76 of the *Act* and that such conduct could be subject to an order of the Competition Tribunal (the "Tribunal") under section 76 of the *Act*.

2. In a nutshell, SEI is alleging and complaining about price discrimination. SEI alleges that the *Act* prohibits ITCL from selling its products to SEI at one price and selling its products to another customer (SEI's competitor) at another, lower price. SEI alleges ITCL must offer its products to all customers at the same price, subject to volume discounts, or at least must offer its products to all competing customers at the same price, subject to volume discounts. This is exclusively an allegation of price discrimination. SEI makes no allegations that ITCL is discriminating against SEI because of SEI's low pricing policy or even that SEI has a low pricing policy.

3. Prior to March 2009, the *Act* contained specific price discrimination provisions which, subject to certain exceptions, required a supplier to treat its competing customers purchasing like quality of products in like quantities equally in terms of price (the "Former Price Discrimination Provisions"). The Former Price Discrimination Provisions were repealed from the *Act* as of March 2009. They were repealed in light of the fact that such price discrimination can often be pro-competitive, and in any event, falls outside of the object and purpose of the *Act*, which is to protect the process of competition, not to protect competitors from competing with

each other. Thus, there is no longer a legal requirement for suppliers to treat competing customers purchasing like products in like quantities equally in term of price.

4. The price discrimination alleged in this case is not conduct that could be subject to an order under the price maintenance provisions of section 76. Section 76 is exclusively focussed on an upstream firm controlling or attempting to control the price at which a downstream firm chooses to resell its product or controlling the downstream price by refusing to supply or otherwise discriminating against a customer who engages in a low pricing policy.

5. As the Tribunal recently affirmed in clear and unequivocal terms in *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*,[1] section 76 applies only to conduct relating to the resale price of a product purchased from a supplier. Section 76 does not apply to conduct relating to the input price (being the price at which the supplier sells the product to the retailer for resale by the retailer to the downstream market). As the Tribunal held, to interpret otherwise:

> ... would mean that Canada has embarked on a form of price control where any increase in a price – an increased input – would be subject to section 76 consideration. If Parliament had intended to extend the reach of section 76 so far beyond what had been the traditional area of competition policy and law, clear language would be required.[2]

6. SEI has not alleged that ITCL sells products to SEI on the basis that SEI must resell such products at or above a specified price level. SEI has not suggested that ITCL is controlling or attempting to control the price at which SEI chooses to resell its products. SEI's allegations relate solely to ITCL's input price. Thus, SEI has not even alleged that ITCL is engaged in resale price maintenance, which is the only conduct covered by section 76 of the *Act.*

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1 *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 ("*Visa*").

2 *Ibid*, at paras. 135-136.

7. Moreover, the relief sought by SEI from the Tribunal falls well outside the scope of the Tribunal's jurisdiction under section 76. Under section 76, the Tribunal may make an order prohibiting a person engaged in resale price maintenance from continuing to engage in that conduct, or requiring that person to accept another person as a customer within a specific time on usual trade terms.[3] There is therefore no basis, as SEI pleads, for the Tribunal to award it compensation for lost business, lost profits, and emotional distress.

8. For all of these reasons, and as set out below, SEI's application for leave under section 76 should be dismissed, with costs.

Part II – Concise Statement of Facts

9. SEI commenced this application by notice of application dated September 6, 2013. In support of its application, SEI filed an affidavit of Adnan Mustafa, sworn September 6, 2013 ("Mustafa Affidavit"). Mustafa is the Manager of SEI and has also brought a motion seeking to represent the corporation in this application, pursuant to Rule 120 of the *Federal Court Rules*. The Mustafa Affidavit alleges the following facts:

A. The Parties

10. SEI is a corporation incorporated under the laws of British Columbia. Its head office is in Surrey, BC, and it carries on business as My Convenience Store, located at 450 West Hasting St., Vancouver BC.[4]

11. ITCL is a corporation incorporated under the laws of Canada, with its head office in Montreal, QC. It manufactures and distributes a wide variety of tobacco products, including

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3 The *Act* at section 76(2).

