

**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 Swenson Inc. for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, granting leave to make an application under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

**BETWEEN:**

**SWENSON INC.**

Applicant  
(Respondent on the Motion)

- and -

**TRADER CORPORATION**

Respondent  
(Moving Party)

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**  
August 1, 2008  
CT- 2008-007

Chantal Fortin for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

# 0014

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**WRITTEN REPRESENTATIONS**

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**PART I – STATEMENT OF FACTS**

**Nature of Motion**

1. In this motion brought on consent, the Respondent, Trader Corporation (“Trader”), seeks an order granting it an extension of time to file its response pursuant to Rule 119 of the *Competition Tribunal Rules*.

Notice of Motion dated August 1, 2008

**Facts**

2. On July 16, 2008, the Applicant, Swenson Inc., filed its Notice of Application and the Affidavit of Darold Swenson pursuant to section 103.1 of the *Competition Act* (the “Act”)

seeking leave to bring an application for an order under subsection 75(1) of the Act directing Trader to supply advertising space in its publications on usual trade terms (the "Application").

*Competition Act*, R.S.C. 1985, c. C-34, ss.75 and 103.1, Appendix A1

Affidavit of Kathryn Lester, sworn August 1, 2008, at para. 2  
("Lester Affidavit")

3. On July 24, 2008, the Competition Tribunal (the "Tribunal") confirmed that it can hear Swenson Inc.'s application for leave to make an application under subsection 75(1) of the Act.

Lester Affidavit, at para. 3

4. The Tribunal's Notice was served on Trader on Thursday, July 24, 2008.

Lester Affidavit, at para. 4

5. On Monday, July 28, 2008, counsel for Trader wrote to counsel for Swenson Inc. advising that they intend to cross-examine Mr. Swenson on his affidavit sworn on July 10, 2008, and indicating availability to do so in Winnipeg (where Swenson Inc.'s counsel is located) on any date in the week of July 28 or on August 5 or 6, 2008.

Lester Affidavit, at para. 5

Email from Catherine Beagan Flood to William Haight dated July 28, 2008,  
Exhibit "A" to the Lester Affidavit

6. Swenson Inc.'s counsel has advised that Mr. Swenson is currently on a recreational vehicle ("RV") trip through Alaska and is not expected to return until early or mid September. Counsel for the parties have discussed tentative cross-examination dates of September 22, 23 or 29, to be confirmed with Mr. Swenson, who is not currently within reliable telephone range. The parties have agreed that a reasonable deadline for Trader's response would be ten days after receipt of the transcripts of the cross-examination.

E-mail from William Haight to Catherine Beagan Flood dated July 30, 2008,  
Exhibit "A" to the Lester Affidavit.

**PART II – POINTS IN ISSUE**

7. The only issue on this motion is whether Trader should be granted an extension of time to file its response.

**PART III - SUBMISSIONS**

**Extension of Time**

8. Trader seeks an extension of time to file its response to ten days after it receives the transcript of the cross-examination of Mr. Swenson on his affidavit. Trader seeks this extension to give it time to conduct the cross-examination of Mr. Swenson on his affidavit and obtain a copy of the transcript, so that it may rely upon the cross-examination in its response.

9. Pursuant to Rule 119 of the *Competition Tribunal Rules*, Trader has 15 days from the date of receiving the Tribunal's Notice to serve and file its response to the Application. The Court however has discretion to vary this timeline. Rule 5 of the *Competition Tribunal Rules* provides that the time limits prescribed by the Rules may be extended by an order or a direction of a judicial member.

*Competition Tribunal Rules, Rules 5 and 119, Appendix A2*

10. Rule 8 of the *Federal Courts Rules* similarly provides that the Federal Court may extend a period of time provided by the *Rules*. Rule 3 provides that the Rules should be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

*Federal Courts Rules, Rules 3 and 8, Appendix A3*

11. In considering a motion for a time extension, this Tribunal should do justice between the parties. To do so, it may consider the following factors based on the circumstances of the case:

- (a) whether the party seeking the extension has a continuing intention to pursue the matter;
- (b) whether the position taken by the party seeking the extension of time has some merit;
- (c) the length of the period of extension;

- (d) whether the other party is prejudiced by the delay; and
- (e) whether there is a reasonable explanation for the delay.

*Grewal v. Canada (Minister of Employment and Immigration)* (1985), 63 N.R. 106 at para. 35 (C.A.), Appendix B1

*Jakutavicius v. Canada (Attorney General)*, [2004] F.C.J. No. 1488 at paras. 15-17 (C.A.) (QL), Appenix B2

*Stanfield v. Canada*, [2005] F.C.J. No. 466 at para. 3 (C.A.) (QL), Appendix B3

12. Weighing all of the above factors, granting Trader's request would do justice between the parties in this case.

13. First, Trader has demonstrated a continuing intention to respond to the Application. It acted promptly upon being served with the Tribunal's Notice, it is seeking to cross-examine Mr. Swenson on his affidavit and has made itself available to conduct the cross-examination as soon as Mr. Swenson is available.

14. Second, the position that Trader seeks to advance in its response has considerable merit. Swenson Inc. has failed to provide sufficient credible evidence to give rise to a *bona fide* belief that it has been directly and substantially affected in its business by a reviewable practice, much less that an order could be made under s. 75(1) of the *Competition Act*.

*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No. 1657 (C.A.) (Q.L.), 2004 FCA 339 at paras. 16, 23, Appendix B4

15. Third, the extension requested is as short as is reasonable given that Swenson Inc.'s affiant is not available. The parties have agreed that ten days after receipt of the transcript of the cross-examination is a reasonable extension.

E-mail between counsel for the parties, Exhibit "A" to the Lester Affidavit

16. Fourth, no prejudice to Swenson Inc. would arise from the delay, to which it has consented and which results from its own affiant's unavailability.

17. Finally, there is a reasonable explanation for the delay. Trader requires additional time to conduct the cross-examination and obtain a copy of the transcript, so that it may rely upon that cross-examination in its response. Trader was available to cross-examine Mr. Swenson within the time limit for its response, but he was not available. Trader thus has good

reasons to seek an extension of time to file its response, so it can rely upon the cross-examination in the response.

**PART IV – ORDER SOUGHT**

18. Trader seeks an order in the form attached as Schedule “A” to the Notice of Motion dated August 1, 2008 granting it an extension of time to file its response pursuant to Rule 119 of the *Competition Tribunal Rules*.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of August 2008.



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## APPENDIX A – STATUTES AND REGULATIONS

1. *Competition Act*, R.S.C. 1985, c. C-34, ss.75 and 103.1
2. *Competition Tribunal Rules*, Rules 5, 119
3. *Federal Courts Rules*, SOR/98-106, Rules 3, 8, 83 and 369

**APPENDIX B – LIST OF AUTHORITIES**

1. *Grewal v. Canada (Minister of Employment and Immigration)* (1985), 63 N.R. 106 (C.A.)
2. *Jakutavicius v. Canada (Attorney General)*, [2004] F.C.J. No. 1488 (C.A.) (Q.L.)
3. *Stanfield v. Canada*, [2005] F.C.J. No. 466 (C.A.) (Q.L.)
4. *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] F.C.J. No.1657 (C.A.) (Q.L.), 2004 FCA 339

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**COMPETITION TRIBUNAL**

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