**File No.: CT-2011-006**
**Registry Document No.: .....**

# COMPETITION TRIBUNAL

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

**AND IN THE MATTER** of an Application by the Used Car Dealers Association of Ontario for an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76 of the *Competition Act*.

**BETWEEN:**

**USED CAR DEALERS ASSOCIATION OF ONTARIO**

Applicant

- and -

**INSURANCE BUREAU OF CANADA**

Respondent

## REPLY SUBMISSIONS OF THE APPLICANT PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT* AND SECTION 120 OF THE *COMPETITION TRIBUNAL RULES*

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**REPLY SUBMISSIONS OF THE APPLICANT**
**PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT* AND SECTION 120 OF THE *COMPETITION TRIBUNAL RULES*:**

1. This Reply addresses arguments raised in IBC's Representations that UCDA's section 103.1 application did not meet the test for leave in respect of the "substantially affected", "product" and "market", "inability to obtain adequate supply", "usual trade terms", "ample supply" and "adverse effect on competition" elements of section 75 of the *Competition Act* ("*Act*"), as well as the "low pricing policy" element and the "loss leader" defence in section 76 of the *Act*.

## Sufficient Credible Evidence Exists That UCDA Has Been "Substantially Affected" By IBC's Conduct

### The Impact On UCDA Is Substantial

2. IBC attempts to argue that the financial data provided by UCDA is insufficient to demonstrate that it has been "substantially affected" by IBC's refusal to deal. In doing so, it quotes selectively from a handful of prior Tribunal cases. For example, at paragraph 13 of its Representations, IBC makes much of the fact that in the *La-Z-Boy* case, the applicant provided "four tables of financial data" and "a breakdown of its sales and a comparison of gross profits." In fact, those four tables of data were included as a means of comparing the applicant's sales of La-Z-Boy recliners with other major product lines unaffected by the refusal, such as wood, sofas, beds, lamps, clocks and appliances.

> *Allan Morgan and Sons Ltd.* v. *La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4, at para. 17 [hereinafter *La-Z-Boy*]

3. Unlike the applicant in *La-Z-Boy*, UCDA is not a commercial enterprise selling a broad range of products and services. As noted in the affidavit of UCDA's Executive Director, Robert Beattie ("Beattie Affidavit"), which accompanied the leave application, UCDA is a not-for-profit association whose primary commercial activities are the Auto Check™ business that forms the subject of this application and a lien search service. UCDA has provided the

critical information to address the substantially affected test, namely, the magnitude of the Auto Check™ sales and the portion of UCDA's net income that is generated by the Auto Check™ business.

Beattie Affidavit, paras. 3, 44

4. Similarly, at paragraph 18 the Respondent complains that UCDA should have submitted an "income statement prepared in the ordinary course of business in accordance with generally accepted accounting principles." However, no authority is cited in support of the position that this is required at the leave (or any other) stage of section 75 and/or 76 proceedings. In fact, UCDA's audited financial statements do not contain segmented information related to the Auto Check™ business or the association's other activities, which is why Mr. Beattie's affidavit included the chart containing the breakdown of the Auto Check™ contribution to UCDA's aggregate net income.

Beattie Affidavit, para. 44 and Confidential Appendix A

5. The Respondent raises questions about how the Auto Check™ net income was calculated and whether it differs from "earnings". These two matters can and should be addressed through the discovery and cross-examination process which occurs in the merits phase of proceedings before the Tribunal; the leave process was purposely designed not to include such forensic analysis in order to ensure that it remains expeditious and not duplicative of the merits phase.

6. IBC also cites the Tribunal's decision in *Construx Engineering* in an attempt to argue that UCDA should have provided an annual breakdown of Auto Check™ sales over multiple years. However, that decision did not hold that long-term financial data was required. To the contrary, the issue in *Construx Engineering* arose because the applicant claimed that the products it had been purchasing represented an average of 38% of its aggregate sales in the period of 1997-2003, while the Tribunal was attempting to determine whether the applicant was being substantially affected **at the time of its application**. UCDA has provided a sworn affidavit containing net income data for its most recent fiscal year, which is the most relevant data for assessing whether UCDA is being "substantially affected" at the time of its application. This recent time period is particularly relevant given the change in the regulatory

framework applicable to used vehicle sales effective January 2010, as described in the application.