4 Mustafa Affidavit, para. 3; Mustafa Affidavit, Exhibit "K".

brands such as Avanti, du Maurier, Medallion, Pall Mall, Peter Jackson, Player's and John Player Standard.[5]

B. The Conduct at Issue

12. SEI purchases tobacco products directly from ITCL. SEI alleges that beginning in June, 2011, ITCL sold tobacco products to SEI's competitor, New Hasty Market ("NHM"), at lower prices than were offered to SEI, and that NHM in-turn was able to offer tobacco products to customers at lower prices than SEI.[6] SEI alleges that ITCL selected NHM to participate in ITCL's "preferred pricing program" (also referred to as the "PPP"), which afforded NHM lower wholesale prices from ITCL.[7] In order to compete, SEI alleges that it had to lower the prices at which it sold ITCL products, at times at or below its cost.[8] SEI alleges it suffered harm in the form of lost sales to NHM and sales to customers at lower prices than it would otherwise have charged.[9] SEI asserts that it should have a right to participate in the PPP, and that ITCL's failure to select it for the PPP was discriminatory.[10]

Part III – Statement of the Points in Issue

13. The points in issue in this application are as follows:

(a) whether the Tribunal should grant leave under section 103.1(7.1) of the *Act* for SEI to apply for an order under section 76.

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5 Mustafa Affidavit, para. 4.

6 Mustafa Affidavit, paras. 5, 6, 9.

7 Mustafa Affidavit, para. 11.

8 Mustafa Affidavit, paras. 18, 37.

9 Mustafa Affidavit, paras. 38-39.

10 Mustafa Affidavit, paras. 27-31, 34.

Part IV – Concise Statement of Submissions

A. The Standard of Proof on an Application for Leave Under section 103.1(7.1)

14. The test for leave to bring an application under section 76 of the *Act* is found in subsection 103.1(7.1), which provides as follows:

> The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

15. Section 76 sets out the prohibition on price maintenance, and provides in relevant part:

> **Price Maintenance**
>
> 76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
>
> (a) a person referred to in subsection (3) directly or indirectly
>
> (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
>
> (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and
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> (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.
>
> **Order**
>
> (2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.
>
> **Persons subject to order**
>
> (3) An order may be made under subsection (2) against a person who
>
> (a) is engaged in the business of producing or supplying a product; ....

16. This is only the second case in which a private party has sought leave to the Tribunal to commence an application under section 76. In the first case, *Used Car Dealers*,[11] the applicant also sought leave to commence an application pursuant to section 75 of the *Act* for refusal to deal, and the majority of the Tribunal's analysis in that case addressed the test for leave to commence an application under section 75, which is set out in subsection 103.1(7). As such, there is limited case law on the standard of proof that must be met under subsection 103.1(7.1).

17. In contrast, there is a considerable body of case law on the test for leave under section 103.1(7). Subsection 103.1(7) contains language that is nearly identical to subsection 103.1(7.1) and provides that,

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

18. The standard of proof that must be satisfied to meet the requirements of subsection 103.1(7) was first set out by Dawson J. in *National Capital News Canada v. Milliken*:[12]

> I accept that the requirement that the Tribunal has "reason to believe" does not require that it be satisfied that an applicant be directly and substantially affected, but rather that there are reasonable grounds to believe the applicant's allegation that he has been so affected.
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> As to the nature of the evidence required to establish reasonable grounds upon which to believe that the Applicant has been directly and substantially affected ...
>
> I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application 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 the applicant's business by a reviewable practice, and that the practice in question could be subject to an order. (Emphasis added)

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[11] *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10 ("*Used Car Dealers*").

[12] *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, at paras. 10, 11 and 14 (Emphasis added).

19. This standard was subsequently affirmed by the Federal Court of Appeal in *Symbol Technologies Canada ULC v. Barcode Systems Inc.*,[13] and has been applied by the Tribunal in over a dozen cases where leave has been sought to commence an application under section 75 or 77.

20. In *Used Car Dealers*, Simpson J. applied the "sufficient credible evidence" test to both her analysis under subsection 103.1(7) and her analysis under subsection 103.1(7.1). For example, at paragraph 48, in considering the application for an order under section 76, she held:

> While I accept that circumstantial evidence and reasonable inferences may be relied on, the question is whether the circumstantial evidence in this case meets the requirement that there be **sufficient credible evidence** to give rise to a *bona fide* belief that the conduct could be subject to an order. (Emphasis added).[14]

21. This approach is eminently sensible. Given that the words of subsection 103.1(7) and subsection 103.1(7.1) are identical in requiring that the Tribunal must have "reason to believe...", it follows that those words should be understood as having the same meaning and mandating the same standard of proof under each subsection. As Justice Sopinka wrote in *R. v. Zeolkowski*, "Giving the same words the same meaning throughout a statute is **a basic principle of statutory interpretation**."[15] This point was reinforced by Justice Cory in *Thomson v. Canada (Deputy Minister of Agriculture)*, who held: "Unless the contrary is clearly indicated by the context, **a word should be given the same interpretation or meaning whenever it appears in**

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[13] *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004), 34 C.P.R. (4th) 481 (F.C.A.), at para. 16 ("*Barcode*").

