

CT-2015-010

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an application by Audatex Canada,
ULC for an Order pursuant to section 103.1 granting leave
to make application under section 75 of the *Competition
Act*;

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT November 9, 2015 CT-2015-010 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 44

AUDATEX CANADA, ULC

Applicant

- AND -

**CARPROOF CORPORATION, TRADER CORPORATION
AND eBAY CANADA LIMITED**

Respondents

MEMORANDUM OF FACT AND LAW OF CARPROOF CORPORATION

(Response to Application for Leave Pursuant to Section 103.1)

A. Overview

1. The refusal to deal provision of the *Competition Act* (the "**Act**") provides a narrowly circumscribed exception to the overriding principle that firms have a right to choose with whom they deal. This exception is intended to protect vulnerable market participants from refusals to deal by dominant firms where such refusals have a material impact on competition. This application, however, does not involve a refusal to deal. It is a case of a much larger market participant, Audatex Canada, ULC ("**Audatex**"),

attempting to force a smaller participant, CarProof Corporation ("**CarProof**"), to accede to Audatex's demands that CarProof license confidential and proprietary information on unfavourable terms. CarProof has expended significant efforts and resources to acquire rights to such data and Audatex has not offered sufficient credible evidence that CarProof should be compelled to license it on terms dictated by Audatex.

2. Audatex has failed to meet the two-part test for leave to commence a private application. As described in further detail below, Audatex has not offered sufficient credible evidence that its business is "substantially and directly" affected by the alleged refusal to license the confidential and proprietary data of the Respondents. Nor has Audatex offered sufficient credible evidence with respect to each of the statutory requirements in section 75 of the Act. In any event, this Tribunal should not exercise its discretionary authority under section 103.1(7) of the Act to grant leave in the present circumstances.

3. As a threshold matter, Audatex is not substantially affected by the alleged refusal to license the automobile listing data for a number of reasons:

- (a) Although Audatex claims that the Marktplaats B.V. ("**Marktplaats**") data are critical to its operations, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- (b) With respect to the TRADER Corporation ("**Trader**") listing data, Audatex was informed by CarProof in August 2014 – well over one year ago - that Audatex's licensing arrangement for the Trader data would be discontinued. Despite the alleged importance of the Trader data, Audatex failed to take steps (including negotiating in good faith with CarProof) to secure a license to access Trader's data.

- (c) Despite not having access to the allegedly "critical" Marktplaats automobile listings data since July 6, 2015 and the Trader automobile listing data since August 31, 2015, Audatex cannot identify a single customer or a single dollar in revenue that it has lost.
- (d) Rather, Audatex relies on a number of bald, speculative allegations to the effect that [REDACTED]
[REDACTED] as a result of its failure to license the data.
- (e) In reality, there are numerous alternate suppliers of the data that Audatex claims is necessary to compete, and other alternatives that are readily available to Audatex. Despite these alternatives, Audatex would prefer to acquire data from CarProof, but only on its own terms.

4. Audatex has also failed to provide sufficient credible evidence in respect of each of the remaining elements of section 75 of the Act:

- (a) Audatex is not willing to meet the usual trade terms for the supply of automobile listing data. Contrary to Audatex's assertions, CarProof has been more than willing to sublicense available listing data to Audatex and its affiliates on fair and reasonable terms consistent with industry practice. In fact, it was CarProof that first reached out to Audatex regarding the prospect of sublicensing available listing data more than one year ago and it has been CarProof that has consistently attempted to move negotiations forward.
- (b) Since that time, Audatex and its affiliates have refused to negotiate with CarProof in good faith and instead are now attempting to use this proceeding to leverage better terms for the listing data, or [REDACTED]
[REDACTED]
[REDACTED]
- (c) The data for which Audatex seeks a compulsory license is proprietary, subject to valid intellectual property rights, and therefore is not in ample

supply. The data has only been licensed by Marktplaats and Trader pursuant to the terms of specific arrangements that impose limits on the use of such data and preserve the intellectual property rights of those Respondents.

- (d) Given the numerous alternate suppliers of data - a number of which have already entered into licensing arrangements with Audatex - there is more than adequate competition among suppliers.
- (e) Audatex has also failed to provide any basis for the Tribunal to conclude that the alleged refusal to license the data is likely to have an adverse effect on competition in any market in Canada.

Each of these issues is discussed further below.

B. Concise Statement of Facts

(a) The Parties

(i) CarProof

5. CarProof is a privately held corporation headquartered in London, Ontario. CarProof's principal business is the sale of detailed vehicle-history reports ("VHRs") which are used by car sellers and buyers to obtain detailed information about a vehicle's past.¹

(ii) Other Respondents

6. The Respondent, Trader, is a Canadian corporation that owns www.autotrader.ca and other online vehicle marketplaces. The Respondent, Marktplaats, is a Dutch corporation that operates the Canadian website Kijiji, an online marketplace that includes an automobile classified advertisement service.

¹ Affidavit of Paul Antony, para. 1 (hereinafter, "Antony Affidavit").

(iii) *The Applicant*

7. The Applicant, Audatex, is an Alberta corporation that licenses data and software to Canadian automobile insurance companies and repair shops to estimate the cost of automobile repairs, and to assist in calculating the market value of automobiles for total loss calculations. Audatex's affiliate, Audatex North America, Inc. ("**Audatex North America**") provides similar services in the United States, and other Audatex entities (together with Audatex and Audatex North America, the "**Audatex Group**") provide similar services globally.²

8. As explained further below, Audatex North America is currently party to an agreement with CarProof pursuant to which Audatex North America licenses Canadian and American automobile repair estimate data to CarProof for use in CarProof's VHRs.

