File No. CT-2011-006

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

MEMORANDUM OF FACT AND LAW OF INSURANCE BUREAU OF CANADA IN RESPONSE TO APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

July 22, 2011

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PART I - OVERVIEW

1. Insurance Bureau of Canada ("IBC") opposes the application of the Used Car Dealers Association of Ontario ("UCDA") for leave to apply for orders under ss. 75 and 76 of the *Competition Act* (the "Act"). UCDA has failed to file sufficient credible evidence establishing that it is substantially affected in its business by IBC's termination of UCDA's licence to use certain vehicle insurance claims data, or that IBC has engaged in a refusal to deal (s. 75) or price maintenance (s. 76) that could be subject to an order of the Competition Tribunal (the "Tribunal").

2. UCDA's application for leave under s. 75 should be dismissed for the following reasons:

(a) UCDA has failed to provide sufficient credible evidence that it is "substantially affected" in its business under subsection 103.1(7) and paragraph 75(1)(a). On the contrary, UCDA has provided no evidence of the significance of Auto Check's earnings in the ordinary course of business;

(b) The relevant "product" for the purposes of paragraph 75(1)(a) in this case is a *licence* to access and use vehicle insurance claims data. Section 75 of the Act does not apply to the relief UCDA has sought in its application for leave. In the alternative, if the relevant product is simply vehicle insurance claims data, then UCDA can switch to substitute products without being substantially affected in its business;

(c) UCDA has failed to define the relevant product and geographic market under paragraph 75(1)(a), and has provided differing descriptions of the product market throughout its material;

(d) UCDA has failed to provide sufficient credible evidence that it is unable to obtain adequate supplies of substitutable vehicle insurance claims data, as required by paragraph 75(1)(b). In fact, UCDA's own evidence is that it is in the process of pursuing the permission of insurers to access superior data from IBC;

(e) UCDA has failed to provide sufficient credible evidence that it is willing and able to meet IBC's usual trade terms (as required by paragraph 75(1)(c)) or that the licence it seeks is in ample supply (as required by paragraph 75(1)(d)). In fact, there cannot be usual trade terms since IBC has the right to withhold such licence, and accordingly, there cannot be ample supply of a licence; and

(f) UCDA has failed to provide sufficient credible evidence that the elimination of its Auto Check product will have an adverse effect on competition in a market, as required by paragraph 75(1)(e). On the contrary, the evidence is that Auto Check serves a separate downstream product market that uses less detailed and less precise source data. Auto Check costs five times less than the more detailed and more precise reports offered by two other suppliers. UCDA's evidence discloses that Auto Check is the sole supplier in its own downstream market.

3. With respect to s. 76, UCDA has provided no evidence – let alone sufficient credible evidence – that IBC's decision to terminate UCDA's right to use the data accessible

through IBC's Web Claims Search application was due to UCDA's low pricing policy in respect of Auto Check.

4. Given UCDA's failure to provide sufficient credible evidence for each of the requirements in ss. 75, 76, 103.1(7) and 103.1(7.1) of the Act, UCDA's application for leave should be dismissed.

PART II - CONCISE STATEMENT OF FACTS

5. UCDA commenced this application under s. 103.1 for leave to apply under ss. 75 and 76 of the Act by notice of application dated June 29, 2011. In support of its application, UCDA has filed the affidavit of Robert G. Beattie, sworn June 29, 2011 (the "Beattie Affidavit").

6. The Beattie Affidavit attaches only one document as an exhibit, despite the fact that it references numerous documents which should have been disclosed to the Tribunal. In fact, the Beattie Affidavit makes highly selective references to eleven specific pieces of correspondence relating to IBC's termination of UCDA's right to use the Web Claims Search application, though none of these documents have been attached as exhibits.

7. Without the full context presented by these documents, the ability of the Tribunal to assess whether UCDA has provided sufficient credible evidence to obtain leave is impaired.

PART III - STATEMENT OF THE POINTS IN ISSUE

8. The points in issue on this application are three-fold:

(a) whether the Tribunal should grant leave under s. 103.1 of the Act for UCDA to apply for an order under s. 75;

(b) whether the Tribunal should grant leave under s. 103.1 of the Act for UCDA to apply for an order under s. 76; and

(c) whether the Tribunal should exercise its discretion to refuse to grant leave under s. 103.1 of the Act, even if all of the conjunctive requirements of subsection 75(1) and s. 76 are met based on sufficient credible evidence (which IBC denies).