> *Construx Engineering Corp.* v. *General Motors of Canada*, 2005 Comp. Trib. 21, at para. 8 [hereinafter *Construx Engineering*]
>
> Beattie Affidavit, paras. 20, 44

7. Similarly, IBC quotes a reference from the *Nadeau* case that it is "useful" to consider an applicant's earnings over time. First, UCDA notes that the Tribunal was merely referring to information that could be "useful", rather than information that is mandatory to have before it. More importantly, the passage cited by IBC comes from the Tribunal's lengthy decision on the merits in *Nadeau* — no such reference is made by the Tribunal in its determination that there was sufficient credible evidence to grant leave in the *Nadeau* case. In fact, the decision on the *Nadeau* leave application — which the Respondent does not cite in its Representations — made clear that the loss of approximately 48% of the applicant's "current supply" of live chickens was sufficient, standing alone, to meet the "substantially affected" test.

> *Nadeau Poultry Farm Ltd.* v. *Groupe Westco Inc.*, 2009 Comp. Trib. 6, at para. 200 [hereinafter the *Nadeau Section 75 Decision*]
>
> *Nadeau Poultry Farm Ltd.* v. *Groupe Westco Inc.*, 2008 Comp. Trib. 7, at paras. 23 and 26 [hereinafter the *Nadeau Leave Decision*]

8. IBC's selective quotations from prior Tribunal cases distract attention from the real issue: that the Auto Check™ business, one of only two significant fee-based services offered by UCDA and the source of more than 50% of its net income, has been put out of business by IBC's refusal to deal. As noted in Mr. Beattie's affidavit, the termination of the Auto Check™ business is also likely to directly and substantially affect UCDA through damage to UCDA's credibility, reputational harm among both existing and prospective dealer members, and a likely reduction in future membership fees.

> Beattie Affidavit, paras. 39, 42

Contrary To IBC's Allegations, UCDA Has Not "Deprived the Tribunal" Of Relevant Evidence

9. At paragraphs 6, 7, 12, 55 and 56 of its Representations, IBC erroneously suggests that UCDA has not made "full disclosure of all relevant facts in its application". IBC further implies that it has somehow been prejudiced by the omission of certain correspondence referenced in Mr. Beattie's affidavit since IBC has "no right of cross-examination" on a leave application and the time limit for it to respond to UCDA's application is "short".

10. UCDA is puzzled as to how IBC could be prejudiced by the omission of such correspondence, given that employees of IBC were either the **author or recipient** of each of these pieces of correspondence. Thus, IBC had access to these materials and could have suffered no prejudice from the fact that copies were not appended to the section 103.1 application.

11. As indicated in Mr. Beattie's affidavit, these documents are correspondence between UCDA, IBC and legal counsel in respect of IBC's threatened termination of supply to UCDA in the summer of 2010 and its actual termination of supply to UCDA in 2011. They are referenced in the proposed section 75 and 76 applications for which leave is sought in order to provide the context in which the alleged refusal to deal and price maintenance occurred. IBC has not indicated how any of these documents bears directly on the test for leave under section 103.1 of the *Act*. Nor do IBC's Representations on this subject address any legal standard under section 103.1 of the *Act* or related Tribunal jurisprudence on the subject. If any of the documents contained information which IBC felt was relevant to the section 103.1 leave determination, IBC would surely have referred to such information in its Representations, given that it had possession of these materials.

Beattie Affidavit, paras. 28-31, 34-38

UCDA Cannot Switch To Other Sources Of Supply, Nor Does Section 75 Require That It Must Do So

12. IBC argues at paragraphs 28-32 of its Representations that UCDA has not been "substantially affected" by IBC's refusal to deal because it could switch to other sources of vehicle

insurance claims data. It attempts to buttress this argument by again citing the Tribunal's decisions on the merits in *Nadeau* and *B-Filer*.

13. This argument is misplaced because section 75 refers to a person being directly and substantially affected by a refusal to supply, and UCDA has been so affected. There is no basis in the wording of section 75 for considering hypothetical alternative scenarios that may or may not be possible in the future.

14. Even if hypotheticals were considered by the Tribunal to be relevant, the two raised by IBC have no merit.

15. One of the hypotheticals raised by IBC is that UCDA could switch to Automobile Statistical Plan ("ASP") data, which is also maintained by IBC. However, IBC requires that UCDA first obtain consents to access ASP data from each of IBC's many member insurers, unlike the Web Claims Search application which contains integrated industry-wide data. As Mr. Beattie's affidavit explained, several of those insurers have declined such consent and UCDA therefore is currently substantially affected because it cannot obtain an adequate supply of integrated industry-wide vehicle insurance claims data and cannot continue to operate its Auto Check™ business.

