DEAL ME OUT: CLARIFYING THE TEST FOR LEAVE IN COMPETITION ACT REFUSAL TO DEAL CASES

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Overview

For forty years, Canada has had a "refusal to deal" law which allows the Competition Tribunal to order firms to accept, or prevent them from cutting-off supply to customers for their products in certain circumstances. Between 1976 and 2002, only the Commissioner of Competition could bring refusal to deal cases to the Tribunal. That changed in 2002, when Canada's *Competition Act*[1] was amended to permit private parties to bring cases to the Tribunal in their own name, with leave of the Tribunal. On January 4, 2016, the Tribunal released its latest decision on a private application for leave to commence a refusal to deal application[2]. In reaching this conclusion, the Tribunal re-articulated its approach to deciding whether to grant leave to commence a private application under section 75 of the Act, and offered valuable guidance on the analysis of "directly and substantially affected" under the first part of the leave test.

Background Case Facts

Audatex Canada ULC ("Audatex") was a provider of data and software solutions to Canadian automobile insurance companies and repair shops. Audatex described its "primary business" to be the provision of two services: "total loss valuation" and "partial loss estimating". The total loss valuation services involved generating total loss valuation for damaged automobiles based on information from automobile sales listings and preparing valuation reports for insurance company customers. A key input for providing such services was the automobile sales listings data. The partial loss estimating services referred to the automobile repair estimates offered to both insurance companies and repair shops. Unlike total loss valuation services, partial loss estimating services did not require automobile sales listings data as an input.

Trader Corporation ("Trader") and Marktplaats B.V. ("Marktplaats") were two companies that provided online automobile classified advertisements services. Both companies refused to supply their automobile sales listings data to Audatex on the basis that they had entered into exclusive supply agreements with CarProof Corporation ("CarProof"). CarProof used automobile sales listings data to produce detailed vehicle-history reports for use by prospective used car sellers and buyers. CarProof also sublicensed some of the data to other

industry participants. Audatex tried to negotiate a satisfactory sublicense agreement with CarProof to gain access to Trader and Marktplaats automobile sales listings data. However, the parties could not agree on the contractual terms. Consequently, Audatex applied to the Tribunal for leave to commence a refusal to deal application, seeking an order requiring CarProof, Trader and Marktplaats to supply Audatex with automobile sales listings data on usual trade terms.

The Tribunal Decision

The Leave Test

The test which the Tribunal applies on an application for leave in refusal to deal cases is prescribed in section 103.1(7) of the Act. It is a two-part test, pursuant to which the Tribunal is to determine whether the application for leave is supported by sufficient credible evidence to give rise to a bona fide belief that (i) the applicant is directly and substantially affected in its business by the refusal to deal; and (ii) the practice in question could be subject to an order under section 75 of the Act. The Tribunal clarified that the "business" to be considered under the first part of the test is the Applicant's entire business. The second part of the test requires the applicant to satisfy the Tribunal that all of the five elements of the refusal to deal set out in subsection 75(1) of the Act[3] could be met when the application is heard on the merits.

For both parts of the test, the burden of proof rests upon the applicant, and the standard of proof requires that the evidence establish the "existence of reasonable grounds" for a belief of direct and substantial effect, which is more than a mere possibility but need not rise to the standard of proof on a balance of probabilities.

Application to the Audatex Case

Applying the test discussed above to Audatex's leave application, the Tribunal held that Audatex failed to meet the first part of the leave test. On this basis, the Tribunal denied Audatex's leave application, without proceeding to the second part of the test to consider whether each of the five elements of the refusal to deal could be met.

Audatex claimed that the Respondents' refusal to supply "directly and substantially" affected its total loss valuation services, because Trader and Marktplaats were the only sufficiently large sources of data to enable Audatex to produce the valuation reports for its insurance company customers. Furthermore, Audatex claimed that its partial loss estimating services would also be adversely impacted, even though automobile sales listings data was not used as input for such services, for two reasons. First, the master services agreement under which some insurance company customers purchased both of Audatex's services in a bundled package permitted the customers to terminate the entire contract if Audatex failed to provide one of the services. The second reason was that Audatex believed the repair shop customers would not remain with Audatex if

insurance companies dropped Audatex as a supplier.

The Tribunal, however, was not persuaded that the alleged impact on Audatex's partial loss estimating services was supported by sufficient credible evidence. It viewed the claims as "essentially based on an interpretation of certain contractual provisions" in Audatex's master services agreement and on "a complex chain of cascading assumptions" about how Audatex's insurance company customers and repair shop customers might act in the future. There was no evidence of any actual or threatened contract terminations by Audatex's customers. Thus, the Tribunal concluded that the evidence adduced by Audatex only amounted to a mere possibility and was speculative.