PART IV - CONCISE STATEMENT OF SUBMISSIONS

I. THE TEST FOR LEAVE TO COMMENCE A PRIVATE APPLICATION HAS NOT BEEN MET

9. The test for leave to commence a private application under s. 103.1 was established by the Federal Court of Appeal in *Symbol v. Barcode*.[1] The Tribunal must be satisfied that the leave application is "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".[2]

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1 *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004), 34 C.P.R. (4th) 481 (F.C.A.) ("*Barcode*").

2 *Barcode*, para. 16.

10. Importantly, the Tribunal must be also satisfied that there is "sufficient credible evidence" with respect to *each of the conjunctive statutory conditions* under ss. 75 or 76 of the Act. As the Federal Court of Appeal cautioned in *Barcode*:

> […] 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).[3]

11. UCDA has failed to meet the two-part test for leave to commence a private application in this case. First, there is not sufficient credible evidence that UCDA is "substantially affected" (103.1(7)) or "affected" (103.1(7.1)) in its business by any conduct of IBC. Second, there is not sufficient credible evidence with respect to each of the conjunctive statutory requirements for a refusal to deal under subsection 75(1), or for price maintenance under subparagraph 76(1)(a)(ii).

12. Moreover, the Tribunal should find that the entirety of UCDA's evidence is neither sufficient nor credible, due to UCDA's failure to file numerous documents that are referenced in, but not attached as exhibits to, the Beattie Affidavit. By selectively referring to but not attaching various important correspondence documents, and by not even referring to other

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[3] *Barcode*, para. 18.

correspondence that is mentioned in the documents referenced, ***UCDA has deprived the Tribunal of the benefit of available objective evidence*** on this application. IBC has no right of cross-examination on the affidavit filed in support of UCDA's application for leave. The time limit in the Act for responding to a leave application is short. The Tribunal is asked to grant or refuse leave on the basis of the written record. In these circumstances, it is incumbent on an applicant to make full disclosure of all relevant facts in its application, which UCDA has not done.

A. There Is Not Sufficient Credible Evidence That UCDA Is "Substantially Affected" By Any Conduct Of IBC Under Subsection 103.1(7) And Paragraph 75(1)(a)

13. The Tribunal has been exacting in requiring an applicant on an application for leave to provide "sufficient credible evidence", and not merely bare assertions, that the applicant is directly and substantially affected in its business by the impugned reviewable practice. In prior cases where leave has been granted, this standard has been applied rigorously. As Blais J. stated in *Paradise Pharmacy v. Novartis Pharmaceuticals Canada Inc.*:

> 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 sales. There was thus a credible basis as to substantial effect.[4]

In the referenced *La-Z-Boy* decision,[5] the applicant provided four tables of financial data in support of its assertion that it had been substantially affected, including a breakdown of its sales and a comparison of gross profits over a period of four years.

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4 *Paradise Pharmacy v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21, para. 20.

5 *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4, paras. 15-19 ("*La-Z-Boy*").

14. In *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, the Tribunal observed that ***earnings over time*** (as opposed to "net" income from a single year) is the relevant benchmark for whether an applicant's business has been substantially affected:

> Earnings are a meaningful indicator of the performance of an enterprise. In order to assess the impact of the refusal at issue on the Applicant's business, it is therefore useful to consider the Applicant's earnings over time.[6]

15. In support of UCDA's assertion that is has been substantially affected by the conduct of IBC, UCDA has provided a summary chart attached as Appendix "A" to the Beattie Affidavit, subject to a confidentiality undertaking. The chart purports to show that Auto Check accounted for over 50% of UCDA's "net income" in 2010.

16. The provided net figures do not relate to the earnings generated by UCDA's Auto Check product compared to UCDA's earnings as a whole. There is no indication of how the Applicant adjusted the earnings of Auto Check and UCDA to arrive at these net figures. No specific sales figures have been provided for the Auto Check product.

17. Moreover, there is no breakdown of any financial information for any years outside of 2010, though UCDA indicates in the Beattie Affidavit that it has been selling its Auto Check product since at least 1998.[7] As the Tribunal held in *Construx Engineering Corp. v. General Motors of Canada*, "Construx claims that the sale of Vehicles represented 38% of its

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[6] *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6, para. 200, affirmed 2011 FCA 188, ("*Nadeau Poultry*").

[7] Beattie Affidavit, para. 6.

total sales from 1997 to 2003, but given the absence of a yearly breakdown, the Tribunal cannot assess the significance of those sales."[8]

18. In order to demonstrate the effect of IBC's impugned conduct on UCDA's earnings, UCDA should have submitted, at a minimum, an income statement prepared in the ordinary course of business in accordance with generally accepted accounting principles and approved by its board of directors. Such income statement would provide the Tribunal with a segmented summary of UCDA's business in order to demonstrate the *earnings* (as opposed to ambiguous "net income" figures) attributable to the Auto Check product.