Beattie Affidavit, paras. 34, 42

16. IBC then makes the incredible suggestion that UCDA should instead attempt to purchase vehicle insurance claims data from its competitors, CarProof and Carfax. However, these firms are not in the business of compiling and supplying integrated industry-wide vehicle insurance claim data; they are suppliers of vehicle accident history searches. Furthermore, given the hostile tactics that CarProof has employed against the Auto Check™ business in the past (described in Mr. Beattie's affidavit), UCDA would have little confidence in the stability and fairness of such a hypothetical supply relationship. More importantly, the Tribunal has never refused a section 103.1 leave application on the basis of an applicant's hypothetical ability to obtain supply from its downstream competitors. Indeed it would pervert the meaning and purpose of sections 103.1 and 75 of the *Act* to deny leave on this basis.

Beattie Affidavit, paras. 13-15

**The Application Provides Sufficient Credible Information About The Product And Geographic Markets**

17. At paragraphs 2(c), 25, 26, 27 and 32 of its Representations, IBC argues that UCDA has inadequately defined the relevant product and geographic markets for purposes of 75(1)(a) of the *Act*.

18. Once again, IBC confuses the test to be applied on a leave application under section 103.1 of the *Act* with the substantive analysis to be conducted in a full hearing on the merits under section 75. In none of the three prior cases in which the Tribunal has granted leave under section 103.1 — *B-Filer*, *Nadeau* and *Deeley* — has the applicant advanced, or the Tribunal required, detailed submissions as to the definition of relevant product and geographic markets at the leave stage. Indeed, it would be premature to make such determinations in the absence of a full factual record developed in a proceeding on the merits.

*B-Filer Inc.* v. *The Bank of Nova Scotia*, 2005 Comp. Trib. 38 [hereinafter *B-Filer*]

*Nadeau Leave Decision*, 2008 Comp. Trib. 16

*Quinlan's of Huntsville Inc.* v. *Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15 [hereinafter *Deeley*]

19. IBC also complains that UCDA "variously refers to" the product in question as the "Web Claims Search application" or "vehicle insurance claims data". The former is the name of IBC's product and the latter is a description of it. At most, this is a semantic quibble that does not relate in any way to the factors to be considered by the Tribunal on a section 103.1 leave application.

20. At paragraph 32 of its Representations, IBC flatly states that "[t]here is no mention in any of UCDA's materials as to the relevant geographic market". Again, it does not cite any legal authority that this is a formal requirement on a section 103.1 leave application. In fact, the same argument was raised by the respondent in the *Nadeau Leave Decision* and rejected by the Tribunal.

*Nadeau Leave Decision*, 2008 Comp. Trib. 7, at para. 25

21. The application and Mr. Beattie's affidavit clearly describe the scope of the UCDA's supply of vehicle accident history searches to its 4,500 members in Ontario and the provincial regulatory framework related to the disclosure of used vehicle accident histories in Ontario. They also describe the importance of integrated industry-wide insurance claims information as an essential input for the provision of vehicle accident history searches. IBC cannot credibly claim that it does not know what products or geography are in issue in these proceedings.

Beattie Affidavit, paras. 3-7, 13, 20, 41

**Sufficient Credible Evidence Exists With Respect To Meeting Usual Trade Terms**

22. At paragraphs 36-40 of its Representations, IBC attempts to deny UCDA's demonstrated willingness to meet its usual trade terms over a 13-year period by, again, selectively citing to the *Nadeau Section 75 Decision*.

23. Notably, IBC's Representations **make no mention** of any instance in which UCDA failed to make timely membership or "per search" payments for the Web Claims Search application, failed to observe any confidentiality obligations, or failed to comply with any other usual trade terms.

24. Moreover, even at the time that IBC terminated UCDA's supply of the Web Claims Search application, no suggestion was made that UCDA was failing to meet usual trade terms for accessing this service — in fact, as Mr. Beattie's affidavit noted, no reasons for the termination were given at all.

Beattie Affidavit, paras. 28-29

25. The passage cited by IBC from the *Nadeau Section 75 Decision* notes, among other things, that "usual trade terms" are not only those between the parties in question, but those of all suppliers of the product in question. However, in the present case IBC is **the only supplier**

of integrated industry-wide vehicle insurance claims data. Thus its supply terms, by definition, are the "usual trade terms" for purposes of the section 75 analysis.