[14] *Used Car Dealers*, *supra*, at para. 48.

[15] *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378 (S.C.C.), at 1387 (Emphasis added).

an Act." [16] This presumption applies with particular force where the provisions in which the repeated words appear are close together or otherwise related.[17]

22. ITCL therefore submits that the Tribunal must answer the following questions in determining whether to grant leave:

(a) Has the applicant put forward sufficient credible evidence to give rise to a *bona fide* belief that it is directly affected by conduct referred to in section 76?

(b) Has the applicant put forward sufficient credible evidence to give rise to a *bona fide* belief that the practice in question could be subject to an order under section 76?

23. Importantly, with respect to the second question, the Tribunal must also be satisfied that there is sufficient credible evidence with respect to **each** of the conjunctive elements under section 76. As the Federal Court of Appeal cautioned in *Barcode*:

> ... it is important not to conflate the law standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). **These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7)**. That is because, unless the Tribunal considers all of the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by subparagraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).[18]

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[16] *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.), at 400-401 (Emphasis added).

[17] *Ibid.*

[18] *Barcode, supra,* at para. 18 (Emphasis added).

24. For the reasons that follow, ITCL submits that the applicant has not put forward any evidence, let alone sufficiently credible evidence, that it is directly affected by conduct referred to in section 76, or that the practice in question could be the subject of an order under section 76. ITCL addresses these points in reverse order below.

(B) The Applicant Has Not Alleged Price Maintenance

25. The Tribunal may only grant leave if ITCL's impugned practice could be subject to an order under section 76. There are two distinct elements to section 76, both of which must be satisfied for an order to issue. First, the respondent's **conduct** must constitute price maintenance (subsection 76(1)(a)). Second, that conduct must have an **adverse effect** on competition in the market (subsection 76(1)(b)). SEI's application for leave must fail if the Tribunal finds that SEI has not provided sufficient credible evidence with respect to any one of these conditions.

26. In considering whether sufficient credible evidence has been adduced to support any of the elements of section 76, it is critical to have consideration to the purpose and intent of the law. As the Tribunal recently held in the *Visa* case, "The ill which Parliament sought to address is the adverse effects in the price of products **for resale** not the control of adverse effects of price *per se*."[19] In other words, the conduct at issue is conduct by suppliers to restrict a reseller's ability to set their own prices and compete through low-pricing policies, not the input price of the supplier.[20]

27. *Visa* was the first, and thus far the only, case to consider the new price maintenance provisions in section 76. However, the Tribunal's findings were consistent with the

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19 *Visa*, *supra*, at para. 130 (Emphasis added).

20 *Ibid*, at paras. 127-131.

existing jurisprudence considering the predecessor price maintenance provisions. That jurisprudence confirms that price maintenance involves circumstances where an upstream supplier either controls the price at which a downstream customer chooses to resell the supplier's product or controls the downstream price by refusing to supply a customer who engages in a low-pricing policy. For example, the predecessor sections to section 76 were used to prosecute a manufacturer of jeans who induced retailers to sell the jeans at not less than a minimum price,[21] a gasoline supplier who threatened that low prices by retail gas stations would cause a price war and told retail gas stations to increase the price of gas "or else Shell would be ticked off,"[22] and a beer company that maintained the price at which discount beer was sold by convenience stores.[23]

28. In *R. v. Kito Canada Ltd.*, the Manitoba Court of Appeal described a predecessor section to section 76 as follows:

> In my opinion, the mischief aimed at by section 38 of the *Combines Investigation Act* was the practice of large corporations, with monopolistic or near monopolistic powers, artificially keeping retail prices high by coercing independent retailers into fixing prices and by refusing to supply such independent retailers if they did not maintain the suggested list price of products. Before 1951, for instance, a retail gasoline station which undercut the suggested list price of gasoline was in danger of having its supply cut off as a punishment. I believe that Parliament wanted to protect the small retailer from undue pressure from large wholesalers, distributors and manufacturers. Parliament wanted to protect the weak against the strong, though it enacted words which catch the weak as well as the strong.[24]