19. Given that Appendix "A" to the Beattie Affidavit is a cursory summary prepared for the purpose of this application – as opposed to a pre-existing document – that uses net income rather than earnings figures, UCDA has failed to provide sufficient credible evidence that it has been "substantially affected" by IBC's conduct under ss. 103.1(7) or 75(1)(a) of the Act.

B. There Is Not Sufficient Credible Evidence Of A Refusal To Deal Under Section 75 Of The Act

20. As indicated above, the Tribunal may only grant leave in respect of IBC's alleged refusal to deal under subsection 103.1(7) if IBC's impugned practice could be subject to an order under subsection 75(1). UCDA's application for leave must fail if the Tribunal finds that UCDA has not provided sufficient credible evidence with respect to ***any one*** of the conditions in subsection 75(1).

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[8] *Construx Engineering Corp. v. General Motors of Canada*, 2005 Comp. Trib. 21, para. 8.

(i) There Is Not Sufficient Credible Evidence Of An Inability To Obtain Adequate Supplies Of A Product In A Market On Usual Trade Terms (paragraph 75(1)(a))

(a) The "product" is a licence and s. 75 does not apply in the circumstances of this case

21. It is the ***right or ability to use*** IBC's Web Claims Search application and the data it contains that is at stake in this application, rather than obtaining title to the data itself. UCDA's Proposed Notice of Application seeks from IBC the right to access and use IBC's insurance claims database through IBC's Web Claims Search application. This right to use is a licence granted by IBC in favour of UCDA.

22. In *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.*, the Tribunal observed the difficulties inherent in applying s. 75 of the Act to licences.[9] In that case, the Director brought an application to the Tribunal alleging that the respondents' refusal to grant licences to make sound recordings contravened s. 75 of the Act. While *Warner Music* dealt with copyright rights in particular, the Tribunal made general comments with regard to the problems associated with treating a licence as a product under s. 75 of the Act:

> 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***

[9] *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.*, [1997] C.C.T.D. No. 53 ("Warner Music"). Note that this aspect of the decision was considered in *obiter* by the Federal Court in *Cinémas Guzzo Inc. v. Canada (Attorney General)* (2005), 47 C.P.R. (4th) 250 at para. 56 (F.C.). Rouleau J. distinguished *Warner Music* on the facts, but stated that "in my view, the term 'product' does, within the meaning of the Act, include licences, since to conclude otherwise would prevent the Act from having any application at all in the area of intellectual property." However, the Federal Court of Appeal ([2006] F.C.J. No. 721) characterized Rouleau J.'s statement in respect of *Warner Music* to be "mere *obiter*" since "no serious debate was undertaken concerning the correctness and the application of *Warner*" (para. 7).

> ***the facts of this case*** [...] ***There cannot be usual trade terms when licences may be withheld.***[10] (emphasis added)

23. UCDA has recognized in its materials that it is seeking the ***right to use*** IBC's data through the Web Claims Search application. UCDA is not seeking to acquire title in the data itself. For example, the Beattie Affidavit states that "IBC reinstated UCDA's Associate Membership and ***ability to use*** the Web Claims Search application"[11] and that "UCDA's Associate Membership has continued on a month to month basis as did its ***ability to use*** the Web Claims Search application."[12] There is no suggestion anywhere in UCDA's materials that IBC's former provision of access to Web Claims Search in any way constituted a transfer of title to the information that UCDA accessed through IBC's Web Claims Search application.

24. As the Tribunal held in *Warner Music*, the attempted application of s. 75 to licences raises specific analytical issues with respect to the usual trade terms and ample supply requirements of s. 75. These issues are discussed below. It also engages the Tribunal's more general concern that s. 75 of the Act not function as a compulsory licensing regime that would nullify the ability of an owner of data to refuse to grant a licence to a third party for the use of those data.[13] In the circumstances of this case, the Tribunal should not compel IBC to provide a licence to UCDA to access data in the Web Claims Search database.

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[10] *Warner Music*, para. 30.

[11] Beattie Affidavit, para. 32 (emphasis added).

[12] Beattie Affidavit, para. 33 (emphasis added).

[13] *Warner Music*, para. 30.

(b) UCDA has inadequately defined the product and the product market

25. In order for the Tribunal to find a refusal to deal, paragraph 75(1)(a) requires that "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." Definitions of the product and the product market are central to the analysis in paragraph 75(1)(a), and to much of the analysis under subsection 75(1) as a whole.