9. The Audatex entities are wholly-owned subsidiaries of Solera Holdings, Inc. ("**Solera**"), a publicly traded Delaware corporation that generated over US\$1 billion in revenues in its most recent fiscal year.³

10. One of Solera's subsidiaries is HyperQuest, Inc. ("**HyperQuest**" and, together with the Audatex Group and Solera, the "**Applicant Group**"), also a Delaware corporation, which Solera purchased in 2013. Like Audatex, HyperQuest licenses data and software to automobile insurance companies and repair shops, but has access to different data sources than the Audatex Group.⁴

(b) **CarProof's Business, and the Proprietary and Confidential Nature of its Data**

11. CarProof's primary business is the sale of VHRs. CarProof expends a great deal of effort, time, money and other resources to acquire the rights to numerous data

² *Ibid.* at para. 6.

³ *Ibid.* at para. 7.

⁴ *Ibid.* at para. 8.

sources in Canada and the United States for use in its VHRs and its other products and services.⁵

(i) *Estimate Repair Data*

12. One valuable source of information for CarProof's VHRs is damage repair estimates provided by repair shops following a car accident.⁶ Audatex, HyperQuest and [REDACTED] all collect this data as part of their insurance estimate business.

13. Since 2006, CarProof has licensed North American estimate repair data from Audatex North America. It currently pays approximately [REDACTED] per year for a license to this data pursuant to a data license agreement (the "**Audatex Data License Agreement**"), which currently expires on [REDACTED]

[REDACTED]⁷

14. In July 2014, CarProof similarly entered into an agreement to license estimate repair data from Audatex's affiliate, HyperQuest (the "**HyperQuest Data License Agreement**"). The Applicant Group has reneged on this agreement, alleging that HyperQuest's founder and Managing Director did not have authority to sign this agreement. After months of negotiation described below, CarProof sued HyperQuest to enforce its rights in the United States District Court for the Northern District of Illinois.⁸

15. [REDACTED]
[REDACTED]⁹

(ii) *Other Services*

16. CarProof's success in developing and maintaining diverse and comprehensive sources of data has allowed CarProof to not only expand its VHR business, but also to

⁵ *Ibid.* at paras. 10-11.

⁶ *Ibid.* at para. 14.

⁷ *Ibid.* at para. 15.

⁸ *Ibid.* at para. 16.

⁹ *Ibid.* at para. 17.

monetize and trade the data it licenses from others (where permitted to do so) by sublicensing some of this data to other industry participants for use in their respective products, often in exchange for other data license rights.¹⁰

(iii) *Listing Data*

17. One important type of data that CarProof has licensed is information about a vehicle contained in an advertisement listing the vehicle for sale, commonly referred to as listing data.¹¹

18. CarProof uses or plans to use listing data in its VHRs (to provide insight into a vehicle's value), in valuation reports that it is developing for dealerships, and in its "Redbook", which provides vehicle valuations to (among others) government agencies to help those government agencies determine the applicable sales taxes on vehicles.

[REDACTED]
[REDACTED].¹²

19. CarProof licenses automobile listing data from numerous sources, including the two sources that Audatex has focussed on: Marktplaats and Trader.¹³ In addition, CarProof currently has access to inventory data (listing data generated by car dealers) of over 1,400 dealers via [REDACTED] on a non-exclusive basis.¹⁴

20. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁰ *Ibid.* at para. 20.

¹¹ *Ibid.* at para. 23.

¹² *Ibid.* at para. 24.

¹³ *Ibid.* at paras. 25, 27.

¹⁴ *Ibid.* at para. 30.

[REDACTED]

[REDACTED].¹⁵

21. All in all, CarProof estimates that between 2013 and 2017 its total cash investments to license listing data, including direct cash payments for data access and investments in products supplied back to data providers, will exceed [REDACTED]. In addition, CarProof also provides significant non-pecuniary benefits to listing data providers, such as [REDACTED].¹⁶

(c) Terms on Which CarProof Has Offered to License Listing Data to the Audatex Group

22. Contrary to Audatex's assertions, CarProof has been more than willing to sublicense its available listing data to the Audatex Group on fair and reasonable terms consistent with industry practice.¹⁷ [REDACTED]

[REDACTED] refusing to sublicense listing data would cause CarProof to forgo significant value (cash and/or data). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁸

23. In fact, it was CarProof that reached out to the Audatex Group about sublicensing the available listing data to the Audatex Group, first in November 2013 during a strategy session and subsequently in 2014 in order to resolve the dispute about the HyperQuest Data License Agreement described above. Specifically, in 2014, CarProof offered to sublicense to the Audatex Group the available listing data licensed by CarProof, in

¹⁵ *Ibid.* at para. 31.

¹⁶ *Ibid.* at para. 31.

¹⁷ *Ibid.* at para. 34.

¹⁸ *Ibid.* at para. 33.

exchange for complying with the HyperQuest Data License Agreement, paying a fee for the listing data and extending the term of the Audatex Data License Agreement.¹⁹

24. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁰

25. In January 2015, CarProof and the Applicant Group reached an understanding that: (a) the Audatex Group would pay CarProof [REDACTED] per year in exchange for a sublicense providing the Audatex Group with access to available listing data received by CarProof in Canada; (b) HyperQuest would grant CarProof access to its estimate repair data in accordance with the terms of the HyperQuest Data License Agreement; and (c) the term of the Audatex Data License Agreement would be extended until [REDACTED]
[REDACTED].²¹ However, Audatex then failed to provide a promised term sheet for months. When it finally did so in March 2015, the term sheet differed significantly from the framework previously agreed upon.²²

26. Further negotiations followed. CarProof offered to give the Audatex Group a sublicense to the listing data free of charge for two years, and thereafter pay CarProof just [REDACTED] per year (a reduction from [REDACTED] per year). CarProof continued to insist that in return, HyperQuest would also commence its supply of estimate repair data to CarProof, and the term of the Audatex Data License Agreement would be extended until [REDACTED] [REDACTED]²³

¹⁹ *Ibid.* at para. 37.