29. More recently, in *Fairview Donut Inc. v. The TDL Group Corp.*, Justice Strathy (as he then was) described the predecessor provision to section 76, as follows:

> **Section 61 does not prohibit a manufacturer or supplier from increasing the price at which it sells the product.** As I have said earlier, it does not prohibit a supplier from making a large profit on a product it sells to someone downstream. It prohibits a person who produces or supplies a product from attempting, by

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21 *R. v. H.D. Lee of Canada* (1980), 57 C.P.R. (2d) 186 (QCSSP).

22 *R. v. Shell Canada Products Ltd.* (1990), 63 Man. R. (2d) 1 (C.A.).

23 *R. v. Labatt Brewing Company,* Cour du Québec, Court File No. #500-73-02495-055 (unreported).

24 (1976), 30 C.C.C. (2d) 531 (Man. C.A.), at para. 22.

> means of agreement, to influence upward or discourage the reduction of the price at which another person sells the product. **The provision is designed to protect the public by prohibiting an upstream supplier from preventing competition among retailers, thereby increasing the price paid by the ultimate consumer. It does not prohibit the upstream supplier from increasing the price at which it supplies the product to a downstream purchaser.**[25]

30. Thus, section 76 is not intended to, and does not, restrict a manufacturer or supplier from setting, increasing, or decreasing the prices at which it offers its products for sale. As the Tribunal clearly and unequivocally affirmed in *Visa*, section 76 is not concerned with the input price that a supplier charges to its customer.[26] Rather, section 76 is specifically intended to prohibit a supplier or manufacturer from constraining its customer from charging a lower price to consumers, either through agreement, threat, promise or other like means, or by refusing to supply or discriminating against a customer that engages in a low-pricing policy.

31. Section 76 also does not cover and is not intended to cover conduct which, prior to March 2009, was prohibited by the Former Price Discrimination Provisions. The Former Price Discrimination provisions were contained in subsections 50(1)(a) and 50(2) of the *Act*, which stated:

> 50(1) Everyone engaged in a business who...
>
> (a) is a party or privy to, or assists, in any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser or articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity ....
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (2) It is not an offence under paragraph 1(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price

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25 2012 ONSC 1252, at para. 585 (Emphasis added).

26 *Visa, supra*, at paras. 135 and 136.

> concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

32. Thus, in general terms, the price discrimination provisions prohibited a supplier from engaging in a practice of granting a price advantage to one of its customers which was not available to competing customers who purchased like products from the seller in like quantities.

33. In March 2009, the Former Price Discrimination Provisions were repealed. As a result, conduct that could be characterized as price discrimination under those provisions is now lawful. As Sullivan explains in *The Construction of Statutes*:

> Repeal is the key terminal event in the operation of legislation. When a repeal takes effect, the repealed legislation ceases to be law and ceases to be binding or to produce legal effects. This means that conduct that was formerly prohibited is now lawful.[27]

Thus, since March 2009, it is entirely lawful for a supplier to provide a discount to one of its customers and not to another.

34. The repeal of the price discrimination provisions occurred after a lengthy legislative process, involving recommendations from numerous expert panels.[28] Those panels recommended the repeal of the Former Price Discrimination Provisions on the basis, *inter alia*, that price discrimination is often pro-competitive.[29] More importantly, requiring suppliers to treat all competing customers equally in terms of price falls outside of the proper scope of the *Act*,

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[27] R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont.: LexisNexis Canada, 2008) at p. 647.

[28] The process began as early as 1999 with the recommendations by J. Anthony VanDuzer & Gilles Paquet in *Anticompetitive Pricing and Practices and the Competition Act, Theory, Law and Practice* (University of Ottawa, 1999), and continued through the report of the House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime* (April 2002) (Chair: Walt Lastewka) (*"A Plan to Modernize"*), and the report of the Competition Policy Review Panel, *Compete to Win: Final Report – June 2008* (Ottawa: Public Works and Government Services Canada, 2008) (*"Compete to Win"*).

