Federal Court of Appeal | Cour d'appel fédérale

Date: 20170907

Docket: A-428-16

Citation: 2017 FCA 181

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

CARGURUS, INC.

Appellant

and

TRADER CORPORATION

Respondent

Heard at Toronto, Ontario, on June 14, 2017.

Judgment delivered at Ottawa, Ontario, on September 7, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] CarGurus, Inc. (CarGurus) appeals from a decision of the Competition Tribunal (the Tribunal) dated October 14, 2016 (*CarGurus, Inc. v. Trader Corporation*, 2016 CACT 15) (Reasons), which denied CarGurus' request for leave under section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act) to bring an application under sections 75, 76 and 77 of the Act. These sections deal, respectively, with the restrictive trade practices of refusal to deal, price

maintenance and exclusive dealing. Pursuant to section 13 of the *Competition Tribunal Act*, R.S.C. 1985 (2nd Supp.), c. 19, Tribunal decisions can be appealed to this Court as if they were judgments of the Federal Court.

[2] Before this Court, CarGurus has abandoned its section 76 price maintenance claim and only appeals the Tribunal's decision as it pertains to sections 75 and 77. Having carefully considered the arguments put forward by the parties, both orally and in writing, I am of the view that this appeal should be dismissed.

I. Background

[3] The advent of digital marketing has transformed how consumers purchase cars. Though transactions between buyers and sellers are still conducted in person, much of the research is done online prior to the actual sale via research websites called Digital Marketplaces. Information available on these Digital Marketplaces will typically include, for each vehicle, the make, model, year, Vehicle Information Number, mileage and price, as well as photographs (these elements being referred to as Vehicle Listings). Digital Marketplaces aggregate Vehicle Listings from a number of sources, including vehicle manufacturers, automobile dealers, private sellers, and the marketplaces themselves. Certain other businesses known as "Feed Providers" also receive Vehicle Listings from dealers and provide them to Digital Marketplaces.

[4] On the evidence before this Court, there are approximately 10 businesses in Canada which offer Digital Marketplaces for the automotive sector, including the parties to this appeal. The appellant is a private company registered under the laws of Massachusetts. Its website has

been active in the United States since 2007, and it entered into the Canadian marketplace in May 2015 as "http://ca.cargurus.com". As for the respondent, it owns and operates an English and French Digital Marketplace ("http://www.autotrader.ca" and "http://www.autohebdo.net"). Trader Corporation (Trader) also offers "capture services" whereby their employees actually create Vehicle Listings for dealers. A Trader employee or contractor will visit the dealership to gather information and take photos of the vehicle. These listings can then be posted on Trader's websites, as well as on the dealer's own website. These listings can also be made available to other Digital Marketplaces through a licensing process (referred to as syndication agreement).

[5] The core issue raised in the application for leave was access to the supply of the Trader Vehicle Listings. Trader claims that it holds copyright in photographs included in the listings it creates. In June 2015, Trader apparently received complaints from some dealers that their vehicles were appearing for sale on CarGurus' website without their permission. In June 2015, Trader sent a letter to CarGurus through which it alleged that CarGurus was "scraping" or "crawling" the Trader website; this is a technique whereby computer software is used to search an online data source to identify data of interest and then extract them from that source. Trader later sent a draft syndication agreement to CarGurus for the use of its listings. CarGurus rejected the proposed agreement and never entered into negotiations with Trader, claiming that the terms of the agreement would prevent it from effectively competing with Trader in the Canadian marketplace.

[6] In December 2015, Trader commenced a copyright proceeding seeking declarations that CarGurus had infringed Trader's copyright in relation to at least 150,000 photographs added to a

website administered by Trader pursuant to its capture services. That proceeding was pending when the Tribunal heard the application, but the Ontario Superior Court of Justice has since rendered judgment in favour of Trader, in April 2017 (*Trader v. CarGurus*, 2017 ONSC 1841).

