

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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
August 25, 2011	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 27

- and -

INSURANCE BUREAU OF CANADA

Applicant

Respondent

FURTHER REPLY SUBMISSIONS OF THE APPLICANT PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

McMILLAN LLP
Barristers & Solicitors
181 Bay Street, Suite 4400
Toronto, Ontario, M5J 2T3

A. NEIL CAMPBELL, LSUC# 31774T

Tel: 416-865-7025
Fax: 416-865-7048
E-mail: neil.campbell@mcmillan.ca

CASEY W. HALLADAY, LSUC# 45965G

Tel: 416-865-7052

Fax: 416-865-7048

E-mail: casey.halladay@mcmillan.ca

Solicitors for the Applicant

TO: The Registrar
Competition Tribunal
The Thomas D'Arcy McGee Building
#600-90 Sparks Street
Ottawa, Ontario K1P 5B4
Tel: 613-957-7851
Fax: 613-952-1123

AND TO: Melanie Aitken
Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau, Québec K1A 0C9
Tel: 819-997-3301
Fax: 819-997-0324

AND TO: Insurance Bureau of Canada
2235 Sheppard Avenue East
Atria II, Suite 1100
Toronto, Ontario M2J 5B5

**FURTHER REPLY SUBMISSIONS OF THE APPLICANT
PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*:**

This Further Reply responds to correspondence received from the Deputy Registrar of the Competition Tribunal (“Tribunal”) on August 22, 2011, in which the Applicant was invited to provide further reply submissions dealing specifically with the last sentence of paragraph 35 of the Respondent’s Representations.

UCDA Is Unable To Obtain Adequate Supplies Of Integrated Industry-Wide Vehicle Claims Data Because Of Insufficient Competition Among Suppliers Of That Product

IBC’s Arguments Relate To ASP Data, A Separate Product That Is Not In Issue In This Proceeding

1. At paragraph 35 of its Representations, the Respondent claims that the test under section 75(1)(b) of the Competition Act (the “*Act*”) has not been met in this case since “any inability of UCDA to obtain adequate supplies of such data from IBC is due to UCDA’s apparent inability to obtain consents from insurers and not from insufficient competition.” This statement is misdirected as it attempts to substitute arguments that may relate to the supply of ASP data — a different product, to which access is not sought in this proceeding — for arguments that relate to the Web Claims Search application, the product to which access is sought in this proceeding.
2. IBC’s Web Claims Search application and ASP data are two different products. The affidavit of UCDA’s Executive Director, Robert Beattie (the “Beattie Affidavit”), makes clear that the Web Claims Search application has numerous characteristics that distinguish it from ASP data. Most importantly, it provides integrated industry-wide vehicle claims data from virtually all insurers supplying auto insurance coverage in Ontario. In addition: (i) it is a commercial data service offered by IBC through its web portal; (ii) it provides certain data about a vehicle but excludes dollar value claims information; and (iii) no individual insurer consents have ever been required to access this product since UCDA began doing so in 1998.

Beattie Affidavit, paras. 6, 7, 27

3. ASP data is a clearly separate product. Most notably, it is not integrated industry-wide vehicle claims data: what is potentially available is piecemeal access to the individual data of specific insurers that may only be obtained by negotiating a consent for each insurer's data. Additionally, unlike the Web Claims Search application, ASP data: (i) is not a commercial data service accessible through IBC's web portal; (ii) provides different information about a vehicle's history, including dollar value claims data (which IBC asserts at paragraph 35 of its Representations makes it a "superior" product); (iii) is licensed rather than sold (which would not make it a "product" at all based on other submissions made by IBC about intellectual property rights); and (iv) was not available to UCDA when requested in 2009 and 2010, and since autumn 2010 has only been available in respect of a subset of IBC members.

Beattie Affidavit, paras. 21, 25, 26, 27, 28, 33

4. In the alternative, UCDA submits that even if ASP data were considered to be another potential product, which is not admitted but denied, UCDA has demonstrated that it has not yet been able to obtain "adequate" supply of this product since it does not have consents to access the data of a large number of IBC members and therefore is not able to continue providing its Auto Check™ service.

Beattie Affidavit, paras. 33, 34, 40

5. UCDA's notice of application under sections 75 and 76 of the *Act* very clearly states that it is seeking an order that the IBC "accept UCDA as a customer and continue supplying it with the **Web Claims Search application** on usual trade terms forthwith." No such order has been sought with respect to ASP data. At this stage of the leave process, UCDA submits that it has provided more than sufficient credible evidence that integrated industry-wide vehicle claims data is a product and that UCDA has been unable to obtain adequate supplies of that product.