[29] See for example *A Plan to Modernize*, *ibid* at p. 77; *Compete to Win*, *ibid* at p. 58.

which is concerned with protecting the process of competition, not protecting competitors from competing with one another.[30]

35. With this background in mind, it is clear that the conduct alleged by SEI does not bear any resemblance to resale price maintenance and could not form the basis for an order under section 76. This conclusion is reinforced when one considers the specific elements of section 76.

(i) The Applicant has not adduced sufficient credible evidence that by agreement, threat, promise or other like means, ITCL has influenced upward, or has discouraged the reduction of, the price at which ITCL's customer supplied or offered to supply or advertise a product within Canada

36. SEI alleges that, beginning in June, 2011, ITCL sold tobacco products to NHM at discounted prices that were not offered to SEI, and that NHM in-turn was able to offer tobacco products to consumers at lower prices than SEI. SEI alleges that it had to lower its prices to consumers, at times at or below its cost, in order to compete with NHM.

37. There is no evidence put forward to support the proposition, nor is it even alleged, that ITCL sells products to SEI (or NHM) on the basis that SEI (or NHM) must resell such products at or above a specific price level. SEI has not suggested that ITCL is controlling or attempting to control the price at which SEI (or NHM) chooses to resell it products. SEI's allegation relate solely to ITCL's input price.

38. Moreover, there is no evidence put forward to support the proposition, nor is it even alleged, that by offering discounted input prices to NHM, ITCL influenced upward or discouraged the reduction of the price at which NHM supplied tobacco products to consumers. The allegation is precisely the opposite: that by giving NHM a discount, NHM was able to **lower**

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[30] For example, as former Commissioner of Competition von Finckenstein stated in his remarks to the House of Commons Standing Committee on Industry in the context of the debate over Bill C-234 (April 15, 1999): "...**the Competition Act is there to protect competition, not competitors.** It's to ensure that we have a competitive system..." (Emphasis added).

its prices. In other words, SEI alleges that ITCL's PPP **encouraged the reduction** of NHM's prices, and that SEI in-turn **reduced** its prices in order to stay competitive with NHM.

39. The evidence that SEI has put before the Tribunal is that the purpose of ITCL's PPP was to lower prices for consumers on ITCL-branded products. As set out in a letter from Thierry Schmidt, Regional Sales Manager at ITCL, to SEI, dated January 17, 2013 "the main objective of this program is to ultimately offer **lower** retail prices to consumers on Imperial Tobacco products."[31] This is precisely what SEI alleges to have occurred in this case. There is therefore no credible evidence that ITCL's PPP caused any of ITCL's customers (in this case, SEI and NHM) to sell tobacco products to consumers at artificially high prices. To the contrary, SEI's evidence is that the PPP lowered prices for consumers on ITCL-branded products in selected retail outlets and enhanced competition between retailers. This is a pro-competitive effect, and, therefore could not be the subject of an order under section 76.

(ii) The Applicant has not adduced sufficient credible evidence that ITCL has refused to supply a product to or has otherwise discriminated against any person engaged in business in Canada because of the low pricing policy of that other person

40. Nor is there any evidence to support the proposition that ITCL has refused to supply or otherwise discriminated against any person because of that person's low pricing policy. As is apparent from the explicit language of subsection 76(1)(a)(ii), for conduct to be captured by subsection 76(1)(a)(ii), a supplier must refuse to supply or discriminate against its customer **because** of that customer's low pricing policy. This requirement recognizes the mischief that section 76 is intended to address, namely, an upstream supplier's control over the downstream price by refusing to supply or otherwise discriminating against a customer that is selling or intends to sell the product below a minimum price. In this case, there is no allegation and no

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[31] Mustafa Affidavit, Exhibit "I" (Emphasis added).

evidence that ITCL refused to supply SEI or discriminated against SEI because of any pricing policy by SEI, or for the purpose of maintaining and controlling resale prices at a higher level than they otherwise would be. There is no allegation of any interference by ITCL with SEI's pricing decisions. Rather, the allegation is that ITCL provided one customer with a discount and not another, and the result was increased competition between those customers and decreased prices for consumers. This is not conduct that could be the subject of an order under section 76.