[7] As a result of the copyright proceedings being launched, CarGurus removed over one million photographs it obtained by crawling dealer websites. The lack of access to Trader's inventory and the resulting decrease in page views and in advertising revenues were the basis for CarGurus' application for leave before the Tribunal. CarGurus claimed that Trader engaged in anticompetitive conduct, including refusing to licence Trader's Vehicle Listings to CarGurus on the usual trade terms, instructing third parties not to deal with CarGurus, and improperly asserting copyright.

II. The impugned decision

[8] Part VIII of the Act sets out the matters reviewable by the Tribunal, including restrictive trade practices that the Tribunal can review on application either by the Commissioner of Competition or by another person who has been granted leave. Pursuant to section 75, the Tribunal has jurisdiction to review a situation where a person is unable to obtain adequate supplies of a product on usual trade terms. If the test set out in that section is met, the Tribunal may order that one or more suppliers of that product accept the person as a customer. Under section 76, the Tribunal can review situations of price maintenance and may make orders prohibiting that behaviour. Under section 77, the Tribunal can review the practices of exclusive dealing, tied selling, and market restriction. If the Tribunal finds that these activities are

occurring within the meaning of that provision, the Tribunal may make orders prohibiting those practices.

[9] After summarizing the facts, the parties' submissions and the relevant legislative provisions, the Tribunal noted that before granting leave, it must come to a twofold determination. First, it must determine whether the application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been either directly (for the purposes of applications brought under section 76 of the Act) or both directly and substantially (for the purposes of applications brought under sections 75 and 77 of the Act) affected in its business by the alleged practice (see respectively subsection 103.1(7.1) and 103.1(7) of the Act). Second, it has to conclude that the alleged practice could be subject to an order pursuant to the section under which the restrictive trade practice falls.

[10] CarGurus had argued that removal of the Trader photographs and its inability to display the Trader Vehicle Listings led to less traffic and was generating less leads to dealers, which has negatively affected its revenue realization. More particularly, CarGurus had submitted to the Tribunal that: 1) the number of multiple leads CarGurus can generate for dealers has diminished significantly; 2) CarGurus has lost 60% of leads for dealers whose Vehicle Listings are related to Trader; 3) CarGurus has lost approximately 25% of its overall lead volume; 4) CarGurus' conversion rate (i.e. the percentage of visitors to the CarGurus website who contacted at least one dealer about a car for sale) has decreased by 16%; and 5) detailed views of CarGurus' pages have dropped by 31%, leading to a corresponding 31% drop in advertising revenues.

[11] In its Reasons, the Tribunal proceeded on the assumption that CarGurus, being a competitor of Trader, was directly affected by its practices. Thus, for the purposes of sections 75 and 77, the Tribunal's analysis focused on the substantial nature of Trader's impact on CarGurus' business. The Tribunal found that CarGurus' evidence was lacking in sufficient particulars and credibility. In particular, the Tribunal identified the following five major problems with CarGurus' evidence:

i. The Tribunal found that there was "no reliable evidence on the proportion of CarGurus' total inventory of Vehicle Listings which is represented by the Trader Vehicle Listings that were deleted from CarGurus' website and that Trader allegedly refuses to supply". On this front, the Tribunal took particular issue with CarGurus' 42.5% market share figure, as it was apparently arrived at without any consideration for Kijiji as a competitor (Reasons at paras. 72-78);

ii. The Tribunal also found that CarGurus' evidence did not show an actual drop in existing or anticipated revenues. CarGurus' showing of substantial harm was entirely based on the difference between its actual and projected revenues, and the Tribunal criticized the fact that the evidence of reduced revenues was based purely on estimates. It also found that the basis upon which CarGurus came to its projections of anticipated sales had to be submitted to satisfy it that the evidence was sufficient and credible (Reasons at paras. 79-87);

iii. CarGurus alleges substantial effect, yet it expects and forecasts its revenues to continuously increase until the end of December 2017. The Tribunal found that this made it difficult for it to see any substantial impact on CarGurus' business (Reasons at paras. 88-92);

iv. Actual revenues posted by CarGurus from the time it entered the Digital Marketplace business in Canada show an increase in advertising revenues rather than an adverse effect caused by Trader, which suggests that there are other sources of inventory supply remaining available to CarGurus (Reasons at paras. 93-99); and

v. The gap between CarGurus' actual revenues and its initial projections is in the same range, before and after Trader allegedly refused to supply the Trader Vehicle Listings. For the Tribunal, this was indicative of the decreases being attributable to inaccurate projections, rather than to Trader's conduct (Reasons at paras. 100-101).

