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Competition Tribunal Dismisses Refusal to Deal Application Against CarProof, AutoTrader and Kijiji

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On January 4, 2016, the Canadian Competition Tribunal publicly released its decision dismissing Audatex Canada ULC's application for leave to bring a refusal to deal application under the *Competition Act* against CarProof Corporation, Trader Corporation and Marktplaats BV. Audatex wanted the Competition Tribunal to require CarProof, Trader (owner of the AutoTrader website) and Marktplaats (owner of the Kijiji website) to supply Audatex with automobile "listings" data on what Audatex claimed to be usual trade terms.

Davies was counsel to the respondent CarProof.

In dismissing the application, the Competition Tribunal provided a comprehensive evaluation of the test to be met by firms seeking leave from the Competition Tribunal to commence a private proceeding and extensive guidance on the evidentiary requirements for leave applications in future refusal to deal cases brought by private parties.

Background

Audatex provides data and software solutions to Canadian automobile insurance companies and repair shops. Among other things, Audatex uses automobile sales listings to generate "total loss valuations" to provide estimated market values of damaged automobiles to insurers where the automobile may be a complete writeoff. Audatex also provides "partial loss valuations" where vehicles can be repaired based on comparable data from repair shops.

Audatex argued that the two largest generators of listings data in Canada are Trader and Marktplaats (via the AutoTrader and Kijiji websites), and that Audatex required their listings data in order to effectively provide its total loss valuations. Audatex also claimed that its partial loss valuation insurance customers would stop buying its partial loss valuations if it could not provide both.

Earlier in 2015, Audatex was informed that Trader would be terminating its agreement with Audatex, and that Trader and Marktplaats had each entered into exclusive agreements with CarProof for the listing of their respective listings data. CarProof uses sales listing data in preparing vehicle history reports for use by prospective used car sellers and buyers. Audatex then attempted to negotiate a sublicense of the listings data with CarProof, but the parties have thus far been unable to agree on commercial terms.

As a result, Audatex brought an application under the refusal to deal provisions of the *Competition Act* seeking an order requiring CarProof, Trader and Marktplaats to provide Audatex with listings data on usual trade terms.

The Leave Test and Application to the Case

The refusal to deal provision provides the Competition Tribunal with the ability to require a supplier to accept a person as a customer on usual trade terms where

1. that person is substantially affected in his business due to his inability to obtain adequate supplies of a product on usual trade terms;
2. that person is unable to obtain adequate supplies of the product because of insufficient competition among suppliers in the market;

3. that person is willing and able to meet the usual trade terms for the product;
4. the product is in ample supply; and
5. the refusal to deal is having or is likely to have an adverse effect on competition in a market.

This provision (section 75) is one of the few in the *Competition Act* allowing for a private right of action. For the majority of the civil provisions in the *Competition Act*, only the Commissioner of Competition can initiate a challenge before the Competition Tribunal. However, before a private party can bring a refusal to deal application, it must first obtain leave of the Competition Tribunal.

In order to obtain leave, there must be sufficient credible evidence that (a) the applicant is directly and substantially affected in its business by the refusal to deal, and (b) the practice in question could make out the above requirements. As the Tribunal recognized, it is not sufficient that the evidence show a mere possibility that the business may be directly and substantially affected. The applicant must establish the existence of reasonable grounds for a belief that the refusal to supply will have a substantial effect. The Tribunal also noted that simply proving that a supplier has refused to supply a product to a willing customer is not sufficient. Rather, the application has to meet all of the elements of section 75 before leave may be granted.

In the present case, the Competition Tribunal held that Audatex provided insufficient credible evidence to provide reasonable grounds for a belief that it was directly and substantially affected in its business by the refusal to deal. In reaching this conclusion, the Tribunal clarified that the entirety of the applicant's business must be considered in this determination, and not just the affected product line. The Tribunal held that Audatex failed to provide sufficient credible evidence concerning

- the portion of Audatex's total business that is represented by its total loss valuation business;
- the portion of its supply of listings data that would be represented by Trader and Marktplaats data; and
- how a refusal to supply listings data may impact Audatex's partial loss valuation business.

The Competition Tribunal specifically concluded, in the circumstances of this application, that a loss of about one-quarter of the business of Audatex resulting from the refusal to supply was not adequate to show the substantial effect on a business necessary to obtain leave:

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).¹

As the Competition Tribunal held that there was insufficient evidence that Audatex was directly and substantially affected in its business by the refusal to deal, it was not necessary to consider whether it could make out the other required elements of the leave application.

The implication of the Competition Tribunal's decision is that, while the standard of proof is lower in leave applications than in a full trial, applicants must still provide sufficient and credible information about their business and the impact of the refusal to supply in order for the Tribunal to be able to have a *bona fide* belief of a direct and substantial effect.

¹ *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28 at para. 79.

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