26. The Tribunal's section 103.1 leave jurisprudence provides further support for UCDA's position. As Simpson J. noted in *B-Filer*, "[t]he Applicants have met the [supplier's] usual trade terms, in the sense that **there have been no allegations that they did not respect** the terms of payment or honour their commitments to the [supplier]". Furthermore, the term "usual trade terms [...] must mean **the trade terms which have thus far applied to the Applicants**" in respect of their relationship with the supplier. That is precisely what has occurred in the present case.

> *B-Filer*, at paras. 56-57 (emphasis added)

**There Is A Product With Usual Trade Terms That Is In Ample Supply**

27. IBC relies heavily on the *Warner* case as authority for arguments that this case does not involve any "product" within the meaning of section 75(1)(a), that there can be no "usual trade terms" under section 75(1)(c), and that there cannot be "amply supply" of a product under section 75(1)(d). All of these representations are based on factual and legal arguments related to intellectual property rights that UCDA submits are unmeritorious for the reason summarized below.

The Web Claims Search Application Is A Service, Not A Licence Of Intellectual Property

28. It is news to UCDA that IBC believes it has been licensing intellectual property to UCDA. Prior to filing its Representations in this matter, IBC had never communicated to UCDA that it viewed the relationship between the parties in respect of the Web Claims Search application to be one of licensor-licensee.

29. As Mr. Beattie indicated in his affidavit, the business relationship between UCDA and IBC between 1998-2011 consisted of: (i) UCDA paying an annual fee to become an Associate Member of IBC; (ii) IBC supplying a service to UCDA in the form of its Web Claims Search application; and (iii) since 2010, IBC charging a $1.00 "per hit" fee for this service. Unlike the emerging approach of IBC and its member insurance companies in respect of ASP

information (also described in Mr. Beattie's affidavit), UCDA has never been aware of a licence related to the Web Claims Search application. UCDA submits that IBC's licence arguments are an attempt to justify termination of a customer with an *ex post* re-characterization of a long-term business relationship in order to prevent review of such conduct by the Tribunal.

Beattie Affidavit, paras. 6-8

Leave Should Be Granted Even If Intellectual Property Was Involved

30. IBC asserts in paragraphs 2(b) and 21-24 of the Representations that the 1997 decision in the *Warner* case precludes leave being granted in this case because of "specific analytical issues related to the usual trade terms and ample supply requirements of s. 75" as well as the "more general concern that s. 75 of the *Act* not function as a compulsory licensing regime."

31. UCDA respectfully submits that any determination by the Tribunal that IBC's Web Claims Search application is a licence of intellectual property — which would be contrary to the evidence before the Tribunal on this leave application — could not properly be made without a full record of fact and argument developed after leave is granted.

32. UCDA also submits that there are good reasons to doubt whether *Warner* would preclude UCDA's proposed applications under section 75 of the *Act* even if the Tribunal were to conclude this case involves intellectual property. Among other considerations, UCDA notes that:

a. While subsection 79(5) of the *Competition Act* expressly provides that the reviewable practice of abuse of dominant position does not apply to acts engaged in pursuant only to the exercise of any statutory intellectual property ("IP") right, there is no such exclusion in section 75. This legislative design implies that section 75 is potentially applicable to circumstances involving intellectual property.

b. Subsequent to the *Warner* case, the Competition Bureau (after two rounds of extensive stakeholder consultations) issued *Intellectual Property Enforcement Guidelines* ("IPEGs") in 2000 which state that the Bureau will apply the general provisions of the

*Competition Act* when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights. This portion of the IPEGs has been supportively cited by the Federal Court of Appeal in *Eli Lilly and Co.* v. *Apotex Inc.* and suggests that, even if the Tribunal were to conclude that this case involves intellectual property, such a finding should not preclude UCDA's proposed applications under section 75 of the *Act* given the factual background of this matter.

> Industry Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (2000), at pages 7-8
>
> *Eli Lilly and Co.* v. *Apotex Inc.*, 2005 FCA 361, [2006] 2 F.C.R. 478, at para. 34

c. In addition (as acknowledged by the Respondent), the Federal Court Trial Division has observed in *obiter* that "the term 'product' does, within the meaning of the *Act*, include licenses, since to conclude otherwise would prevent the Act from having any application at all in the area of intellectual property."