²⁰ *Ibid.* at para. 26.

²¹ *Ibid.* at para. 42.

²² *Ibid.* at para. 44.

²³ *Ibid.* at para. 45.

27. The Applicant Group then went silent yet again, [REDACTED] and knowing that it would lose access to the Trader data in September 2015. [REDACTED]

[REDACTED] No further developments in respect of these negotiations occurred until August 2015 when the general counsel of Solera sent CarProof an offer which again completely ignored the underlying negotiations concerning Audatex and the HyperQuest estimate repair data.²⁴

28. Given that no progress with respect to honouring the terms of the HyperQuest Data License Agreement had been made in months, on August 21, 2015, CarProof commenced proceedings in the United States District Court for the Northern District of Illinois to enforce its rights under the HyperQuest Data License Agreement.²⁵

29. Following the commencement of proceedings in the United States and immediately prior to Audatex's agreement with Trader expiring, Audatex began discussions again. However, no further progress was made and on October 2, 2015 Audatex Canada served CarProof with materials for this action.²⁶

(d) Trade Terms for Listing Data that CarProof Has Offered to [REDACTED]

30. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31. Contrary to Audatex's allegations that CarProof has refused to supply listing data on the usual trade terms, CarProof has offered listing data to Audatex on better terms

²⁴ *Ibid.* at paras. 46-47.

²⁵ *Ibid.* at para. 48.

²⁶ *Ibid.* at paras. 49-50.

than it has offered such data to [REDACTED]. While an agreement has yet to be finalized, CarProof and [REDACTED] have agreed upon a framework whereby CarProof sublicenses its available listing data to [REDACTED] in exchange principally for: (a) [REDACTED] paying or providing other consideration to CarProof valued at [REDACTED] per year, and (b) [REDACTED].

Notably, [REDACTED] has agreed to provide total consideration that is valued at [REDACTED] per year more for access to the listing data than Audatex, [REDACTED] [REDACTED] and has agreed to extend the term of its estimate repair data license agreement to [REDACTED] the date to which CarProof is seeking to extend the Audatex Data License Agreement.²⁷

C. Test for Leave Under Section 103.1 of the Act

32. The Tribunal exercises an important gatekeeper or "screening" function in determining whether leave to commence a private application under section 103.1 of the Act should be granted. Part of that function is to ensure that this provision is used for genuine abuses of market power, and not so that a multi-national conglomerate can extract more favourable terms of trade through litigation than what it could achieve by negotiation.

33. Recognizing the significant costs for respondents in proceedings under section 75 of the Act, the potential disruption to the operations of the respondents, and the limited resources available to the Competition Tribunal, subsection 103.1(7) of the Act empowers the Tribunal to prevent unmeritorious applications from proceeding to full litigation.

34. Subsection 103.1(7) of the Act sets out the following test for leave:

103.1(7) 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 applicant's business by any practice referred to in one of

²⁷

Ibid. at paras. 53-54.

those sections that could be subject to an order under that section.

35. In *National Capital News Canada v. Milliken*,²⁸ the Tribunal established that to determine whether leave should be granted under subsection 103.1(7), an application for leave must be 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.

36. This test was subsequently adopted by the Federal Court of Appeal in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*,²⁹ where Justice Rothstein found that the Tribunal must be satisfied that there is sufficient credible evidence with respect to each of the elements of section 75 before granting an application for leave:

"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).

[...]

Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7)."³⁰ [emphasis added]

37. Audatex has failed to meet either element of the two-part test for leave to commence a private application. As described in further detail below, Audatex has failed to provide sufficient credible evidence that its business is "substantially and directly"

²⁸ 2002 Comp. Trib. 41, para. 14.

²⁹ [2004] FCA 339 (hereinafter, "*Barcode Systems*").

³⁰ *Ibid.* at paras. 18 and 20.

affected by the alleged refusal to license. The Applicant has also failed to provide sufficient credible evidence with respect to each of the statutory requirements in section 75 of the Act.

D. Not Substantially and Directly Affected

38. Audatex has failed to provide sufficient credible evidence that its business is substantially and directly affected by the alleged refusal to license the data. The evidence demonstrates that:

- (a) Audatex's allegations regarding the effects of the refusal to license are based on speculation and not direct evidence;
- (b) Audatex has significantly overstated the impact of the alleged refusal to license by limiting the analysis of effects to only one part of its overall business;
- (c) Even taken at its highest, the alleged effects of the refusal to license the data cannot be considered substantial in the context of Audatex's business; and
- (d) Audatex has failed to address why the numerous and alternate sources of supply for the data or other alternatives are not adequate.

Each of these submissions is discussed below.

(a) Audatex's Evidence is Highly Speculative

39. Evidence of alleged effects arising from the refusal to deal must be direct and not speculative.

40. The Affidavit of Gabor Toth (the "**Toth Affidavit**") relied upon by the Applicant contains a number of bald statements to the effect that Audatex's [REDACTED]

[REDACTED]
[REDACTED] On these issues, the Toth Affidavit relies on a complex and speculative chain of cascading assumptions that are based entirely on theorizing about what *might* occur in the future with respect to

Audatex's business.³¹ Specifically, the Toth Affidavit alleges that without a license for the automobile listing data from Marktplaats and Trader:

(a) [REDACTED]
[REDACTED],³²

(b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],³³ and

(c) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].³⁴

41. In reality, Audatex's own affidavit evidence reveals that despite not having access to the Marktplaats automobile listings data since July 6, 2015 and the Trader automobile listing data since August 31, 2015, Audatex cannot identify a single customer that has even threatened to terminate its agreement with Audatex.