26. UCDA variously refers to the product throughout its materials as either (a) IBC's Web Claims Search application, or (b) vehicle insurance claims data, and inexplicably alternates between these two descriptions. For example, while UCDA's Proposed Notice of Application under ss. 75 and 76 states that UCDA seeks an order directing IBC "***to resume supplying the Web Claims Search data on usual trade terms***",[14] UCDA's Notice of Application for Leave under s. 103.1 states that UCDA seeks an order directing IBC "***to resume supplying vehicle insurance claims data to UCDA on usual trade terms***".[15] Further, in paragraph 30 of the Statement of Grounds and Material Facts, UCDA states that the "***inability to obtain supply from the IBC Web Claims Search application*** has begun and will continue to directly and substantially affect UCDA [...]."[16] However, two paragraphs later, UCDA states that "the substantial negative impact on Auto Check and UCDA results from ***the inability to obtain adequate supply of vehicle insurance claims data*** anywhere in a market on usual trade terms."[17]

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[14] UCDA's Proposed Notice of Application pursuant to sections 75 and 76 of the *Competition Act*, para. 1.

[15] UCDA's Notice of Application for Leave to make an application under sections 75 and 76 of the *Competition Act*, pursuant to section 103.1 of the *Competition Act*, para. 1.

[16] Statement of Grounds and Material Facts, para. 30 (emphasis added).

[17] Statement of Grounds and Material Facts, para. 32 (emphasis added).

27. Thus, on the basis of UCDA's material alone, UCDA has not provided sufficient credible evidence of the relevant product and product market for the purposes of subsection 103.1(7) and paragraph 75(1)(a).

(c) In the alternative, the Tribunal should find that the proper product market is "vehicle insurance claims data". UCDA will not be substantially affected in its business as a result of switching to other such data

28. In *Nadeau Poultry*, the Tribunal confirmed the test for determining the relevant product market: "[f]or the purpose of 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as a result of switching to these other products."[18]

29. Applying this test, the operative product market in this case should be "vehicle insurance claims data", as opposed to the "IBC Web Claims Search application," since UCDA has provided no evidence that it would be substantially affected in its business as a result of switching from Web Claims Search to another source of vehicle accident claims data, namely, the Automobile Statistical Plan ("ASP") data described in the Beattie Affidavit. In fact, UCDA's evidence is clear that UCDA *could* switch from the Web Claims Search application to ASP data without being substantially affected in its business. The Beattie Affidavit states that UCDA was in the process of pursuing "consents from insurers for supply of the ASP information" as recently as June, 2011.[19] Further, UCDA has indicated that it would only need further access to the Web Claims Search database "unless and until UCDA is able to obtain consents from

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[18] *Nadeau Poultry*, para. 90, citing *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42, para. 79 ("*B-Filer*").

[19] Beattie Affidavit, para. 36.

individual insurers to access sufficient ASP information to offer a viable vehicle accident history search service."[20]

30. While UCDA acknowledges that it has not yet been able to obtain insurer consents to access a sufficient amount of ASP information to offer a "viable" vehicle accident history search service,[21] there is no evidence – let alone sufficient credible evidence – that UCDA has been unable to acquire these consents and thereby obtain supply of ASP data ***on usual trade terms***. Though UCDA's evidence is that it has been in discussions with insurers in this regard, UCDA has provided no explanation for why certain insurers have apparently refused to provide or have revoked their consent, and whether these insurers would be open to providing consent for UCDA to access their ASP data on modified terms.[22] In fact, there could not be usual trade terms in respect of ASP data on the basis of the analysis in *Warner Music*, since insurers must decide whether or on what terms they will provide their consent to each third party who seeks the right to use the insurers' ASP data.

31. Moreover, UCDA's evidence is that CarProof and Carfax do have access to the vehicle insurance claims data UCDA needs in order to continue providing its Auto Check product to its members. There is no evidence as to whether UCDA has approached CarProof or Carfax to seek supply of vehicle insurance claims data directly from these entities under a negotiated bulk discount rate for UCDA's more than 4,500 motor vehicle dealer members.[23]

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[20] Beattie Affidavit, para. 40.

[21] *Id*.

[22] Beattie Affidavit, paras. 32, 33, 36.

[23] Beattie Affidavit, para. 3.

There is, however, evidence that CarProof has made repeated efforts to partner with UCDA to provide reports to UCDA members.[24] In fact, in the sole letter that has been attached as an exhibit to the Beattie Affidavit, i2iQ conveys to IBC that "UCDA can purchase and distribute vehicle history reports from CarProof to its Members" and that "CarProof would be pleased to work out a suitable arrangement with UCDA."[25] While UCDA states in the Beattie Affidavit that it rejected CarProof's offers because "a relationship with CarProof was not in the best interests of [UCDA's] members", this is not a criterion in applying the test under s. 75(1)(a).[26] IBC submits that – on the basis of UCDA's own evidence - UCDA could surely have negotiated a bulk supply arrangement with CarProof and continued supplying its members with vehicle accident history reports without being substantially affected in its business.