Focusing on the Audatex's total loss valuation services, the Tribunal found that the alleged impact of Respondents' refusal was not of a sufficient magnitude to be considered a "substantial effect" for purposes of the first part of the leave test. As noted above, the alleged impact of the refusal is to be measured in the context of the Applicant's entire business. Audatex submitted that the total loss vacation services made up "approximately one-quarter" – more precisely, 22 – 23 percent – of its revenues from its "primary business", but gave no indication as to what the "primary business" represented in Audatex's entire business. Audatex's evidence also lacked clear information on the proportion of Audatex's total purchases of automobile sales listings data represented by the Respondents. Furthermore, the Tribunal opined that, even if it were to equate Audatex's "primary business" with its total business, 22 – 23 percent did not amount to a substantial effect. In reaching this conclusion, the Tribunal cited three past refusal to deal cases in which it granted leave – *Used Car Dealers*[4] , *Nadeau*[5] and *B-Filer*[6] — and observed that the magnitude of the impact of the alleged refusal to deal was 48 percent of the applicant's total supply in *Nadeau*, and 50 percent of the applicants' total revenue or net income in the other two cases. By contrast, the Tribunal denied leave in the *Construx*[7] case where the alleged impact of the refusal was 38 percent of total sales over a six-year period, and in five other cases[8] where no direct and non-speculative evidence about the alleged impact was adduced.

Key Takeaways from the Case

The most important takeaway from the *Audatex* case is the Tribunal's holding that a refusal to deal affecting 22 – 23 percent of the applicant's total business is not of a sufficient magnitude for the Tribunal to grant leave. When considered together with *Nadeau*, it appears that the line that the Tribunal draws between substantial effect and insubstantial effect lies somewhere in the range from 22 or 23 to 48 percent. This significantly clarifies the meaning of "substantial" under section 103.1(7).

As well, the Audatex case provides greater clarity on what constitutes sufficient credible evidence at the leave stage. The applicant must provide enough information on its own business to allow the Tribunal to understand

precisely (i) the portion of its total business that is affected by the refusal and (ii) the portion represented by the suppliers refusing to supply. Allegations about the impact of the refusal must be based on actual past experiences, or on solid evidence of likely future events, as opposed to forward-looking speculation.

At the time of writing, the *Audatex* decision was under appeal. It remains to be seen if and how the Federal Court of Appeal will modify the interpretation and application of the test for leave to bring private applications respecting refusals to deal.

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[1] *Competition Act*, RSC 1985, c C-34, as amended.[ps2id id='1' target=''/]

[2] *Audatex Canada*, ULC v. *CarProof Corporation*, 2015 Comp. Trib. 28 [*Audatex*].[ps2id id='2' target=''/]

[3] The five elements under subsection 75(1) are the following: "(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." *Competition Act*, RSC 1985, c C-34, s.75(1).[ps2id id='3' target=''/]

[4] *Used Car Dealers Assn of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10 [*Used Car Dealers*].[ps2id id='4' target=''/]

[5] *Nadeau Ferme Avicole Ltee / Nardeau Poultry Farm Ltd. v Groupe Westco Inc.*, 2008 Comp Trib 7 [*Nadeau*].[ps2id id='5' target=''/]

[6] *B-Filer Inc v Bank of Nova Scotia* (2005), 2005 Comp Trib 38 [*B-Filer*].[ps2id id='6' target=''/]

[7] *Construx Engineering Corp v General Motors of Canada Ltd*, [2005] CCTD No 20 [*Construx*].[ps2id id='7' target=''/]

[8] *Sears Canada Inc. v Parfums Christian Dior Canada Inc.*, 2007 Comp Trib 6 [*Sears*]; *Mrs. O's Pharmacy v Pfizer Canada Inc.*, (2004), 35 CPR (4th) 171 (Comp Trib) [*Mr. O's Pharmacy*]; *Paradise Pharmacy Inc. v Novartis Pharmaceuticals Canada Inc.* [2004] CCTD No 21 (Comp Trib) [*Paradise*]; *Broadview Pharmacy v Pfizer Canada Inc.*, [2004] CCTD No 23 (Comp Trib) [*Broadview*]; *Broadview Pharmacy v Wyeth Canada Inc*, [2004] CCTD No 24 (Comp Trib) [Wyeth].[ps2id id='8' target=''/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.