42. Indeed, the only evidence that relates to customers of Audatex are a series of vague emails from [REDACTED] inquiring [REDACTED]

[REDACTED].³⁵ [REDACTED]
[REDACTED]

[REDACTED] What these emails establish is that [REDACTED]
[REDACTED] and despite knowing since August 2014 that it

³¹ Toth Affidavit, paras. 11, 17.

³² Toth Affidavit, para. 17.

³³ *Ibid.*

³⁴ *Ibid.* at para. 12.

³⁵ Toth Affidavit, Exhibits 4 and 19.

would not have access to the Trader data, Audatex did not feel that it was necessary to inform its customers about the changes to its data sources.

43. Audatex's speculative concerns about [REDACTED] are also impossible to reconcile with Audatex's allegation that its "only material competitor is Mitchell International Inc."³⁶ Mitchell does not have (and has never had) access to the Marktplaats data relating to automobile listings, and yet would appear to remain a viable competitor to Audatex.

44. The Tribunal has consistently recognized that evidence of substantial effects from a refusal to deal must be direct and not speculative. An applicant must provide "sufficient credible evidence" and not merely rely on bare assertions in order to obtain leave.

45. For example, in *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*,³⁷ the applicant argued that (similar to Audatex's allegations) the refusal to supply certain prescription pharmaceuticals by Novartis would result in lost sales in other product areas as "[c]ustomers will go elsewhere if they cannot fill their prescription, or part of their prescription, at the applicants' pharmacies". The Tribunal properly rejected this evidence on the basis that it was speculative:

"In its application, the applicants submit that the action of the respondent will have consequences for the business beyond the loss of sales of the respondent's products. Customers will go elsewhere if they cannot fill their prescription, or part of their prescription, at the applicants' pharmacies.

No figures are provided to show exactly what has occurred in terms of the impact of the decision of the respondent on the applicants' businesses. Subsection 103.1(7) states that the Tribunal may grant leave if it has reason to believe that the applicant is directly and substantially affected. In other words, the evidence must be direct, not speculative. Since no figures are given, it is difficult for the Tribunal to form a

³⁶ Toth Affidavit, para. 47.

³⁷ 2004 Comp. Trib. 21.

bona fide belief that the financial viability of the business is threatened."³⁸ [emphasis added]

46. Justice Blais contrasted the absence of evidence of the respondent in *Paradise Pharmacy* with the evidence of *actual* effects before the Tribunal in other cases:

"The applicants must show sufficient credible evidence of a direct and substantial effect. In *Barcode*, for example, the company was in receivership and fifty per cent of the employees had been laid off. In *La-Z-Boy*, the applicant had figures showing a 46 per cent decrease in its sales. There was thus a credible basis as to substantial effect."³⁹

47. In contrast, Audatex relies entirely on speculation regarding what *might* occur with respect to its total loss valuation service without evidence of *any* actual adverse effects resulting from the alleged refusal to supply. Indeed, the only financial evidence submitted by the Applicant is a one-page income statement that shows that Audatex's insurance-related business is [REDACTED]

[REDACTED].⁴⁰

(b) Audatex Substantially Overstates Impact of Alleged Refusal

48. It is well-established that the issue of whether a refusal to deal has a substantial effect on a business must be measured in the context of the entire business of the applicant, and not in relation to a particular sector or line of business impacted by the conduct.

49. In *Sears Canada Inc. v. Parfums Christian Dior Inc. and Parfums Givenchy Canada Ltd.*,⁴¹ the Tribunal considered whether leave should be granted to Sears Canada for an application under section 75 of the Act based on the respondent's refusal to supply certain brands of perfumes and cosmetics. With respect to the issue of

³⁸ *Ibid.* at paras. 22-23.

³⁹ *Ibid.* at para. 20.

⁴⁰ Toth Affidavit, Exhibit "3".

⁴¹ 2007 Comp. Trib. 6.

whether the applicant was substantially affected by the refusal, the Tribunal considered whether the impact of the refusal should be evaluated with respect to the relevant sector or segment of Sears Canada's business, or whether the impact must be measured in the context of the overall business of Sears Canada:

"Sears says that this application for leave is significant because it raises for the first time the question of how the Tribunal will approach the issue of a substantial effect on a multi-product business when the refused items impact only one sector or segment of the overall business. However, this issue is not new. It has already been considered in five cases: Chrysler, three Pharmacy cases and Construx Engineering."⁴²

50. Following a review of the cases referenced in the passage above, the Tribunal concluded that the issue of substantial effects must be considered in the context of Sears Canada's entire department store business, and not only in the cosmetics segment. On this issue, Justice Simpson concluded as follows:

"Based on this review, I have concluded that the Tribunal has consistently taken the position that a substantial effect on a business is measured in the context of the entire business."

...

"I have concluded that, when taken together, these submissions show that Sears will be directly affected by the Respondents' refusal to supply the Dior and Givenchy Products, but that the effect on Sears' department store business will not be substantial.

Accordingly, applying the test for leave approved by the Federal Court of Appeal in *Symbol Technologies ULC v. Barcode Systems Inc.*, [2004] F.C.A. 339 at paragraph 16, I am not satisfied that Sears has provided sufficient credible evidence to give rise to a *bona fide* belief that it may have been directly and substantially affected in its business by the

⁴² *Ibid.* at para. 16; see also *Director of Investigation & Research v. Chrysler Canada Ltd.*, 27 C.P.R. (3d) 1, aff'd 38 C.P.R. (3d) 25 (F.C.A.); 1177057 *Ontario Inc. (c.o.b. as Broadview Pharmacy) v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22; *Paradise Pharmacy Inc.*, *supra*; *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23; and *Construx Engineering Corporation v. General Motors of Canada*, 2005 Comp. Trib. 21.