41. Indeed, it is clear that although this application is framed as an application under section 76, what SEI is actually alleging is that ITCL engaged in lawful price discrimination. This is evident from the very first paragraph of SEI's Application for Leave, which states at paragraph 1(a) that SEI is seeking leave so that ITCL will be "prohibit[ed] from continuing to discriminate SEI of low pricing policy awarded to SEI's direct competitor (New Hasty Market "NHM") and accept SEI as a customer on the 'same discounted trade terms as SEI's direct competitor NHM' forthwith... ."[32] Similarly, at paragraph 1(b), SEI seeks an order requiring ITCL to "stop its discriminating policy and accept all retailers across the board on similar trade terms unless the discounts awarded by the Respondent are volume discounts."[33]

42. As set out above, the prohibition against such price discrimination was repealed in 2009. It is therefore perfectly lawful, and in fact is pro-competitive, for a supplier to offer a discount to one customer and not another. SEI's application ultimately boils down to a single grievance – that it was prejudiced by the fact that its competitor was offered a discount and that it was not. That is not, however, a basis for any order that could be made under section 76.

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[32] SEI Notice of Application, para 1(a).

[33] SEI Notice of Application, para 1(b).

(iii) The Applicant has not adduced sufficient credible evidence that ITCL's conduct has had, is having or is likely to have an adverse effect on competition in a market.

43. In order for an order to issue under section 76, the Tribunal must also find that the conduct in subsection 76(1)(a) results in an adverse effect on competition. Beyond a single bald statement in the Mustafa Affidavit,[34] SEI has offered no evidence to support the conclusion of any adverse effect. As the Tribunal has found, speculation and bald assertions do not qualify as sufficient credible evidence.[35] Moreover, even if the conduct at issue could be characterized as resale price maintenance (which it cannot), SEI's own evidence in this case is that the effect of that conduct was **increased competition** between SEI and NHM with respect to the sale of ITCL products, and **lower** prices for consumers on those products. Accordingly, the evidence before the Tribunal is that the preferred pricing program had a pro-competitive effect on the market for these products. There is therefore no credible evidence that ITCL's conduct has had, is having, or is likely to have an adverse effect on competition in the market.

(C) The Applicant has not Adduced Sufficient Credible Evidence that it was Directly Affected by Price Maintenance

44. Finally, section 103.1(7.1) provides that the Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected "**by any conduct referred to in that section** [s. 76]." As described above, SEI has not alleged any conduct by ITCL that could be characterized as falling within section 76 (or any other section of the *Act*). Accordingly, SEI has failed to meet this branch of the test, and this provides another independent ground on which the Tribunal should deny leave.

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[34] Mustafa Affidavit, para. 48.

[35] *Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22, at para. 21; *Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority,* 2011 Comp. Trib. 1. at para 13.

PART V – OTHER MATTERS

45. ITCL respectfully requests that the proceeding take place in Ottawa and be conducted in English.

46. ITCL takes no position on SEI's motion to be represented by its manager, Mustafa, instead of counsel.

PART VI – ORDER REQUESTED

47. ITCL respectfully requests that this leave application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PART VII – LIST OF AUTHORITIES, STATUTES AND REGULATIONS

ITCL has referred to the following authorities, statutes and regulations:

Case Law

a) *Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22

b) *Commissioner of Competition (the) v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10

c) *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252

d) *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41

e) *R. v. H.D. Lee of Canada* (1980), 57 C.P.R. (2d) 186 (QCCSP)

f) *R. v. Kito Canada Ltd.* (1976), 30 C.C.C. (2d) 531 (Man. C.A.)

g) *R. v. Labatt Brewing Company,* Cour du Québec, Court File No. #500-73-02495-055 (unreported)

h) *R. v. Shell Canada Products Ltd.* (1990), 63 Man. R. (2d) 1(C.A.)

i) *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378

j) *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, (2004), 34 C.P.R. (4^{th}) 481 (F.C.A.)

k) *Thomson v. Canada (Deputy Minister of Agriculture)* [1992] 1 S.C.R. 385

l) *Used Car Dealers Association of Ontario (the) v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10

Secondary Authorities

m) House of Commons Standing Committee on Industry, (15 April, 1999) (Konrad von Finckenstein)

n) House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime* (April 2002) (Chair: Walt Lastewka)

o) *Compete to Win: Final Report – June 2008* (Ottawa: Public Works and Government Services Canada, 2008)

p) J. Anthony VanDuzer & Gilles Paquet, *Anticompetitive Pricing and Practices and the Competition Act, Theory, Law and Practice* (University of Ottawa, 1999)

q) R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont.: LexisNexis Canada, 2008)

Statutes and Regulations

r) *Competition Act*, R.S.C., 1985, c. C-34, as amended