[12] Given the weaknesses in CarGurus' evidence, the Tribunal concluded it could not reasonably believe that CarGurus may be directly and substantially affected in its business by Trader's conduct. CarGurus accordingly did not get past the first requirement of the leave test found under subsection 103.1(7) of the Act.

[13] As for the section 76 claim, the Tribunal turned immediately to the second part of the leave test since CarGurus only needed to show that its business was directly affected by the alleged reviewable conduct of Trader. The Tribunal found that at least three of the required elements set out in that provision were not met. It was accordingly determined that, if heard on the merits, an order under that section would not be possible. As already mentioned, this finding is not challenged on appeal.

III. Issues

[14] This appeal raises the following three issues:

A. Did the Tribunal misapprehend the evidence on Trader's market share?

B. Did the Tribunal misapply the test for leave with respect to CarGurus' projections of harm, requiring CarGurus to meet a heightened evidentiary threshold?

C. Did the Tribunal misapply the "but for" test for evaluating the issue of substantial harm?

IV. Analysis

A. *Did the Tribunal misapprehend the evidence on Trader's market share?*

[15] CarGurus has attempted to characterize its first ground of appeal as a question of mixed fact and law. Yet, this Court has cautioned against revisiting the Tribunal's factual conclusions under cover of challenging a question of mixed fact and law: *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2011 FCA 188, 419 N.R. 333 at para. 47 (*Nadeau FCA*). In my view, this is precisely what the appellant is trying to do here.

[16] CarGurus essentially argues that the Tribunal erred in finding that there was no reliable evidence on the proportion of CarGurus' total inventory of Vehicle Listings which was represented by the Trader Vehicle Listings. According to counsel, CarGurus' estimates that Trader controls 42.5% of the upstream market is based on its internal analysis of Vehicle

Listings that it cannot obtain from any source other than, or without the consent of, Trader. Instead, the Tribunal erroneously understood CarGurus to be using its downstream estimates as a proxy for the upstream market. Since the downstream market share estimates seemed suspect because CarGurus left Kijiji.ca out of its market share estimates, the Tribunal was inevitably led to believe that the upstream market share estimates must equally be faulty.

[17] Whatever the merit of this argument, there is no doubt in my mind that the question of whether Trader controls 42.5% of the upstream market is a pure question of fact. There is no legal component in the alleged error made by the Tribunal. As such, this issue is not properly before us, as subsection 13(2) of the *Competition Tribunal Act* requires leave of this Court in order for it to engage with questions of fact. Even if the first question could somehow be characterized as a question of mixed fact and law, it would be of no help to the appellant as this Court is bound by the findings of facts of the Tribunal.

B. *Did the Tribunal misapply the test for leave with respect to CarGurus' projections of harm, requiring CarGurus to meet a heightened evidentiary threshold?*

[18] CarGurus alleges that the Tribunal applied a more stringent threshold for leave than would otherwise be required, and this is evidenced by how it arrived at its conclusion regarding the second (i.e. no basis for projections) and fifth (i.e. difference between actual and forecasted revenues not attributable to Trader) issues regarding the perceived frailties with CarGurus' financial projections.

[19] CarGurus argues that the onus for obtaining leave under section 103.1 is low. The leave stage is a summary screening process where the evidence is not tested and where the applicable standard of proof is less than a balance of probabilities. It submits that demonstrating the likelihood of substantial harm is necessarily based on projections as such a demonstration is a forward-looking process. Relying on a previous decision of the Tribunal (*The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 CACT 10 (*Used Car*)), CarGurus alleges that the information tendered may be incomplete, and that it is not reasonable to require hard and fast evidence on every point. Accordingly, the Tribunal impermissibly raised the threshold requirements for leave in stating that projections and forecasts are not enough to constitute credible and convincing evidence of substantial effect on CarGurus' business, and in requiring that the basis of its projections be shown. This is particularly so given that CarGurus was a new market participant, which should have prompted the Tribunal to relax the evidentiary requirements set out in cases where the plaintiff is an established player.