Respondents' refusal to supply the Dior and Givenchy Products."⁴³

51. Like Sears Canada, Audatex is engaged in several different lines of business, including the supply of data and software solutions to insurance companies and automobile repair shops. Audatex's total loss valuation and overall insurance company business is only one line of business, and it has offered limited evidence of how significant the total loss valuation business is in the context of Audatex's overall business.

52. Audatex's evidence is that the total loss valuation service for which it wants CarProof's listing data (and for which it refuses to trade the Applicant Group's estimate repair data) constitutes approximately █████ of Audatex's "primary business".⁴⁴ However, it has offered no evidence of what percentage of Audatex's revenues or profits this "primary business" provides.

53. Although Audatex has failed to submit evidence showing its total revenues, it can be fairly inferred that the total loss valuation services will represent significantly less than █████ of Audatex's total revenues from all operations—and Audatex has not led any evidence demonstrating that even this part of its business has been directly affected by the alleged refusal to license the data.

(c) Alleged Effects Cannot be Considered Substantial

54. In any event, even taken at its highest, the effects of the alleged refusal to Audatex's business cannot be considered substantial.

55. The Tribunal has found that the Applicant is required to provide sufficient and credible evidence to demonstrate that the financial loss caused by the refusal to deal will have "important" and "significant" effects on its business.

⁴³ *Sears Canada*, *supra* at paras. 21, 39-40.

⁴⁴ Toth Affidavit, para. 13.

56. For example, in *Mrs. O's Pharmacy v. Pfizer Canada Inc.*,⁴⁵ the applicant alleged that the refusal to supply certain pharmaceutical products would result in a loss of 20% of total revenues. The Tribunal denied leave on the basis that the applicant failed to provide sufficient credible evidence that its business has been directly and substantially affected by the respondent's conduct:

"The applicant submits that Pfizer's actions have significantly limited the growth of the pharmacy. However, no figures are provided. Based on the evidence in the supporting affidavit, the direct effect on the business of the applicant has been that it has been unable to fulfill the expectations of the business plan. After some 5 months in business, the pharmacy had forecast filling 50 prescriptions a day; it is only filling 20.

The Tribunal cannot rely on such evidence to grant the leave. No figures are provided as to the loss of prescription sales due to the respondent's actions. The applicant states that customers fill multiple prescriptions, and may take their business elsewhere if part of the prescription is not filled at the applicant's pharmacy. However, no evidence is provided of the number or percentage of such multiple prescriptions, nor how often these multiple prescriptions include the respondent's products."⁴⁶

57. In the present case, the Applicant has failed to submit sufficient and credible evidence of substantial effects resulting from the alleged refusal to deal. [REDACTED]

[REDACTED], the Applicant's own evidence indicates that the total loss valuation services at issue represent less than [REDACTED] of the Applicant's total revenues. This is insufficient to establish that the Applicant will be substantially and directly affected by the alleged refusal.

⁴⁵ *Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 24.

⁴⁶ *Ibid.* at paras. 23 and 24.

(d) Alternate Sources of Supply

58. The Applicant has failed to submit sufficient and credible evidence of why the numerous alternative sources of automobile listing data are not adequate. As admitted in the Toth Affidavit, the Applicant has already licensed data from a number of suppliers of automobile listing data, including [REDACTED]

[REDACTED] In addition to these suppliers, there are numerous other sources of automobile listing data, such as Authenticom, CDK Global or Reynolds & Reynolds. The data maintained by CDK Global and Reynolds & Reynolds alone represents over one-half of all listings by major car dealers across Canada.⁴⁷

59. As noted above, the Toth Affidavit states in paragraph 47 that "Audatex's only material competitor is Mitchell International, Inc. ("Mitchell"), who is also a significant competitor". However, as Audatex acknowledges, Mitchell does not have access to the Marktplaats automobile listing data, but "uses automobile sales data from J.D. Power and Associates" [REDACTED]. The Applicant does not appear to have even attempted to negotiate access to the J.D. Power data, or to other sources of sold data, including from [REDACTED].

60. In light of the numerous alternative sources of data available to the Applicant and other available alternatives, the Applicant has failed to provide sufficient credible evidence that it is directly and substantially affected by the alleged refusal to deal.

E. Applicant Failed to Establish That Order Could Issue

61. The second step of the test for leave requires the Applicant to satisfy the Tribunal that there is "sufficient and credible evidence" with respect to each of the statutory conditions outlined in subsection 75(1) of the Act. The application for leave must fail if the Tribunal finds that the Applicant has not provided sufficient and credible evidence with respect to any one of the conditions outlined in subsection 75(1) of the Act. As the Federal Court of Appeal recognized in *Barcode Systems*:

⁴⁷ Antony Affidavit, *supra* at para. 55.

"... it is important not to conflate the low 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 s. 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 s. 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 s. 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in s. 75(1) on the leave application, it could not conclude, as required by s. 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under s. 75(1)."⁴⁸ [emphasis added]

62. As described in greater detail below, the Applicant has failed to adduce sufficient and credible evidence with respect to *any* of the statutory conditions outlined in subsection 75(1) of the Act. The Applicant has therefore failed to meet the test for leave to commence a private application in this case.

(a) Proprietary Data of Marktplaats and Trader Not in Ample Supply

63. To secure a remedy under section 75 of the Act, one of the conditions that the Applicant must establish is that the "product is in ample supply". In this case, the product that the Applicant seeks is a license to use the confidential and proprietary Marktplaats and Trader data.