(d) UCDA has failed to define the geographic market

32. There is no mention in any of UCDA's materials as to the relevant geographic market for the product(s) being supplied by UCDA.

(ii) There Is Not Sufficient Credible Evidence Of An Inability To Obtain Adequate Supplies Because Of Insufficient Competition Among Suppliers (paragraph 75(1)(b))

33. The Tribunal in *Nadeau Poultry* established the relevant two-part test to determine whether an applicant is unable to obtain adequate supplies because of insufficient competition among suppliers under s. 75(1)(b): first, there must be insufficient competition among suppliers in the relevant market; second, the inability of the refused party to obtain

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[24] Beattie Affidavit, paras. 13-15.

[25] Beattie Affidavit, Exhibit "A".

[26] Beattie Affidavit, para. 14.

adequate supplies of the product must be by reason of that insufficient competition.[27] In *Nadeau Poultry*, the Tribunal emphasized its earlier reasoning in *Canada (Director of Investigation and Research, Competition Act) v. Xerox Canada Inc.*[28]:

> the refusal to supply must be "*because* of insufficient competition among suppliers of the product. That is, the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market.[29] (emphasis in *Nadeau Poultry*)

34. The sole evidence UCDA has provided in support of its assertion that it has been unable to obtain adequate supplies of access to Web Claims Search and/or access to vehicle insurance claims data is a statement in the Beattie Affidavit that IBC "is the only available source for integrated industry-wide data from all insurers supplying auto insurance coverage in Ontario."[30]

35. This statement does not constitute sufficient credible evidence. Even if IBC were the sole supplier of such data (which it is not), IBC is prepared to offer UCDA access to substitute and superior data (*i.e.*, the ASP data) provided UCDA is able to obtain the requisite consents from insurers. UCDA has acknowledged in its material that it would like to obtain access to ASP data and that IBC has offered to assist UCDA in this regard. For example, UCDA states in the Beattie Affidavit that Mr. Bundus of IBC provided UCDA with information about the form of authorization required to obtain ASP data.[31] Similarly, the Beattie Affidavit indicates

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27 *Nadeau Poultry*, para. 228.

28 *Canada (Director of Investigation and Research, Competition Act) v. Xerox Canada Inc.*, [1990] C.C.T.D. No. 18.

29 *Nadeau Poultry*, para. 228.

30 Beattie Affidavit, para. 6.

31 Beattie Affidavit, para. 31.

that IBC extended UCDA's access to Web Claims Search for a six month period while UCDA began contacting insurers to obtain their consent.[32] While the Beattie Affidavit states that UCDA has continued to pursue the consent of insurers to access ASP data, there is no evidence with respect to the reasons that UCDA has been unable to obtain such consent. Accordingly, although IBC is alleged to be the sole supplier of vehicle insurance claims data, even if this were true, 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.

(iii) There Is Not Sufficient Credible Evidence That UCDA Is Willing And Able To Meet The Usual Trade Terms For The Right To Use Web Claims Search Data Or The Right To Use ASP Data (paragraph 75(1)(c))

36. As discussed above in the paragraph 75(1)(a) analysis, UCDA has not provided sufficient credible evidence that it is willing and able to meet the usual trade terms of IBC, either for access to Web Claims Search or for access to ASP data.

37. In fact, UCDA's only mention of "usual trade terms" appears in its Memorandum of Fact and Law, where UCDA submits that:

> Auto Check is willing and able to meet the usual trade terms to obtain vehicle claims data. UCDA has fully paid its IBC associate membership dues and is paying the $1.00 per hit fee levied by IBC for the Web Claims Search output for Auto Check.[33]

38. However, the argument that "usual trade terms" means simply the terms on which the applicant obtained supply from the respondent prior to termination was specifically rejected by the Tribunal in *Nadeau Poultry*:

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[32] Beattie Affidavit, para. 32.

[33] Memorandum of Fact and Law of UCDA, para. 12.