UCDA Notice of Application, para. 1 (emphasis added)

UCDA Notice of Application, Schedule A, Statement of Grounds and Material Facts, para. 37

UCDA's Inability To Obtain Supply Of Integrated Industry-Wide Vehicle Claims Data Has Resulted From Insufficient Competition

6. Subsection 75(1)(b) of the *Act* requires that a person must be “unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market.” The “product” at issue in this proceeding, and in respect of which a remedial order from the Tribunal is sought, is integrated industry-wide vehicle claims data. As set out in Mr. Beattie’s affidavit, the Web Claims Search application is the only such product currently available in the market. UCDA is unable to obtain adequate — in fact, any — supply of this product precisely because of “insufficient competition among suppliers” of this product: there are no alternative suppliers that it can turn to in response to IBC’s refusal to deal.

Beattie Affidavit, paras. 4, 6

7. Rather than attempting to explain or defend its termination of UCDA’s access to the Web Claims Search application, at paragraph 35 of its Representations IBC attempts to shift the focus to defending its approach to allowing UCDA partial access to ASP data, a different product, subject to negotiating individual consents from its numerous members. While the Tribunal has invited UCDA to provide further reply submissions in response to the last sentence of paragraph 35 of IBC’s Representations, UCDA notes that in the second-last sentence of that paragraph IBC states that “[...] UCDA has continued to pursue the consent of insurers to access ASP data [...]”. It then concludes, in the last sentence, that “any inability of UCDA to obtain adequate supplies of such data from IBC is due to UCDA’s apparent inability to obtain consents from insurers and not from insufficient competition.” The use of phrase “such data” in the last sentence is clearly a reference to ASP data, a product that is not the subject of these proceedings. This is a classic case of the “straw man fallacy” — IBC is attempting to replace the argument it must address (access to integrated industry-wide vehicle claims data such as the Web Claims Search application) with a different argument (access to ASP data), and then attempting to refute that latter premise.

IBC Representations, paras. 35 (emphasis added)

8. However, even if the Tribunal considered ASP data to be relevant, IBC's submissions at paragraph 35 conveniently ignore the fact that IBC is the ringleader for organizing the ASP data offering. It is not credible for a monopolist to claim that another of its own products provides sufficient competitive discipline on the monopolist's own behaviour in respect of the product it is refusing to supply. Nor is it credible to say that the individual insurers from whom consents must be obtained are providing any, let alone sufficient, competition to the Web Claims Search application. These insurers are not independently selling their data, but rather merely consenting to its use. Furthermore, no insurer can offer to supply another insurer's data, let alone supply integrated industry-wide vehicle claims data.

Beattie Affidavit, para. 6

9. In summary, IBC's ASP data submissions should not distract the Tribunal from the matter actually in issue in these proceedings: access to the Web Claims Search application. On that issue — which is the question raised in UCDA's leave application and presently before the Tribunal — it is plain that UCDA cannot get access to that product since the sole supplier, IBC, faces insufficient competition (indeed, any competition) and is refusing to supply the Web Claims search application to UCDA. UCDA submits that the test under section 75(1)(b) is clearly met in this case.
10. Finally, UCDA further submits that the objectives of the *Act*, which include ensuring that “small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy”, would be frustrated if a monopolist provider of a product (*i.e.*, the Web Claims Search application) were permitted to foreclose access to that product by insisting that a longstanding customer switch to another product (*i.e.*, ASP data), over which that supplier also holds monopoly power. Since a positive decision on a leave application leads to a proceeding on the merits in which the Respondent can fully contest all relevant issues, whereas a negative decision terminates the Applicant's ability to carry on its business, the purpose clause supports a lenient approach to the Tribunal's discretion to grant leave.

Competition Act, s. 1.1

All of which is respectfully submitted.

DATED at Toronto, this 25th day of August, 2011.

McMILLAN LLP

Barristers & Solicitors
181 Bay Street, Suite 4400
Toronto, Ontario, M5J 2T3

A. NEIL CAMPBELL, LSUC# 31774T

Tel: 416-865-7025
Fax: 416-865-7048
E-mail: neil.campbell@mcmillan.ca

CASEY W. HALLADAY, LSUC# 45965G

Tel: 416-865-7052
Fax: 416-865-7048
E-mail: casey.halladay@mcmillan.ca

Solicitors for the Applicant