> *Cinémas Guzzo Inc.* v. *Canada (Attorney General)* (2005), 47 C.P.R. (4th) 250, at para. 56

d. UCDA respectfully submits that the *Warner* case may have been decided incorrectly and it would be unfair to make a negative leave determination which would preclude reconsideration of the reasoning in *Warner* in a proceeding where the parties have the full opportunity to develop the facts and arguments related to each element of section 75. In particular, as set out in the application for leave and Mr. Beattie's supporting affidavit:

   i. UCDA believes that, even if it has unknowingly been licensing the data obtained from the Web Claims Search Application, there are usual trade terms for this "licence" and UCDA has been and continues to be willing to meet those trade terms. Any "special analytical issues" are not insurmountable.

   ii. IBC has treated the Web Claims Application as being in ample supply and there is nothing about the licensing (or refusing to license) intellectual property that makes it

any less amenable to being in "ample supply" than the supplier of an article or service being willing to sell.

**IBC's Refusal Is Having An Adverse Effect On Competition**

33. IBC attempts to conceal the obvious adverse effect on competition that its refusal to deal is already having, and will continue to have, by engaging the Tribunal in a speculative discussion of hypothetical separate markets: Market A (the market for Auto Check™ search reports) and Market B (the market for CarProof and Carfax search reports). As discussed above, UCDA submits that the precise definition of relevant product markets should be determined by the Tribunal in a hearing on the merits, and not at the initial stage of granting leave. In any event, IBC's market segmentation argument does not demonstrate any insufficiency in the credible evidence of an adverse effect on competition provided in the leave application.

34. For purposes of both section 75 and 76, IBC attempts to segment two markets on the basis that CarProof and Carfax charge much higher prices for their search reports than the Auto Check™ reports, that UCDA only supplies searches to its members, and because IBC alleges Auto Check™ to be an "inferior product" after changes to the used car dealer regulatory framework in 2010. In fact: (i) the services supplied by all three competitors are used vehicle accident search histories; (ii) the primary purchasers of such searches are used car dealers; (iii) most used car dealers in Ontario are members of UCDA; (iv) the price differential between Auto Check™, Carfax and CarProof did not change after the January 2010 amendments; and (v) the Auto Check™ search reports have always been are priced lower than those of CarProof and Carfax because the UCDA is a not-for-profit corporation and is prepared to operate the Auto Check™ business on a much lower margin basis than its for-profit competitors as a benefit to its members. In addition, CarProof's misleading advertising activities targeted at UCDA and its multiple attempts to propose an arrangement in which it would replace Auto Check™ as the source of vehicle accident history searches for UCDA members (both described in Mr. Beattie's affidavit), clearly indicate that CarProof views UCDA's Auto Check™ business as a direct competitor.

Beattie Affidavit, paras. 3, 5, 9, 10, 12, 13-15

35. Sections 75 and 76 are not limited to commodity markets consisting of identical products sold at identical prices. Relevant markets may contain products supplied by firms which compete through differentiated pricing as well as various non-price dimensions of competition. The application, including Mr. Beattie's affidavit, certainly provides sufficient credible evidence of price and non-price competition to warrant granting leave and allowing these issues to be fully canvassed in a section 75 application.

    Beattie Affidavit, paras. 10-13, 22-25

36. IBC's refusal to continue supplying its Web Claims Search application has resulted in the exit of the Auto Check™ business from the market for used vehicle accident histories. As a result, used car dealers in Ontario have lost an important product choice and the lowest-priced option for conducting a vehicle accident history search. This will clearly have an adverse effect on competition and facilitate the preservation and enhancement of CarProof's market leadership and market power.

37. Alternatively, even if the Auto Check™ vehicle accident history search reports were to constitute a separate market from the CarProof and Carfax vehicle accident history search reports, IBC's refusal to deal with UCDA has resulted in the elimination of the sole supplier in that hypothetical market. This would clearly constitute an adverse effect on competition and on the customers in that market.

**There Is Sufficient Credible Evidence Of All Elements Of Price Maintenance**

38. IBC argues that the circumstantial evidence provided by UCDA in the application is not sufficiently credible evidence to address the portion of section 76(1)(a)(ii), which requires that a refusal to deal be based on the "low pricing policy" of the person who was refused supply. However, under the predecessor provision in former section 61 of the *Act*, which contained the same requirement, the jurisprudence was clear that this element was satisfied if the low pricing policy was one of the reasons for the refusal, even if there were others. Moreover, the caselaw provides that a specific intent to restrict or maintain prices is not required in order to establish a violation of the price maintenance provision; it suffices that

the supplier intentionally engaged in proscribed behaviour which had the effect or would have the effect of maintaining prices.