> ***We do not accept the Applicant's submission that the applicable terms are those which reflect the very agreements, in terms of price, units supplied etc., that prevailed between the Respondents and the Applicant prior to the refusal.*** Parliament did not provide that the Applicant need only establish its inability to obtain supply on the "same" trade terms, for the purposes of paragraph 75(1)(*a*). Had it intended this, it would have expressly provided so, as it did elsewhere in the Act. See section 80 of the Act where reference is made to "same" trade terms.
>
> In our view, ***the plain reading of the provision leaves no doubt that the trade terms are not those specific to the parties***, but rather those that are viewed from the perspective of all processors competing for live chickens in the defined market generally. In such a market, the usual trade terms are identified and customarily come to be expected by suppliers of live chickens.[34]
>
> (emphasis added)

39. In this case, UCDA cannot meet the usual trade terms for access to Web Claims Search because, as the Tribunal held in *Warner Music*, "***there cannot be usual trade terms when licences may be withheld.***"[35] In *Warner Music*, the Tribunal agreed with the respondent that the language of s. 75 must be "tortured" in order to apply to licence agreements. For example, "trade terms" in subsection 75(3) of the Act is defined to mean "terms in respect of payment, units of purchase and reasonable technical and servicing requirements." In this case, the usual trade terms could not include "units of purchase", but would likely include a host of other provisions regarding data use and dissemination. In any event, UCDA has not provided any evidence that IBC even continues to supply the right to use Web Claims Search data to any other third party, let alone any evidence of "usual trade terms" that might govern such supply.

40. With respect to whether UCDA is willing and able to meet the usual trade terms for access to ASP data, UCDA has provided no evidence in this regard. As set out above, UCDA

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[34] *Nadeau Poultry*, paras. 140-141.

[35] *Warner Music*, para. 30.

has provided no explanation for why certain insurers have apparently refused to provide or have revoked their consent, and whether these insurers would be open to providing consent on modified terms.

(iv) There Is Not Sufficient Credible Evidence That The Product Is In Ample Supply (paragraph 75(1)(d))

41. Similarly, UCDA has not provided sufficient credible evidence that the product is in ample supply in this case. UCDA states in its materials that the Web Claims Search product is in ample supply because of the "reproducible nature" of the data.[36] This statement misses the point. While data accessible through the Web Claims Search application *itself* may be endlessly reproducible, ***access to*** that data is determined based on the terms and conditions established by the licensor.

42. UCDA's assertion that the Web Claims Search data is reproducible and therefore in ample supply is underpinned by precisely the logic the Tribunal rejected in *Warner Music*. A product cannot be in ample supply when its owners have the legal right to withhold it. To accept UCDA's reasoning necessitates the conclusion that the owners of data have no right to refuse to grant a licence to a third party for the use of those data.

(v) There Is Not Sufficient Credible Evidence Of An Adverse Effect On Competition In A Market (paragraph 75(1)(e))

43. The Tribunal considered the correct approach to determining whether the alleged refusal to deal has had an adverse effect on competition in *B-Filer*. First, the Tribunal made clear that for the purpose of paragraph 75(1)(e), "the market at issue need not be [...] the market of concern in paragraphs 75(1)(a) and (b). The market of concern under paragraph 75(1)(e) is the

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[36] Memorandum of Fact and Law of UCDA, para. 13.

market in which the applicants participate."[37] Second, 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 a result of the refusal, of created, enhanced or preserved market power."[38] In *Nadeau Poultry*, the Tribunal cited its decision in *Canada (Director of Investigation and Research) v. NutraSweet Co.* for the definition of "market power": "[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period".[39]

44. UCDA's own evidence discloses that there are two separate downstream markets at issue in this case, serviced by two separate types of products: (a) the market for UCDA's inexpensive Auto Check product based on access by UCDA to IBC's Web Claims Search data ("Market A"), and (b) the market for CarProof and Carfax's product based on ASP data ("Market B"). UCDA, with its Auto Check product, operates alone as the sole participant in Market A. The Beattie Affidavit reveals a number of critical differences between the Auto Check product on one hand, and the CarProof and Carfax products on the other:

(a) Auto Check obtains and provides data of a different character (*i.e.*, data from IBC's insurance claims database through Web Claims Search) than the data provided by CarProof and Carfax (*i.e.*, ASP data);[40]

(b) CarProof and Carfax provide "more precise information" than Auto Check;[41]

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37 *B-Filer*, para. 213.

38 *B-Filer*, para. 208.

39 *Nadeau Poultry*, para. 369, citing *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1.