64. In *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*,⁴⁹ the Director brought an application to the Tribunal alleging that the respondents' refusal to grant a license to BMG Canada to make sound recordings contravened section 75 of the Act. Even though it was conceded that BMG Canada was substantially affected in its business as a result of the refusal to license, the Tribunal summarily

⁴⁸ *Barcode Systems, supra* at paras. 17-18.

⁴⁹ (1997), 78 C.P.R. (3d) 321 (Comp. Trib.).

dismissed the Director's application on the basis that the Tribunal lacked jurisdiction to make the order sought.

65. Although the intellectual property rights at issue in *Warner Music* were copyrights in the music, the Tribunal made a number of general comments that demonstrate that section 75 cannot be used to compel licenses so as to nullify the rights of intellectual property holders. At the core of the Tribunal's conclusion was the recognition that licenses are not "products" for the purpose of section 75 of the Act, that given their exclusive nature such rights are never in ample supply, and that section 75 cannot operate as a form of "compulsory licensing" provision:

Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" -- there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.⁵⁰ [emphases added]

66. In fact, the present case provides an additional obstacle to leave under section 103.1 that was not before the Tribunal in *Warner Music*. In that case, the Director argued that because the licenses granted to Columbia House were non-exclusive, the product should be considered to be in ample supply as "there could be further licences if the respondents were willing to grant them". Although the Tribunal rejected this

⁵⁰ *Ibid.* at 333.

argument on the basis that such rights cannot be considered to be in ample supply, it is notable that in the present case, the licenses between Marktplaats and CarProof, and between Trader and CarProof, are both exclusive.⁵¹ If the compulsory licenses sought by Audatex are granted, this would nullify the exclusivity in respect of the data licenses negotiated and paid for by CarProof. CarProof negotiated and paid for exclusivity, in circumstances where Audatex had every opportunity to do the same but chose not to do so.

67. The Applicant argues in paragraph 17 of its Memorandum of Argument that there are no intellectual property rights in the automobile listing data as it is "merely factual data about automobiles that are for sale, and which is not arranged in any original fashion". The data is clearly confidential and proprietary information. Marktplaats and Trader accumulated it by expending substantial resources to collect such data through their respective businesses.

68. Audatex's own actions in previously licensing the data from Trader pursuant to the terms of a Data Licensing Agreement,⁵² seeking to negotiate with Marktplaats "a formal license agreement" for the data,⁵³ and in bringing this proceeding, are fundamentally at odds with its argument that no intellectual property rights exist in the data.

69. Canadian courts have frequently found that compilations of information are confidential and worthy of protection, even where such information could be replicated through publicly available information. For example, in *Essentially Yours Industries Corp. v. Infinitec Marketing Group Inc.*,⁵⁴ the Court considered whether a valid claim of confidentiality existed in respect of a list of sales associates. The defendant argued that the list was not confidential as it could be assembled from information available on the

⁵¹ Antony Affidavit, *supra* at paras. 25, 27.

⁵² Toth Affidavit, Exhibit "5".

⁵³ Toth Affidavit, Exhibit "9".

⁵⁴ [2000] 5 W.W.R. 283 (Man. Q.B.), *aff'd* [2000] 7 W.W.R. 297 (Man. C.A.).

plaintiff's website, although with some effort. The Court disagreed and found that the list was confidential and worthy of protection:

"The availability of the names in the public domain by culling them from a huge list involving considerable difficulty speaks to the issue of confidentiality. The effort needed to search for the list on an individual basis would, to say the least, be tedious, as each individual web site must be accessed through individual computer search and, therefore, would involve a considerable degree of time and energy.

The defendants, on the other hand, have a ready-made discrete list of all of the information without the need to tediously obtain it through individual searches on the Internet.

The process of sophisticated searching on the Internet might simplify the process although, if easily carried out, it was not made known to the court. I am left with the belief that, although it is possible to ultimately obtain much of the information contained in the list, the defendants could have avoided this litigation had the names been readily available. In my view, having the names in the organized fashion the defendants have it, renders it confidential information and worthy of protection."⁵⁵ [emphasis added]

70. The automobile listing data is confidential and proprietary information of the Respondents that is worthy of protection. Marktplaats and Trader have the exclusive right to determine whether to grant a license to permit a third party to access their confidential and proprietary data, and the terms associated with such access. Consistent with the decision in *Warner Music*, the Tribunal cannot use section 75 to nullify these rights by granting what would in effect be a compulsory license to the data.

71. Contrary to Audatex's submissions,⁵⁶ the Federal Court of Appeal's decision in *Eli Lilly v Apotex Inc.*⁵⁷ is not relevant to the matters at issue and does not justify overriding the intellectual property held by these Respondents.

⁵⁵ *Ibid.* at paras. 22-24.

⁵⁶ Audatex's Memorandum of Argument, para. 17.

⁵⁷ 2005 FCA 361.

72. The Court in *Eli Lilly* considered whether an agreement relating to the assignment of patents should be exempt from the conspiracy provision in section 45 of the Act, and did not consider whether a license could be a product for the purpose of section 75 of the Act, whether such intellectual property rights can be in "ample supply", or whether the Tribunal has jurisdiction under section 75 to compel the Respondents to grant a compulsory license of their confidential and proprietary data to Audatex.

73. The fact that CarProof has entered into a series of separate exclusive licensing arrangements with Marktplaats and Trader does not mean that the confidential and proprietary automobile listing data of the Respondents is in ample supply, nor does it justify an order under section 75 to nullify the rights of the Respondents in the data by granting what would in effect be a compulsory license.

74. In summary, the Applicant has failed to submit sufficient credible evidence that the automobile listing data that Audatex seeks to license is in "ample supply". Resort to section 75 to attempt to compel the Respondents to license such data is not permissible given the confidential and proprietary nature of this data.