[20] At the outset, I note that even though this is a statutory appeal, principles of judicial review apply, rather than appeals standards of review (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at para. 29, 43 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339). CarGurus characterizes this error as a legal error that must be reviewed on a standard of correctness, without providing any further explanation for that view. I disagree with that characterization. What CarGurus challenges is not so much the legal test itself, but its application to the facts of this case. Indeed, CarGurus acknowledges at paragraph 45 of its Memorandum that the Tribunal correctly described the summary screening role it is meant to play at the leave stage; what it objects to is the extent of

the evidence necessary to be furnished at this stage, and particularly the requirement that some basis be provided for financial projections. In other words, CarGurus' real challenge is not to the test applied by the Tribunal but to the Tribunal's conclusion that CarGurus' evidence was insufficient to establish a reasonable possibility that its business may be substantially affected by Trader's practices. As the Court stated in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 at paras. 35, 45, questions about whether the facts satisfy a legal test are deemed to be questions of mixed fact and law. Such questions are reviewed on a standard of reasonableness.

[21] CarGurus seems to be of the view that its revenue projections should have been accepted simply because they were attached to a sworn affidavit; any potential problems with these projections should have been addressed at the merits stage (Appellant's Memorandum of Fact and Law at paras. 48-49). Even if we accept, as the Tribunal did throughout its Reasons, that the threshold is low and that there will inevitably be incomplete information at the screening stage, there must still be sufficient, non-speculative and cogent evidence to give the Tribunal *bona fide* grounds to believe that the impact of Trader's conduct on CarGurus' business could reasonably be characterized as a substantial effect.

[22] In the case at bar, CarGurus provided the Tribunal with a set of "initial projections" and a set of "revised projections" purporting to show the impact of Trader's alleged conduct. Yet, as noted by the Tribunal, the affidavit to which these projections were attached (as part of an exhibit) did not explain how and by whom these calculations were performed. In the absence of any background for these projections, the Tribunal was entitled to find that the evidence was

neither sufficient nor cogent and that the forecasts used by CarGurus are speculative and only amount to a mere possibility of substantial effect. As the Tribunal states emphatically at paragraph 83 of its Reasons:

> I agree with CarGurus that it is only required to provide "sufficient credible evidence" to satisfy the Tribunal that there is a reasonable possibility that its business may be directly and substantially affected by a refusal to deal. I am also mindful of the fact that CarGurus does not have to wait until harm actually occurs before bringing an application under subsection 103.1 of the Act […]. But sufficient, cogent evidence is needed, even for anticipated harm. Relying on projections to establish a substantial impact on a business under subsection 103.1(7) still requires support in the form of clear and convincing evidence, which CarGurus has not provided. A party relying on projections has the onus to at least provide a basis for those projections.

[23] Far from imposing an additional onus on CarGurus, the Tribunal simply determined that CarGurus' evidence was not sufficient to meet the established legal test. Obviously, what constitutes sufficient credible evidence will vary from case to case depending on the context. That being said, there must still be credible and objective evidence supporting CarGurus' claim that it has been substantially affected in its business by Trader's practices.

[24] CarGurus argues that the Tribunal's conclusion runs contrary to some previous Tribunal decisions; yet, a careful reading of those decisions shows that the evidence available in those cases was clearly more reliable than in the case at bar. In *Used Car*, for example, the Tribunal found that the substantial effect test was met because the affected portion of the applicant's business accounted for more than 50% of the applicant's net income. While the Tribunal accepted that there is no obligation on an applicant to provide data of earnings over time, there was at least reliable and credible evidence of substantial harm caused by the respondent's refusal to supply the information in the year when the agreement between the two parties was

terminated. Moreover, it is worth noting that the passages relied upon by CarGurus in its Memorandum to the effect that hard and fast evidence is not required on every point, are found in the section of the Tribunal's reasons dealing with the second part of the leave test (i.e. whether an order could be made).