> *R.* v. *Royal LePage Real Estate Services Ltd.* (1993), 50 C.P.R. (3d) 161 (Alta. Q.B.), at para. 36
>
> *2038724 Ontario Ltd.* v. *Quizno's Canada Restaurant Corp*. (2009), 250 O.A.C. 87, 96 O.R. (3d) 252, at paras. 53-56 (Ont. S.C.J. (Div. Ct.))

UCDA Has Provided Available Evidence In Respect Of The Low Pricing Policy Element

39. In this situation, the circumstantial evidence that IBC was acting to benefit CGI, with whom it has a preferred business relationship, and which in turn has a close business relationship with i2iQ and CarProof, is the only evidence on the record related to the reasons for IBC's refusal to supply. It is noteworthy that, as Mr. Beattie indicated in his affidavit, IBC did not provide reasons when it terminated supply to UCDA, and again in its Representations IBC has remained silent about any other reasons for the termination. UCDA submits that in such a situation an adverse inference should be drawn from IBC's silence and/or the "sufficient credible evidence" test should be applied in a manner which allows potentially viable claims to proceed and be tested on the merits rather than be frustrated by the Applicant's inability to access relevant evidence in the possession of the Respondent during the leave stage.

Beattie Affidavit, paras. 16-19, 22-25, 28-29

The Loss Leader Defence Does Not Apply

40. IBC alleges at paragraphs 52-53 of its Representations that the defence in section 76(9) of the Act "may" apply if UCDA was making a practice of using its Auto Check™ service as a loss leader. Loss-leadering would involve selling below variable cost. Unfortunately, this argument ignores the obvious relevant evidence on the record which refutes this claim: (i) that an Auto Check™ vehicle accident history search report is priced at $7.00; (ii) that the per hit cost that UCDA pays to IBC for the Web Claims Search application is $1.00; and (iii) that Auto Check™ is profitable and generated over 50% of UCDA's net income in 2010.

**The Tribunal Should Exercise Its Discretion To Grant Leave**

41. IBC offers two reasons for urging the Tribunal to refuse to grant leave even if it finds that the test established for granting leave has been met: the fact that copies of 11 documents already in the possession of IBC were not appended to Mr. Beattie's affidavit, and the nature of IBC's dealings with UCDA over the past year (*i.e.*, its decision to defer termination for approximately one year and IBC's alleged efforts to assist UCDA to obtain consents to license ASP data from insurers). The lack of any prejudice related to the correspondence has been addressed above. UCDA submits that the merits stage of these proceedings is the appropriate forum for examination of whether the Respondent's conduct is an aggravating or mitigating factor bearing on the issuance of a compulsory supply order under sections 75 and/or 76 of the *Act*.

42. To the extent that the Tribunal decides to consider such aggravating factors at the leave stage, UCDA notes that IBC terminated UCDA without providing reasons and has not in fact facilitated an adequate supply of ASP data for UCDA, resulting in the closure of a business that has provided a valuable service to used car dealers for 13 years.

43. The Federal Court of Appeal emphasized in *Barcode Systems Inc.* v. *Symbol Technologies Canada ULC* that the threshold for an applicant obtaining leave is a "low" standard and "not a difficult one to meet." The applicant need only provide sufficient credible evidence of what is alleged in order to give rise to a *bona fide* reason for the Tribunal to believe that the Respondent's conduct "could be subject to an order". Notably, this amounts to a lower standard of proof than the balance of probabilities standard that applies to a decision on the merits. The principle established by the Court would be frustrated if the leave test is used to deny terminated customers an opportunity to be heard on the basis of equity assertions that cannot be properly evaluated without discovery and cross-examination on the merits. It is respectfully submitted that UCDA has provided sufficient credible evidence of all of the elements of the reviewable practices in sections 75 and 76 to give rise to a *bona fide* belief by the Tribunal that an order could be made under either section of the *Act*. Accordingly, the Tribunal should exercise its discretion to grant rather than refuse leave in this matter.

*Barcode Systems Inc.* v. *Symbol Technologies Canada ULC*, 2004 FCA 339 at paras. 17, 18, 20, 23

All of which is respectfully submitted.

DATED at Toronto, this 29th day of July, 2011.

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