(b) Applicant Not Willing to Meet Usual Trade Terms

75. Section 75(1) provides that the Tribunal may only grant a remedy where it finds that:

"(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;" [emphasis added]

76. Similarly, subsection 75(1)(c) expressly requires that the applicant must be "willing and able to meet the usual trade terms of the supplier or suppliers of the product".

77. The Applicant has failed to establish that there are any usual trade terms for the license of the listing data. Data is licensed between various market participants as a part of multi-faceted value exchanges, the terms of which depend on the precise

circumstances of each party.⁵⁸ The most comparable transaction is CarProof's proposed arrangement with [REDACTED]⁵⁹ Audatex has failed to meet those terms by refusing to license the data of it and its affiliated companies to CarProof. On this basis alone, the Applicant's request for leave should be denied.

78. As described above and contrary to the Applicant's assertions, CarProof has been more than willing to sublicense available automobile listing data to the Applicant on fair and reasonable terms consistent with industry practice. CarProof commenced such negotiations in November 2013 and they continued up to the commencement of the Applicant's leave application.

79. CarProof remains willing to sublicense available automobile listing data to the Applicant on the terms negotiated and at various points agreed to between the parties. The Applicant alleges in paragraph 48 of its Notice of Application that the terms offered by CarProof are not consistent with usual trade terms in two respects: (i) "CarProof is demanding costly trade terms"; and (ii) CarProof is "bundling the [supply of the data with] the provision of unrelated services by Audatex and its affiliates to any agreement to supply". In fact, neither of these allegations is supported by the evidence.

80. Although the Applicant alleges that the price of [REDACTED] per listing is "costly", the Applicant's own evidence demonstrates that this amount is reasonable and is, in fact, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵⁸ Antony Affidavit, *supra* at paras. 20-21.

⁵⁹ *Ibid.* at para. 54.

⁶⁰ Toth Affidavit, para. 27.

81. [REDACTED]
[REDACTED]
[REDACTED]; the Applicant admits that it actually offered to pay more than what CarProof had requested, [REDACTED]. In paragraph 35 of the Statement of Grounds and Material Facts, the Applicant states that "on August 3, 2015 Audatex North America wrote to CarProof offering to pay more than [REDACTED], namely, [REDACTED] annually for the entire [REDACTED] period, as opposed to only the final [REDACTED]". Earlier in negotiations, Audatex had agreed to a framework whereby it paid [REDACTED] for five years.⁶¹

82. The fact that the Applicant was willing to pay substantially more than what CarProof offered completely undercuts the Applicant's submission that the price offered by CarProof is inconsistent with the usual trade terms.

83. The Applicant's other argument on this point is that the terms offered by CarProof require agreement by the Applicant on "unrelated matters" and therefore are not "usual trade terms". In fact, the matters that were the subject of negotiations between the parties are not unrelated at all, but reflect the multifaceted nature of the relationship between the parties and the ubiquity of value exchanges in this industry, and were the only reason CarProof ever offered to license listing data to Audatex in the first place.⁶²

84. CarProof purchases North American estimate repair data from Audatex for approximately [REDACTED] per year pursuant to the Audatex Data License Agreement. The term of the contract currently expires on [REDACTED]
[REDACTED]⁶³

⁶¹ Antony Affidavit, *supra* at para. 42.

⁶² *Ibid.* at para. 37.

⁶³ *Ibid.* at para. 15.

85. In July 2014, CarProof also entered into the HyperQuest Data License Agreement to receive estimate repair data from Audatex's affiliate, HyperQuest, but Solera has denied HyperQuest's authority to enter into this agreement.⁶⁴

86. As described above, in December 2014 CarProof offered to license its listings data to Audatex in exchange for Audatex's extension of the Audatex data licensing agreement, and HyperQuest's compliance with its agreement with CarProof. Audatex agreed to pursue an agreement on these terms until its parent Solera reneged on these discussions. CarProof has repeatedly improved its offer to Audatex and remains willing to enter into a mutually beneficial data exchange in accordance with the terms negotiated in April 2015.

87. The terms offered by CarProof are consistent with the standard terms of this industry whereby parties enter into data and value exchanges that involve significant non-monetary consideration.⁶⁵ That CarProof would not want to enter into an agreement with the Applicant without some resolution to the ongoing litigation between the parties before the US District Court, and an extension of the license for Audatex's estimate repair data, is completely reasonable and consistent with normal trade terms. It is Audatex that is demanding abnormal trade terms by insisting that CarProof license its listing data, but refusing to license the Applicant Group's data.

88. Moreover, CarProof has not licensed the listings data to any other party on the terms Audatex has demanded, or indeed at all to date. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].⁶⁶ Audatex cannot plausibly allege that CarProof has refused to deal on usual trade terms when it is Audatex, a member of a massive global conglomerate in this industry, that uniquely and unilaterally insists on a one-way supply of data in its favour.

⁶⁴ *Ibid.* at para. 16.

⁶⁵ *Ibid.* at paras. 20-21.

⁶⁶ *Ibid.* at para. 54.

(c) There is Adequate Competition Among Suppliers of the Data

89. Subsection 75(1)(b) provides that the Tribunal may only grant a remedy where it finds that the applicant:

"(b) ... is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market"

90. This element of section 75 was considered in *Canada (Director of Investigation of Research) v. Xerox Canada Inc.*,⁶⁷ where the Tribunal held that if a potential supplier has an objectively justifiable business reason for not supplying a product, then the inability of an applicant to obtain the product cannot be because of insufficient competition.