[25] In *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 CACT 7, the applicant had provided figures showing that the exact supply held by the respondents represented 48% of its overall chicken processing business, thereby reducing its operations to approximately 40% of its capacity. Again, the Tribunal was satisfied on that basis that it had reason to believe that the applicant was directly and substantially affected in its business by the respondents' refusal to supply live chickens. That conclusion was not challenged on appeal (*Nadeau FCA*).

[26] In the case at bar, the Tribunal accepted that a new entrant may have to rely on anticipated harm and projections to establish a substantial impact on its business; but the party relying on such projections bears the onus to at least provide a basis for those projections (Reasons at para. 83). This is consistent with another decision of the Tribunal, also involving a claim by a plaintiff that Trader and other respondents refused to supply Vehicle Listings on usual trade terms: *Audatex Canada, ULC v. CarProof Corporation*, 2015 CACT 28. In that case, the Tribunal found that evidence of anticipated harm will sometimes be sufficient, but there must still be "sufficient, cogent evidence" of the anticipated harm; since the applicant was unable to show lost sales or revenues despite having already lost its supply of Vehicle Listings data, the Tribunal concluded that there was no sufficient credible evidence of substantial effect.

[27] Once again, the problem with CarGurus' evidence of substantial harm is not so much that it relies exclusively on projections, but that there is no background or explanation as to how these projections were established. In those circumstances, the Tribunal could reasonably find that the projections evidence amounts to no more than a mere possibility of substantial effect and is speculative. The Tribunal came to a similar conclusion in *Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 CACT 24, 35 C.P.R. (4th) 171, where the applicant complained that its financial viability was threatened by the respondent's decision not to supply a number of key products because it was not in compliance with its terms of trade. The applicant based its losses entirely on projections and on its inability to fulfill the expectations of its business plan. The Tribunal found that such evidence was insufficient and that causality was speculative, as many factors could have had an impact on the growth or lack thereof of a new business. See also, to the same effect: *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*, 2015 CACT 26 at para. 29.

[28] To summarize, the threshold to obtain leave under subsection 103.1(7) may be low, but this is not the same as saying that there is no threshold. As this Court stated in *Symbol Technologies Canada ULC v. Barcode Systems Inc.,* 2004 FCA 339, [2005] 2 F.C.R. 254 at para. 23, "[t]he threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market". Parliament clearly intended to limit private applications to persons who are directly and substantially affected in their businesses by the alleged practices. If the Tribunal is to perform its screening function, it cannot be required to accept unsubstantiated assertions in an affidavit.

Such an approach would be contrary to Parliament's intention and would strip the Tribunal of any meaningful role in assessing leave applications.

[29] In the case at bar, not only was CarGurus unable to provide any background as to how the projections were established, but it also failed to explain the difference between its initial projections and its actual revenues. As noted by the Tribunal, CarGurus' actual revenues were consistently lower than its initial projections, even before Trader's conduct was alleged to have impacted CarGurus' business. In the Tribunal's words, "the gap between CarGurus' actual revenues and its Initial Projections is in the same range, before and after the Trader Conduct" (Reasons at para. 100). This discrepancy was clearly further grounds to put in doubt the accuracy of the projections, and the Tribunal was certainly entitled to conclude, on that basis, that the claimed reduction in revenues could as easily result from inaccurate projections as from Trader's conduct.

[30] CarGurus has not challenged this aspect of the Tribunal's conclusion, which also undermines the reliability and credibility of its evidence of substantial effect. In light of all of the Tribunal's findings about CarGurus' evidence on reduced revenues, and of the high degree of deference to which the Tribunal is entitled on questions of fact, I have no hesitation to find that it was reasonable for the Tribunal to conclude that the evidence put forward by CarGurus was not sufficient credible evidence to support a *bona fide* belief that CarGurus may have been substantially affected. I would therefore dismiss this ground of appeal.