40 Beattie Affidavit, paras. 11, 25, 40.

(c) CarProof and Carfax provide the dollar value of claims, while Auto Check does not.[42] This difference is especially important given the January 1, 2010 changes under the *Motor Vehicle Dealers Act, 2002*, which require motor vehicle dealers to disclose to potential purchasers whether a vehicle has ever suffered damage in which the total repair costs exceed $3,000;[43] and

(d) Auto Check charges $7.00 for its report, while CarProof and Carfax reports cost five times more, at $34.95 and USD$34.99, respectively.[44]

45. In effect, UCDA has created Market A in relation to the 4,500 used car dealers comprising its membership, who apparently favour Auto Check's drastically lower price as a trade-off for its comparatively degraded level of precision. In fact, according to the Beattie Affidavit, the users of Auto Check only rarely purchase the CarProof or Carfax products:

> ***in the small number of situations where more precise information is required***, the dealer could then purchase a high-priced vehicle accident history search from CarProof or Carfax.[45]
>
> (emphasis added)

46. Based on the evidence UCDA has provided, it is difficult to fathom how the elimination of Auto Check from Market A, which is comprised of some 4,500 potential customers, could place CarProof or Carfax in a position of created, enhanced or preserved

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41 Beattie Affidavit, para. 41

42 Beattie Affidavit, para. 7.

43 Beattie Affidavit, para. 20.

44 Beattie Affidavit, para. 12.

45 Beattie Affidavit, para. 41.

market power in Market B in which they operate, which is not limited to those who are members of a particular organization and which all Canadians may access. First, Auto Check charges $7.00 for its vehicle accident history report, while CarProof and Carfax's prices are 500% higher, at $34.95 and USD$34.99, respectively.[46] Given the immense price differential for products in Market A compared to Market B, Auto Check clearly has no "price-constraining" effect on CarProof and Carfax.[47] Significantly, however, CarProof and Carfax do have an obvious price-constraining effect on each other. CarProof and Carfax are clearly competing against each other in Market B, and there is no reason to believe that either of them will have "an ability to set prices above competitive levels for a considerable period" if Auto Check is eliminated.[48]

47. This evidence is instructive in light of the Tribunal's guidance in *B-Filer* regarding the *indicia* of adverse effects on competition in a market. The Tribunal stated that:

> [a]dverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers. The question to be answered is whether any of these or other competitive factors can be adversely affected absent an exercise of market power.[49]

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[46] Beattie Affidavit, para. 12.

[47] *B-Filer*, para. 229. The Tribunal stated that "it remains to be shown that they are close competitors in that an important price constraining effect on Interac Online would come from the UseMyBank Service."

[48] *Nadeau Poultry*, para. 369.

[49] *B-Filer*, para. 206.

48. Given the significant differential in prices between Auto Check on one hand, and CarProof and Carfax on the other, it strains credulity to think that the elimination of the Auto Check product would enable CarProof or Carfax to raise or preserve prices. By the same token, there is no reason to think that the quality of CarProof or Carfax's product will decrease if Auto Check is eliminated, considering the 2010 regulatory requirements as to damage claim amounts and UCDA's acknowledgment that the Auto Check product was less precise than the CarProof and Carfax reports.[50] Finally, there is no decrease in the variety of products available to buyers as a result of the elimination of Auto Check, since the evidence is that Auto Check users purchased CarProof or Carfax reports only in a "small number of situations".[51] Similarly, it is difficult to imagine how the vast majority of customers of CarProof and Carfax would be deprived of variety, given that only UCDA members were entitled to purchase Auto Check reports.

49. Moreover, UCDA has provided no evidence that consumers will be adversely affected by the elimination of Auto Check. In fact, UCDA's evidence suggests that the elimination of the low-cost, low-accuracy Auto Check product will result in enhanced transparency for consumers in the used car market. Used car dealers would be "required"[52] to purchase the "more precise" CarProof and Carfax reports for each vehicle, as opposed to only in a "small number of situations".[53] Consumers would no longer have to rely on the "business judgment"[54] of a used car dealer, but could purchase a used vehicle with confidence knowing

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50 Beattie Affidavit, para. 41.

51 *Id*.

52 Beattie Affidavit, para. 42.

53 Beattie Affidavit, para. 41.

54 *Id.*

that the dealer relied on precise information in its determination of a vehicle's accident history. Further, while the Beattie Affidavit appears to suggest that consumers will be harmed because higher prices for vehicle insurance claims data will be passed on to purchasers of used cars, there is no evidence in the affidavit to support this claim, and no reason to believe that it is true. Vehicle insurance claims data is clearly not a key cost input for used car dealers. The $28 difference in the price of CarProof or Carfax data reports is immaterial in the context of a typical used car purchase.