91. Moreover, if the Tribunal considers the broader category of automobile listing data, there is sufficient competition among suppliers of listing data. The Applicant already has access to a number of these, such as listing data from [REDACTED]

92. Additionally, the Applicant could license the Canadian inventory data (listing data generated by car dealers) of used car dealers via one of many aggregators of this information, such as Authenticom, Oasis, CDK Global or Reynolds & Reynolds. While dealers and aggregators would need to consent to the license of such data, dealers and aggregators are willing to do so. CarProof already has access to inventory data from over 1,400 dealers via [REDACTED] on a non-exclusive basis.⁶⁸ Audatex has had plenty of time to follow CarProof's lead in this regard and its apparent failure to do so does not support an order under s. 75.

93. Finally, the Applicant could also negotiate for the supply of automobile sold data from sources such as J.D. Power and Associates, [REDACTED]
[REDACTED] Sold data provides a reasonable means of

⁶⁷ (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

⁶⁸ Antony Affidavit, *supra* at para. 55.

performing total loss valuations and is used by Audatex's biggest competitor, Mitchell, in its loss valuation reports. It is therefore an effective substitute for listing data.⁶⁹ There is no evidence that Audatex has even attempted to negotiate for the supply of sold data or dealer inventory data.

94. Audatex has advanced no plausible anti-competitive rationale for CarProof's position nor has CarProof refused to license the available data. However, there are a number of objectively justifiable business reasons why CarProof should not be required to license the data, including: (i) the proprietary and confidential nature of the automobile listing data at issue; (ii) the Applicant's refusal to license its data to CarProof in accordance with usual trade terms; (iii) the fact that CarProof and the Applicant Group are currently adverse in ongoing litigation before the United States District Court; and (iv) [REDACTED].

(d) No Adverse Effect on Competition

95. In *B-Filer Inc. v. Bank of Nova Scotia*, the Tribunal held that "for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power".⁷⁰ The Applicant offers no credible evidence that its current inability to obtain listing data from CarProof is likely to have an adverse effect on competition.

96. In fact, the Applicant fails to even identify a relevant market, let alone provide evidence of how the refusal to deal will create, enhance or preserve the market power of any participants.

97. Rather, the Applicant baldly asserts that [REDACTED] [REDACTED] its main competitor, Mitchell, will lose an important competitive constraint and competition will therefore be adversely effected. These bald assertions cannot establish an adverse effect on competition and are simply not supported by the evidence.

⁶⁹ *Ibid.* at para. 56.

⁷⁰ 2006 Comp. Trib. 42 at para. 208.

98. The Applicant offers no evidence that [REDACTED]. In fact, as stated above, the evidence demonstrates that Audatex has not lost a single customer even though it has not had access to any of the data it allegedly requires for over two months. Audatex is a large and sophisticated member of a global conglomerate, and yet it would have this Tribunal believe that [REDACTED] if denied unilateral access to one narrow slice of data, which it could have accessed months ago had it been willing to license its own data. This is not sufficient credible evidence of an adverse effect on competition.

99. Further, customers of Audatex are very large and sophisticated public (*i.e.*, government) and private insurance companies with significant countervailing power. Overall, the Applicant has failed to provide sufficient credible evidence that would establish that the alleged refusal to license the data is likely to have an adverse effect on competition.

F. Discretion and Relief Requested

100. Audatex has satisfied none of the requirements under sections 103.1 and 75 of the Act. In any event, this Tribunal should not exercise its discretion to grant relief given the business justifications for the refusal and the conduct of Audatex, including the substantial delay on the part of Audatex to take any steps to secure the data that it claims are critical to its operations, the failure to negotiate with CarProof in good faith, the confidential and proprietary nature of the data, and the prejudice that an order granting leave will cause to the Respondents.

101. CarProof respectfully requests that the application of Audatex for leave pursuant to section 103.1 of the Act be dismissed with costs.

G. Hearing Request

102. CarProof respectfully requests an oral hearing with respect to the application for leave.

H. **Language of Hearing**

103. CarProof respectfully requests that the hearing in this matter be held in the English language.

DATED at Toronto, Ontario, this 5th day of November, 2015.



DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, Ontario M5V 3J7
Tel: (416) 863-5564
Fax: (416) 863-0871

George Addy
Adam Fanaki
Matt Milne-Smith
Jim Dinning

Counsel for CarProof Corporation

SCHEDULE A
LIST OF AUTHORITIES

1. *1177057 Ontario Inc. (c.o.b. as Broadview Pharmacy) v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22
2. *B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42
3. *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] FCA 339
4. *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23
5. *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.* [1997], 78 C.P.R. (3d) 321 (Comp. Trib.).
6. *Canada (Director of Investigation of Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.)
7. *Construx Engineering Corporation v. General Motors of Canada*, 2005 Comp. Trib. 21
8. *Director of Investigation & Research v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, aff'd 38 C.P.R. (3d) 25 (F.C.A)
9. *Eli Lilly v Apotex Inc.*, 2005 FCA 361
10. *Essentially Yours Industries Corp. v. Infinitec Marketing Group Inc.*, [2000] 5 W.W.R. 283 (Man. Q.B.), aff'd [2000] 7 W.W.R. 297 (Man. C.A.)
11. *Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 24
12. *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41
13. *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21
14. *Sears Canada Inc. v. Parfums Christian Dior Canada Inc.*, 2007 Comp. Trib. 6

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*;

BETWEEN:

AUDATEX CANADA, ULC

Applicant

- and -

**CARPROOF CORPORATION,
TRADER CORPORATION
AND eBAY CANADA LIMITED**

Respondents

**MEMORANDUM OF FACT AND LAW OF
CARPROOF CORPORATION**

DAVIES WARD PHILLIPS & VINEBERG LLP

155 Wellington Street West
Toronto, Ontario M5V 3J7

**George Addy / Adam Fanaki / Matt Milne-Smith /
Jim Dinning**

Tel: 416.863.0900

Fax: 416.863.0871

Counsel for CarProof Corporation