C. *Did the Tribunal misapply the "but for" test for evaluating the issue of substantial harm?*

[31] CarGurus' final ground of appeal is that the Tribunal misapplied the "but for" test by engaging in an absolute evaluation instead of a relative evaluation of the impact of Trader's alleged conduct on CarGurus' business. This test was first articulated by this Court in *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, 2006 FCA 233, [2007] 2 F.C.R. 3 at para. 37 (*Canada Pipe*) in the following terms, albeit in the context of another restrictive trade practice (abuse of dominant position):

> The test mandated by paragraph 79(1)(c) is not whether the relevant markets would or did attain a certain level of competitiveness in the absence of the impugned practice, or whether the level of competitiveness observed in the presence of the impugned practice is "high enough" or otherwise acceptable. These are absolute evaluations, while the statutory language of "effect of preventing or lessening…substantially" clearly demands a relative and comparative assessment. In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(c), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial". […]

[32] CarGurus acknowledges that the Tribunal correctly articulated the test, but submits that it erred in applying it, focusing on the growth in the projections and on the actual revenues instead of engaging in the comparative exercise that the "but for" test requires. This is clearly a question of mixed fact and law from which no question of law can be extricated, as agreed by both parties, and it must therefore be reviewed on the deferential standard of reasonableness. As this Court stated in *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28, [2014] 2 F.C.R. 352 at para. 61, an appellate court may encounter difficulties in fully grasping the economic and commercial aspects of a tribunal's decision, and must therefore defer to its findings on these issues, including the inferences it draws from the evidence.

[33] It may be that some paragraphs of the Tribunal's reasons, when read in isolation, may leave the impression that the Tribunal did engage in the sort of absolute evaluation that this Court cautioned against in *Canada Pipe*. But when the Tribunal's reasons are read as a whole, there is no basis for such a claim. First of all, the Tribunal was clearly alert and alive to the "but for" analysis. Second, even when dealing with CarGurus' projections, the Tribunal did not rely exclusively on the expected increased revenues but also on the uncertainty about the projections and the lack of support on their basis, to find that CarGurus' evidence was not sufficient to give rise to a reasonable belief that it was substantially affected in its business (Reasons at para. 92).

[34] It is when discussing the fourth problem with CarGurus' evidence (its actual revenues since it entered into the market in Canada as opposed to its projections) that the Tribunal appears to focus most on an absolute evaluation of the kind rejected by *Canada Pipe*. At paragraph 99 of its Reasons, the Tribunal states:

> As the financial evidence provided by CarGurus shows that actual revenues have been growing month after month since the inception of its business, and have continued to grow since the alleged refusal to deal and exclusive dealing practices are supposed to have affected its business, I am unable to find that the "substantially affected" requirement has been met.

[35] If this was the only ground upon which the Tribunal had found that the evidence was insufficient to give rise to a *bona fide* belief that Trader's practices could substantially affect CarGurus' business, the appeal may well have to be granted. But this is only one of the five problems the Tribunal had with CarGurus' evidence. The four other deficiencies identified by the Tribunal would be sufficient to find that CarGurus had failed to demonstrate a substantial effect on its business. As previously mentioned, the Tribunal also found that CarGurus underperformed relative to its initial projections even before any anticompetitive conduct allegedly began. This

shortcoming, when combined with the absence of any explanation as to how CarGurus' projections were established, could no doubt allow the Tribunal to find that the evidence adduced by CarGurus was not sufficient to reasonably believe that CarGurus may have been substantially affected by Trader's conduct. This finding was clearly available to the Tribunal and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47); as such, it should not be disturbed.

V. Conclusion

[36] For all of the above reasons, I am therefore of the view that CarGurus has not raised any issue that would justify this Court to interfere with the Tribunal's decision. Given that conclusion, it is not necessary to consider the matter of remedy.

[37] I would therefore dismiss the appeal. At the conclusion of the hearing, counsel were invited to make submissions on the costs payable to the successful party. As a result of the parties' agreement, costs are therefore awarded to the respondent in the amount of $15,000 (inclusive of fees, disbursements and taxes) in respect of the hearings at both the Competition Tribunal and this Court.

"Yves de Montigny"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-428-16
STYLE OF CAUSE:	CARGURUS, INC. v. TRADER CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 14, 2017
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. WOODS J.A.
DATED:	SEPTEMBER 7, 2017

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