C. There Is Not Sufficient Credible Evidence Of Price Maintenance Under Section 76

50. UCDA has submitted that IBC has contravened subparagraph 76(1)(a)(ii) of the Act. In particular, UCDA has alleged that "it appears" that IBC's refusal to continue to supply the Web Claims Search application "may have been" motivated by UCDA's low pricing policy.[55]

51. UCDA has offered no evidence in support of these allegations, let alone any sufficient credible evidence. The Beattie Affidavit makes reference to certain alleged communications between IBC, i2iQ and CarProof as evidence of an inappropriate relationship among those parties. While IBC categorically denies any suggestion of impropriety, there is simply no evidence that the alleged relationship has anything to do with UCDA's pricing policy, or that IBC terminated UCDA's access to the Web Claims Search application ***because of*** UCDA's pricing policy. UCDA would have the Tribunal make its determination of leave under s. 76 on the basis of pure speculation.

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[55] Memorandum of Fact and Law of UCDA, para. 23.

52. To the extent that UCDA submits that there is "circumstantial evidence" that IBC's refusal to supply occurred because of Auto Check's low pricing policy, there is equally compelling circumstantial evidence that UCDA was making a practice of using its Auto Check product as a loss leader under subsection 76(9) of the Act.[56] The Beattie Affidavit states that:

> I believe that the loss of Auto Check for an extended period of time will also significantly damage UCDA's credibility and cause reputational harm among existing and prospective dealer members. This will also directly and substantially affect UCDA, including through likely reductions in membership fees, which are a major source of UCDA's revenues.[57]

53. Given the low price of UCDA's Auto Check product and UCDA's concern that the elimination of Auto Check as a product offering will harm its ability to attract new members, UCDA may have been making a practice of using Auto Check not for the purpose of making a profit, but for purposes of advertising, thereby disentitling UCDA to an order under s. 76 in this case.

54. Finally, UCDA has not provided sufficient credible evidence of an adverse effect on competition under paragraph 76(1)(b) as a result of IBC's alleged conduct. IBC relies on its submissions under paragraph 75(1)(e) with respect to this requirement.

II. THE DISCRETION OF THE TRIBUNAL

55. Under subsections 103.1(7) and 103.1(7.1) of the Act, the Tribunal may exercise its discretion to refuse to grant leave. Given that UCDA has failed to provide sufficient credible evidence with respect to the requirements set out in ss. 103.1, 75 and 76 of the Act, IBC

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[56] Memorandum of Fact and Law of UCDA, para. 25.

[57] Beattie Affidavit, para. 45.

respectfully submits that it ought not to be necessary for the Tribunal to consider whether to exercise its discretion to deny leave in this case.

56. However, in the event that the Tribunal determines that UCDA has established all of the elements necessary to obtain leave (which IBC submits is not the case), it is submitted that the Tribunal should exercise its discretion to refuse leave because:

(a) UCDA's materials reproduce only a single document while making selective references to numerous other documents which ought to have been disclosed to the Tribunal as relevant facts, as indicated above; and

(b) evidence of the course of dealings between UCDA and IBC does not denote impropriety on the part of IBC but rather accommodation of UCDA's requests for access to the Web Claims Search database. IBC extended UCDA's associate membership over the period of approximately one year,[58] and has assisted UCDA with respect to UCDA's attempts to obtain consents in relation to the more reliable ASP data.[59]

PART V – OTHER MATTERS

57. IBC respectfully requests that the proceedings be conducted in English.

PART VI - ORDER REQUESTED

58. IBC respectfully requests that this leave application be dismissed with costs.

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[58] Beattie Affidavit, paras. 28-35.

[59] Beattie Affidavit, para. 31.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 22, 2011

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PART VII – LIST OF AUTHORITIES, STATUTES AND REGULATIONS

59. IBC has referred to the following authorities, statutes and regulations:

Authorities

(a) *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4

(b) *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42

(c) *Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.*, [1997] C.C.T.D. No. 53

(d) *Canada (Director of Investigation and Research, Competition Act) v. Xerox Canada Inc.*, [1990] C.C.T.D. No. 18

(e) *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.)

(f) *Cinémas Guzzo Inc. v. Canada (Attorney General)* (2005), 47 C.P.R. (4th) 250 (F.C.)

(g) *Cinémas Guzzo Inc. v. Canada (Attorney General)*, [2006] F.C.J. No. 721 (C.A.)

(h) *Construx Engineering Corp. v. General Motors of Canada*, 2005 Comp. Trib. 21

(i) *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6, affirmed 2011 FCA 188

(j) *Paradise Pharmacy v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21

(k) *Symbol Technologies Canada ULC v. Barcode Systems Inc.* (2004), 34 C.P.R. (4th) 481 (F.C.A.)

Statutes and Regulations

(l) *Competition Act*, R.S.C., 1985, c. C-34, as amended

File No. CT-2011-006

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

MEMORANDUM OF FACT AND LAW OF INSURANCE BUREAU OF CANADA IN RESPONSE TO APPLICATION FOR LEAVE PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

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